

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

STATE OF TEXAS,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	No. 03:17-CV-00179-PRM
	§	
YSLETA DEL SUR PUEBLO, the TRIBAL	§	
COUNCIL, and the TRIBAL GOVERNOR	§	
CARLOS HISA or his SUCCESSOR,	§	
<i>Defendants.</i>	§	

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**PLAINTIFF STATE OF TEXAS’S APPLICATION FOR PRELIMINARY INJUNCTION**

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Plaintiff the State of Texas (“Texas,” “State”) respectfully moves the Court to preliminarily enjoin certain illegal gambling on Defendant’s (the “Tribe,” the “Pueblo”) reservation. The above-captioned lawsuit seeks declaratory<sup>1</sup> and permanent injunctive<sup>2</sup> relief against the Tribe’s illegal gambling activities. With this Application, Texas seeks to preliminarily enjoin the Tribe’s operation of “electronic bingo” slot machines during the pendency of this cause.

**I. INTRODUCTION**

1. For the past decade and a half, the Tribe has engaged in gambling activities on its reservation that violate Texas law. *See generally State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991 (W.D. Tex. May 27, 2016) (describing the history of the litigation over the Tribe’s gaming since 2001). It has done so in the face of an injunction issued by the Western District of Texas—and despite three subsequent findings of contempt holding the Tribe in violation of that injunction. *See generally id.* As Texas found in its May 17, 2017

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<sup>1</sup> Specifically, to be declared in violation of the Restoration Act, 25 U.S.C. §1300g *et seq.*

<sup>2</sup> Specifically, to be enjoined from violating Texas Penal Code Chapter 47’s prohibition on illegal lotteries, which serves as surrogate federal law on the Pueblo’s reservation under the Restoration Act.

inspection of the Tribe’s gaming facility, the Pueblo continues to operate illegal lotteries—games involving chance, prize, and consideration—in violation of Chapter 47 of the Texas Penal Code. Exhibit 1, Video of May 17, 2017 Physical Inspection of Speaking Rock Entertainment Center, at 27:30-31:39, 32:05-34:28, 34:52-41:53, 45:10-45:30, 57:10-01:02:28, 01:03:20-01:04:45 (time-stamp in lower left-hand corner of screen); Exhibit 2, Expert Report of Captain Daniel Guajardo ¶¶ 1.18, 1.6-1.6.7, 1.7-1.7.4, 1.8-1.8.8, 1.9, 1.11-1.11.6, 1.12-1.12.23, 1.13. Among other things, the Tribe operates several hundred one-touch “electronic bingo” slot machines: a particularly brazen form of illegal lottery. Exhibit 1 at 45:10-45:30, 56:05-57:10; Exhibit 2 at ¶¶ 1.18, 1.6. But not only does the Tribe’s illegal gambling constitute a money-making enterprise; it also violates the will of Texas voters, whose must authorize any exception to Texas’s gambling prohibition. TEX. CONST. art. III § 47a<sup>3</sup>; *see also, e.g., Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d 670, 681 (E.D. Tex. 2002) (If “the Tribe wishes to [offer gambling] on its Reservation, its recourse lies with the legislatures of the United States and the State of Texas[.]”).

2. With each day that the Tribe continues to operate its slot machines, the State of Texas suffers injury. Such injury cannot be undone with a future injunction alone. As the Eastern District of Texas observed in a similar situation, “the Tribe . . . continue[s] to profit from its unlawful enterprise,” “an enterprise that was unlawful from its inception;” “therefore . . . the threatened injury of continuing operation . . . to the State outweighs the potential harm to the Tribe and . . . the public interest is not jeopardized by the granting of an injunction.” *Id.* For these reasons, Texas requests this Court’s emergency intervention. Through this Motion, Texas requests preliminary

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<sup>3</sup> “[T]he Legislature by law may authorize and regulate bingo games conducted by a church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs. A law enacted under this subsection must permit the qualified voters of any county, justice precinct, or incorporated city or town to determine from time to time by a majority vote of the qualified voters voting on the question at an election whether bingo games may be held in the county, justice precinct, or city or town.”

injunctive relief against the Tribe's aforementioned violations of Texas law, and through it, the Restoration Act.

