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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
v.	§	
	§	
YSLETA DEL SUR PUEBLO, *et al.*	§	
	§	
	§	**No. EP-99-CA-0320-KC**
Defendants.	§	

PUEBLO DEFENDANTS' RESPONSE TO
BRIEF OF *AMICI CURIAE* AMERICAN LEGION POST 312, *ET AL.*

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INTRODUCTION

Unlike a traditional "friend of the court," this ever dwindling number of amici use their brief to launch a full bore written assault on the defendant Ysleta del Sur Pueblo, its people, their culture and their sovereign Tribal government. The amici brief is wrong in tone and substance. It ridicules the Pueblo and its people for believing they will be treated fairly. ECF 599 at 28. It accuses them of "hatching plots." *Id.* at 20. It ridicules federal officials – including high level presidential appointees confirmed by the United States Senate – for honoring the sacred trust responsibility we through our federal government owe to Indian people. *Id.* at 23-24 n.17. For centuries the Ysleta del Sur people have worked tirelessly to protect themselves and their families from exactly the kind of attacks launched by these amici in their brief. It is not the Pueblo's government that has refused to honor commitments, taken what does not belong to it or in any way caused the losses the remaining amici claim to have suffered in recent years. But their attacks notwithstanding, amici are correct in one regard. The Pueblo has never accepted defeat. And it never will. It is a federally recognized Tribe and will diligently protect all sovereign rights that accompany that status. It is the oldest continually occupied community in what is now Texas, and it will be here long after amici's bingo halls are gone.

ARGUMENT

I. The "Deal" About Which Amici Express Such Concern Confirmed that Texas Would Not Regulate Class II Gaming on the Pueblo.

The only "deal" Congress and the Ysleta del Sur Pueblo made as to Class II gaming on the Pueblo was that the State of Texas had absolutely no regulatory authority:

> **(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.

25 U.S.C.A. § 1300g-6.

The Pueblo's need to be protected from state regulation was evident in the tone set by Texas officials leading up to adoption of the Restoration Act. For example, Bob Bullock, the Texas State Comptroller at the time whose office was responsible for regulating bingo in the state, issued a press release in which he quoted himself as stating:

> These Indian Chiefs better get over to the AG's Office and light up their peace pipe if they want to keep getting this wampum, because Mattox is holding the Tomahawk now. [1]

The negotiations that led to passage of legislation are just that – negotiations. No single member of Congress, or any state, nor any Indian tribe, has an enforceable contractual right in a statute. IGRA, and the Restoration Act, are just what they purport to be – congressionally passed statutes, signed into law by the President. Congress did not pass IGRA to give tribes the right to gamble – tribes already had that right as confirmed by the United States Supreme Court in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987). Instead, Congress passed IGRA to restrict tribal gambling rights, and in the process to ensure day to day regulatory oversight of Class II gaming on Indian Lands. Congress passed the Restoration Act, in part, to establish specific limitations on the criminal and civil jurisdiction of the State of Texas, including the unambiguous denial of ANY state regulatory authority over gaming on the Pueblo. As to class II gaming, that regulatory authority was instead vested by Congress in the National Indian Gaming Commission through IGRA. The issue now before the Court is one of first impression in the federal courts: given that Texas has "no regulatory jurisdiction," who does? Did Congress

[1] *See* April 5, 1983 Bullock news release. (Exhibit A). In fact, Congressman Wilson stated that "the principal purpose of this legislation is to give the Alabama-Coushatta Tribe the same status as other Indian tribes in the United States.") One version of why only three tribes survived out of the hundreds that originally thrived in what is now Texas can be found at https://www.tsl.texas.gov/exhibits/indian/index.html

intend this Court to serve as the de facto administrative regulatory body in perpetuity, or did Congress intend that a specific federal executive branch agency (formed to perform that very task) should fill that role. That executive branch agency, the National Indian Gaming Commission, after taking years to review the question, has taken final agency action – within the scope of its congressional authority to do so – confirming that Congress intended that it regulate class II gaming on the Pueblo. The Court must defer to that determination.

