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

STATE OF TEXAS,	§	
Plaintiff,	§	
	§	
v.	§	**EP-17-CV-00179-PRM-LS**
	§	
YSLETA DEL SUR PUEBLO, *et al.*,	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE ON THE STATE OF TEXAS'S MOTION FOR A PRELIMINARY INJUNCTION

Can a state seek injunctive relief in federal court based on an alleged violation of federal criminal law? The State of Texas returns to federal court for an injunction to stop the Pueblo[1] from operating slot machines on its reservation in violation of federal criminal law. The defendants deny that the machines are illegal slot machines, and deny that they are violating federal criminal law. Before me is Texas's motion for a preliminary injunction to bar the use of the slot machines immediately instead of waiting for the lawsuit to conclude. Notwithstanding twenty-five years of similar litigation between these parties over injunctive relief, I find that Texas's ability to seek injunctive relief in federal court based on alleged violations of federal criminal law deserves further scrutiny. Accordingly, and especially given the Fifth Circuit's admonitions to use preliminary injunctions only sparingly, I recommend that Texas's motion for a preliminary injunction be **DENIED**.

I. Background

Texas and the Ysleta del Sur Pueblo, a federally recognized Indian tribe in El Paso County, Texas, have been litigating about gambling on the Pueblo's reservation for more than twenty-five

[1] The named defendants are the Ysleta Del Sur Pueblo, the Tribal Council, and Tribal Governor Carlos Hisa or his Successor. I refer to the Ysleta Del Sur Pueblo, and the defendants collectively, as "the Pueblo," consistent with such designation in their own pleadings.

years.[2] In 2001, a federal district court granted Texas's first request for an injunction to stop illegal gambling in the Pueblo's casino. *See Tex. v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 697-98 (W.D. Tex. 2001). The district court modified the injunction in 2002 to permit some forms of gambling. *Id*. at 709. It then issued contempt orders against the Pueblo in 2009 and 2015 for operating illegal gambling devices in violation of the injunction. *State v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 U.S. Dist. LEXIS 28026, at *11-12, *118 (W.D. Tex. Mar. 6, 2015). The 2015 contempt order included "a civil penalty of $100,000.00 per day, jointly and severally among each of the Pueblo Defendants," for any further illegal gambling at the Pueblo's casino. *Id*. at *118.

A scant two years after the last contempt order, Texas alleges in this new lawsuit that the Pueblo is operating "several thousand" illegal slot machines and an unlicensed bingo operation in its casino.[3] The Pueblo contends they are electronic "bingo card minders,"[4] not slot machines. The permanent injunction Texas seeks would bar the Pueblo from offering gaming activities that violate federal law and would remove the slot machines from the Pueblo's casino.[5] The requested preliminary injunction would bar operation of the slot machines immediately, pending the final resolution of this lawsuit.[6]

[2] It all began in 1993 when the Pueblo filed an unsuccessful civil action to force Texas to negotiate a Tribe-State compact that would allow gaming activities on the Pueblo's reservation. *See Ysleta del Sur Pueblo v. Texas (Ysleta I)*, 36 F.3d 1325 (5th Cir. 1994).
[3] ECF No. 8, at 1.
[4] ECF No. 57, at 1.
[5] ECF No. 8, at 10.
[6] ECF No. 9, at 10.

II. Preliminary Injunctions

A preliminary injunction is an extraordinary remedy and a decision to grant one should be treated as an exception rather than the rule. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). It is typically granted while a lawsuit is pending to prevent irreparable injury before a final decision on the merits. *Shanks v. City of Dallas, Texas*, 752 F.2d 1092, 1096 (5th Cir. 1985). A plaintiff seeking a preliminary injunction must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) the requested injunction is in the public interest. *Glossip v. Gross*, 135 S. Ct. 2726, 2736, 192 L. Ed. 2d 761 (2015). As "an extraordinary and drastic remedy," a preliminary injunction is not to be granted routinely, "but only when the movant, by a clear showing, carries the burden of persuasion." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Mississippi Power & Light*, 760 F.2d at 621.

III. Discussion

Texas's argument for injunctive relief is clear: "A permanent injunction should be entered…to prohibit the Pueblo Defendants from violating federalized Chapter 47 Texas Penal Code[] prohibitions on illegal lotteries."[7] In other words, Texas wants an injunction to stop the Pueblo from violating criminal laws against gambling. Longstanding doctrine, however, provides that federal "courts have no power to enjoin the commission of a crime" unless one of three established exceptions applies. *United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969). These

[7] ECF No. 8, at 9.

exceptions are "national emergencies, widespread public nuisances, and where a specific statutory grant of power exists." *Id*. The Pueblo's slot machines do not constitute a national emergency, so Texas's requested injunctive relief must be based on a "*specific* statutory grant of power" or be directed at a "*widespread* public nuisance."

