IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

State of Texas, *Movant, Plaintiff,* *v.* *Alabama-Coushatta Tribe of Texas, Tribal Council Chairperson JoAnn Battise, Vice-Chairman Ronnie Thomas, Secretary Johnny Stafford, Treasurer Nita Battise, Member Clint Poncho, Member Roland Poncho, and Member Maynard Williams,* *Respondents, Defendants.*	§ § § § § § § § § § §	Civil Action No. 9:01-CV-299

PLAINTIFF TEXAS' RESPONSE TO
TRIBAL DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE JUDGE KEITH F. GIBLIN:

INTRODUCTION

The Alabama-Coushatta Tribal Defendants ask this Court to ignore twenty years of settled law—including a directly on-point, published Fifth Circuit opinion—based upon the recent National Indian Gaming Commission ("NIGC") approval of the Tribe's Class II electronic bingo application, *see* Ex. A to Defendants' Motion for Relief from Judgment, E.C.F. 76-1. This approval—a reversal from the NIGC's position just six years ago[1]—was supported by nothing more than an opinion letter written by the Department of Interior ("DOI") Deputy Solicitor for Indian Affairs, without any delegated authority from Congress,[2] and without any confirmation by

[1] *See Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 38 (D.D.C. 2010) (noting that the Ysleta del Sur Pueblo—a Restoration Act tribe—brought suit to challenge the NIGC's determination that the Pueblo were governed by the Restoration Act and not IGRA).

[2] *See Cherokee Nation of Okla. v. United States*, 73 Fed. Cl. 467, 479 n.7 (2006) (noting that *Chevron* deference is appropriate "'only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.'" (citation omitted)).

DOI.[3] The NIGC now opines that the adoption of the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701–21 ("IGRA") impliedly repealed § 207 of the Tribe's Restoration Act, 25 U.S.C. §§ 731–37, which regulates gaming by the Tribe. Three times the Fifth Circuit has rejected this incorrect "implied repeal" argument with respect to the Ysleta del Sur Pueblo Tribe,[4] the only other Texas Restoration Act tribe in Texas. Other federal courts that have considered the Tribal Defendants' arguments have also rejected them,[5] including the Chevron-gap argument advanced today. *See Tex. v. Ysleta del Sur Pueblo*, 2016 WL 3039991, at *9–12 (W.D. Tex. May 27, 2016). This Court should deny the motion in all respects.

ARGUMENT

A. There is no *Chevron* deference for NIGC regulatory jurisdiction when Congress spoke directly on the subject of jurisdiction and where NIGC has no special expertise to interpret conflict of law issues.

In their Motion for Relief From Judgment, E.C.F. 76 at 7, the Tribal Defendants correctly assert that "[t]he NIGC is the agency entitled to administer IGRA" and cite a number of cases for the proposition that "Congress empowered the NIGC and its Chairman with broad regulatory powers over Indian gaming, including the power to promulgate regulations under the Act" (IGRA).

Yet none of the cases the Tribal Defendants cite is relevant to the inquiry before this Court: whether to follow the Fifth Circuit determination that the Restoration Act, not IGRA, governs gaming by the Tribal Defendants. Instead, in the two cases cited in Defendants' motion in which *Chevron*[6] deference was at issue, the courts considered: (1) a published NIGC amendment to the

[3] For example, in *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1147–48 (9th Cir. 2013), the Office of Solicitor's memorandum opinion was expressly *rejected* by the DOI Secretary.
[4] *See Ysleta del Sur v. Tex.*, 36 F.3d 1325 (5th Cir. 1994, reh'g denied, cert. denied, 115 S.Ct. 1358, 1995); *Tex. v. Ysleta del Sur Pueblo*, 69 F. App'x. 659 (5th Cir. 2003), cert. denied, 540 U.S. 985 (2003); and *Tex. v. Ysleta del Sur Pueblo*, 431 F. App'x 326, 328 (5th Cir. 2011).
[5] *See Commonwealth of Mass. & Aquinnah/Gay Head Cmnty. Assoc. v. Wampanoag Tribe of Gay Head*, 144 F. Supp. 3d 152, 172 n.23 (D. Mass. 2015); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996).
[6] *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.* 467 U.S. 837 (1984).

