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 CARLOS HISA OR HIS SUCCESSOR,	§	
	§	**No. EP-99-CA-0320-KC**
Defendants.	§	

PUEBLO DEFENDANTS' MOTIONS

TO VACATE INJUNCTION AND DISMISS CASE FOR FAILURE TO NAME INDISPENSABLE PARTIES AND LACK OF SUBJECT MATTER JURISDICTION

-OR IN THE ALTERNATIVE-

TO MODIFY INJUNCTION TO ALLOW CLASS II GAMING AND STAY FURTHER PROCEEDINGS

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MOTION

Pursuant to the Court's order of October 9, 2015, instructing the Pueblo Defendants to address "the impact of [ECF No. 523-2] on the Court's continuing jurisdiction," pursuant to Federal Rules of Civil Procedure 12(b)(1) and (7), 60(b)(5) and (6), and pursuant to the Court's inherent authority, the Pueblo Defendants ask the court to vacate the injunction entered September 27, 2001(ECF No. 115) as amended (ECF No. 165) ("2001 Injunction") and dismiss this case. In the alternative, the Pueblo Defendants ask the Court to amend the 2001 Injunction, stay further proceedings and administratively close the case to allow Plaintiff State of Texas to bring an Administrative Procedures Act appeal or take other action available to it to challenge federal administrative decisions impacting this case and the Court's jurisdiction over this case.

MEMORANDUM IN SUPPORT OF MOTION

LEGAL STANDARD

I. Motion to Dismiss

A. Deference Owed to Administrative Decisions

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such **legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute**. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, **a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency**. *Chevron, U.S.A., Inc. v. Natural Res.*

Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (internal quotations and citations omitted)(emphasis added). Congress, in the Indian Gaming Regulatory Act (IGRA, 25 U.S.C §§ 2701 *et seq.*) delegated to the National Indian Gaming Commission (NIGC) administrative authority to monitor and regulate *all* class II gaming on Indian lands, without exception.[1] Congress delegated authority to administer the Restoration Act to the Department of Interior. Pub. L. No. 100-89 § 2, 101 Stat. 666 (Aug. 18, 1987); see also ECF No. 523-2, DOI letter at 9 note 79. The Court must defer to the decisions of the National Indian Gaming Commission on the IGRA issues addressed in NIGC's October 5, 2015 letter, and must defer to the decision of the Department of Interior on the Restoration Act and IGRA issues addressed in its September 10, 2015 letter. ECF No. 523-2.

B. Lack of Jurisdiction

A court's lack of subject matter jurisdiction may be raised at any time. *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012). The burden of proof for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Volvo Trucks*, 666 F.3d at 935.

[1] 25 U.S.C. §§ 2706(b), 2710(b) and (c). NIGC is charged with, among other things,'promulgating such regulations and guidelines as it deems appropriate to implement the provisions' of IGRA and, by implication, has primary authority to interpret any ambiguous phrases or terms contained in the IGRA. 25 U.S.C. § 2706(b)(10). Since the NIGC is the agency expressly charged by Congress with administering the IGRA, this Court finds that a NIGC interpretation of IGRA provisions is properly afforded *Chevron* deference." *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 322, *amended on reconsideration in part*, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007).

C. Failure to Name Indispensable Parties[2]

Because Rule 19 protects the rights of an absentee party, it may be raised at any time. *Pickle v. Int'l Oilfield Divers, Inc.*, 791 F.2d 1237, 1242 (5th Cir.1986) ("[A] Rule 19 objection can even be noticed on appeal by the reviewing court *sua sponte.*") Once the issue is raised, "[d]etermining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). . . . If the necessary party cannot be joined . . . the court must then determine whether that person is 'indispensable' [under Rule 10(b)], that is, whether litigation can be properly pursued without the absent party." *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 628-29 (5th Cir. 2009). The factors that the district court is to consider in determining whether a party is indispensable are:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed.

