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

STATE OF TEXAS, *Plaintiff*,	§	
v.	§	EP-17-CV-179-PRM-LS
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Defendants.*	§	

PLAINTIFF TEXAS'S OBJECTIONS TO REPORT AND RECOMMENDATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 72(B)[1]

The Report and Recommendation begins with a question: "Can a state seek injunctive relief in federal court based on an alleged violation of federal criminal law?" Doc. 64 at 1. This inquiry is inapposite, because Texas does not "seek an injunction to stop the Pueblo from operating slot machines on its reservation in violation of federal *criminal* law." Doc. 64 at 1 (emphasis added).[2] Rather, Texas seeks relief under the Restoration Act, a federal law which expressly provides for the very civil remedy Texas seeks here. That is, the Act provides Texas a mechanism to seek civil injunctive relief against violations of Texas gaming law—which imposes both

[1] On September 11, 2017, the Court referred Texas's Application for Preliminary Injunction to Magistrate Judge Leon Schydlower pursuant to 28 U.S.C. §636(b)(1)(A) and Local Rules, Appendix C, Rule 1(c) ("Determination of Non-Dispositive Pretrial Matters"). Doc. 16. Rule 1(c) provides that "[a] magistrate judge may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in subsection 1(d), *infra*, of these rules." Rule 1(d)(1)(A), for its part, includes the motion pending before the court among those for which "[a] magistrate judge may submit to a judge of the court a report containing proposed findings of fact and recommendations for disposition by the judge of…[m]otions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions[.]"

[2] *Cf.* Doc. 64 at 1 ("Texas's ability to seek injunctive relief in federal court based on alleged violations of federal criminal law deserves further scrutiny[.]")

criminal and civil penalties on gambling—when such violations are committed by Restoration Act tribes on tribal lands.

Thus, under the Act, all provisions of Texas gaming law—whether subject to civil or criminal penalties in Texas court—operate as federal law on the Tribe's reservation; federal courts have exclusive jurisdiction over violations of this federalized law; Texas cannot be prevented from seeking civil injunctive relief against these violations; and Texas is expressly permitted to seek that civil remedy, should it exercise its prerogative as a sovereign state to do so.

Because this action does not seek to remedy a "violation of federal criminal law," Texas objects to the Report and Recommendation's conclusion that Texas may not properly maintain it in federal court. Texas urges the Court to instead recognize—consistent with the Restoration Act's text, the historical context of Indian law, and Fifth Circuit precedent—Texas's right to maintain this civil action to enjoin the Tribe's continuing violations of Texas gaming law. And, because the hearing record establishes that the Tribe is, in fact, engaged in ongoing violations of Texas gaming law, Texas requests that the Court preliminarily enjoin these violations.

LEGAL & PROCEDURAL BACKGROUND

I. The Restoration Act

Texas brings this suit under the Restoration Act, which includes a clear prohibition on conduct: "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." 25 U.S.C. §1300g-6(a). The Act also plainly incorporates both civil and criminal laws: "[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." *Id.* Rather than limiting itself to Texas criminal law, the Act's prohibition encompasses all gaming illegal under "the laws of the State of Texas," regardless of whether such gaming is subject to criminal penalties, civil penalties, or both. *Id.* As the Fifth Circuit has put it, the Act provides that "Texas gambling laws and regulations are surrogate federal law" on the Tribe's reservation. *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1335 (5th Cir. 1994).

Texas law, for its part, includes both civil and criminal penalties for illegal gaming. The genesis of these provisions is the Texas Constitution's prohibition of illegal lotteries: games of chance, prize, and consideration. TEX. CONST. art. III §47(a) ("[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State[.]"). Given this Constitutional prohibition, the Texas Penal Code criminalizes, *inter alia*, gambling (TEX. PENAL CODE §47.02); operating a gambling promotion (TEX. PENAL CODE §§47.03(a)(1) & (a)(5)); keeping a gambling place (TEX. PENAL CODE §47.04(a)); and possessing gambling devices, equipment, or paraphernalia or any subassembly thereof (TEX. PENAL CODE §§47.06(a) & (c), 47.06(a)).

Texas law also provides for civil injunctive relief against common nuisances, which include, *inter alia*, gambling as defined by the Penal Code and related activity. *See* TEX. CIV. PRAC. & REM. CODE §§125.002(a) ("A suit to enjoin and abate a common nuisance described by [§]125.0015(a) or (b) may be brought by an individual, by the attorney general, or by a district, county, or city attorney…"); 125.0015(a)(5) (person maintains a common nuisance by tolerating "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code.").

The portion of the Restoration Act governing "gaming activities" specifically provides for how these federalized provisions of Texas gaming law are to be enforced against Restoration Act tribes: "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 the lands of the tribe." 25 U.S.C. §1300g-6(c) (emphasis added). This subsection, titled "enforcement against members," expressly contemplates Texas's remedy for violations of its gaming laws: "bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *Id.*

II. The Report and Recommendation

The Report and Recommendation turned on a general principle that "federal 'courts have no power to enjoin the commission of a crime' unless one of three established exceptions applies." Doc. 64 at 3 (quoting *United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969)). It listed these exceptions as "national emergencies, widespread public nuisances, and where a specific statutory grant of power exists." *Id.* Concluding that the Tribe's gaming activity is not a national emergency, the Report and Recommendation stated that "Texas's requested injunctive relief must be based on a 'specific statutory grant of power' or be directed at a 'widespread public nuisance,'" otherwise it would be an impermissible civil injunction of criminal conduct. Doc. 64 at 4.