II. Bingo *Amici* Misstate the Facts.

The amici brief is rife with embellishment and misstatement, including:

1. ***Amici* Claim**: the Pueblo has engaged in "outright refusal to accept, much less follow, the law" citing the 2001 order enjoining operation of the Class III gaming casino, and the 2002 order amending the injunction. ECF 599 at 8.

What the facts show: In the fifteen years since 2001, the court has only twice found the Pueblo in contempt – once for using gift cards as prizes, and once for having third party vendors conduct sweepstakes without first receiving the court's approval to do so. Contrary to the adjective riddled claims of the Bingo amicus brief, the facts show that the Pueblo has consistently worked with the court to conduct its operations in strict compliance with the law.

2. ***Amici* Claim:** the Pueblo "[has] never come into full compliance with this Court's order." ECF 599 at 9.

What the facts show: The Court confirmed that the Pueblo complied with the court's injunction in the order amending that injunction. *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 702 (W.D. Tex. 2001), *modified* (May 17, 2002) ("On February 12, 2002, this Court having received the Fifth Circuit's mandate, the Defendants complied with the

injunction, ceasing operation of the Casino"). Neither the Court nor any party to this litigation claims that the Pueblo is in violation of the Court's orders at this time.

3. ***Amici*** **Claim:** "a single NIGC agency official . . . worked to 'supplant' this Court's authority." ECF 599 at 24.

What the facts show: The presidentially appointed Chairman of NIGC, after having been confirmed in his position by the United States Senate, and acting on advice of NIGC counsel offered after years of detailed research and analysis, confirmed NIGC's final administrative decision, all as required by federal law. ECF No. 524.

4. ***Amici*** **Claim:** "Texas and its congressional delegation **refused to allow** federal supervision over the Tribe." ECF 599 at 1.

What the facts show: The Pueblo was federally recognized in 1968. Tiwa Indians Act, Pub. L. No. 90–287, 82 Stat. 93 (Apr. 12, 1968) ("Tewa Indians Act"). Texas Attorney General Jim Mattox thereafter opined that the state's constitution prohibited the state from accepting responsibility to fulfill federal trust obligations. Texas Attorney General Opinion JM-17. The federal government restored the trust relationship between the Pueblo and the federal government on terms accepted by Congress. Texas was never in a position to "refuse to allow" that from happening. [2]

III. Bingo *Amici* Misstates the Legislative History of the Restoration Act.

A. Federal Trust Responsibility Before the Restoration Act.

In 1968, the United States gave its federal recognition to the Ysleta del Sur Pueblo, thus

[2] Under the Indian Commerce Clause, exclusive authority over Indian affairs is vested in the federal government. Unless Congress has explicitly authorized a state to apply its laws within an Indian reservation, it may not do so. *See Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("(t)he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

establishing a government to government relationship with the Pueblo. Tiwa Indians Act. This Act transferred federal trust obligations to the state of Texas. In 1981, as a result of a hunting rights dispute between the Texas Parks and Wildlife Department and members of the Alabama-Coushatta Tribe, the Executive Director of the Texas Parks and Wildlife Department asked Attorney General Jim Mattox for an opinion regarding the authority of the Department to enforce its code within the confines of the Alabama-Coushatta Indian Reservation. *See* Texas Attorney General Opinion JM-17 (Exhibit B). In response, Attorney General Mattox concluded, among other things, that there was no valid claim that the Alabama-Coushatta Tribe's land was an "Indian Reservation," and that there could be no trust relationship between Texas and the Alabama-Coushatta Tribe. *Id.*

B. H.R. 6391

Congressmen Ronald Coleman (R. 18th District, Texas) and Charlie Wilson (D. 2nd District, Texas) introduced the first version of the Restoration Act, H.R. 6391, on October 3, 1984. Because there were only nine days left in the 98th Congressional Session, Congress adjourned prior to any action being taken on the bill.[3] H.R. 6391 made no mention of gaming.[4]

C. H.R. 1344

On February 26, 1985, Congressmen Coleman and Wilson reintroduced the Restoration Act and the bill was captioned H.R. 1344.[5] Again there was no mention of gaming in the bill. *Id.* On October 17, 1985, there was a hearing before the Committee on the Interior and Insular