Id. citing Fed.R.Civ.P. 19(b). The Fifth Circuit reviews Rule 19 determinations for abuse of discretion, with the district court's underlying legal conclusions reviewed *de novo*:

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[2] The language of Rule 19 was amended in 2007 changing "necessary" party to "required" party and deleting the term indispensable: "The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Fed. R. Civ. P. 19 Advisory Committee Notes to 2007 Amendment.

> Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor, and [Federal Rule of Civil Procedure] 19's emphasis on a careful examination of the facts means that a district court will ordinarily be in a better position to make a Rule 19 decision than a circuit court would be. However, a court abuses its discretion when its ruling is based on an erroneous view of the law.

Hood, 570 F.3d at 628 (internal quotations and citations omitted); *see also Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1308 (5th Cir. 1986).

II. Motion to Amend Injunction and Stay Further Proceedings

Motions under Rule 60(b) are directed to the sound discretion of the district court. *In re Grimland, Inc.*, 243 F.3d 228, 233 (5th Cir. 2001); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984). The court's discretion under 60(b)(6) is especially broad because relief may be granted "when appropriate to accomplish justice." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (citations omitted). Accordingly, an order amending the injunction, staying further proceedings and administratively closing the case would be reviewed for abuse of discretion. *State of Texas v. Ysleta del Sur Pueblo*, 69 F. App'x 659, 2003 WL 21356043, at *1 (5th Cir. 2003); *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998) ("We review the district court's decision whether to grant or deny an injunction and the scope and form of the injunction for an abuse of discretion. Findings of fact are reviewed for clear error; conclusions of law, *de novo*." (Internal quotations and citations omitted)).

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts

plus the court's resolution of disputed facts." *Barrera–Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). Here, review of the complaint together with the facts, including those presented to the Court at the evidentiary hearing in October 2014, confirms that the Court lacks jurisdiction, primarily because the Pueblo is immune from suit absent a waiver of its sovereign immunity. As the Supreme Court recently reiterated:

> Among the core aspects of sovereignty that tribes possess – subject, again, to congressional action – is the "common-law immunity from suit traditionally enjoyed by sovereign powers. . . . [T]ribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals.

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030, 2031 (2014).

Here, the single waiver of sovereign immunity identified by the Plaintiff in its complaint is section 107 of the Restoration Act.[3] ECF No. 38 at 2. But that section was repealed by Congress's subsequent enactment of the Indian Gaming Regulatory Act. ECF 523-2, DOI letter at pp 19-21. Because the Plaintiff's amended complaint does not identify a statutory waiver of the Pueblo's sovereign immunity, the Court lacks subject matter jurisdiction to consider Plaintiff's claims and must therefore dismiss this case.[4] *Bridges v. Soc. Sec. Admin.*, 2006 WL 1881454, at *7 (W.D. Tex. July 6, 2006) *subsequently aff'd*, 251 F. App'x 927 (5th Cir. 2007) ("Without a waiver, the doctrine of sovereign immunity bars plaintiff's action, and the Court lacks subject matter jurisdiction to hear his claim").

II. The Court Should Dismiss this Case for Failure to Name Indispensable Parties.

A. The Applicable Rules

1. Rule 12(b)(7)

[3] Restoration Act. Pub. L. No. 100-89 § 2, 101 Stat. 666 (Aug. 18, 1987)
[4] The plaintiff always bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

Federal Rule of Civil Procedure 12(b)(7) provides that a complaint may be dismissed for "failure to join a party under Rule 19." Fed.R.Civ.P. 12(b)(7).