The Report and Recommendation ultimately concluded that the Restoration Act's "language does not affirmatively constitute an independent and specific source of federal injunctive power." Doc. 64 at 9. It also concluded that the Tribe's gaming

activity does not fall within the public nuisance exception because "the Restoration Act does not refer to nuisances," and therefore 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" to trigger the nuisance exception. Doc. 64 at 8. Thus, the Report and Recommendation recommended denial of Texas's application for preliminary injunction.

ARGUMENT

I. The Legal Standard

Appendix C, Rule 4(b) of the Court's Local Rules provides that "[a]ny party may object to a magistrate judge's proposed findings, recommendations or report under subsections 1 (d)…within 14 days after being served with a copy thereof." The district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

Texas objects to the Report and Recommendation for the reasons below.

II. The Restoration Act provides a specific statutory grant of federal court power to civilly enjoin the Tribe's violations of Texas gaming law.

a. The Act specifically grants this Court jurisdiction to enter the injunction Texas requests.

The Report and Recommendation concluded that the phrase "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…does not affirmatively constitute an independent and specific source of federal injunctive power." Doc. 64 at 9 (citing 25 U.S.C. §1300g-6(c)). But the quoted portion of the Act—the first sentence of 25 U.S.C. §1300g-6(c)—speaks to whether Texas is a proper party (*Texas's standing*), not whether the Court has authority to exercise "federal injunctive power" (the *Court's jurisdiction*). The basis of the Court's jurisdiction (that is, the "specific statutory grant of power" for this action) is the *first* sentence of 25 U.S.C. §1300g-6(c): "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 the lands of the tribe." *Id*. This is a plain, express, and unambiguous grant of power to exercise jurisdiction over the Tribe's violations of Texas gaming law.

The *Jalas* case cited in the Report & Recommendation illustrates that courts look for a "specific statutory grant of" *jurisdictional* power to civilly enjoin activity that violates criminal law (as distinguished from a "specific statutory grant of" *standing* to sue). In *Jalas*, the court found that it lacked a "specific statutory grant of power" to civilly enjoin a criminal law violation where "the Government fail[ed] to rely on any specific *jurisdictional provision* of the [relevant] federal [] laws other than [a provision] which is patently a criminal statute contemplating proceeding by indictment or information." *United States v. Jalas*, 409 F.2d at 360 (emphasis added). In other words, the only basis for federal court jurisdiction asserted in *Jalas* was a statute that explicitly (and exclusively) provided a criminal remedy. This was,

according to the Seventh Circuit, insufficient for the court to exercise its equitable jurisdiction to enter an injunction. *Id.*

But the Court's jurisdiction over this case is based upon a federal statute that expressly creates Article III jurisdiction to civilly enjoin the Tribe's violations of Texas gaming law. Because 25 U.S.C. §1300g-6(c) provides this specific statutory grant of jurisdictional power, and because Texas has filed suit under precisely that provision, this case satisfies the "specific statutory grant of power" exception. *See also, e.g., United States v. Cappetto*, 504 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) ("acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings…[a] civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.") (citing *In re Debs*, 158 U.S. 564 (1895)).

b. The Restoration Act also expressly provides for Texas to maintain this suit for civil injunctive relief.

Neither the Tribe nor the Report and Recommendation identifies authority for the proposition that—simply because the activity Texas seeks to enjoin could be subject to criminal penalties—Congress was required to provide "a specific statutory grant of power" for Texas to sue. Instead, as set out in the previous section, this "grant of power" requirement is imposed (and fulfilled) in the context of jurisdiction. Whether a Plaintiff may maintain a cause of action is evaluated in terms of the requirements of Article III standing, which Texas undisputedly satisfies here.[3]

[3] To establish Article III standing, a plaintiff must satisfy the "triad of injury in fact, causation, and redressability." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998). Each element is met here: Texas suffers injury by the continued violation of its laws, *see Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); that injury is caused by the Tribe's illegal gaming operations at

But even if "a specific statutory grant of power" were required for Texas to bring this suit, Congress's express creation of federal court jurisdiction and its incorporation of Texas gaming law would satisfy this requirement. Indeed, the Restoration Act abrogated the tribe's immunity from suit in federal court, and expressly incorporated Texas gaming laws as its substantive, federalized provisions. *See supra*, pp. 2-4 ("The Restoration Act").[4] These substantive provisions of law both prohibit gaming and permit civil suit to abate it. *Id.* In this context, it is apparent that "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" is, indeed, a specific statutory grant of power for Texas to maintain this action should it choose to do so. 25 U.S.C. §1300g-6(c).

After all, Texas is a sovereign State, and empowering Texas to enforce its gaming laws in federal court by civil injunction is a permissible function of Congress. *E.g.,* U.S. Const. art. I §8 cl. 3. ("Congress shall have the power to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.") (citation omitted). But there is no authority for the

Speaking Rock; and that injury can be redressed by an injunction that prohibits the Tribe from continuing to violate Texas gambling laws.

[4] *See also infra*, Part IV (Tribe's immunity is subject to abrogation by Congress, Restoration Act abrogated that immunity, and "Tigua Nation has waived tribal immunity [] regarding the State's gaming statutes.") (quoting Order Adopting Report and Recommendation, *Pais v. Sinclair*, No. EP-06-CV-137-PRM, 2006 WL 3230035 at *1 (W.D. Tex. Nov. 2, 2006)).

proposition that—in *empowering* Texas to enforce specific provisions of its own laws in the courts of the United States—Congress must attempt to *compel* Texas to do so.