[3] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 6391 (98th Congress). (Exhibit C)
[4] *See* H.R. 6391, 2d Session of the 98th Congress. (Exhibit D)
[5] *See* H.R. 1344, 1st Session of the 99th Congress. (Exhibit E)

Affairs of the House of Representatives on H.R. 1344.[6] Because gaming was not an issue, none of the speakers that day mentioned gaming or the possibility that the Pueblo or Alabama-Coushatta Tribe might someday engage in gaming.[7] In fact, Congressman Wilson stated that "the principal purpose of this legislation is to give the Alabama-Coushatta Tribe the same status as other Indian tribes in the United States."[8]

D. Texas Comptroller Bob Bullock's Response to H.R. 1344

Approximately a month after the hearing on H.R. 1344, Texas Comptroller Bob Bullock raised for the first time the issue of unregulated bingo on tribal reservations if H.R. 1344 became law. The regulation of Texas Charitable Bingo was the responsibility of Bullock's office. David Anderson, an employee in Bullock's office, prepared an interoffice memorandum on H.R. 1344 and the ability of states to regulate bingo on tribal lands.[9] In the memorandum, Anderson stated his belief that the section in H.R. 1344 which provided that Texas "shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such state had assumed such jurisdiction with the consent of the tribe under 25 U.S.C. §§ 1321 and 1322" did not ensure that Texas bingo regulations would apply on reservation land.[10] As support for his position, Anderson pointed to the Fifth Circuit decision in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

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[6] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 1344 (99th Congress). (Exhibit F)
[7] *See* Witness List for October 17, 1985, hearing before the House Interior Committee and the testimony of Hazel E. Elbeit, Acting Deputy Secretary for Indian Affairs, Texas Governor Mark White, Congressman Ronald Coleman, Congressman Charles Wilson, and Raymond Apodaca, Executive Director of the Texas Indian Commission. (Exhibit G)
[8] *See* October 17, 1985, Statement of Charles Wilson, U.S. Representative, hearing before the House Committee on Interior and Insular Affairs. (Exhibit H)
[9] *See* November 19, 1985, interoffice memorandum from David Anderson to John Moore. (Exhibit I)
[10] *Id.*

On November 22, 1985, Bullock went public with his concerns about H.R. 1344. In a press release issued on that day, he argued that H.R. 1344 would allow unregulated, high stakes bingo games.[11] In the release, Bullock stated that "if this bill passes like it is written we might as well get the highway department to put a sign at the state line that says, 'Gangsters Welcome.'"[12] The release goes on to say that Bullock had asked Congressmen Coleman and Wilson to amend the bill to provide for state regulation of bingo.[13]

E. House Amendments to H.R. 1344

Congressman Coleman then offered an amendment to H.R. 1344 that provided:

> Gaming, lottery or bingo on the Tribe's reservation and on tribal lands shall only be conducted pursuant to tribal ordinance or law approved by the Secretary of Interior. Until amended as provided below, tribal gaming laws, regulation and licensing requirements shall be identical to the laws and regulation of the State of Texas regarding gambling, lottery and bingo. Any amendments to the tribal gaming laws, regulations and licensing requirements shall be submitted by the Tribe to the Secretary for approval. Upon such approval, the Secretary shall submit such amendments to the Congress. Such amendments shall become effective at the end of 60 legislative day, beginning on the day such amendments are submitted to Congress, unless during such 60 day period Congress adopts a join resolution disapproving such amendments.[14]

But Bullock was not satisfied with the amendment, issuing a press release on November 25, 1985, in which he stated that the amendments would not stop high stakes unregulated bingo.[15] In spite of Bullock's protestations, H.R. 1344 was amended on December 4, 1985, to include Congressman Coleman's amendment on gaming.[16] On December 16, 1985, the amended