Code of Federal Regulations extending Class II IGRA protection to an IGRA Tribe for pull-tab bingo,[7] and (2) regulations promulgated by the NIGC after public hearings which classified keno as a Class III game prohibited to Class II IGRA tribes.[8] In the third case the Tribal Defendants cite, no NIGC published regulation addressed the question presented, and the court thus had "no choice but to proceed without the benefit of the Commission's position" and did not employ *Chevron* deference in this analysis.[9] The NIGC has not issued any regulation or advisory opinion regarding the central issue here—whether the Restoration Act governs the Tribal Defendants' gambling activities.

The Tribal Defendants overreach when they argue NIGC approval of Class II bingo is entitled to *Chevron* deference to fill a "gap" in federal law. *Chevron* deference is warranted "'only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006). Defendants assert that the gap that NIGC can fill is "whether IGRA applies to the Tribe in the light of the Restoration Act." E.C.F. 76 at 7.

But the Tribal Defendants offer no legal authority to support the NIGC's authority to promulgate regulations or interpret the Restoration Act for any purpose.[10] In fact, Congress delegated the task of administering the Restoration Act to the DOI, 25 U.S.C. § 731(2), while assigning exclusive jurisdiction to "the courts of the United States," *id*. § 737(c), to determine if the gaming activities of the Tribe violate the federalized Texas law of gambling, *id*. § 737 (a), (c).

[7] *See Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019, 1036–40 (10th Cir. 2003).
[8] *See Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 263–65 (8th Cir. 1994).
[9] *See Diamond Game Enterprises Inc. v. Reno*, 230 F.3d 365, 369 (10th Cir. 2003).
[10] Indeed, the Tribal Defendants concede that if the Restoration Act controls gaming, then "the NIGC's jurisdiction is ousted under IGRA." E.C.F. 76 at 8.

The *Chevron* doctrine, in fact, actually forbids this type of action by federal agencies of the Executive Branch of Government. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Tex. v. United States*, 497 F.3d 491, 501 (5th Cir. 2007). If, however, "the statute is silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–843.

Here, there is no evidence that DOI ever adopted the attorney opinion that portions of the Restoration Act were repealed by IGRA, and in fact, the opposite is true. DOI recognized in an official opinion that the Restoration Act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas." E.C.F. 76-1 at 20. n. 126. As a matter of law, the Deputy Solicitor's opinion is not DOI's adopted position. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1147–48 (9th Cir. 2013). The NIGC has no authority to interpret the Restoration Act,[11] making its administrative jurisdiction to approve gaming by a non-IGRA tribe all the more suspect.

In support of their *Chevron* deference argument, the Tribal Defendants ignore the Restoration Act altogether, and suggest that the answer can be gleaned from the "broad provisions of IGRA." E.C.F. 76 at 8. Fatal to the Tribal Defendants' analysis is the Tribe's own admission that even under the IGRA analysis, the Tribal Defendants cannot escape the prohibitions of § 207(c) of the Restoration Act which make their electronic bingo "specifically prohibited on Indian lands by federal law." 25 U.S.C. § 2710(b)(1)(A).

[11] At p.3 of their approval letter, E.C.F. 76-1, Chairman Chaudhuri of the NIGC opines that IGRA applies to the Tribe without any jurisdiction under the Restoration Act to interpret it.

Likewise, the Tribal Defendants' analysis fails to consider that § 207(a) of the Restoration Act applies to "[a]ll gaming activities," 25 U.S.C. § 737(a), without regard to the distinction IGRA later drew between "Class II" and "Class III" gaming activities. The Fifth Circuit so held in *Ysleta Del Sur Pueblo v. Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994), reh'g denied, cert. denied, 115 S.Ct. 1358 (1995) (hereafter, *Ysleta I*). The court first analyzed the Restoration Act's legislative history, noting the absence of Public Law 280 language and applications of IGRA Class II bingo and Class III lottery classifications. Id. Thus, the court concluded, "Texas gaming laws and regulations . . . operate as surrogate federal law on the Tribe's reservation." *Id*. at 1334. This is binding precedent today.