2. Rule 19(a)

An absent party is necessary to a suit under Rule 19(a) if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
> (i) as a practical matter impair or impede the person's ability to protect that interest or
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). If one of the above criteria is met, any necessary person "who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party." *Id.*

3. Rule 19(b).

Once the court decides that a person should be joined, the court must determine whether joinder is possible. If a necessary person cannot be joined, the court proceeds to the second step, determining, "whether that person is 'indispensable,' that is, whether litigation can be properly pursued without the absent party. *Hood* , 570 F.3d at 629. Use of the word 'indispensable' is conclusory, that is, "a person is 'regarded as indispensable' when he cannot be made a party and, … the court determines that in [the party's] absence it would be preferable to dismiss the action, rather than to retain it." *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir.2005).

Rule 19(b) enumerates four factors which the district court must weigh when determining whether in equity and good conscience a suit can proceed in the absence of a necessary party:

First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third whether a judgment rendered in the person's absence will be adequate; fourth, whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Fed. R. Civ. P. Rule 19(b). This list of factors is not exclusive. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1608 at 91 (3d ed.2001) (stating "the list in [Rule 19(b)] does not exhaust the possible considerations the court may take into account; it simply identifies those that will be most significant in most cases"). Under Rule 19(b), "a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors in Rule 19(b), it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." *EEOC v. Peabody*, 400 F.3d at 780.

Provident Tradesmens Bank and Trust Co. v. Patterson, 390 U.S. 102 (1968) describes the Rule 19(b) factors as representing four distinct interests: (1) "the interest of the outsider whom it would have been desirable to join," *id.* at 110; (2) the interest of the defendant in avoiding "multiple litigation, ... inconsistent relief, or sole responsibility for a liability he shares with another," *id.*; (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies[,] ... settling disputes by wholes, whenever possible ...." *id.* at 111; and (4) the plaintiff's interest in having a forum in which to present the claims, *id.* at 109.

B. The Case Must be Dismissed for Failure to Name the United States as a Party.

1. The United States is a Required Party Under Rule 19(a)

The United States Department of Interior has determined that the Indian Gaming Regulatory Act applies to the Ysleta del Sur Pueblo, and repeals any conflicting provisions in the

Restoration Act. ECF No. 523-2. The NIGC has determined that the Pueblo can engage in Class II gaming under IGRA. *Id.* If it continues to exercise jurisdiction in this case, the Court will be required to consider and rule upon the deference it owes to these two administrative decisions. Where, as here, administrative decisions are at issue, the administrative agency issuing the decision has an interest relating to the subject of the action that always is sufficient to make it a required party.[5] *Simons v. Vinson*, 394 F.2d 732, 736 (5th Cir. 1968) (holding that "the United States is an indispensable party" where "Appellants must show either that the statutes are void under which Congress authorized the Secretary of Interior to lease the disputed land, or that the Secretary or his agents acted beyond the scope of their statutory authority").[6]

2. Because the United States Cannot be Named as a Party in this Pending Action, The Case must be Dismissed Under Fed. R. Civ. P. 19(b).

a. Joinder of the United States is not feasible.

The United States, as a sovereign, is immune from suit, unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Any such consent must be "unequivocally expressed." *Id.* at 538. Therefore, a court has no subject matter jurisdiction unless a specific statute waives sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). In other

[5] The ruling in this case on an earlier Rule 19 motion is not dispositive on the issue now because at the time of that earlier interlocutory order the United States had not issued an administrative decision confirming its statutory obligation to regulate gaming on the Pueblo, and because the earlier ruling was decided solely on the claim that failing to join the United States would subject the Pueblo to multiple litigation. *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 711 (W.D. Tex. 1999) ("the threat of multiple litigation does not, by itself, necessitate joinder").