This principle was recognized in previous litigation between these parties, where the Tribe "cited no authority in support of the proposition that the state law allowing the AG to enjoin gambling must specifically refer to the Tribe or its reservation." *Tex. v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 695 (W.D. Tex. 2001). This Court recognized that "[t]he Restoration Act allows such suits, and only Congress can waive the Tribe's sovereign immunity; thus, there is no need for the State of Texas to also pass a statute authorizing suits against these particular Defendants." *Id.* The Court further noted that "the state is not obligated to amend its public nuisance statute specifically mention the federal cause of action; the [R]estoration Act solves the problem by 'federalizing' all state anti-gaming law." *Id.*

In sum, even if it were proper to analyze this case under *Jalas*, and even if a "specific statutory grant of power" to sue (rather than to enjoin) were required, these conditions are satisfied here.

c. The Restoration Act's legislative history and principles of statutory construction confirm this result.

In concluding that Texas cannot maintain this suit, the Report and Recommendation declined to consider the Act's legislative history, stating 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.'" Doc. 64 at 6 (quoting *Guilzon v. C.I.R.*, 985 F.2d 819, 823 n.11 (5th Cir. 1993) (citation omitted)). But the Report and Recommendation also acknowledged that the last sentence of 25 U.S.C.

§1300g-6 "appears to authorize Texas to seek injunctive relief in federal court," Doc. 64 at 5—implicitly indicating that the statute *is*, perhaps, ambiguous after all. The Court further stated, in the context of the second sentence of 25 U.S.C. §1300g-6, "[n]ot preventing injunctive relief is not the same as affirmatively authorizing it." The "legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Canon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979).

Thus, if the Restoration Act is insufficiently clear to provide for this cause of action, it at least contemplates it, which renders consideration of legislative history appropriate. In the 100th Congress, the Senate considered H.R. 318, which later became the Restoration Act.[5] The Senate Select Committee on Indian Affairs made some changes to the House version of the legislation, including sections 107 and 207 (later codified at 25 U.S.C. §1300g-6 for the Ysleta del Sur Pueblo and 25 U.S.C. §737 for the Alabama-Coushatta Tribe of Texas), which impose the gaming ban this suit seeks to enforce. In passing the final version of the law, the Committee reiterated Congress's intent to provide Texas with a right to seek injunctive relief in federal court for violations of the gaming ban:

> Sections 107 and 207 are stricken and new sections 107 and 207 are inserted. However, **the central purpose of these two sections - to ban gaming on the reservations as a matter of federal law** – remains unchanged. Both Tribes, by formal tribal resolution, requested that this legislation incorporate their existing law and custom that forbids gambling. The Committee's amendments simply expand on the House version to provide that anyone who violates the federal ban on gaming contained in Sections 107 and 207 will be subject to the same civil and criminal penalties that are provided under Texas law. New

[5] *See* Doc. 59-1, Senate Select Committee on Indian Affairs, Senate Report 100-90 at 1.

> subsections 107(b) and 207(b) were added to make it clear that Congress does not intend, by banning gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas. **New subsections 107(c) and 207(c) grant to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming ban and make it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban.**

Id. at 8–9 (emphasis added).

The Committee reiterated that Section 107 "provides that the Federal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section and ***further authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming***." *Id.* at 11 (emphasis added). It was thus the unequivocal view of the Committee responsible for recommending the passage of the Restoration Act that Texas could seek injunctive relief in federal court if the Tribe were violating Texas gaming laws.

If this legislative history were not enough, courts have also recognized that causes of action can be implied in a statute, even if no cause of action is expressly included in the statutory framework. *E.g.*, *Canon v. Univ. of Chicago*, 441 U.S. 677 (1979) (finding implied private right of action in favor of plaintiffs to sue for violations of Title IX). In determining whether an implied right of action exists, courts consider "'(1) whether the plaintiff is one of a class for whose especial benefit the statute was enacted; (2) whether there is an indication of legislative intent to create or deny such remedy; (3) whether such a remedy would be inconsistent with the underlying legislative purpose; and (4) whether the cause of action is one traditionally relegated to state law.'" *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 395 (5th Cir. 2007) (quoting

Cort v. Ash, 422 U.S. 66 (1975)). "[T]he determinative question is whether Congress intended to create a private right of action in favor of the plaintiff." *Id.*

Applying these factors in the context of the Restoration Act, the Senate Committee on Indian Affairs indicated an unambiguous intent to provide Texas a cause of action, and then did so. *See* Doc. 59-1, *supra*, at 8–9, 12. And, of course, such suits are consistent with one of the central purposes of the Restoration Act: "to ban gaming on the reservation[] as a matter of federal law." *Id.* at 8. For these reasons, Texas can continue to pursue its claims for injunctive relief under 25 U.S.C. §1300g-6(c), just as it has done for past violations of Texas gaming laws.

Indeed, if the "nothing shall preclude" language in 25 U.S.C. §1300g-6 were interpreted differently, it would render the provision a nullity. It is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). Courts interpreting language like the "nothing shall preclude" clause in the Restoration Act have also interpreted that expression to be coextensive with the terms "permit" or "authorize." *E.g.*, *Bensi v. El Camino Hosp.*, 2012 WL 607979, at *8 (N.D. Cal. Feb. 24, 2012) (collective bargaining agreement "expressly permits subcontracting" where it provided that "[n]othing shall preclude the Hospital from utilizing contractors" for certain types of work.).

d. Decades of Fifth Circuit precedent also confirms this result.