The Tribal Defendants argue that the NIGC's interpretation of the Restoration Act flows from its authority to interpret IGRA. E.C.F. 76 at 8–9. No statutory citation is offered for that argument. And the First Circuit, in fact, rejected that argument and held "we cannot take it upon ourselves to assume, without any evidence, that Congress intended to entrust the Commission with reconciling the Gaming Act and other statutes in the legislative firmament." *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 794 (1st Cir. 1996) (also noting that IGRA was "not exclusive of other potentially applicable legislation.").

Nevertheless, the Tribal Defendants argue that the NIGC can construe the term "Indian lands" under IGRA to include property (governed by the Restoration Act), and thereby sidestep the need to establish repeal of Restoration Act § 207. E.C.F. 76 at 8. This approach fails because it conflates the question raised here—whether the Restoration Act federalized Texas gaming law—with an irrelevant inquiry into who regulates Indian lands. The Fifth Circuit has already rejected this argument. *Ysleta I*, 36 F.3d at 1333–36.

B. The NIGC's interpretation of IGRA is not reasonable, because neither IGRA's text nor the subsequently enacted Settlement Acts applicable to other tribes impliedly repealed the Restoration Act.

Notwithstanding the arguments above, the Tribal Defendants' motion should also be denied because the NIGC's interpretation of IGRA is not a reasonable one. The Tribal Defendants posit that their electronic bingo meets the four requirements for NIGC gaming jurisdiction under IGRA, 25 U.S.C. § 2710(b)(1), and correctly surmise that Plaintiff Texas disputes the second criteria that the gaming not be "otherwise specifically prohibited on Indian lands by Federal law." E.C.F. 76 at 10–11. Plaintiff Texas disputes the second criteria because § 202 of the Restoration Act federalizes Texas gambling laws as the control to be applied, and because as described in its Amended First Motion for Contempt, E.C.F. 74 at 9–12, the form of electronic bingo operated by the Tribal Defendants is Class III gaming, prohibited under IGRA. To conduct this type of electronic bingo under IGRA would require a Compact with Plaintiff Texas, *see* 25 U.S.C.§ 2710(d)(1)(c).

The Tribal Defendants argue that the Restoration Act is not a prohibition of gaming on "all Indian lands" and that Restoration Act § 207 restrictions on gaming are not "Federal law." E.C.F. 76 at 10–11. No case citations are offered for these novel interpretations. This is perhaps because the Fifth Circuit in *Ysleta I,* and recently an El Paso district court, reached the opposite result. *Ysleta I,* 36 F.3d at 1334 ("[W]e are left with the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas."); *Tex. v. Ysleta del Sur Pueblo*, 2016 WL 3039991, at *14.

The Tribal Defendants next argue that "[t]he NIGC's interpretation also harmonizes both IGRA and the Restoration Act" by pretending that the Restoration Act does not cover all gaming by the Tribe, and that NIGC can regulate Class II IGRA gaming. E.C.F. 76 at 12. They even suggest that if the Tribe violates any provision of IGRA Class II gaming, "then the Restoration

Act's application of state law again controls, and the State may seek an injunction under the Restoration Act for a violation of those provisions. 25 U.S.C. § 737." Apart from contradicting the majority of the rest of Tribal Defendants' own arguments that IGRA repealed § 207 of the Restoration Act remedies, *see* E.C.F. 76 at 12–16, this argument does violence to both statutes. IGRA has enforcement provisions for tribes who violate Class II gaming requirements quite separate from the remedies provided in § 207 of the Restoration Act. *See* 25 U.S.C. § 2713. The Fifth Circuit identified those competing remedies provisions as the source of a conflict between the two statutes, not as an opportunity to harmonize them. *See Ysleta I*, 36 F.3d at 1334.