[6] *See also Boles v. Greeneville Housing Auth.*, 468 F.2d 476 (6th Cir. 1972) (where appellant property owners attacked HUD Plan, they indirectly attacked HUD's administrative decision to approve it making HUD an indispensable party); *George v. Bay Area Rapid Transit Dist.*, 175 F. App'x 809 (9th Cir. 2006) (United States indispensable party to challenge of Department of Transportation regulations).

words, a federal district court lacks subject matter jurisdiction if the plaintiff's action is not one described by a jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962). Federal courts have limited jurisdiction, and jurisdictional limitations imposed by the Constitution or by Congress must be "neither disregarded nor evaded." *Owen Equip.& Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "The validity of an order of a federal court depends on the court's having jurisdiction . . . over the subject matter. . ." *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The burden of proof is on the party alleging jurisdiction. *Gibbs v. Buck*, 307 U.S. 66, 72 (1939).

b. Equity and good conscience confirm that the action should not proceed without the United States.

(i) A judgment rendered in the absence of the United States would prejudice it and the existing parties.

Any judgment entered without joinder of the Department of Interior and the NIGC yet touching on the validity of the decisions they have made would be prejudicial to the United States and to the Pueblo because of the federal government's strong interests in the proper administration of the statutory mechanism adopted by Congress in IGRA to regulate gaming on Indian lands. *Accord Simons*, 394 F.2d at 736 (holding that "the United States is an indispensable party" in a judicial challenge to administrative action).

(ii) Prejudice to the United States by entry of a judgment in its absence cannot be lessened or avoided.

There is no way by which the prejudice to the United States can be lessened or avoided. Any judgment entered without participation by the United States would be of no value, because the only issue to be decided – the federal government's regulatory authority over gaming on the Pueblo's lands – is the one for which the Unites States as the federal regulator is indispensable. *McCowen v. Jamieson*, 724 F.2d 1421, 1423-24 (9th Cir. 1984) ("In order to grant relief, we

would have to hold that FNS misinterpreted the statute and its own regulations, and had no authority to grant such a waiver. To make such a determination without the Secretary's being a party to the action would be to deprive it of the right to defend the integrity of its administrative decisions in these areas which so intimately affect its policies and procedures" (quotations and citations omitted)).

(iii) A judgment entered in the absence of the United States would not be adequate.

If the United States is not joined in this action, it will be free to bring its own action seeking to confirm its administrative jurisdiction and decisions, and the Pueblo's rights under IGRA. The possibility of inconsistent obligations arising from multiple actions confirms that any judgment entered in the absence of the United States would not be adequate. *Provident Tradesmens* 390 U.S. at 102, 111 ("there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible"). In contrast, an APA action by the State addressing both NIGC decisions would lead to a single uniform result binding on both tribes, the State of Texas and the United States.

(iv) The Plaintiff here has an adequate remedy if the action is dismissed for nonjoinder.

Whether an adequate remedy is available in another forum has been described as "perhaps [the] most important" of the four issues to be considered by a court when determining whether a party is indispensable. *Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003). Here, the Plaintiff has an adequate remedy in another forum – it can bring an APA action against

the United States challenging this final agency action. 25 U.S.C. § 2714. Because the plaintiff has an adequate remedy in another forum, this final factor supports dismissal under rule 12(b)(7).

C. The Case Must be Dismissed for Failure to Name the Alabama Coushatta Tribe of Texas as a Party.

1. The Alabama Coushatta Tribe is a Required Party Under Rule 19(a)

a. The Alabama Coushatta Tribe claims an interest relating to the subject of the action.

(i) The Alabama Coushatta Tribe's interest.

The Restoration Act confirmed the federal trust relationship with two tribes, both located in Texas: the Ysleta del Sur Pueblo and the Alabama Coushatta Tribe of Texas.[7] In affirming its regulatory jurisdiction under IGRA over gaming on the Ysleta del Sur Pueblo, NIGC relied upon the Department of Interior's September 10, 2015 decision regarding the impact IGRA had on the Restoration Act. ECF No. 532-2. Within weeks of affirming its regulatory authority over the Pueblo, NIGC issued a similar decision as to its regulatory authority over the Alabama Coushatta Tribe, again relying on the Department of Interior's September 10, 2015 decision regarding both IGRA and the Restoration Act. That decision is attached as Ex. A.

