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,	§	
	§	**No. EP-99-CA-0320-KC**
Defendants.	§	

PUEBLO DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE

STATEMENT OF THE 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.

FACTUAL BACKGROUND

Pueblo Defendants incorporate by reference the facts stated in their Motion to Exclude Evidence Offered by Plaintiff in Opposition to Motion for Summary Judgment (ECF No. 471).

ARGUMENT

I. This Court Does Not Have to Wait Until After It Has Once Sanctioned Plaintiff Before It Can Enforce Binding Orders and Federal Law.

Plaintiff does not get "one free bite" before it must comply with the law. Congress was clear – Plaintiff does not have *any* "civil or criminal regulatory jurisdiction" on or over the Ysleta del Sur Pueblo. 25 U.S.C. § 1300g-6(b). Honoring Congress' unambiguous language, this Court allowed Plaintiff limited discovery. ECF No. 115, as amended by ECF No. 324 at pp. 2-3 (granting "limited authority to conduct discovery to insure the Defendants' compliance with the injunction and contempt order" based on the Court's "intention to authorize continuing, limited discovery to verify the Defendants' compliance"); *aff'd Texas v. Ysleta Del Sur Pueblo*, 431 Fed. Appx. 326, 331 (5th Cir. 2011), *cert. den.* 132 S. Ct. 1028 (2012) ("state agents are only empowered to *inspect* those records. Then if they should find any irregularities, the State would have to return to the district court for further action") (emphasis in original). The Court purposefully limited the scope of what Plaintiff could do to gather evidence, and Plaintiff was on notice of that limitation as it concedes on page 2 of its Response. Evidence is either admissible or it is not. No authority exists for the proposition that a district court must first enter a discovery sanction before excluding improperly gathered evidence.

II. Plaintiff Cannot Unilaterally Expand the Court's Limited Discovery Orders.

Plaintiff argues that neither Congress (in the Restoration Act) nor this Court (when limiting its grant of "access on a monthly basis") imposed any restriction at all on uncoordinated,

uncooperative, clandestine undercover state government operations on restricted Pueblo land. But in ordering the Pueblo to allow inspection by "*designated representatives* of the State of Texas access on a *monthly* basis" this Court took the opposite position: only allowing coordinated and cooperative monthly inspections by persons identified to the Pueblo Defendants as designated representatives. ECF No. 324 at 3. (emphasis added).[1] The "district court has been taking an active role in overseeing the 'discovery' at issue here . . . ." *Texas v. Ysleta Del Sur Pueblo*, 431 Fed. Appx. at 331. If Plaintiff found any irregularities following a monthly inspection by designated agents, it was required to *return* to the Court.

The Court further limited Plaintiff to monthly inspections; a limitation Plaintiff also ignored here. *See*, Pl. Texas' Response to Pueblo Defendants' Motion to Exclude Evidence (ECF No. 473); *see also* March 10, 2014 Hearing Transcript at p. 25:15-24, excerpts attached as Exhibit A (Court: "my question is, when I get a pleading that says you went out March 13-19 of 2012, May 7-9, 2012, that's more than once a month, isn't it? Mr. Deane: Yes."). Evidence gathered outside of the parameters ordered by the Court must be excluded both to honor the Court's authority and to comply with the Restoration Act's limitations on state authority.

III. The Pueblo Has the Sovereign Right to Prohibit or Restrict State Government Clandestine Undercover Operations on Pueblo Reservation Lands.

Contrary to Plaintiff's Response, this Court has never held that the State's ability to conduct clandestine operations *off* reservation somehow "operates as surrogate federal law" *on* the Pueblo's federal enclave. And no court has ever held that it has the judicial authority to overrule the Restoration Act's congressionally imposed limitations on state regulation. This is

[1] This motion applies only to the "evidence" offered from the illegal clandestine operations – the Pueblo Defendants do not seek to exclude evidence gathered in compliance with this Court's orders and the Rules of Civil Procedure.

not an issue of "remedies." It is a procedural issue regarding collection of evidence. Texas' law cannot circumvent or supersede federal rules of procedure, this Court's orders, the Restoration Act or the Pueblo Defendants' sovereign rights and protections. 25 U.S.C. § 1300g-6(b).