Every court to have interpreted the Restoration Act, including the Fifth Circuit, has tracked this understanding, directly equating the language that "nothing shall preclude" Texas from suing with terms like permit, allow, and authorize. *See*

infra, Part V. Indeed, Texas's right to sue in federal court to enjoin violations of the Restoration Act is so firmly entrenched that the Tribe has conceded it twice in prior iterations of this litigation. *See* Doc. 59-2, *Texas v. Ysleta Del Sur Pueblo et al.*, No. 10-50804 (5th Cir.), Appellants' Brief at 21–22 (contending that Congress limited Texas's remedies to "the right to bring an action in federal court to enjoin alleged violations of the 'gaming activities' section of the Restoration Act."); Doc. 59-3, *Ysleta Del Sur Pueblo v. Bush et al.*, No. 98-50859 (5th Cir.), Appellant's Brief, 1999 WL 33658598, at *19 (acknowledging that "[t]he State of Texas may bring an action in the courts of the United States to enjoin gaming activities of the Pueblo under the Restoration Act").

III. This action also qualifies under the nuisance exception to the general principle against civil injunctions of criminal activity.

The Report and Recommendation concluded that Texas could not pursue this case under the nuisance exception, either, because "the Restoration Act does not refer to nuisances." Doc. 64 at 8. Having reached that conclusion, the Report and Recommendation imposed a requirement that Texas "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." Doc. 64 at 8. Neither of these reasons provides a basis to reject Texas's right to recover here.[6]

[6] To the extent the Report and Recommendation found that federal question jurisdiction is lacking, this misses the fact that the Restoration Act federalizes substantive Texas gaming law for purposes of a suit for civil injunctive relief. *E.g.*, *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1335 (5th Cir. 1994) ("Texas gambling laws and regulations are surrogate federal law" on the Tribe's reservation."); 28 U.S.C. §1331 ("Federal question—The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") A cause of action arising under the Restoration Act, therefore, confers Federal Question jurisdiction.

First the Restoration Act *does* refer to nuisances, because it expressly incorporates Texas gaming law, and Texas gaming law provides for a civil suit to abate illegal gaming and related activity as common nuisance. *See* TEX. CIV. PRAC. & REM. CODE §§125.002(a); 125.0015(a)(5) (person maintains a place of common nuisance by tolerating "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code.") These provisions of Texas nuisance law expressly provide a cause of action for civil injunctive relief based upon the very facts in this case. *Id.* Second, as noted above, the Restoration Act *does* affirmatively authorize federal injunctive relief when covered tribes violate its provisions.

The Report and Recommendation bypasses these provisions, stating "that the definition of 'public nuisance' under Texas law refers only to gang activity." Doc. 64 at 8 and n.22 (citing TEX. CIV. PRAC. & REM. CODE §§125.001; 125.062; 125.063). While Texas's definition of "public nuisance"[7] does refer to gang activity, its "*common* nuisance" statute—which proscribes gambling—does not refer to gang activity.[8] Importantly, both "public nuisance" and "common nuisance" are equally subject to injunctive relief in a civil "Suit to Abate Certain Common Nuisances." TEX. CIV. PRAC. & REM. CODE §125.001. Thus, Texas law does not distinguish between "public nuisance" and "common nuisance" for purposes of injunctive relief, and treats public

[7] "'Public nuisance' is a nuisance described by [§]125.062 or 125.063." TEX. CIV. PRAC. & REM. CODE §125.001. Sections 125.062 and 125.063 do refer to gang activity. *See* TEX. CIV. PRAC. & REM. CODE §§125.063 ("The habitual use of a place by a combination or criminal street gang for engaging in gang activity is a public nuisance."); 125.062 ("A combination or criminal street gang that continuously or regularly associates in gang activities is a public nuisance.").

[8] Specifically, it proscribes "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code." TEX. CIV. PRAC. & REM. CODE §125.0015.

and common nuisances equally for the purpose of "bringing a suit to abate" them.[9] Thus, the Report and Recommendation rejected the nuisance exception based upon an incomplete reading of Texas law. Because Texas law defines the Tribe's activity as a nuisance, the Court should find that the nuisance exception is satisfied.

Interestingly, the Texas Civil Practice and Remedies Code also proscribes, by incorporation, a whole host of activities one could expect an unregulated casino to be involved in: money laundering, felony fraud, and felony tax code violations.[10] These overlap with the definition of public nuisance offered in the Report and Recommendation: "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." Doc. 64 at 8 (citing *United States v. Cnty. Bd. of Arlington Co.*, 487 F. Supp. 137, 143 (E.D. Va. 1979)). This further emphasizes that the nuisance exception is appropriate here.

Moreover, as the Fifth Circuit has stated, "'if the court finds that the prosecution of the criminal charge is not an adequate remedy, as when the conduct is creating a widespread public nuisance . . . the fact that a crime is involved should not prevent the court from entering an injunction.'" *United States v. Buttorff*, 761 F.2d

[9] Section 125.001 refers to §125.0015 to define "common nuisance," just as it refers to §§125.062 and 125.063 to define "public nuisance." TEX. CIV. PRAC. & REM. CODE §125.001(1), (2) ("'Common nuisance' is a nuisance described by [§]125.0015; 'Public nuisance' is a nuisance described by [§]125.062 or 125.063.").