(ii) Disposition of the action in the absence of the Alabama Coushatta Tribe may impair or impede its ability to protect its interest.

Because they are both covered by the Restoration Act, judicial decisions on the gaming rights of the Ysleta del Sur Pueblo routinely have been relied upon as controlling precedent by the federal courts when called upon to decide issues relating to the gaming rights of the Alabama Coushatta. *E.g., Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 674 (E.D.

[7] The Restoration Act has two titles. Title I, 25 U.S.C. § 1300g, concerns the Ysleta del Sur Pueblo, and Title II, 25 U.S.C. §§ 731–37, concerns the Alabama Coushatta Indian Tribe of Texas.

Tex. 2002). As a result, any ruling by this Court will be looked to as controlling precedent to determine the gaming rights of the Alabama Coushatta Tribe. Disposition of this action without having the Alabama Coushatta Tribe joined to argue on its own behalf will "impair or impede [its] ability to protect [its] interest" under the decision it received from NIGC. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) ("the tribes claim an interest and are so situated that this litigation *as a practical matter* impairs or impedes their ability to protect it. It was an abuse of discretion for the district court to find otherwise" (emphasis in original); *Lucero v. Lujan*, 788 F. Supp. 1180, 1183 (D.N.M. 1992) ("Without the Pueblo's stand, its interests could not practically be protected because the Pueblo has a real stake in the outcome of this action").

(iii) Disposition of the action in the absence of the Alabama Coushatta Tribe may leave the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

If the Alabama Coushatta Tribe is not joined in this action, it will be free to bring its own action against the State of Texas seeking to confirm the tribe's rights under IGRA. That parallel action would place Texas at risk of incurring inconsistent obligations. *Davis*, 343 F.3d at 1292 ("The Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants . . . . Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe"); *Lucero v. Lujan*, 788 F.Supp. at 1183 ("in the absence of the Pueblo, the decision would have no *res judicata* effect as to the Pueblo").

2. Because the Alabama Coushatta Tribe Cannot be Named as a Party in this Action, The Case must be Dismissed Under Fed. R. Civ. P. 19(b).

a. Joinder of the Alabama Coushatta Tribe is not feasible.

The Alabama Coushatta Tribe is immune from suit absent a waiver of its sovereign immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, 2031 (2014). That immunity precludes its joinder in this litigation. Moreover, "Amicus status is not sufficient to satisfy this test, however, nor is [the absent party's] ability to intervene if it requires waiver of immunity." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

b. Equity and good conscience confirm that the action should not proceed without the Alabama Coushatta Tribe.

(i) A judgment rendered in the absence of the Alabama Coushatta Tribe would prejudice it and the existing parties.

As noted above, a judgment rendered in the absence of the Alabama Coushatta Tribe would prejudice it by impacting its rights under IGRA, and the explication of those rights by NIGC and the Department of Interior. *See Am. Greyhound,* 305 F.3d at 1024-25 ("the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence"). A judgment rendered without the Alabama Coushatta would also prejudice Texas as it would subject the State to multiple, possibly inconsistent obligations. *Davis,* 343 F.3d at 1292 ("Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe").

(ii) Prejudice to the Alabama Coushatta Tribe by entry of a judgment in its absence cannot be lessened or avoided.

Because the Pueblo and the Alabama Coushatta Tribe are both covered by provision in the Restoration Act, there is nothing the Court can do to limit the impact of its decision to the issue of gaming by the Pueblo. *Accord Am. Greyhound Racing* 305 F.3d at 1025.

(iii) A judgment entered in the absence of the Alabama Coushatta Tribe would not be adequate.

Where, as here, a "judgment rendered in the Tribe's absence could well lead to further litigation and possible inconsistent judgments . . . [t]hat judgment, therefore, would be 'inadequate.'" *Davis,* 343 F.3d at 1293; *Provident Tradesmens,* 390 U.S. at 109-10.