In gathering its "evidence," the Plaintiff claims that its paid criminal investigators "acted as private citizens." Yet it does not dispute that the Pueblo has greater authority than any private business to restrict state agent (and "private citizen") activity on Pueblo lands. In any event, Plaintiff's "private citizen" claim rings hollow given that Plaintiff has asked this Court to order the Pueblo to pay $57,896.15 in costs purportedly incurred paying these "private citizens" to conduct their illegal activities. *See* ECF No. 423 (arguing the Pueblo "should pay costs to Plaintiff State of the undercover investigations of $57,896.15 . . .").

The authorities Plaintiff offers involving other instances where undercover investigations were allowed are not applicable on this federal reserve controlled by a specific federal Act that denies Plaintiff the investigatory authority it asks the Court to give it here. Pueblo Defendants are not like the private individuals cited in Plaintiff's authorities, nor do the defendants cited in Plaintiff's Response reside on federal lands, nor are they federally recognized Indian tribes or sovereign nations, nor did Congress ever say that any of those defendants are free from state jurisdiction or control. *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."). Thus, the "extra-jurisdictional observations" discussed in Plaintiff's Response cannot be compared to violating this Court's orders or federal law because the Pueblo Defendants' status and reservation is not like the private individual or public places described in Plaintiff's cited authorities.

Plaintiff's claim that it can ignore Court orders based solely on the absence of language prohibiting undercover inspections does not override the express Congressional prohibition of state jurisdiction. The Court's carefully curtailed, limited grant of a right to inspect falls within the framework of the Pueblo's power to exclude anyone, including officers of the state.

IV. The Pueblo Defendants Have Allowed All Inspections Conducted in Accordance with the Court's Orders.

Plaintiff *asked this Court to order* that it be allowed monthly access to the Pueblo and its books and records. Pl. Mot. For Contempt for Violation of the September 27, 2001 Injunction (ECF No. 204)[2]. There would have been no need for that request if the Plaintiff could conduct any inspection it wanted, when it wanted, without Court authority. This Court granted Plaintiff's request. But the Pueblo is not thereby precluded from challenging later unauthorized clandestine operations that occurred in violation of this Court's order and federal law. Simply because they may once have acquiesced when the State improperly conducted illegal operations does not mean that the Pueblo Defendants are forever barred from seeking Court enforcement of the Restoration Act and the protections of the Pueblo's sovereign rights:

> To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head, and we do not adopt this analysis.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

V. Evidence Gathered Through Undercover Investigations Should Be Excluded as Irrelevant.

Plaintiff asserts that its licensed law enforcement officers were merely "acting as private citizens" when they conducted their undercover investigation. ECF No. 473 at 6. Plaintiff does

[2] Notwithstanding how hard if fought to gain this right of inspection "on a monthly basis," the Plaintiff has only conducted one such inspection in over four years.

not assert that the officers were acting as experts or that they were inspecting records or software – rather, they only went to "public places." *Id.* at 8. In addition, Plaintiff acknowledges that "evidence produced from the *agreed* inspection of May 6, 2014 . . . contains videos of . . . operations and photos and records of cash payment." *Id.* at 3 (emphasis added). The Pueblo Defendants have not included evidence from the May 6, 2014, as part of this motion to exclude and Plaintiff concedes that the May 6, 2014, cooperative inspection produced the same evidence as its improper clandestine investigations. Plaintiff has not offered any reason why its illegally collected evidence should not be considered duplicative of evidence from the May 6, 2014, compliant inspection. Therefore, the evidence should be excluded as irrelevant, cumulative and inadmissible. *See* Fed. R. Evid. 401 (defining relevant evidence as that which has "any tendency to make the existence of the fact to be proved more probable or less probable that it would be without the evidence.").

Specifically, Plaintiff has offered no reason why the illegally collected evidence has "any tendency to make the existence of the fact to be proved more probable or less probable that it would be without the evidence." *Id.* Moreover, this Court has authority to exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. To the extent that this evidence is – as suggested by Plaintiff – merely observing the public places visited by its representatives during the May 6, 2014, cooperative inspection, it is cumulative evidence that is not probative of any fact in issue and should be excluded.

CONCLUSION

The Court should exclude evidence gathered during unauthorized clandestine operations.

September 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, 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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