A. Specific Statutory Grant of Power Exception

Texas argues that the federal Restoration Act[8] provides the specific statutory grant authorizing its requested injunctive relief. The Restoration Act establishes the relationship between Texas and the Pueblo and delineates the relationship's legal contours. It gives Texas state courts jurisdiction over civil and nearly all criminal matters on the Pueblo's reservation.[9] It prohibits gaming activities[10] on the reservation that are illegal under Texas law,[11] and gives the federal courts exclusive jurisdiction over gaming crimes committed by the Pueblo or its

[8] The "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act," Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987). It was codified at 25 U.S.C. § 1300, *et seq*., but is now omitted from the United States Code. It is now found online at: https://www.gpo.gov/fdsys/pkg/STATUTE-101/pdf/STATUTE-101-Pg666.pdf (last accessed January 25, 2018).

[9] *Id*. at § 105(f).

[10] *Id*. at § 107.

SEC. 107. GAMING ACTIVITIES.

(a) IN GENERAL.- All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any 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. The provisions of this subjection 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.

(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.

(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.

[11] *Id*. at § 107(a).

members.[12] Texas state courts retain criminal jurisdiction over Texas gaming crimes that non-Tribal members commit. The practical effect of the foregoing is that Texas courts have the same criminal and civil jurisdiction over matters on the reservation as they do off, except that gaming crimes committed by the Pueblo or its members are federalized and must be prosecuted in federal court.

If the Restoration Act grants federal courts only limited *criminal* jurisdiction over gaming crimes that the Pueblo and its members commit, leaving all other criminal and all civil jurisdiction to Texas state courts, how then can it serve as a basis for civil injunctive relief in federal court? Texas relies on the last sentence of Section 107(c), just as it has in the prior injunction litigation between these parties:

> 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.
>
> § 107(c).

Texas's reliance on this sentence is certainly understandable. A cursory reading of it appears to authorize Texas to seek injunctive relief in federal court. Moreover, citing only to Section 107(c)'s last sentence, an unpublished Fifth Circuit opinion explains that "[t]he Restoration Act permits Texas to seek an injunction in federal court if the Tribe should engage in gaming activities prohibited by Texas law." *Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x 326, 328 (5th Cir. 2011). I note, however, that this 2011 Fifth Circuit case was not about whether the Restoration Act provides an independent source of federal injunctive relief, and the court undertook no analysis of the issue. Indeed, I cannot find, and the parties have not provided me, any

[12] *Id*. at § 107(c).

court opinion analyzing whether the Restoration Act can serve as an independent source of federal injunctive relief.

At issue is whether the last sentence of Section 107(c) qualifies as a "*specific* statutory grant" of federal injunctive power so as to overcome the doctrine proscribing federal courts from enjoining criminal activity. *See Jalas*, 409 F.2d at 360 (emphasis added). The starting point when analyzing the construction of a statute is its language. *Watt v. Alaska*, 451 U.S. 259, 265, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981). Section 107(c)'s clause, "nothing in this section shall be construed as precluding (Texas from seeking federal injunctive relief)" can be translated into plain English: nothing in Section 107 (which makes gambling on the reservation a federal crime) prevents Texas from seeking federal injunctive relief.

Two important points can be gleaned from this reading. First, even though *nothing in Section 107* of the Restoration Act prevents Texas from seeking federal injunctive relief, any federal statute, procedural rule, or caselaw *outside of Section 107* that would otherwise bar such injunctive relief would still do so. Also, Section 107 states that nothing shall "preclude," or in other words, prevent (or block, hinder, inhibit, or bar), Texas from seeking injunctive relief. This clause, written in the negative, can hardly be said to be an affirmative grant of injunctive relief authority. Not preventing injunctive relief is not the same as affirmatively authorizing it.

Texas cites to the Restoration Act's legislative history to show Congress's intent to give "the State of Texas…injunctive relief in Federal court to enforce the federal ban on gaming,"[13] but "Fifth Circuit law is crystal clear that when, as here, the language of a statute is unambiguous, [a court] has no need to and will not defer to extrinsic aids or legislative history." *Guilzon v. C.I.R.*,

[13] ECF No. 59, at 14, citing to Senate Select Committee on Indian Affairs, Senate Report 100-90, at 11.

985 F.2d 819, 823 n.11 (5th Cir. 1993) (citation omitted)). Texas has not argued, yet, that Section 107(c) is ambiguous so as to merit a legislative history analysis. Besides, even if Congress intended to provide Texas an independent basis for federal injunctive relief, the last sentence of Section 107(c) is not a "*specific* statutory grant of power" toward that end. This same need for specificity also negates Texas's alternative argument that Section 107(c) somehow constitutes an implied grant of federal injunctive power.

B. The "Widespread Public Nuisance" Exception

Texas argues that the "widespread public nuisance" exception applies "because, under Texas law, gambling constitutes a common nuisance."[14] In its pending motion to dismiss, the Pueblo argues that Texas's general nuisance statute was recently amended and now excludes from its ambit activities "exempted, authorized, or otherwise lawful activity regulated by federal law."[15] It argues that the federal Restoration Act authorizes and regulates its casino gambling, so the Texas nuisance statute cannot serve as the basis for federal injunctive relief.