## II. FACTUAL BACKGROUND

3. Texas's work to stop the Tribe's illegal gambling activities predates this case. After Texas filed *Texas v. Ysleta del Sur Pueblo*, the court issued a permanent injunction ("2002 Injunction") prohibiting the Tribe from engaging in illegal gambling in violation of Chapter 47 of the Texas Penal Code. 220 F. Supp. 2d 668, 697-98 (W.D. Tex. 2001), modified May 17, 2002 ("*del Sur Pueblo*") (Eisele, J.). Notwithstanding the fact that the Fifth Circuit upheld the 2002 Injunction on appeal, *State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), further litigation—including one Fifth Circuit decision and two decisions of the Western District of Texas—regarding the injunction ensued.<sup>4</sup> Through all those cases, the 2002 Injunction remained intact.<sup>5</sup>

4. In 2016, Texas learned that the Tribe was preparing to roll out a modified form of gambling when the Tribe's attorney informed the media that the Tribe was "transitioning to bingo."<sup>6</sup> The State moved to hold the Tribe in contempt for violating the 2002 Injunction.<sup>7</sup> After filing several competing motions, the parties ultimately filed a Joint Advisory in which the State and the Tribe "informed the Court that they reached an agreement to allow [Texas] to conduct a videotaped

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<sup>4</sup> See, e.g., *Tex. v. Ysleta del Sur Pueblo*, 431 F. App'x 326, 329 (5th Cir. 2011); *Tex. v. Ysleta del sur Pueblo*, No. EP-99-CV-320-KC, 2015 WL 1003879, at \*4 (W.D. Tex. Mar. 6, 2015) (Cardone, J.); *State of Tex. v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at \*26-27 (W.D. Tex. May 27, 2016).

<sup>5</sup> On May 27, 2016 the court modified the 2002 Injunction by eliminating requirements that the Tribe (1) obtain court pre-approval before engaging in any gaming, and (2) allow Texas monthly access to the locations where the Tribe held gaming activities or to records of those activities. *Id.* at \*27. The court found that the Tribe was engaged in gaming activities that violated Texas law, ordered the Tribe to cease those activities within 60 days, and imposed a \$100,000 per day fine for each the day gaming operations continued in violation of the order. *Id.*

<sup>6</sup> A July 23, 2016 *El Paso Times* article reported that the Pueblo was "transitioning to bingo" gambling activities. Marty Schladen, [Tiguas ending sweepstakes, starting bingo](http://www.elpasotimes.com/story/news/local/el-paso/2016/07/23/tiguas-ending-sweepstakes-starting-bingo/87458650/), EL PASO TIMES, July 23, 2016, <http://www.elpasotimes.com/story/news/local/el-paso/2016/07/23/tiguas-ending-sweepstakes-starting-bingo/87458650/>. Beginning on March 21, 2016, the State initiated attempts to schedule an inspection of the Tribe's gaming facility. On April 20, 2017, the State and the Tribe agreed that the State would conduct an inspection to be governed by the provisions of Federal Rule of Civil Procedure 34.

<sup>7</sup> On August 25, 2016 Texas filed its Corrected Opposed Third Motion for Contempt and Motion for Injunctive Relief. ECF No. 615, *State of Tex. v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC.

inspection” of the Tribe’s Entertainment Center. ECF No. 625, *Order* of March 10, 2017 at 1-2, *State of Tex. v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC (quoting ECF No. 624, *Joint Advisory* of March 3, 2017 at 2). After the filing of that Joint Advisory, the court denied as moot the State’s motions for contempt, and ordered it to hold off filing anything further until it had completed a physical inspection of the Tribe’s gaming facility. *Id.* at 2. In that same order, the court discouraged Texas from seeking leave to amend its Complaint, and encouraged Texas to—pending the results of the inspection—either file a motion for civil contempt, or “seek to file a new case in this Court seeking injunctive relief.” *Id.* at 2-3. Consistent with the court’s order, Texas conducted a physical inspection of the Tribe’s gaming facility and filed the instant cause of action.