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[11] *See* November 22, 1985, Bullock news release. (Exhibit J)
[12] *Id.*
[13] *Id.*
[14] *See* December 4, 1985, letter to Raymond Apodaca from Cindy Darcy; Report of House Committee on Interior and Insular Affairs, Report No. 99-440. (Exhibit K)
[15] *See* November 25, 1985, press release. (Exhibit L-1)
[16] *See* THOMAS (Library of Congress) Report on all Congressional Actions on H.R. 1344. (Exhibit L-2)

version of H.R. 1344 was reported to the House.[17] The House passed H.R. 1344 as amended by voice vote on December 16, 1985.[18]

F. H.R. 1344 in the Senate

Having failed in the House, Bullock took his campaign to prohibit gaming to the Senate. There he only needed to convince one of the two Texas Senators, Lloyd Bentsen (Democrat) or Phil Gramm (Republican), to oppose the bill as written. Senator Bentsen initially opposed the bill because he viewed it as granting special status to the Pueblo and the Alabama-Coushatta Tribe, something he opposed in general.[19] Senator Gramm wanted to balance the federal budget by reducing spending on what he considered social programs.[20] The Tribes tried to counter Bullock's efforts by pointing out that the House amendments to H.R. 1344 were designed to arrive at a compromise with Bullock "without setting an unfavorable precedent for other tribes" or compromising the Tribes' powers of self-government.[21]

Despite the efforts of the Tribes, Bullock was able to persuade both Senators Bentsen and Gramm to indicate that they would kill H.R. 1344 in the Senate unless gaming was prohibited on tribal lands.[22] At this same time, Bullock and other state officials were putting tremendous financial pressure on both Tribes. *See* Testimony of Ray Apodaca, Executive Director, Texas Indian Commission ("the state of Texas is 'gradually going out of the Indian business'" [Exhibit Q at 59]. For example, Bullock had declared in 1984 that the Tribe's royalty payments from oil

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[17] *Id.*
[18] *Id.*
[19] *See* Mark Edward Miller, *Forgotten Tribes-Unrecognized Indians and the Federal Acknowledgement Process* (2004), 249-50. (Exhibit M)
[20] *Id.*
[21] *See* January 21, 1986, letter from Morris Bullock and Miguel Pedraza to Bentsen. (Exhibit N)
[22] *See* Mark Edward Miller, *Forgotten Tribes-Unrecognized Indians and the Federal Acknowledgement Process* (2004) at 250. (Exhibit M)

and gas production were subject to Texas state severance taxes.[23] Moreover, the Polk County Appraiser had notified the Tribe that the Tribe's reservation had been placed on the county tax rolls.[24] Finally, the Texas State Legislature failed to appropriate any funds for the Alabama Coushatta Tribe's governmental operations, electing instead to use the Tribe's oil and gas funds held in the state treasury to fund the Tribe's governmental needs.[25]

In response to this pressure, the Tribes passed resolutions asking that Congressman Coleman's House amendments to H.R. 1344 be struck and Bullock's language prohibiting all gaming be substituted.[26] On June 25, 1986, the Senate Indian Affairs Committee held a hearing on H.R. 1344 at which Sections 107 and 207 of the House bill were amended to read:

> All forms of gaming, gambling, betting, lottery, and bingo on the reservation of the Tribe or on any land acquired after the date of the enactment of this Title and added to the reservation or held in trust status for the Tribe is hereby prohibited. For the purposes of this Section, the term "gaming," "gambling," "betting," "lottery," and "bingo" shall have the meaning given those terms under the laws and administrative regulations of the State of Texas.[27]

In prepared remarks to the Committee, Bullock withdrew his objection to H.R. 1344, stating that this amendment to the bill satisfied his concerns.[28]

On September 23, 1986, the Senate received a favorable report from Senator Andrews of