Although the Texas statute to which the parties refer does define "common nuisance,"[16] their focus on it arguably misses the point. The exception allowing courts to enjoin criminal activity applies to situations involving "*widespread* public nuisances." Examples of "widespread public nuisances" include an illegal operation in forty-five cities across the country involving twenty-five million Christmas cards,[17] and the broadcasting of radio signals without a license

[14] ECF No. 59, at 5.
[15] ECF No. 13, at 7, citing TEX. CIV. PRAC. & REM. CODE § 125.0015(5).
[16] TEX. CIV. PRAC. & REM. CODE §§ 125.001; 125.0015(a)(5).
[17] *National Assn. of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.*, 336 F. Supp. 804, 811 (W.D. Ok. 1971).

causing interference with the frequencies of duly licensed radio stations.[18] One federal court has written that a public nuisance "is the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience or injury to the public generally."[19]

Texas cites the *Santee Sioux Tribe* case as an example of a federal court enjoining a tribe's gambling activities on public nuisance grounds. In *Santee*, however, the plaintiff was the United States, not a state, and the law allowing the use of the Nebraska Supreme Court's definition of "public nuisance" was the Indian Gaming Regulatory Act,[20] which does not apply to the Pueblo.[21] *United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565-66 (8th Cir. 1998). I also note that the definition of "public nuisance" under Texas law refers only to gang activity.[22] Finally, the Restoration Act does not refer to nuisances, so even if Texas were to establish that the Pueblo's casino constitutes a "widespread public nuisance" as an exception to the proscription against enjoining crime, Texas would still need to identify a federal statute that both affirmatively authorizes federal injunctive relief and supplies the requisite federal question jurisdiction to keep this lawsuit in federal court.

C. Conclusion and Observations About Federal Jurisdiction

The language of Section 107(c) seems to provide that if Texas can otherwise obtain its requested federal injunctive relief based on a source *outside of Section 107*, then nothing *in Section 107* would prevent such relief. This reading would also address Texas's argument about the need

[18] *United States v. McIntire*, 365 F. Supp. 618, 623 (D.N.J. 1973).
[19] *United States v. County Bd. of Arlington Co.*, 487 F. Supp. 137, 143 (E.D. Va. 1979).
[20] 25 U.S.C. § 1166.
[21] *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1335 (5th Cir. 1994).
[22] TEX. CIV. PRAC. & REM. CODE §§ 125.001; 125.062; and 125.063.

to give full effect to each word and clause of the statute, without manufacturing federal injunctive power where the statute's language does not specifically authorize it. In the end, the statute's language does not affirmatively constitute an independent and specific source of federal injunctive power. Accordingly, given the Fifth Circuit's admonitions to use preliminary injunctions sparingly, Texas's preliminary injunction motion should be denied based on this analysis alone.

Moreover, any doubt about federal jurisdiction would obviously preclude Texas's requested preliminary injunctive relief. Texas and the Pueblo are not diverse,[23] so only federal question jurisdiction[24] can keep this lawsuit in federal court. Texas asserts that the Pueblo is violating the federal Restoration Act because of the alleged gambling on its reservation. Assuming this is true, the only federal court jurisdiction that the Restoration Act affirmatively provides is criminal prosecution of the Pueblo and its members, which only the United States Attorney can initiate.

This is a civil case, and the Restoration Act rests civil jurisdiction in state court. If the Restoration Act does not provide an affirmative and independent source of federal injunctive power, and there is no alternative source, not only is there no basis to overcome the doctrine which proscribes enjoining criminal activity, there may also be no basis to keep this lawsuit in federal court.

RECOMMENDATION

I recommend that Texas's preliminary injunction motion be **DENIED**.[25]

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[23] *See* 28 U.S.C. § 1332.
[24] 28 U.S.C. § 1331.
[25] I raised the issues discussed in this Report and Recommendation *sua sponte* during the preliminary injunction motion hearing. They may have import beyond the preliminary injunction context, especially with respect to federal subject matter jurisdiction.

SIGNED and ENTERED on January 29, 2018.

LEON SCHYDLOWER
UNITED STATES MAGISTRATE JUDGE

NOTICE

THE PARTIES HAVE FOURTEEN DAYS FROM SERVICE OF THIS REPORT AND RECOMMENDATION TO FILE WRITTEN OBJECTIONS. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). FAILURE TO FILE TIMELY OBJECTIONS MAY PRECLUDE APPELLATE REVIEW OF FACTUAL FINDINGS OR LEGAL CONCLUSIONS, EXCEPT FOR PLAIN ERROR. *ORTIZ V. CITY OF SAN ANTONIO FIRE DEP'T*, 806 F.3D 822, 825 (5TH CIR. 2015).