[10] Section 125.0015(3) proscribes, among other things, "engaging in organized criminal activity as a member of a combination as prohibited by the Penal Code." TEX. CIV. PRAC. & REM. CODE §125.0015. Texas Penal Code § 71.01 defines "'Combination' [to] mean[] three or more persons who collaborate in carrying on criminal activities." TEX. PENAL CODE §71.01. Texas Penal Code §71.02, in turn, titled "Engaging in Organized Criminal Activity," proscribes, by name, Class A misdemeanor gambling and, through incorporation of the respective Penal Code statutes, money laundering, felony violations of the Texas tax code, and felony fraud. TEX. PENAL CODE §71.02.

1056, 1063 (5th Cir. 1985) (quoting 11 Wright & Miller, FED. PRAC. & PROC. §2942 at 386–87). There, the Court upheld an injunction against activity that violated the Internal Revenue Code.[11] One factor weighing in favor of the "appropriate[ness]" of the injunction was that the "[a]ppellant ha[d] been found liable for illegal conduct" in the past, which was similar to the activity enjoined and which "showed a disdain for the [relevant] laws." *Id*. at 1062.

That factor is present here, too. In 2014, the Tribe was operating slot-machine style devices that violated the Texas Penal Code, the Texas Constitution, and Texas's prohibition on common nuisances.[12] In 2016, Judge Cardone ordered the Tribe to "within sixty (60) days of the entry of this Order . . . cease the gaming activities described above . . . as violating Texas Penal Code Sections 47.03(a)(5), 47.01(7), and 47.06(a), to the extent the Pueblo Defendants are still offering such activities." *Texas v. Ysleta del Sur Pueblo,* 2016 WL 3039991, at *27 (W.D. Tex. May 27, 2016). After closing for 60 days, the Tribe re-opened Speaking Rock, and is again operating one-touch, slot-machine style devices that violate Texas gaming law.[13] Under *Buttorff*, such demonstrated "disdain for the [relevant] laws" counsels in favor of an injunction.

Buttorff found it dispositive that the statute "expressly authoriz[es] injunctive relief . . . against actions denounced as wrongful by positive, public law." *Id*.; *cf. United States v. Zenon*, 711 F.2d 476, 478–79 (1st Cir. 1983) (explaining that "[a]

[11] The Internal Revenue Code provisions at issue in *Buttorff* were "Promoting abusive tax shelters, etc.," 26 U.S.C. §6700 and "Actions to enjoin specified conduct related to tax shelters and reportable transactions," 26 U.S.C. §7408.
[12] Testimony of Lt. James Ferguson, November 13, 2017 Preliminary Injunction Hearing Transcript at 184:6-12.
[13] Testimony of Commander Daniel Guajardo, November 13, 2017 Preliminary Injunction Hearing Transcript at 86:7-19.

court has power to enjoin a trespass if it would cause irreparable injury, or if there are repeated instances of trespassing, and a single injunction might forestall a multiplicity of legal actions . . . The fact that the trespass may be punishable as a crime does not bar injunctive relief.") (citations omitted). So too here. Texas criminal law bans gambling, TEX. PENAL CODE §§47.01-47.07, and Texas civil law authorizes a suit to enjoin and abate common nuisances—which include violations of Texas gaming law. *See* TEX. CIV. PRAC. & REM. CODE §§125.002(a); 125.0015(a)(5) (person maintains a place of common nuisance by tolerating "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code."); *Nasits v. Texas*, 100 S.W.2d 783, 785–86 (Tex. Civ. App.—Texarkana 1936, no writ) (affirming injunction against cabin in tourist camp as a common nuisance where bookmaking and betting on horse races in violation of Texas Penal Code were being conducted).

Thus, because Congress created jurisdiction over Texas's request for relief here, and made clear that Texas was authorized to seek it, the mere fact that the activity violates criminal law does not preclude this request for relief. *See Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987) ("No court, state or federal, is barred from enjoining activity that causes or threatens injury to property merely because the activity, in addition to being tortious, is a violation of the criminal law."). For these reasons, courts have enjoined violations of criminal law, together with tortious activities that double as violations of criminal law, in a diverse array of circumstances.[14] It is proper to do so here.

[14] *See, e.g.*, *Mott's LLP v. United Food & Commercial Workers*, 2010 WL 3238944, at *4 (N.D. Tex. Aug. 5, 2010)) (finding that "[b]ecause of the uncertain nature of the damages . . . [the plaintiff] ha[d] no

IV. Considering the Restoration Act in the unique context of Indian law confirms Texas's right to pursue the requested injunction.

Indian law is complex, and is unique within American jurisprudence. Other than the States, Indian tribes are the only entities regulated by positive United States law who have a measure of sovereignty. Understanding the history of Indian law—including the relationships between these three types of sovereigns—provides insight into why Congress phrased the Restoration Act as it did, allows the Act to be read in its proper context, and underscores Texas's right to maintain this action.

a. Nature of Inter-Sovereign Relationship

Federally recognized tribes are "dependent domestic nations," and thus, have a unique relationship with the United States federal government and the sovereign states of the Union. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). Because tribes are "dependent domestic nations," Tribal sovereignty is of a "unique and limited character," and exists "only at the sufferance of Congress and is subject to complete defeasence" by the United States. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (citations omitted). Thus, states may exercise some authority on Indian reservations, but only to the extent that Congress has expressly provided for such authority.

