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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**No. 03:17-CV-00179-PRM**
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, and the TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR,	§	
	§	
Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On the scant factual record he provides, the Attorney General asks this Court to enter an "obey the law" preliminary injunction that would prohibit the Pueblo Defendants from operating "electronic bingo machines" that are alleged to violate Chapter 47 of the Texas Penal Code. But the extraordinary and drastic remedy of a preliminary injunction is particularly inappropriate here, not only because electronic bingo machines are legal in Texas, but more importantly because Plaintiff has failed to meet its required burden to make a clear showing on all four of the following elements: 1) substantial likelihood of success on the merits; 2) a substantial threat of irreparable injury if the injunction is not issued; 3) that the threatened injury to the State outweighs any damage the injunction might cause to the Pueblo; and 4) that the injunction will not disserve the public interest. Should the Court decline to reject the motion based on the briefing, a determination on the requested preliminary injunction would, at a minimum, require an evidentiary hearing, where again Plaintiff would bear the steep burden of proof.

PROCEDURAL STATUS

Congress has confirmed the Pueblo's sovereign right to engage in all gaming activity not prohibited by the laws of the State of Texas. 25 U.S.C. § 1300g-6(a).[1] Bingo is not prohibited by the laws of the State of Texas, nor is the playing of bingo using electronic video devices that operate as card minders. *See* Tex. Occ. Code Ann. § 2001.002(5) (defining bingo equipment as including an "electronic or mechanical cardminding device").[2] Congress has also confirmed that Texas' regulatory scheme cannot be applied by the Court to the Ysleta del Sur Pueblo. 25

[1] The Restoration Act, Pub. L. No. 100-89, 101 Stat. 66 (Aug. 6, 1987), was formerly codified at 25 U.S.C. 1300g-1, *et seq*. However, it is now omitted from the U.S. Code.
[2] Although cited herein, the state statutes that discuss legal bingo do not apply to the Pueblo to the extent they are regulatory in nature and thus prohibited by the Restoration Act.

U.S.C. § 1300g-6(b) ("**No State regulatory jurisdiction.** Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.").

Over fifteen years ago, when the Pueblo was operating a Class III gaming facility, this Court entered an injunction prohibiting all gaming activity by the Pueblo. *Texas v. Ysleta Dl Sur Pueblo*, No. EP-99-CA-0320, ECF No. 115 (W.D. Tex. Order of Sept. 27, 2001) ("*Ysleta I"*). The Pueblo complied, and the Court then amended the injunction to allow the Pueblo to engage in gaming that is not prohibited by the laws of the State. *Id.*, ECF No. 165 at 16 (Order of May 17, 2002) ("Not all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations. As such, the Tribe may participate in legal gaming activities."). This Court also confirmed that Texas cannot regulate the Pueblo's legal gaming activities. *Id.* at 17 ("The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the Commission. It is not.").

That injunction and the disputes regarding its application and interpretation, led to a decade and a half of litigation in both the District Court and the Fifth Circuit. Ultimately, this Court eliminated from the injunction the requirement that the Pueblo Defendants seek advisory opinions from the Court in advance by submitting proposals of any gaming activity. *Id.* at ECF No. 608 at 2 (Order of May 27, 2016). The Court specifically held that:

> Requiring the Pueblo Defendants to seek this pre-approval from the Court to engage in any gaming activities violates the spirit, if not the letter, of the Restoration Act, and has improperly contorted this Court's role of arbiter into that of a regulatory body overseeing a segment of the affairs of a sovereign tribal nation. The Court should not, and will not, undertake this role any longer.

Id. The Court then closed that case.

In this new lawsuit, Plaintiff seeks to have this Court return to the status of a regulatory body overseeing gaming activities on the Pueblo's sovereign lands. ECF No. 1 (original

complaint); ECF No. 8 (first amended complaint).[3] Plaintiff seeks to cut these proceedings short through issuance of a preliminary injunction to "preliminarily enjoin the Tribe's operation of 'electronic bingo' slot machines during the pendency of this cause" and ultimately to permanently enjoin the Pueblo "from violating Texas's ban on illegal lotteries." ECF No. 9 at 1, 10. Plaintiff's request is based on a single inspection of Speaking Rock mutually agreed upon by the parties when no litigation was pending and without any formal discovery.[4]

BURDEN OF PROOF

A party seeking a preliminary injunction must establish all four of the following elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest." *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984). In considering whether to grant or deny preliminary injunctive relief, "the district court must remember that a preliminary injunction is an extraordinary and drastic remedy, and that the movant has a heavy burden of persuading the district court that all four elements are satisfied." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985) (internal quotation marks and citations omitted); *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994) ("a preliminary injunction is to be treated

[3] The Pueblo Defendants moved to dismiss both the original and the amended Complaint for lack of capacity to sue and failure to state a claim. ECF No. 6; ECF No. 13. The motion to dismiss the original complaint is moot because the Attorney General filed an amended complaint. The motion to dismiss the amended complaint is pending.