Moreover, as discussed above, this argument to harmonize IGRA with the Restoration Act ignores the express savings provision in § 203(a) of the Restoration Act. The Tribal Defendants argue that IGRA is the sole law affecting gaming, and repealed by implication all other federal laws for Indian gaming. E.C.F. 76 at 14–16. They point to IGRA's exemption of five states from IGRA coverage to support this argument. But it is the savings clause of the settlement act—not IGRA—which determines this issue. For example, in *R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994), the First Circuit considered the federal Settlement Act recognizing the Narragansett Tribe in Rhode Island, which contained a savings provision.[12] The court concluded that because the Settlement Act was "specific" in controlling tribal activities, and IGRA was a "general" statute, the Settlement Act placed the Narragansett under Rhode Island law, rather than IGRA. In *Passamaquoddy Tribe v. Maine*,[13] 75 F.3d 784, 791 (1st Cir. 1996), the First Circuit further held that IGRA is not "exclusive of other potentially applicable legislation."

[12] The federal Settlement Act at issue in *Passamaquoddy Tribe* contained a savings provision similar to § 203(a) of the Restoration Act, which provided that laws adopted after the effective date of the Settlement Act "shall not apply within the State of Maine, *unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine."* 25 U.S.C. § 1735(b).

[13] This *Passamaquoddy Tribe* opinion is cited by the Deputy Solicitor at p. 9 of her Ex. A letter, in FN 79.

Passamaquoddy Tribe, 75 F.3d at 792. The Court observed that when an "enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging" any other presumption." *Id*. at 789. In fact, Passamaquoddy Tribe rejected the argument that IGRA impliedly repealed a previously enacted settlement act, relying upon the Fifth Circuit's holding in *Ysleta I*.

After DOI issued a 2013 opinion letter stating that IGRA repealed the settlement act applicable to the Wampanoag Tribe of Gay Head, a Massachusetts trial court applied *Passamaquoddy Tribe* and *Ysleta I* to reach the opposite result. *Commonwealth of Mass. & Aquinnah/Gay Head Cmnty. Assoc. v. Wampanoag Tribe of Gay Head*, 144 F. Supp. 3d 152 (D. Mass. 2015). The court explained:

> The two statutes are not merely capable of co-existence; rather, both can be given full effect. IGRA permits tribes to engage in class II gaming on their land unless it is specifically prohibited by federal law. 25 U.S.C. § 2710(b)(1). When Congress passed IGRA, the Settlement Act was an existing federal law that specifically prohibited gaming on the Settlement Lands. 25 U.S.C. § 1771g. The statutes are "capable of co-existence" because the Settlement Act's parenthetical triggers IGRA's exemption. Therefore, the Court can, and must, "regard each as effective."

Commonwealth of Mass., 144 F. Supp. 3d at 172.

In the case of the Tribal Defendants before the Court here, Congress has twice spoken to this issue. First, when Congress adopted § 207 of the Restoration Act to apply to the Tribal Defendants, *see* Restoration Act §§ 201(1) and 202, Congress specifically established what law would apply to gambling by expressly saying so in § 207 of the Restoration Act. To show their intent, Congress included a reference to Tribal Resolution No. T.C.-86-07 and stated that § 207 "was enacted in accordance with the tribe's request." *See also, Ysleta I* at 1335.

Second, to establish legislative intent into the future, Congress added a specific savings provision in Restoration Act § 203(a), 25 U.S.C. § 733(a), that ". . . all laws and rules of law of the United States of general application to Indians . . . or Indian reservations which are not

inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation." 25 U.S.C. §733(b). This was an expression of Congressional intent of what law to apply to the Tribal Defendants. Were it not, § 203(a) conflict of laws provision would have been unnecessary.

C. The non-delegation doctrine, Supreme Court precedent, the Fifth Circuit's Ysleta I opinion, and all subsequent trial court decisions uniformly reject NIGC regulatory jurisdiction over the Tribal Defendants.