(iv) The Plaintiff has an adequate remedy if the action is dismissed.

As noted above, the Plaintiff has an adequate remedy in another forum – an APA action against the United States challenging this final agency action. 25 U.S.C. § 2714. Therefore, this factor supports dismissal under rule 12(b)(7). *Cf. Am. Greyhound,* 305 F.3d at 1025 (even where it was unclear whether plaintiff could obtain an adequate remedy in an alternative forum, the court nevertheless recognized that "this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims").

III. Should the Court Deny the Pueblo's Motion to Dismiss this Case, then the Injunction Should Be Amended to Allow the National Indian Gaming Commission to Regulate Gaming Conducted by the Pueblo.

A. Rule 60(b)(5) requires that the Injunction Be Amended Because its Prospective Application Is No Longer Equitable.

If enforcement of an injunction is no longer equitable, it must be amended or vacated, a decision that requires a court to balance the equities. Fed. R. Civ. P. 60(b)(5); *e.g., United States v. Swift & Co.,* 189 F.Supp. 885, 904 (N.D. Ill. 1960), *aff'd* 367 U.S. 909 (1961) (whether relief under Rule 60(b)(5) is warranted is not dependent upon whether the decree is needed today, but whether, if it was needed when entered, intervening changes have eliminated such need). This equitable balancing favors amendment or dismissal if a significant change either in factual

conditions or in law renders continued enforcement detrimental to the public interest,[8] if amending the injunction is necessary to accomplish justice,[9] or if a movant establishes that the injunction injuriously affects his interests.[10]

1. Significant factual and legal changes require amendment of the injunction.

a. Factual Changes.

The Court entered the September 2001 injunction in response to an entirely different factual scenario than the one that exists today. Plaintiffs filed this action over sixteen year ago seeking to stop Class III, Las Vegas style gambling at the Speaking Rock Casino. At that time, the Casino was offering a full range of Class III gambling activities. *See* Memorandum Opinion on September 27, 2001 Injunction [ECF No. 113] at 29 (Court found that the Pueblo was operating, inter alia, keno games, a form of blackjack, poker games, slot machines, crap games, a "Big-Six" wheel game, and off-track betting on horse and dog races). In contrast to the circumstances leading to the issuance of the injunction, the Pueblo is not now seeking to conduct Class III Las Vegas style gambling, but instead is asking the Court to accept a determination by the United States government that the National Indian Gaming Commission has the authority to regulate Class II gaming activities on the Pueblo.

The original objective of the injunction was to ensure that no illegal gambling occurred on Pueblo lands. As stated in this Court's May 14, 2002 order modifying the September 27, 2001 injunction, the effect of the September 27, 2001 injunction was to enjoin all gaming

[8] *Horne v. Flores*, 557 U.S. 433, 447 (2009).

[9] *Hesling v. CSX Transp., Inc*., 396 F.3d 632, 42 (5th Cir. 2005)

[10] *United States v. Bd. of School Com'rs of City of Indianapolis*, 128 F.3d 507, 511 (7th Cir. 1997)

activities by Defendants, including all legal gaming activities. [ECF No. 165] at 6-7. The Court did so to ensure that all illegal gaming activities ceased. *Id.* at 5. It was not the Court's desire to judicially appoint itself as the permanent regulatory body tasked with oversight of gaming operations on the Pueblo. Indeed, the Court repeatedly has lamented the imposition of that task upon it when it has been asked to address regulatory matters in this case. E.g. Transcript Motion For Contempt Hearing, at 5 (March 10, 2014) ("Now I recite all of this because this Court has great concern over this sort of neverending saga that we're in. This case seems to go on and on, it -- this injunction has been in effect for 12 years").

b. Legal Changes.