[4] For example, proper discovery will confirm that the bingo card minders offered at Speaking Rock comply with the laws of the State of Texas, and also would have informed the Plaintiff that the entity offering bingo at Speaking Rock is not among the Defendants named by Plaintiff in this action. *See* Exhibit A (Declaration of Philip Sanderson); Exhibit B (Declaration of Governor Carlos Hisa).

as the exception rather than the rule."). If the movant is unable to carry that burden on any one of the elements, an injunction is not warranted. *Id.* at 472. "Even when the movant carries its burden of persuasion on all four elements for obtaining a preliminary injunction, the decision to grant or deny relief is left to the sound discretion of the district court." *Johnson v. United States*, No. EP-14-CV-00317, 2014 WL 12540469, at *8 (W.D. Tex. Sep. 12, 2014) (citing *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985)).

ARGUMENT

I. The Attorney General Lacks the Capacity to Bring This Action to Enforce Texas Gambling Law, and Activities Conducted Pursuant to Federal Law Cannot be a Nuisance Under Texas Law.

As the Pueblo Defendants have set out in detail in their Motion to Dismiss the First Amended Complaint, this Court has held that the Attorney General of the State of Texas lacks the capacity to sue under the Restoration Act to enforce Texas gambling laws. ECF No. 13 (citing No. EP-99 CA-320, ECF No. 15 at 8-13 (Order of Dec. 3, 1999)). The people of the State of Texas have determined that only their county and district attorneys, and not their Attorney General, may enforce Texas gaming laws. Texas Const. art. V, sec. 21. That limitation on the power of the Attorney General must be respected, as the Court itself previously held. Moreover, and as also addressed in detail in the pending motion to dismiss, which is incorporated herein by reference, activities conducted pursuant to federal law cannot be a nuisance under the laws of the State of Texas. Lacking capacity to sue, and lacking a nuisance to sue on, the Attorney General cannot seek relief from this Court by means of a preliminary or permanent injunction.

II. Plaintiff Seeks an Impermissible "Obey the Law" Injunction.

"Obey the law" injunctions, like the one requested by Plaintiff here, are not specific and therefore have been deemed improper under Federal Rule of Civil Procedure 65(d). Rule

65(d)(1) requires "[e]very order granting an injunction" to "state its terms specifically" and to "describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." These are "no mere technical requirements" and were "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Thus, "orders simply requiring defendants to 'obey the law' uniformly are found to violate the specificity requirement" of Rule 65(d). 11A Wright, Miller & Kane, Fed. Prac & Procedure § 2955 (3d ed., Apr. 2017 update); *Meyer v. Brown*, 661 F.2d 369, 373 (5th Cir. 1981) ("A general injunction which in essence orders a defendant to obey the law is not permitted."); *Payne v. Travenol Lab., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) ("'obey the law' injunctions cannot be sustained").

In its motion, Plaintiff seeks "a preliminary injunction pursuant to Fed. R. Civ. P. 65, *et seq.*, to enforce the gambling prohibitions in the Restoration Act." ECF No. 9 at 9. What Plaintiff seeks, therefore, is "a general injunction against all possible breaches of the law" that federal courts have held impermissible. *E.g., Swift & Co. v. United States*, 196 U.S. 375 (1905).

III. Plaintiff Seeks a Mandatory Injunction to Change the Status Quo.

Plaintiff has moved for an Order "to preliminarily enjoin the Tribe's operation of 'electronic bingo' slot machines during the pendency of this cause." ECF No. 9 at 1. By way of its motion, Plaintiff is not seeking to preserve a status quo, and instead seeks to alter the status quo by enjoining bingo at Speaking Rock. Thus, Plaintiff is in fact seeking a mandatory preliminary injunction. *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) ("Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the

moving party"). Because Plaintiff "is seeking a mandatory injunction, it bears the burden of showing a **clear entitlement** to the relief under the facts and the law." *Justin Indus., Inc. v. Choctaw Sec. L.P.*, 920 F.2d 262, 268 n.7 (5th Cir. 1990) (emphasis added).