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[23] *See* October 17, 1985, Testimony of Raymond Apodaca, Executive Director of the Texas Indian Commission, before the House Committee of Interior. (Exhibit O)
[24] *See* March 26, 1984, letter from Richard Craig, Polk County Appraiser, to G.C. Edgar. (Exhibit P)
[25] *See* October 17, 1985, Testimony of Raymond Apodaca, Executive Director of the Texas Indian Commission, before the House Committee of Interior. (Exhibit O)
[26] *See* Alabama-Coushatta Tribal Resolution ACITC No. 86-07 (Exhibit R) and Ysleta del Sur Pueblo Council Resolution No. TC-02-86 (Exhibit S-1).
[27] *See* Report of the Senate Indian Affairs Committee, Report No. 99-771. (Exhibit S-2)
[28] *See* Prepared Statement of Bob Bullock dated January 25, 1986. (Exhibit T)

the Senate Committee on Indian Affairs.[29] With this vote of confidence by the Committee, H.R. 1344 was placed on the Senate legislative calendar under general orders on the same day.[30] The next day, H.R. 1344 was passed in the Senate by voice vote.[31] However, on September 25, 1986, Senator Gramm, through the unusual administrative procedure of having a voice vote vitiated, killed H.R. 1344.[32] Senator Gramm's basis for requesting to cancel Senate passage of H.R. 1344 was driven by his desire to better understand the potential cost of the bill.[33] On October 2, 1986, Senator Gramm requested written responses to specific questions from the BIA, the Department of Treasury and the General Accounting Office ("GAO") concerning the precise extent of the proposed federal obligation.[34] The GAO did not respond to Gramm's request until January 7, 1987.[35] By that time, the 99th Congressional Session had come to a close and no further action was taken on H.R. 1344.

G. 100th Congress

On January 3, 1987, the 100th Session of the United States Congress commenced. On January 6, 1987, Congressmen Coleman and Wilson introduced H.R. 318.[36] Shortly after the introduction of H.R. 318, the United States Supreme Court issued its opinion in *California v. Cabazon Band of Mission* Indians, 480 U.S. 202 (1987). In that case, the Supreme Court found that California state law permitted gaming, subject to regulation, rather than prohibiting it.

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[29] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 1344. (Exhibit L-2)
[30] *Id.*
[31] *Id.*
[32] *See* NCIA News on Indian Laws of the 99th Congress, December 1986. (Exhibit U)
[33] *See* Jake Henshaw, *Tribe Blames Gramm for Delays*, El Paso Times, October 17, 1986. (Exhibit V)
[34] *See* January 7, 1987, GAO report to Gramm. (Exhibit W)
[35] *Id.*
[36] *See* THOMAS (Library of Congress) Report on all Congressional Actions on H.R. 318. (Exhibit X)

Therefore, the court ruled California could not prohibit tribes from offering gaming. *Id.*

H. H.R. 318 in the House

As introduced, H.R. 318 was a mirror image of the final version of H.R. 1344, the version that Senator Gramm killed with his last minute legislative maneuver. After the Supreme Court's decision in *Cabazon*, however, the House Committee on Interior and Insular Affairs voted to amend Sections 107 of H.R. 318 (relating to the Pueblo) and 207 (relating to the Alabama-Coushatta Tribe) to strike the gaming language inserted into H.R. 1344, simplifying the prohibition on gaming to read that "all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands."[37] The House Interior Committee wanted to make clear that it was not adopting a new policy banning gaming on Indian reservations, but merely honoring the request of the tribal resolutions to prohibit gaming.[38]

On March 24, 1987, Bullock sent a letter to Coleman attaching the substitute language for Sections 107 and 207.[39] Bullock informed Coleman that the amendments satisfied his concerns and were acceptable.[40] Bullock did express his surprise at the amendments, "in light of the agreement that was struck during last session," but he also stated that he was pleased that the situation was resolved so quickly.[41] On April 1, 1987, the House received a favorable report on H.R. 318 as amended from the House Committee on Interior and Insular Affairs.[42] Thereafter, on April 21, 1987, H.R. 318, as amended, passed the House by voice vote.[43] The following day,

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[37] *See* House Committee on Interior and Insular Affairs, Report 100-36. (Exhibit Y)
[38] *Id.*
[39] *See* March 24, 1987, letter from Bullock to Coleman. (Exhibit Z)
[40] *Id.*
[41] *Id.*
[42] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 318. (Exhibit X)
[43] *Id.*

H.R. 318 was received in the Senate and referred to the Committee on Indian Affairs.[44]

I. H.R. 318 in the Senate

On June 17, 1987, the Senate Committee on Indian Affairs met and amended H.R. 318.[45] The Indian Affairs Committee amended Section 107 in three significant ways. First, the Committee rejected the absolute prohibition on all gaming and amended Section 107 to provide:

> (a) IN GENERAL. – All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and lands of the tribe. Any violation of the prohibition provided in this subject shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the Tribe's request in Tribal Resolution No. T.C.-02-86, which was approved and certified on March 12, 1986.[46]

Next, the Committee added a new clause in Section 107 that addressed regulatory jurisdiction. That clause reads:

> (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.[47]

Finally, the Committee added a second new clause to Section 107 that concerned jurisdiction and enforcement:

> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS. – Notwithstanding Section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the Tribe, or by any member of the Tribe, on the reservation or on lands of the Tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.48

On July 23, 1987, H.R. 318 as amended passed the Senate by voice vote.[49]

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[44] *Id.*
[45] *Id.*
[46] *See* Report of Senate Committee on Indians Affairs, No. 100-90. (Exhibit AA)
[47] *Id.*
[48] *Id.*
[49] *See* Report of House Committee on Interior, No. 100-36. (Exhibit Y)

The clause in Section 107(a) that incorporates Texas civil and criminal gaming laws in the Restoration Act was not an extension of state regulatory authority, which Congress specifically denied in Section 107(b). Instead, its inclusion is similar to the Assimilative Crimes Act, which makes state law applicable to conduct occurring on lands reserved or acquired by the Federal government when the act or omission is not made punishable by an enactment of Congress. 18 U.S.C. § 13; 18 U.S.C. § 7(3). By expressly stating in Section 107(a) that the civil and criminal penalties that are provided by the laws of the State of Texas are applicable to violations of the Restoration Act prosecuted in federal district court, Congress was establishing civil and criminal jurisdiction for the United States. This clause does not change Congress's specific language denying regulatory jurisdiction to the state.

J. H.R. 318 Returns to the House and Becomes Law.

The House received the Senate version of H.R. 318 on July 24, 1987.[50] During the debate on the Senate version of H.R. 318, Representative Morris Udall,[51] then the Chairman of the House Committee on Interior and Insular Affairs, requested that the House act on the Senate amendments to the Restoration Act by unanimous consent,[52] stating:

> It is my understanding that the Senate amendments to [Section 107] are in line with the rational[e] of the recent Supreme Court decision in the Cabazon Band of Mission Indians versus California. This amendment in effect would codify for those

[50] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 318. (Exhibit X)

[51] Morris K. Udall was one of the most powerful members of the House of Representatives in 1987. At that time he had established a record of commitment to the interests of Native Americans. Congressman Udall's papers are held by the University of Arizona Library Special Collections Department, which describes the Congressman as "one of the most creative and productive legislators of the century. His concern for Native Americans and love of the environment resulted in numerous pieces of legislation moving through congress."

[52] In 1987 the Chairman of the House Committee on Interior and Insular Affairs exercised full control over all Native American legislation passing through the House of Representatives. He was the singular most powerful member of the House of Representatives on Indian Issues.

tribes the holding and rational[e] adopted in the Court's opinion in the case.[53]

Later that day, the House agreed to the Senate amendments to H.R. 318 by unanimous consent.[54] On August 18, 1987, H.R. 318 as amended by the Senate became Public Law 100-89 and restored the trust relationship between the United States and the Ysleta del Sur Pueblo when it was signed into law by President Ronald Reagan.[55]

IV. The Pueblo Did Not "Promise" Not to Engage in Class II Gaming

Bingo amici point to the Restoration Act's reference to a tribal resolution to urge this Court to act as the Class II gaming regulator for the Pueblo in perpetuity. But that reference does not require the result urged on the Court by amici. Section 107(a) includes the following language: "The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986." 25 U.S.C. § 1300g-6(a). This in turn led the Fifth Circuit to conclude that the Pueblo had entered into a Class III gaming compact. But that reasoning does not affect Class II gaming which, as explained in the Pueblo's reply in support of the pending motions, does not require a compact.