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adequate remedy at law," and enjoining violations of federal anti-tampering laws, which are punishable by "fine . . . or imprison[ment] not more than three years, or both," 18 U.S.C. §1365(b).); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1016–17 (S.D. Tex. 1981) ("enjoin[ing] self help tactics of threats of violence and intimidation," including gun pointing, cross burning, and boat burning, perpetrated by Ku Klux Klan members against Vietnamese shrimp fishermen); *Featherstone v. Indep. Serv. Station Ass'n of Tex.*, 10 S.W.2d 124, 127 (Tex. Civ. App. 1928) (enjoining the operation of an illegal lottery and observing that "courts of equity will interfere to prevent such an injury, notwithstanding the commission would constitute a criminal offense, not because it would be a crime, but because the injury to . . . rights would be irreparable"); *Lawson v. State*, 283 S.W.3d 438, 441–42 (Tex. App.—Fort Worth 2009) (upholding the constitutionality of Texas Civil Practice and Remedies Code provision allowing local governments to "enjoin[] gang members from engaging in . . . illegal activities within a specified area").

The Supreme Court has described the inter-sovereign relationship as follows:

> The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. Of course, **because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy**. **And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition**. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-891 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *McClanahan v. Arizona St. Tax Comm'n*, 411 U.S. 164, 173 (1973)) (emphasis added).

b. Public Law 280 provides a framework under which states may elect to assume limited jurisdiction over illegal activity on tribal reservations.

To understand the Restoration Act, one must first understand Public Law 280, which is one example of the federal government setting the terms of the relationship between sovereign states and quasi-sovereign tribes. Public Law 280 and a key Supreme Court case construing it—*California v. Cabazon Band of Mission Indians*—set out general terms under which states may exercise jurisdiction in Indian country. In Public Law 280, "Congress expressly granted six States…jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).[15]

[15] Superseded by statute as stated in *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

"Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations." *Id.* at 207-08 (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379-80 (1976)). The six enumerated states—Alaska, California, Minnesota, Nebraska, and Oregon—were "granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State." *Cabazon*, 480 U.S. at 208 (citations omitted).[16] These are known as "mandatory" Public Law 280 jurisdiction states. States other than the six enumerated states are "optional" Public Law 280 jurisdiction states: they have the authority to "opt-in" to the Public Law 280 regime, if the particular state wishes, and if the tribe in question consents. *See* 25 U.S.C. §1321 ("Assumption by State of Criminal Jurisdiction").[17]

Public Law 280 also provided for states to exercise civil jurisdiction in Indian country, though its "grant of civil jurisdiction was more limited." *Cabazon*, 480 U.S. at 208 (citations omitted).[18] In the civil context, Public Law 280 permits "States jurisdiction over private civil litigation involving reservation Indians in state court, but [does] not to grant general civil regulatory authority." *Id.* Again, this applies only

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[16] *See also* 18 U.S.C. §1162(a) (mandatory Public Law 280 criminal jurisdiction states).

[17] *See also, e.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (In 1968, Congress amended Public Law 280, and "added a requirement that the tribes involved consent before a State can assume jurisdiction over Indian country.") (citations omitted); *Rodewald v. Kan. Dep't. of Revenue*, 296 Kan. 1022, 1033 (Kan. 2013) ("Essentially, P.L. 280 authorized the transfer to those six states of the federal government's jurisdiction over tribes to prosecute crimes and handle other private civil affairs. At the time P.L. 280 was enacted, Congress also granted the remaining states authority to assume civil and criminal jurisdiction over the tribes within their respective states. That power, however, was limited by a 1968 Amendment requiring approval of the tribe before the state could assume jurisdiction. Before the amendment, nine additional states—Nevada, Idaho, Iowa, Washington, South Dakota, Montana, North Dakota, Arizona, and Utah—assumed jurisdiction in at least some form over the tribes within their respective states. The remaining 35 states—including [Texas]—fall under the general rule that they must obtain the express permission of the tribe or the federal government before they may assert jurisdiction over tribal members or land.") (citations omitted).

[18] *See also* 28 U.S.C. §1360(a) (mandatory Public Law 280 civil jurisdiction states).

in the mandatory Public Law 280 states, and in those optional Public Law 280 states that have actually "opted-in" to Public Law 280 jurisdiction. *See* 25 U.S.C. §1322 ("Assumption by State of Civil Jurisdiction"); *see also supra*, n. 16.

The Supreme Court explained Public Law 280's criminal/civil distinction as follows: "when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under [the broad grant of criminal authority], or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Cabazon*, 480 U.S. at 207-08. Texas is an optional Public Law 280 jurisdiction state: absent a "legislative pronouncement to the contrary," it may opt in and assume jurisdiction over the specific universe of activity Public Law 280 permits. Texas has not, however, chosen to exercise its discretion to "opt in."

For purposes of the Restoration Act, it is perhaps most important to note that Public Law 280 does not confer state court jurisdiction over suits brought against Indian *tribes*—regardless of the Plaintiff[19]—absent a legislative pronouncement to the contrary (that is, absent a legislative pronouncement conferring jurisdiction). *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).[20] Numerous courts including Texas State courts have reiterated this principle. *E.g.*, *Silva v. Ysleta del Sur Pueblo*, 28 S.W.3d 122, 125 (Tex. App.—El Paso 2000, pet. denied) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)) (recognizing that "suits brought

[19] This is also consistent with the intent behind Public Law 280: combatting rampant unlawful activity on reservations, rather than illegal activity by tribes themselves. *E.g., Cabazon* at 207-08.

[20] *See also, e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. at 892 ("the United States Supreme Court has held that Public Law 280 and its amendments, entitled the Indian Civil Rights Act of 1968, do not constitute a waiver of tribal immunity.")

against Indian tribes pursuant to the terms of Public Law 280 are barred by tribal immunity absent a legislative pronouncement to the contrary.")

