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
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Defendants.*	§	

REPLY IN SUPPORT OF TEXAS'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

The Tribe does not dispute that its gaming activities constitute a lottery under Texas law. *See* Doc. 154 at 16. And the Tribe does not attempt to show that its gaming activities are "authorized" under the Bingo Enabling Act, TEX. PENAL CODE § 47.09, which would function as an affirmative defense to a violation of Texas's criminal prohibitions on gaming.

Instead, the Tribe primarily argues that Texas law does not completely prohibit bingo, and thus, that the "regulatory" aspects of Texas's bingo laws do not apply to the Tribe. This argument has been rejected at least three times—once by the Fifth Circuit in a published opinion that remains good law—and it should be rejected again. Because there is no dispute of material fact that the Tribe's gaming activities violate the Texas Penal Code and the Texas Civil Practice and Remedies Code, and thus, violate the Restoration Act, the Court should grant Texas's motion for summary judgment (Doc. 146).

ARGUMENT

A. The Restoration Act incorporates Texas's gaming laws and regulations.

In the last round of litigation, at the invitation of the Court, the Tribe filed an "Interim Petition to Conduct Bingo." *See Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320, Doc. 296 (Sept. 23, 2009). The Court summarized the Tribe's argument in its order denying the petition: "In its Interim Petition to Conduct Bingo, the Tribe contends that Texas law does not 'prohibit' the conduct of bingo games, but merely 'regulates' the activity by establishing limited categories of authorized sponsors. If a gaming activity is merely 'regulated,' rather than 'prohibited,' so the argument goes, the State lacks jurisdiction to prevent the Tribe from engaging in the same activity." Ex. A, *Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320, Doc. 323 (Aug. 3, 2010).

The Tribe makes a similar argument in response to Texas's motion for summary judgment. *See* Doc. 154 at 10 ("If something is not a gaming activity, the Plaintiff has no authority to impose regulations upon it. If something is a gaming activity but is one not prohibited by the laws of the State of Texas, then it is not prohibited on the reservation and lands of the Ysleta del Sur Pueblo."); *see also id.* at 13 n.14 ("The Pueblo is not restricted to offering 'gaming activities' allowed by the State of Texas. It is only prohibited from offering gaming activities 'prohibited by' the laws of the State of Texas.").

As the Court noted in its order on the bingo petition, "[t]his same argument, or some version of it, has been made several times since the State and the Tribe began

litigating these matters. Each time, the Courts have rejected it. The argument has not gained greater credibility through the passage of time, and the Court finds that it must be rejected once again." *See* Ex. A at 3 (citing *Ysleta Del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1333 (5th Cir. 1994) ("*Ysleta I*"); *State of Texas v. Ysleta Del Sur Pueblo*, 220 F.Supp.2d 668, 707 (W.D. Tex. 2002)). The Court elaborated:

> [T]he Restoration Act clearly and unambiguously prohibits the Tribe from conducting any gaming activities which are prohibited by the laws of the State of Texas. 25 U.S.C. § 1300g-6(a). In the specific area of charitable bingo, the Tribe's efforts to distinguish between laws that 'prohibit' gaming activity and laws which merely 'regulate' such activity are not persuasive. **It is more accurate to say that Texas broadly prohibits all forms of gaming across the board, with only a few minor and narrowly tailored exceptions.**

Ex. A at 5 (emphasis added). This conclusion appropriately considers the Texas Constitution's broad prohibition on "lotteries and gift enterprises." TEX. CONST. art. III, § 47(a) ("The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), (d-1), and (e) of this section."). Charitable bingo in Texas is a narrow exception to this general constitutional prohibition on lotteries. *Id.* § 47(b); *see also Dep't of Texas, Veterans of Foreign Wars of United States v. Texas Lottery Com'n*, 760 F.3d 427, 431 (5th Cir. 2014) ("In Texas, gambling is generally prohibited.").

What the Tribe essentially asks is for the Court to apply the *Cabazon Band* criminal-prohibitory/civil-regulatory distinction to Section 107(a) of the Restoration Act, which is the Act's broad federal ban on gaming. *See* 25 U.S.C. § 1300g-6(a) ("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"). The *Cabazon Band* opinion arose from Public Law 280, which provides for some states to exercise broad criminal jurisdiction, but limited civil jurisdiction, in Indian country. In the civil context, Public Law 280 permits "States jurisdiction over private civil litigation involving reservation Indians in state court, but [does] not . . . grant general civil regulatory authority." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987). 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." *Id.* at 207–08.