As discussed above, Texas Comptroller Bob Bullock asked at one point that the Restoration Act contain specific language that all forms of "gaming, gambling, lottery and bingo" would be prohibited on the Pueblo's reservation. Under pressure to address that effort, the Pueblo's Council passed Resolution No. T.C.-02-86 on March 12, 1986. But as discussed above, although H.R. 1344 was amended to contain language similar to what Bullock wanted,

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[53] *See* 133 Cong. Rec. H6975 (Daily Ed. August 3, 1987) (Statement of Rep. Udall) (emphasis added). (Exhibit AB)
[54] *See* THOMAS (Library of Congress) Report on all Congressional Activity on H.R. 318. (Exhibit X)
[55] *See* Pub. L. No. 100-89, codified at 25 U.S.C. § 731 *et seq.*

H.R. 1344 never became law.[56] Instead, the legislative vehicle that eventually became the Restoration Act was H.R. 318, and it did not contain an absolute bar to gaming on the Pueblo's lands.[57] As the legislative history makes clear, Congress's change to the statutory language was deliberate.

Alex Skibine, who was deputy counsel for Indian Affairs for the House Interior Committee assigned with the primary responsibility for overseeing the passage of the Restoration Act in the House, testified that when the Senate Indian Affairs Committee amended the House version of the Restoration Act to remove the outright prohibition on gaming in Section 107, Senate staff simply forgot to take out the reference to the tribal resolution.[58] Mr. Skibine testified that a similar mistake occurred during the passage of IGRA, when the Senate removed language from a draft of IGRA that would have provided for an outright tax exemption for Indian tribes, but left in the IGRA a parenthetical reference to Chapter 35 of the Internal Revenue Code, a chapter that authorizes such tax exemptions.[59] As Mr. Skibine correctly noted in his testimony, the United States Supreme Court was asked to reconcile this conflict in IGRA in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), and the Court concluded that the reference to Chapter 35 within a parenthesis was a scrivener's error and could not be read to overcome the express intent of Congress not to provide the tribes with a tax exemption.[60]

V. IGRA's Legislative History Confirms that Congress Intended it to Apply to the Indian Tribes in Texas.

As explained in a Senate Report addressing the scope of IGRA:

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[56] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 1344. (Exhibit F)
[57] *See* THOMAS (Library of Congress) Report on all Congressional Action on H.R. 318. (Exhibit X); 25 U.S.C. § 737(a) (b) & (c).
[58] Testimony of Alex Skibine Before the Senate Committee on Indian Affairs for the Oversight Hearing on the Implementation of the Alabama Coushatta Restoration Act. (Exhibit AC)
[59] *Id.*
[60] *Id.; Chickasaw Nation v. United States,* 534 U.S. at 90-95.

> There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. [IGRA] bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill. The card games regulated as class II gaming are permitted by far fewer States and are subject to requirements set forth in section 4(8). The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

S. Rep. No. 100-446 at 11-12 (Exhibit AD). At the time of this report, Texas permitted bingo. IGRA was intended to expressly supersede limitations on bingo imposed by Texas (and forty four other states) such as prohibiting its use by nonprofit organization except those supporting medical research or treatment programs. ECF 599 at 3. Congress passed IGRA shortly after passage of the Restoration Act, when Congress was well aware of the legal status of the Tribes in Texas, and particularly aware that no regulatory body was in place to regulate gaming by those tribes – the state having been denied all such jurisdiction entirely. Clearly, Congress intended IGRA to apply to the regulation of Class II gaming in Texas, and no court has held otherwise.

VI. The Bingo Amici Nowhere Address the Subject Matter Jurisdiction Issue Identified by the Court.

In its October 9, 2015 order, the Court specifically directed that: "Any briefing [in the matter now pending before the Court] should address the impact of the Sealed Document on the Court's continuing jurisdiction." ECF No. 525 at 2. But rather than complying with the Court's direction, the Bingo Amici present only historical argument attacking the propriety of the NIGC final administrative determination that it has jurisdiction to regulate class II gaming on the Pueblo. Only five of the amici brief's thirty pages are identified as "argument." ECF 599 at 24-29. Instead of addressing jurisdictional issues as directed by the Court, the relative number of

pages committed to factual argument versus legal argument shows that the Amici only seek to re-litigate historic facts already considered and resolved by this Court, which is an inappropriate role for *amicus* and only distracts from and impedes resolution of the issues currently before the Court. *Sierra Club v. Fed. Emergency Mgmt. Agency*, No. H-07-608, 2007 WL 3472851, *3, (S.D. Tex., Nov. 14, 1007) *3 ("It appears that [movant] seeks to litigate fact issues; such a role is generally inappropriate for an *amicus*."); *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Circ. 1970), ("An amicus who argues facts should rarely be welcomed.").