Understanding that Public Law 280 does not waive tribal immunity absent a legislative pronouncement otherwise gives context to the Restoration Act. That is, States who opt in to optional Public Law 280 jurisdiction do not, simply by opting in, obtain jurisdiction over Indian tribes absent a legislative pronouncement to the contrary.

c. The Restoration Act expressly rejects the Public Law 280 framework in the context of Texas gaming law.

In adopting 25 U.S.C. §1300g-6, Congress specifically rejected the Public Law 280 framework—and *Cabazon*'s regulatory/prohibitory distinction—when it comes to gaming on Restoration Act Tribes' reservations. *E.g., Ysleta del Sur Pueblo v Texas*, 36 F.3d 1325, 1333–34, (5th Cir. 1994). In doing so, it guaranteed Texas a right to enforce its substantive gaming law against Restoration Act tribes. It accomplished this in two steps.

First, it provided *generally*—under "[p]rovisions relating to tribal reservation,"—that "[t]he State 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 [§§]1321 and 1322 of this title." 25 U.S.C. §1300g-4(f). As noted above, §§1321 and 1322 provide for states to assume jurisdiction on Indian lands *under the terms of Public Law 280*. Thus, Texas is an optional Public Law 280 state, and retains the authority to opt in—as a *general* matter—under the Act.

Second (and crucially here), Congress rejected the Public Law 280 framework in the *specific* context of the Tribe's gaming activities. As set out above, under the terms of Public Law 280, tribal immunity bars state court suits against tribes absent legislative pronouncement to the contrary. Under the portion of the Restoration Act entitled "gaming activities," however, Congress abrogated the Tribe's immunity, in the specific context of gambling:

> **(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 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.
>
> **(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 1300g–4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a)** of this section 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.

25 U.S.C. §1300g-6.

It is a maxim of statutory construction that, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (citation omitted). Plainly, 25 U.S.C. §1300g-4(f) is a general

statute, which cannot nullify or control over 25 U.S.C. §1300g-6—the *specific* provision governing "gaming activities," whether subject to civil or criminal penalties.

Viewed with the knowledge that Texas is an optional Public Law 280 jurisdiction state, it becomes even more apparent why Congress included the language above in the Restoration Act. As a general matter, 25 U.S.C. §1300g-4(f) preserves Texas's prerogative to "opt in"[21] to jurisdiction on the Tribe's reservation under the limited jurisdiction granting terms of Public Law 280, *except* in the context of gaming. In matters unrelated to gaming, Texas courts may exercise only such jurisdiction as Public Law 280—and the regulatory/prohibitory dichotomy established in *Cabazon Band*—permit. In matters of gaming, however, the Restoration Act provides the enforcement mechanism, remedy, and forum: a suit for civil injunctive relief in federal court.

In contrast to Public Law 280, the Restoration Act provides that "*[n]otwithstanding* section 1300g–4(f)'s general provision [for Texas to opt in to P.L. 280 jurisdiction]," the courts of the United States shall have exclusive jurisdiction over any offense in violation of" the Act's "gaming activities" section by the Tribe, and "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" governing "gaming activities."[22] That is, the *Cabazon*

[21] Though not at issue here, the Act further provides the Tribe's consent, should Texas choose to opt in to optional Public Law 280 jurisdiction over matters unrelated to gaming. 25 U.S.C. §1300g-4(f).
[22] As Texas's El Paso Court of Appeals has held, relying upon United States Supreme Court precedent, "[S]ection 1300g-4(f) merely authorizes the State of Texas to exercise the type of jurisdiction described in [§§]1321 and 1322. As stated above, the jurisdiction authorized by these sections is derived from Public Law 280 which, according to the Supreme Court, does not mandate the surrender of tribal immunity. If, in passing [§]1300g-4(f), Congress intended the total surrender of tribal immunity, it

prohibitory/regulatory dichotomy governing *state court* jurisdiction over activities in Indian country lands—together with tribal immunity—drops away, and Texas may to bring suit against the Tribe in federal court.

As this Court has held:

> The Tigua Nation enjoys the status of a federally recognized tribe under the Ysleta Del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987. Since **the Tigua Nation has waived tribal immunity only regarding the State's gaming statutes**, [the Tigua] are immune from suit to the extent [a litigant] sues them in their official capacities.

Order Adopting Report and Recommendation, *Pais v. Sinclair*, No. EP-06-CV-137-PRM, 2006 WL 3230035 at *1 (W.D. Tex. Nov. 2, 2006). *See also, e.g., Ysleta del Sur Pueblo v Texas*, 36 F.3d 1325, 1333–34, (5th Cir. 1994) (rejecting application of Public Law 280 to the Tribe's gaming activities).

"Consequently, the plain language of the Restoration Act—"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"—divested the Tribe of any sovereignty it might otherwise have had over gaming activities on its reservation. Tribal sovereignty is dependent on, and subordinate to, the federal government." *Rice v. Rehner*, 463 U.S. at 719. Congress's decision to prohibit the Tribe from engaging in gaming activities that are not permitted in Texas was a legitimate exercise of the federal government's superior sovereignty, and the plain language of the Restoration Act reveals that intent.

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would not have limited Texas' jurisdiction to the type of jurisdiction Texas may obtain with the consent of the tribe under Section 1321 and 1322." *Silva v. Ysleta del Sur Pueblo*, 28 S.W.3d 122, 125 (Tex. App.—El Paso 2000) (citation omitted).