IV. Plaintiff Has Not Established Any, Let Alone All Four, of the Necessary Elements for Issuance of A Preliminary Injunction.

A. Plaintiff Has Not Proven a Likelihood of Success on the Merits.

Plaintiff's argument in support of its potential success on the merits rests on a critical flaw expressed in only one page of argument – an unexplained claim that the card minding devices located at Speaking Rock qualify as "electronic bingo" devices that, according to argument in the memorandum in support, operate in a fashion that make them an illegal lottery. ECF No. 9 at 4. Inexplicably, however, the Attorney General failed to inform the Court that electronic video terminals are legal under the laws of the State of Texas. Tex. Occ. Code Ann. § 2001.002(5). As the Attorney General has himself recognized:

> While video confirmation may be one component of electronic bingo, we do not believe that video confirmation of a bingo result would by itself comprise electronic bingo. Assuming that the video confirmation device does nothing more than inform players of the winning numbers in a bingo game, we do not believe that it would convert a bingo game into electronic bingo.

Texas Attorney General Opinion No. GA-0591. Yet Plaintiff has not expressed even the merest curiosity as to the mechanics of the card minders, or their relationship to the results of actual live bingo games conducted at Speaking Rock, which can be demonstrated by the Pueblo Defendants and could have been determined by Plaintiff had it engaged in even rudimentary discovery.[5]

[5] As the Attorney General himself has acknowledged, the operation of a card minder is a complicated question of fact. Texas Attorney General Opinion No. GA-0591 ("We do not know how a particular video confirmation device operates or what its full capacities are. The nature of a particular device raises fact questions[.]").

As addressed in the declaration of Philip Sanderson "[t]here is no reference in the Bingo Enabling Act, Tex. Occ. Code Ann. § 2001, regarding the lighting, noise, or layout of a bingo hall." Exhibit A. Similarly, there is no prohibition that prevents "a bingo hall location from serving and selling alcoholic beverages." In fact, other bingo halls in the State of Texas have characteristics similar to Speaking Rock. Similarly, no law of the State of Texas prohibits a person from playing a game of bingo "from the player's point of view, alone" as alleged by Plaintiff. ECF No. 9 at 5; Exhibit A. These subjective observations bear no relationship to the issues currently before the Court. Plaintiff's heavy reliance on these atmospheric criticisms of the activities at Speaking Rock (without citation to any Texas law that purports to control atmospheric conditions in bingo operations) confirms that Plaintiff simply has failed to make a clear showing that it will likely succeed on the merits.

Critically, and as noted above, the Bingo Enabling Act allows for the play of bingo using an electronic or mechanical card minding device. The devices targeted by Plaintiff in this motion are card minding devices – they contain no random number generators and are directly linked to and reveal the results of actual, live bingo games conducted within the Speaking Rock Entertainment Center, and Plaintiff has offered no evidence to the contrary. As noted by Mr. Sanderson, whose affidavit is the only evidence before the court on this issue, under the law of the State of Texas, if an entity can offer patrons the opportunity to play a bingo game on paper, it can offer patrons the same opportunity to play the same game on a card minding device. At a minimum, the evidence before the Court is sufficient to confirm Plaintiff has not met its burden at this early stage of proceedings to warrant issuance of a preliminary injunction.

B. Plaintiff Has Not Proven a Substantial Threat of Irreparable Injury if the Injunction Is Not Issued.

The Fifth Circuit Court of Appeals has acknowledged that "[w]ithout question, the

irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). Plaintiff has not addressed what injury it claims it will suffer should the status quo remain in place until the Court has the benefit of a fully developed factual case presented to it by the parties. Plaintiff's only claimed injury in the absence of a preliminary injunction is its broad reference to a "fundamental interest in enforcement of its laws." ECF No. 9 at 8. But Plaintiff offers no facts to support this and instead cites to two cases that concern injury when the state is the target of the court ordered injunction. *Id.* (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (discussing when "a State is enjoined by a court from effectuating statutes") (citations omitted); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (discussing "[w]hen a statute is enjoined")). Those cases are simply not applicable here, where it is Plaintiff itself that seeks the injunctive relief. Plaintiff is not being enjoined from enforcing its laws, indeed it claims to be doing so by filing this action. Requiring the State to prove the merits of its case, rather than through disfavored injunctive relief, is not "irreparable harm."