The Tribal Defendants argue that where judicial precedent is in conflict with an agency interpretation, "courts must follow the agency interpretation." E.C.F. 76 at 16–17. They rely on *City of Arlington v. F.C.C.*, 133 S.Ct. 1863 (2013) and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005) for that proposition.

That reliance is misplaced under the facts of this case, however, because no federal agency interpretation can contradict Congressional intent. For example, in *Whitman v. Am. Trucking Assocs, Inc*., 531 U.S. 457, 481 (2001), the Supreme Court applied the *Chevron* doctrine, and held that an agency's implementation policy "contradicts what in our view is quite clear." As a result, the Court continued, "[w]e therefore hold the implementation policy unlawful." *Id*. To reach that conclusion, the Whitman court established that in "a delegation challenge, the constitutional question is whether the statute has delegated legislative power to an agency . . . when Congress confers decision-making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which a person or body authorized to (act) is directed to conform.'" *Id*. at 472.

NIGC lacks delegated authority to refashion or declare portions of the Restoration Act impliedly repealed.[14] This is so because legislative authority is a matter of compromise. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statutes' primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Moreover, determining which laws to apply to the Tribal Defendants is a legislative determination reserved to Congress under Article I, § 1 of the United States Constitution. That legislative power may not be constitutionally delegated to another branch of government because this "non-delegation doctrine" is based upon separation of powers. *Touby v. United States*, 500 U.S. 160, 164-65 (1991). The Article I legislative authority to find implied repeal of federal laws like § 207 of the Restoration Act, or to exercise Article III judicial powers to declare sections of laws repealed, is far beyond the scope of permissible delegation to the Article II Executive branch NIGC. *See Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004).

In Pittston, the court held that

> a nondelegation principle serves both to separate powers as specified in the Constitution, and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design. Moreover, because the Constitution's text "permits no delegation of those powers" in exercising conferred powers, a Department may authorize a person or body to act on its behalf only by designating "an intelligible principle to which the person or body authorized to act is directed to conform." In other words, core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design.

Id. at 394. (citations omitted).

[14] DOI used the same tactic to try to enlarge its powers without proper Congressional delegation of *legislative* authority for another Texas tribe, and the Fifth Circuit rejected that attempt to legislate by fiat. *See Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

The legislative power to decide what remedies apply to different Indian Tribes who violate federal law lies exclusively with Congress, as shown in Restoration Act § 207 and the and the savings provision at § 203(a). *See also Loving v. United States*, 517 U.S. 748, 757–58 (1996) (noting that "it remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another and that "Congress [is] the branch most capable of responsive and deliberative lawmaking.").

In addition to asking that the Court ignore the non-delegation doctrine, the Tribal Defendants also urge it to ignore the binding Fifth Circuit precedent of *Ysleta I*. They claim that the Fifth Circuit did not construe the "unambiguous text" of IGRA and failed to apply the analysis from *Calif. v. Cabazon Band of Mission Indians*. E.C.F. 76 at 18 (citing 480 U.S. 202 (1987)). This argument fails.

In *Ysleta I*, the Fifth Circuit squarely addressed the intersection of the Restoration Act and IGRA, and held "not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Ysleta I*, 36 F.3d at 1335.

In reaching its decision, the Fifth Circuit analyzed the same arguments advanced in the Deputy Solicitor's letter concerning repeal by implication and general/specific laws arguments for repeal of the Restoration Act, but rejected all of them as well. *Compare, e.g., p. 3 of their approval letter, E.C.F. 76-1, with Ysleta I* at 1333–34. The Fifth Circuit noted that the Restoration Act "applies to two specifically named Indian tribes located in one particular state, and (IGRA) applies to all tribes nationwide." *Id.* at 1335. The exact same conclusion was reached in the First Circuit opinion in *Passamaquoddy Tribe*, 75 F.3d at 789.

Moreover, the Fifth Circuit did consider that IGRA was adopted "less than one a year after the Restoration Act," but noted in particular that IGRA "explicitly stated in two separate provisions that IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA." *Ysleta I*, 36 F.3d at 1335. Consequently, there was no need for a closer read of IGRA.