The Report and Recommendation states that "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." Doc. 64 at 6. Yet, in the decades of litigation between Texas and the Restoration Act tribes over gaming, no party or Court has identified any such bar to injunctive relief. And neither does the Report and Recommendation. Considered in the context of Public Law 280, Texas's status as a sovereign, and the Tribe's status as a quasi-sovereign, it makes sense why Congress wrote the statute this way. The Restoration Act does not seek to *force* Texas to sue for injunctive relief, but sought to ensure that nothing in the Act would be read as precluding Texas from exercising its prerogative to do so. This is the genesis of the "nothing shall preclude" language.

Texas prohibits gambling, and regulates charitable bingo. Viewed with an understanding of the Public Law 280 regulatory/prohibitory dichotomy, it becomes clear why Congress couched Texas's affirmative grant of a cause of action to enjoin, in federal court, violations of its gaming laws in permissive terms. Notwithstanding the fact that Texas—as a general matter—has optional Public Law 280 jurisdiction, "nothing shall preclude"—in the specific context of gaming—full enforcement of Texas laws and regulations, be they civil or criminal, mere "regulations" or outright "prohibitions." The permissive language is intended to make clear that the *Cabazon* dichotomy does not apply to vitiate the force of Texas law's antipathy to gambling, rooted in the state's very constitution, on Restoration Act tribes' reservations.

V. The Fifth Circuit has repeatedly recognized Texas's right to civil injunctive relief against Restoration Act tribes' violations of State gaming laws.

Decades of precedent confirm Texas's right to maintain this action in this Court. The Report and Recommendation cited one such decision: a 2011 case where the Fifth Circuit reiterated 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). But the Report and Recommendation concluded that this statement is not entitled to deference because that "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." Doc. 64 at 5.

Perhaps this is because the principle is so established that the Tribe itself conceded it: "Congress provided exclusive jurisdiction over alleged violations of the Act's gaming provisions in the courts of the United States, and Congress further limited remedies available to the State of Texas solely to injunctions." Brief of Appellants, *Texas v. Ysleta Del Sur Pueblo*, 2010 WL 5625027 431 F. App'x 326 (filed 10 Nov. 2010). Moreover, the court did not need to consider "whether the Restoration Act provides an independent source of federal injunctive relief" to enjoin criminal conduct, because that case was an action in contempt, in which "all factors confirm that the contempt order is civil in nature, not criminal." *Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x at 330.[23] This further emphasizes that the Report and

[23] That is, the Tribe *did* argue in the 2011 case that it could not be subject to a civil injunction based upon criminal conduct, and the parties briefed the issue. The Fifth Circuit, however, expressly rejected

Recommendation examined this action through the wrong lens by evaluating it as a request for injunctive relief against violations of federal criminal law.

Finally, the sheer number of cases that have reiterated Texas's right to maintain this cause of action is telling:

- *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994) reh'g denied, cert. denied, 514 U.S. 1016 (1995) ("Under §107(c), the state of Texas is authorized to file suit in a federal court to enjoin any violation by the Tribe of the provisions of § 107(a).") (citation omitted).

- *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999) ("the Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations [of the Restoration Act].").

- *Tex. v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 693–94 (W.D. Tex. 2001) ("Although federal courts maintain exclusive jurisdiction over cases involving violations of 107(a), congress empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction."); *id.* at 694 ("In this case, . . . the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation.").

- *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) ("The injunction sought by the State of Texas is authorized by both state and federal statutes.") (emphasis added).

- *Tex. v. Ysleta del Sur Pueblo*, 69 F. App'x. 659, reported in full at 2003 U.S. App. LEXIS 29101 (5th Cir. May 29, 2003), cert. denied, 540 U.S. 985 (2003) (district court did not abuse its discretion in denying Pueblo's motion to modify injunction entered against it engaging in gaming activities illegal under Texas law).

- Order, *Texas v. Ysleta del Sur Pueblo,* 2016 WL 3039991, at *27 (W.D. Tex. May 27, 2016) (ordered the Tribe to "within sixty (60) days of the entry of this Order . . . cease the gaming activities described above . . . as violating Texas Penal Code Sections 47.03(a)(5), 47.01(7), and

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the notion that the remedy sought was criminal in nature. *Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x at 331 ("The district court did not abuse its discretion or otherwise err when it granted the contempt order, an order that was clearly civil in nature.")

> 47.06(a), to the extent the Pueblo Defendants are still offering such activities.")

Courts would not have so often exercised jurisdiction, nor would have Texas have prevailed time and again on appeal, nor would have the Supreme Court more than once denied certiorari, if Texas could not maintain this action for injunctive relief in this Court.

CONCLUSION

In reviewing a report and recommendation on a preliminary injunction, Appendix C, Rule 4(b) of this Court's Local Rules provides that the Court "need conduct a new hearing only in his/her discretion or where required by law, and may consider the record developed before the magistrate judge, making his/her own determination on the basis of that record." The Report and Recommendation did not make any factual findings, instead concluding that Texas could not pursue the requested injunction.

Because, as explained here, this was in error, Texas respectfully requests that the Court enter the proposed findings of fact, conclusions of law, and order granting Texas's application for preliminary injunction appended to this filing as Exhibit A, which are supported with the citations to the hearing record appended to this filing as Exhibit B.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of February, 2018, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, causing electronic service upon all counsel of record, in compliance with Appendix C, Rule 4(b) of the Local Rules of this Court.

/s/Anne Marie Mackin
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