C. Plaintiff Has Not Proven That the Threatened Injury to it Outweighs any Damage the Injunction Might Cause to the Pueblo Defendants.

Plaintiff's argument as to the "balance of equities" fails at the outset because it assumes that what the Pueblo is doing is somehow "illegal" without the required showing on that issue. And, as noted above, there is no threatened injury to the Plaintiff. Grasping at something to "outweigh" the need to procced under the federal rules of civil procedure, Plaintiff can only create a fiction that the only injury to be suffered by the Pueblo Defendants if an injunction should issue is lost income, which Plaintiff argues will in some unspecified manner be offset by federal "assistance" to the Pueblo. ECF No. 9 at 8-9.

The Pueblo and its people do not beg at the foot of the federal government for the resources needed to provide government services to its people. The Pueblo is a sovereign government with full sovereign authority to develop its own resources to support its government operations. *See Ysleta I*, ECF No. 483 at 3-5 (Order of Sept. 24, 2014). In the Restoration Act, Congress confirmed the Pueblo's right to offer gaming to support its government functions, and Congress denied the State of Texas the power to impose civil or criminal regulations on those operations. The Attorney General's argument is not only an outrageous insult, it ignores the fact that the State of Texas itself uses government sponsored lotteries to help pay for government services. Tex. Gov't Code Ann. § 466.355.

Contrary to the Attorney General's baseless claims, the injury that the Pueblo would suffer by entry of a preliminary injunction would be immediate, immense and irreparable. *See* Exhibit B (Declaration of Governor Carlos Hisa). Having the bingo operations at Speaking Rock, or even a portion of those operations, enjoined as broadly as requested by Plaintiff would result in an immediate and devastating reduction in high paying, quality jobs in one of the most financially impoverished locations in the country, and would result in devastating loss of governmental programs and services provided by the Pueblo to its members and the surrounding community. *Id.* Moreover, the mechanism of a preliminary injunction (instead of using the normal course of litigation required to determine the merits) would require additional decades of litigation to resolve disputes regarding the sufficiency of the Attorney General's showing, the scope of the preliminary injunction, its interpretation and its ongoing application to the activities at Speaking Rock. This Court would resume the regulatory mantle and again be called upon to address even the most mundane issues regarding the operations at Speaking Rock, including what sounds machines can make and how much ambient light is enough.

D. Plaintiff Has Not Proven that the Injunction Will Not Disserve the Public Interest.

Plaintiff offers only a single paragraph in support of its argument that an injunction lies in the public interest. ECF No. 9 at 9. In its limited argument, Plaintiff broadly asserts that the activities at Speaking Rock violate the interests of the Texas Legislature and its electorate. Plaintiff fails to note that the Texas Legislature and Texas voters have authorized bingo in the State of Texas. *See Owens v. State*, 19 S.W.3d 480, 484 (Tex. App. 2000); Tex. Const. art. III sec. 47 ("The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b) [charitable bingo games], (d) [charitable raffles], and (e) [state operated lotteries] of this section."); Bingo Enabling Act, Tex. Occ. Code Ann. § 2001. Thus, Plaintiff cannot argue that bingo violates the public interest.

In contrast to the State's anemic reference to legislative interest, Pueblo Defendants have previously provided abundant evidence that all levels of local government and citizens support the activities at Speaking Rock. *See* Exhibit C (*Ysleta I*, ECF No. 358-1 (exhibit to prior filing by the Pueblo Defendants, Oct. 1, 2013) (citing letters and resolutions in support from City Council, County Judge, and clergy)). Plaintiff cannot capture the public interest in a single paragraph, particularly where Plaintiff omits the public interest expressed through the Texas Constitutional provisions allowing comprehensive gaming, including a State lottery and bingo.

CONCLUSION

Plaintiff carries "a heavy burden of persuading the district court that all four elements are satisfied." *Enterprise Int'l*, 762 F.2d at 471 (5th Cir. 1985). Plaintiff has failed to present a clear showing as to any one of the four required elements, let alone all four. Based on this failure, Plaintiff's motion should be denied.

Dated: September 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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