The United States government has now confirmed, in two separate decisions, that the National Indian Gaming Commission, a federal body with extensive experience regulating Class II gaming, has the regulatory authority to ensure that no "illegal gaming activities" are conducted on Pueblo lands. 25 C.F.R. § 501.1 *et seq.*[11] The Court is required to defer to these two decisions, one by the Department of Interior and the other by the NIGC. *Chevron U.S.A. Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984). A precondition of this deference is a congressional delegation of administrative authority,[12] which may be express or implied.[13] Congress, in the Indian Gaming Regulatory Act, expressly delegated to the NIGC administrative authority to monitor and regulate *all* class II gaming permitted on Indian lands, without

[11] ECF No. 523-2.

[12] *Adams Fruit Co. v. Barrett*, 494 US 638, 650-51 (1990).

[13] *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

exception.[14] The Department of Interior is delegated express authority to administer the Restoration Act. Pub. L. No. 100-89 § 2, 101 Stat. 666 (1987); see also ECF No. 523-2, DOI letter at 9 note 79. The Court must defer to these agencies' administrative determinations, including their determinations of their own jurisdiction. *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012), *affd.*133 S. Ct. 1863 (2013).

Given this comprehensive federal regulatory oversight, this Court's role as regulator via the injunction is no longer necessary, and should be discontinued. The injunction should be vacated so that the intervention of this Court will no longer be required to consider every proposed legal gaming activity in which the Pueblo wishes to engage. Instead of continuing to impose the task of day to day regulation upon this Court, the Pueblo's gaming compliance should be handled by the NIGC, in the same manner as it is for the Kickapoo Tribe of Texas, and hundreds of other federally recognized Indian tribes throughout the United States.

B. Rule 60(b)(6) Requires that the Injunction Be Amended to Accomplish Justice.

Fed. R. Civ. P. 60(b)(6) allows a court to relieve a party from a judgment if "any other reason" justifies relief. In *Hesling* , 396 F.3d 632 (5th Cir. 2005) the court explained:

> Rule 60(b)(6) "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." "The broad language of clause (6) gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice."

396 F.3d at 642 (citations omitted). This Court can and should amend the injunction it has entered in this case, because doing so would accomplish justice.

[14] 25 U.S.C. §§ 2706(b), 2710(b) and (c).

The ultimate goal of both parties to this action is appropriate regulation of gaming on the Pueblo's lands in full compliance with the law.[15] The parties and this Court can move toward that goal, and final resolution of this case, through amendment of the injunction to relieve the State and this Court from ongoing litigation, and instead require the federal government (through NIGC) to regulate class II gaming activities conducted by the Pueblo.[16] Under the injunction, both parties and the Court are forced to expend considerable resources whenever the Pueblo seeks to offer gaming activities. The injunction imposes procedures that put the parties under extreme litigation hardships that were never contemplated by federal law. Because all of this can now be avoided through federal regulation of gaming activities, prospective application of the injunction is no longer equitable.

C. The Injunction Should be Amended Because it Injuriously Affects the Pueblo's Interests.

Finally, it is well established that courts may modify or even vacate injunctions if a movant establishes that the injunction "injuriously affects his interests." *Bd. of School Com'rs*, 128 F.3d at 511 (citations omitted); *see also Rockwell Graphic Sys., Inc. v. DEV Indus., Inc*., 91 F.3d 914, 920 (7th Cir. 1996) (court imposed injunctions may be modified to adapt to changed

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[15] Since early in this case, Texas has recognized that IGRA applies to the Pueblo's Class II gaming activities. "Federal law, 'for the purpose of promoting tribal economic development, tribal self-sufficiency, and strong tribal government' has pre-empted the state law in the area of Bingo. 25 U.S. C. § 2701(4); 25 U.S.C. § 2702(1). However, it has not pre-empted state law in those forms of gambling which fall under IGRA's 'Class III,' and state law prohibiting these forms of gambling prevails under the Act." [State] Defendants' Motion for Partial Summary Judgment with Brief in Support at 7, *Ysleta del Sur Pueblo v. Texas*, (W.D. Texas 1993) (P-93-CA-029). See Exhibit 1.