5. Texas inspected the Pueblo’s gaming facility—the Speaking Rock Entertainment Center—on May 17, 2017. Exhibit 1 at 00:30-00:42; Exhibit 2 at ¶ 1.0. During that inspection, the State found the Tribe operating, *inter alia*, hundreds of Las Vegas-style slot machine lookalikes offering “electronic bingo.” Exhibit 1 at 45:10-45:30, 56:05-57:10; Exhibit 2 at ¶¶ 1.18, 1.6, 1.7, 1.8, 1.11, 1.12. The “electronic bingo” machines stood in rows in a dim, casino-like atmosphere, loud with the electronic bells, whistles, and theme songs of the machines and illuminated by their flashing lights. Exhibit 1 at 49:30-51:50; Exhibit 2 at ¶¶ 1.1, 1.10. The machines announced their maximum respective jackpots in blinking, marquis-style lights, some as high as forty thousand dollars. Exhibit 1 at 45:25-46:46; Exhibit 2 at ¶¶ 1.10, 1.18. At least one aisle running between two rows of machines was filled with tables and chairs emanating from the facility’s large bar. Exhibit 1 at 56:05-57:10. In true Las Vegas casino style, the Tribe made its machines available to the public 24 hours a day, 7 days a week. Exhibit 2 at ¶¶ 1.4, 1.15, 1.20.<sup>8</sup>

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<sup>8</sup> Captain Guajardo’s report describes the hours the Tribe offers its paper card, electronic card minder, and pull tab bingo. Based on the evidence gathered during its inspection, Texas understands that the slot machines also operate 24/7. See Exhibit 1 at 03:20-04:55.

6. The “electronic bingo” machines featured large spinning reels that activated during play and turned to line up various graphics in the player’s direct line of vision. Exhibit 1 at 29:00-30:20, 32:10-33:52, 35:20-41:36; Exhibit 2 at ¶¶ 1.18, 1.7, 1.8, 1.11, 1.12. The reels correlated to electronic bingo cards, which were a small fraction of the size of the reels and were displayed outside of the player’s direct line of vision—that is, at the bottom, top, or in a corner of the screen. *Id.* One play resulted in an instantaneous complete bingo game across several inconspicuous electronic cards, concomitant with the reels—the machine’s main event—spinning and coming to rest. *Id.* When the reels lined up in a winning pattern, flashing lights, sound effects, and a notification of the amount won accompanied the cessation of the wheels’ spinning. *Id.*

7. Players could insert cash directly into the machine, or a ticket that contained credit from previous winnings and which would store any future winnings. Exhibit 1 at 27:30-31:39, 32:05-34:28, 34:52-41:53; Exhibit 2 at ¶¶ 1.6, 1.6.7, 1.7 1.7.4, 1.8, 1.8.8. The player could redeem this ticket at any time for cash at a kiosk, Exhibit 1 at 45:10-45:30; Exhibit 2 at ¶¶ 1.9, 1.13. Patrons could also extract cash from one of the several ATMs throughout the gaming floor. Exhibit 1 at 01:13:00-01:13:15. As several persons sitting alone before individual machines made clear, it was possible to play the game, from the player’s point of view, alone. Exhibit 1 at 56:59-57:05.

8. Speaking Rock looked like a Las Vegas casino, and its “electronic bingo” machines appeared to be slot machines.<sup>9</sup> *See* Exhibit 2 at ¶ 1.18.

### III. ARGUMENT AND AUTHORITIES

9. “[T]he question of whether to award injunctive relief is generally within the trial court’s discretion.” *EEOC v. Service Temps Inc.*, 679 F.3d 323, 338 (5th Cir. 2012). “A plaintiff seeking

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<sup>9</sup> In addition to the “electronic bingo” slot machines whose operation Texas seeks to preliminarily enjoin here, the Tribe is engaged in at least three other activities at Speaking Rock that violate Texas law and the Restoration Act: a 24/7 variant on paper card bingo; 90-card bingo card minders; and pull tabs. Texas intends to seek injunctive relief against these and any other illegal activities after discovery in this cause.

a preliminary injunction must establish [a] that he is likely to succeed on the merits; [b] that he is likely to suffer irreparable harm in the absence of preliminary relief; [c] that the balance of equities tips in his favor; and [d] that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). It is appropriate to award Texas the injunctive relief it requests here.