As the Tribal Defendants note, *Cabazon Band* considered Public Law 83-280, 67 Stat. 588 (1953), which distinguished between conduct that states regulate, and conduct that states prohibit, for purposes of state jurisdiction over activities on Indian lands. 480 U.S. at 206. The Fifth Circuit has already rejected this argument, holding that the *Cabazon* dichotomy does not apply to Restoration Act Tribes like the Pueblo Defendants because "Congress provided in §107(a) that "(a)ny violation of the prohibition provided in this subsection shall be subject to *the same civil and criminal penalties* that are provided by the laws of the State of Texas." *Ysleta I* at 1333. The Fifth Circuit continued, "if Congress intended for the Cabazon Band analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a civil penalty? We thus conclude that Congress did not enact the Restoration act with an eye towards Cabazon Band." *Id*. at 1333–34 (emphasis in original).

Finally, the Tribal Defendants argue that *Brand X*, 545 U.S. at 967 "warrants this Court following the NIGC's determination—not *Ysleta*." E.C.F. 76 at 18. At issue in *Brand X* was the Federal Communication Commission's determination that broadband cable internet service was an "information service" rather than a "telecommunications service" such that no registration was necessary under the Communications Act. 545 U.S. at 974. Applying *Chevron* deference, the Court first found that the relevant statute was ambiguous, then found the FCC's interpretation was

proper, because "Congress has delegated to the Commission the authority to 'execute and enforce' the [relevant provisions of the] Communications Act, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act, § 201(b)." *Id*. at 980 (citation omitted). As a result, "[t]hese provisions give the Commission the authority to promulgate binding legal rules, and the Commission issued the order under review in the exercise of that authority, and no one questions that the order is within the Commission's jurisdiction." *Id*. at 980–81.

Here, neither IGRA nor the Restoration Act delegated authority to the NIGC to determine statutory conflicts between different federal laws, including the Restoration Act. Nor can the Tribal Defendants show any legal authority for the NIGC to declare a federal statute repealed by implication. As a result, any attempt to do so by letter is legally invalid.

D. Only Congress, not the NIGC through regulatory jurisdiction, can repeal any provision of the Restoration Act to dissolve the permanent injunction previously issued in this case.

Finally, the Tribal Defendants request this Court to dissolve the permanent injunction issued in 2002, *see Alabama-Coushatta v. Tex.*, 208 F. Supp. 2d 670 (E.D. Tex. 2002) because of a change in the law and/or because the legal basis for the injunction ended. E.C.F. 76 at 18. To support this theory, the Tribal Defendants argue that just as the bridge injunction became moot when Congress changed the law in *Penna. v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), the exercise of IGRA jurisdiction by the NIGC mandates this Court to do the same and dissolve the injunction. This argument should be rejected.

First, as shown above, there has not been a change in the law, but a violation of it by the Tribal Defendants. Second, all the initial equitable grounds in 2002 for issuing the original permanent injunction are equally (if not more) present today. The Restoration Act, § 207(c) still provides for injunctive relief when the federal Restoration Act is violated. *Alabama-Coushatta v.*

Tex., 208 F. Supp. at 680. The Tribal Defendants opened their gambling operation in 2016, despite being advised by the Plaintiff's attorneys that doing so would violate the law. The Tribal Defendants continue to operate that gambling operation, without any termination date, and while making profits from the same. They do this even after the May 27, 2016 Ysleta decision rejecting all of the arguments made herein by the other Restoration Act Tribe; and where, as this Court recited in 2002, the Tribal Defendants' "recourse lies with the legislatures of the United States and the State of Texas" and not with the courts. *Id*. at 681. The Court's injunction should and does remain in effect, and the Tribal Defendants are violating it.

CONCLUSION

For the reasons discussed herein, the Tribal Defendants' Motion for Relief From Judgment should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via the Court's ECF electronic notification system and e-mail on this the 6th day of September, 2016, to:

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