VII. NIGC's Executive Branch Determination Must be Given Judicial Deference.

A. Amici Concede the Propriety of NIGC's Final Determination Confirming the Agency's Jurisdiction over Class II Gaming on the Pueblo's Lands.

At the conclusion of their sixteen page "Factual Overview" section which ends on page 23 of their brief, amici lament what they describe as a "change in position" by NIGC. They argue that this change in position improperly moved NIGC from the litigation strategy it took (but withdrew) in the APA case brought by the Pueblo to the reasoned agency final determination reached after years of analysis and consideration. ECF 599 at 22-23.[61] Yet surprisingly, on the very next page of their brief, amici make the following argument, directly quoted from their brief, confirming the propriety of administrative agencies reconsidering their position, especially if the position was taken in litigation:

> Fifth Circuit precedent holds that when "no prior [agency] interpretation" exists, agency "interpretations advanced during the [course of] litigation" merit no deference when those interpretations "may be construed as offered for the purpose of 'provid[ing] a convenient litigating position." *R&W Tech. Servs. Ltd.v.*

[61] Not appreciating the thoroughness of NIGC's process, amici ridicule this federal executive branch agency for taking the time required to complete its final agency action. ECF 599 at 19-20. IGRA requires NIGC to act within ninety days on gaming ordinance amendments submitted by tribes for approval. 25 U.S.C.A. § 2710(e). The Pueblo repeatedly withdrew and resubmitted the amendments to its Class II gaming ordinance to give NIGC the additional time it required to complete its analysis and final determination.

> *Commodity Futures Trading Comm*'n, 205 F3d 165, 171 (5th Cir 2000); *see also In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000) ("[W]here an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation.").

ECF 599 at 24. As amici concede, the law is clear: NIGC's final agency determination controls, and is in no way impacted by the "convenient litigation position" the agency first took, but withdrew, in an earlier case.

B. The United States Supreme Court and the Fifth Circuit Court of Appeals – not the Pueblo or NIGC - Established the Case Precedent Confirming NIGC's Executive Branch Authority to Determine the Scope of its Jurisdiction Under IGRA and the Deference Courts Owe that Determination.

Congress passed two pieces of legislation, both signed into law by President Ronald Reagan. In the first, Congress confirmed that the state of Texas has no regulatory authority over gaming on the Ysleta del Sur Pueblo. In the second, Congress established NIGC as the executive branch agency specifically tasked with exercising regulatory authority over Class II gaming by Indian Tribes in Texas and other states. No party or amici disputes that Congress gave NIGC the authority to determine the scope of its Class II gaming jurisdiction under IGRA. NIGC has done so here, and that determination is entitled to judicial deference. *See Pueblo Reply in Support*, ECF 591 at 6-11.

In raising APA arguments to challenge NIGC's action, amici rely entirely on case law which addresses *only* class III gaming. But as shown in the Pueblo's reply in support of its motions [ECF 591 at 1-4] and in the amicus brief submitted by the Alabama Coushatta Tribe of Texas [ECF 592 at 14-16], no court has ever addressed NIGC's authority to regulate class II gaming on the Pueblo. As further noted by amicus Alabama Coushatta Tribe, and adopted by the Pueblo here, a "gap" exists as to the Class II regulatory issue, which NIGC has properly addressed by confirming its jurisdiction to regulate class II gaming on the Pueblo's lands.

CONCLUSION

The Pueblo Defendants ask the Court to vacate the September 2001 Injunction and dismiss this case or, in the alternative, amend the September 2001 Injunction to allow class II gaming regulated by NIGC and stay further proceedings.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

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