**a. Texas will likely succeed on the merits because the Pueblo’s gaming activities constitute an illegal lottery that violates Texas law and the Restoration Act.**

10. The slot machines operating so-called “electronic bingo” include payment of cash consideration to play a game of chance for the opportunity to win cash prizes. Exhibit 1 at 27:30-31:39, 32:05-34:28, 34:52-41:53, 45:10-45:30; Exhibit 2 at ¶¶ 1.18, 1.6-1.6.7, 1.7-1.7.4, 1.8-1.8.8, 1.9, 1.11-1.11.6, 1.12-1.12.23, 1.13. This is an illegal lottery under Texas law. TEX. PENAL CODE ANN. § 47.01(7) (elements of an illegal lottery are chance, prize, and consideration.); TEX. CONST. art. III § 47(a) (“The Legislature shall pass laws prohibiting lotteries . . . .”); Exhibit 2 at ¶¶ 1.17-1.18.

11. Because the Restoration Act federalizes Texas gambling law on the Tribe’s reservation, a lottery that is illegal under Texas law also violates the Restoration Act.

12. By operating such a lottery the Tribe is engaged in, at minimum, the following activities illegal under Texas law: gambling under Texas Penal Code Ann. § 47.02; operating a gambling promotion under Texas Penal Code Ann. §§ 47.03(a)(1) and (a)(5); keeping a gambling place under Texas Penal Code Ann. § 47.04(a); and possessing gambling devices, equipment, or paraphernalia under Texas Penal Code Ann. §§ 47.06(a) and (c), and/or under Texas Penal Code Ann. § 47.06(a) (with respect to the servers owned by the vendors, which are a “subassembly or essential part of a gambling device.”).

13. Because the Restoration Act federalizes Texas gambling law on the Tribe's reservation, each of the aforementioned violations of Texas law is also a violation of the Restoration Act.

14. Because the Tribe's activities described herein violate Texas law and the Restoration Act, Texas is likely to succeed on the merits of its suit for declaratory and injunctive relief.

**b. Texas now suffers and will continue to suffer irreparable harm in the absence of the preliminary relief this motion requests.**

15. A litany of Texas laws, ranging from the Texas Penal Code to the Texas Constitution itself, prohibits gambling. It does so in comprehensive fashion, banning games by name ("gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker"); by device description ("any electronic, electromechanical, or mechanical contrivance . . . that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance"); and by player behavior ("A person commits an offense if he: plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device . . . ."), among other things. *See* TEX. PENAL CODE ANN. §§ 47.01-47.02.

16. The Texas Penal Code further prohibits the incidents and accoutrements of gambling. It forbids keeping gambling places, *id.* at § 47.04; it forbids possessing gambling devices, equipment, or paraphernalia, *id.* at § 47.06; it forbids promoting gambling, *id.* at § 47.03; and it even forbids "communicating gambling information," *id.* at § 47.05.

17. The Texas Constitution commands lawmakers to generally prohibit games of chance, prize, and consideration under State law. TEX. CONST. art. III §47(a) ("The Legislature shall pass laws prohibiting lotteries . . . .").

18. It is for the electorate of the State of Texas—through its elected representatives, and the Constitution’s voter approval requirement—to decide what if any gambling may go on in the State. See TEX. CONST. art. III § 47; TEX. PENAL CODE ANN. § 47.01(7). The Tribe’s “electronic bingo” machines have no such approval. The litany of Texas anti-gambling legislation referenced above, together with the Texas Constitution’s mandate, demonstrates the status quo: Texas sees gambling as sufficiently harmful that it is prohibited.

19. The State has a fundamental interest in enforcement of its laws. *E.g.*, *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 742 (S.D. Miss. 2014) (“The State . . . has a significant interest in enforcing its enacted laws.”). When the State is prevented from enforcing those laws, it suffers irreparable injury. *E.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (citations omitted)); see also *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, if enforcement of duly enacted State law is enjoined, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws[.]”)