[16] *See* Brief of [State] Appellants at 5, *Ysleta del Sur Pueblo v. Texas*, (5th Cir. 1994) (No. 93-8477): "This congressional attempt to compel the state to regulate Indian gaming violates the Tenth Amendment." See Exhibit 2.

circumstances). After consideration of a full evidentiary record, this Court confirmed the substantial economic and governmental interests at stake in the Pueblo's operations at its entertainment centers. *See* ECF No. 510 at 67 (citing Oct. 7, 2014 Tr. 166 (Linda Austin testimony that the loss of the donations would result in loss of jobs and the Tribe going "back ten steps instead of [the] progressive move that [it is] on")). Given federal regulatory jurisdiction over gaming activities on the Pueblo, maintaining the injunction is no longer prudent and unnecessarily exposes the Pueblo to continued uncertainty regarding its ongoing and future operations, including the possibility that the operations could be shut down at any time causing irreparable injury to governmental services and programs.

At the October 2014 Hearing, the Court received evidence confirming that the largest source of monetary transfers to the Pueblo's general fund come from operations at the Pueblo's entertainment centers, which "impact every one of the programs offered by the Pueblo." Oct. 7, 2014 Tr. 163; *see also* ECF No. 510 at 15. The Court also received and considered evidence showing that tribal government programs that are funded by donations made at the entertainment centers include "services for the elderly, educational scholarships, border patrol services, the Tribe's police department, mental health care services for tribal veterans, day care programs, environmental initiatives, and efforts to revitalize the Tigua language." ECF No. 510 at 15 (citing testimony of Lt. Governor Carlos Hisa). The evidence considered by the Court included factual showings that certain government programs offered by the Pueblo are funded entirely by donated funds received through operations at the entertainment centers. Oct. 7, 2014 Tr. 194, 201-205 (testimony of Lt. Governor Carlos Hisa).

The Court accepted and considered evidence showing closure of the entertainment centers would cause substantial funding shortfalls and result in reductions in employment and

economic stagnation. Oct. 7, 2014 Tr. 166 (testimony of Linda Austin); *id.* at 198 (testimony of Lt. Governor Carlos Hisa regarding the effect on governmental services should donations cease). The Court heard testimony addressing the effect that prior orders in this dispute have had on the Pueblo, particularly the court ordered closure of the Pueblo's casino. *Id.* at 180-81 (testimony of Linda Austin that closure of the Casino "was probably the most catastrophic time that I have witnessed [the Pueblo] go through" and included a twenty five percent reduction in force of Pueblo governmental employees and termination of 700 to 800 employees at the casino). Closure of the casino forced reduction of Pueblo governmental services, reorganization and realignment of tribal programs, and a reduction of approximately half of the tribal services previously offered to members of the Pueblo. *Id.* at 181.

Finally, should the Court decline to vacate or substantially modify the injunction, the Pueblo will be faced with two sources of regulation of its Class II gaming activities – federal regulation through NIGC and judicial regulation by this Court. Although the courts are not equipped to conduct day-to-day regulation of the Pueblo's gaming activities, that is the only activity conducted by NIGC, through Congress's delegation of that regulatory authority to NIGC in IGRA.

CONCLUSION

The Pueblo Defendants ask the Court to grant this Motion, vacate the September 2001 Injunction and dismiss this case. In the alternative, the Pueblo Defendants ask the Court to amend the September 2001 Injunction to allow the Pueblo to conduct class II gaming regulated by the National Indian Gaming Commission, stay further proceedings in the case to give the Plaintiff an opportunity to pursue remedies available to it outside of this litigation, and administratively close the case until further order of the Court.

Dated: November 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I caused a true and correct copy of the foregoing to be served via e-mail and by U.S. Mail on the following counsel of record:

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