**c. The balance of equities tips in Texas’s favor.**

20. The Tribe’s trust relationship with the federal government—and all attendant benefits—derives from the Tribe’s agreement to refrain from gambling. This was the agreement the Tribe made with the United States Government to pass the Restoration Act. See 25 U.S.C. § 1300g-6a; Tribal Resolution No. T.C.-02-86 (1986); *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1328 (5th Cir. 1994) (quoting Tribal Resolution No. T.C.-02-86 (1986); citing Restoration Act’s



legislative history). It recognizes the Tribe as an Indian Nation, and secures to the Tribe aid and services from the United States, which it would not enjoy absent that trust relationship.<sup>10</sup>

21. Speaking Rock generates revenue from illegal gambling each day.<sup>11</sup> The Tribe cannot claim to suffer injury from the preliminary injunction sought here, because the requested relief would only restore what the *legal* status quo has been all along. The Tribe will not be permitted to operate lotteries illegal under Texas law, and will continue to receive the federal recognition and assistance that motivated it—as recently as 1987—to forego the possibility of such activity.

22. For these reasons, the balance of equities weighs in favor of the requested injunction.

**d. An injunction lies in the public interest.**

23. As noted, it is for the Texas Legislature, and her electorate—and not the Tribe—to determine what, if any, lotteries it may permit. As also noted, Texas’s host of anti-gambling legislation indicates the Texas electorate does not, at this time, believe gambling should be allowed in Texas. Therefore, a grant from this Court of preliminary relief enjoining the Tribe from operating illegal lotteries through its “electronic bingo” slot machines lies in the public interest.

**IV. CLAIM FOR INJUNCTIVE RELIEF**

24. For the reasons set out here and in the Complaint in this cause, this Court should enter a preliminary injunction pursuant to FED. R. CIV. P. 65, *et seq.*, to enforce the gambling prohibitions in the Restoration Act. Such injunction is appropriate because (1) there is a substantial likelihood that Texas will prevail on the merits; (2) there is a substantial threat of irreparable injury if an

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<sup>10</sup> In 2015, according to its Year End Report, the Tribe received over \$15 million in grant money from the United States government for its population of 3,462 persons. *Ysleta del Sur Pueblo 2015 Year-End Report*, [http://www.ysletadelsurpueblo.org/files/spaw/2015\\_Year\\_End\\_Report.pdf](http://www.ysletadelsurpueblo.org/files/spaw/2015_Year_End_Report.pdf) (last visited July 13, 2017).

<sup>11</sup> Information on how much the Tribe makes from its casino is difficult to come by. According to a National Public Radio article, however, the Tribe in 2000—prior to the 2002 Injunction—made \$65 million from its casino. *Tigua Indians Learn Tough Lesson From Abramoff*, National Public Radio (February 16, 2006), <http://www.npr.org/templates/story/story.php?storyId=5220081>. At that time, the Tribe’s membership was 1,300. *Id.*

injunction does not issue; (3) the threatened injury outweighs any possible harm to Defendants; and (4) the public interest weighs in favor of issuing the requested injunction.

25. Following trial on the merits the Court should permanently enjoin the Tribe, its agents, attorneys, and all acting in privity with them from violating Texas's ban on illegal lotteries.

### **CONCLUSION**

26. The Tribe operates hundreds of "electronic bingo" slot machines on its reservation, in violation of Texas and federal law. Because Texas suffers irreparable injury each day these illegal machines remain in operation, Texas seeks a preliminary injunction enjoining their operation during the pendency of this lawsuit, at the conclusion of which a permanent injunction should be entered to prohibit any illegal lottery on the Tribe's reservation.

Respectfully submitted.

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**ATTORNEYS FOR PLAINTIFF  
THE STATE OF TEXAS**

**CERTIFICATE OF CONFERENCE**

I certify that on this the 14th day of August, 2017, I counsel for Texas conferred with Counsel for the Tribe, who confirmed that the Tribe is OPPOSED to the relief sought herein.

/s/ Michael R. Abrams  
MICHAEL R. ABRAMS  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I certify that on this the 15th day of August, 2017, 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 addition, the non-documentary evidence attached to this Motion has been filed with the clerk's office, with a copy to the presiding judge, and has been sent via Federal Express to:

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