The Fifth Circuit has held that the *Cabazon Band* analysis is only relevant to Section 107(b) of the Restoration Act (the section providing that Texas, while authorized to enjoin violations of its gaming laws on the Tribe's reservation, has not been granted civil or regulatory jurisdiction over the Tribe).[1] In *Ysleta I*, the Fifth Circuit responded to the Tribe's argument in that regard:

> The Tribe points to two items in the Restoration Act's legislative history that it believes indicate[] Congress incorporated *Cabazon Band* into § 107(a) of the Act. First, Congress noted in its report that § 107(b) "is a restatement of the law as provided in [Public Law 280]." *Id.* at 10. The reference to Public Law 280, the statute at issue in *Cabazon Band*,

[1] In its objections to the Report and Recommendation on Texas's Motion for Preliminary Injunction, Texas explained in more depth how and why the Restoration Act rejects the Public Law 280/*Cabazon Band* framework in the context of Texas gaming law. *See* Doc. 68 at 22–26.

> presumably is the hook on which the Tribe hangs this argument. The Tribe's argument, however, misses the mark, because § 107(b), as opposed to § 107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. In that sense only, § 107(b) is a restatement of Public Law 280. But it is § 107(a) that determines whether Texas "prohibits" certain gaming activities, and § 107(a) is not a restatement of Public Law 280.

Ysleta I, 36 F.3d at 1334. This case law makes clear that Section 107(a) should be read in the manner the Fifth Circuit has already prescribed, and which Texas re-urges today: "Texas' gaming laws and regulations . . . operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* And on that front, the Tribe offers no viable arguments that it is not violating Texas gaming laws, and accordingly, federal law.

B. The Tribe is violating the Restoration Act.

The elements of an illegal lottery—chance, prize, and consideration—are present in the activities on the Tribe's reservation. *See, e.g.*, *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 50, 100 S.W.2d 695, 701 (1936) (a lottery has "three necessary elements, namely, the offering of a prize, the award of the prize by chance, and the giving of a consideration for an opportunity to win the prize"); *see also* Response to Texas's Motion for Summary Judgment and Permanent Injunction, Doc. 154 at 16 (stating that bingo "inherently consists of prize, chance, and consideration.").

These elements are present in all the games played on the Tribe's reservation: live-called bingo played on paper with ink daubers; live-called bingo played on hand-held devices; and one-touch gaming machines. The Tribe's response presents these

games as the same "game,"[2] only to be distinguished by the presence, or variety, of the operative "aid" to play. *See, e.g.*, Doc. 154 at 4 ("Bingo is a gaming Activity . . . Electronic video devices that operate as card minders are not a 'gaming activity.'").

As the corporate representative of one of the Tribe's one-touch gaming machine vendors observed, however, someone playing on one of the Tribe's one-touch gaming machines cannot play any contemporaneously conducted live-called game on that same machine. *See* Doc. 146-1 at 89 ("Q: But they couldn't do so using your machine since the game that they're playing on your machine uses one historic ball draw only. A: That's correct."). Thus, the one-touch gaming machines offer a different gaming activity from paper-based bingo or bingo played on a handheld device. Critically, however, each of these games contains the elements of an illegal lottery, and none of them, as conducted by the Tribe, complies with the Bingo Enabling Act.

In sum, Texas's motion for summary judgment put forward detailed, competent evidence demonstrating how the Tribe's gaming—the one-touch machines and the live-called bingo—constitute lotteries. Doc. 146 at 3–7. The motion also showed why the Tribe's gaming was not "authorized" under the Bingo Enabling Act, *Id.* at 15–17, which would provide an affirmative defense to a finding that the Tribe was operating an illegal lottery. The Tribe has not offered any evidence to the contrary. Because the Tribe is violating the Texas Penal Code and no affirmative

[2] *See, e.g.*, Doc. 154 at 2 (asserting that the "Ysleta del Sur Pueblo Fraternal Organization . . . offers the gaming activity of bingo. That offering includes the use of aids to play bingo known as cardminders."); *id.* at 7 ("Customers at Speaking Rock can play bingo using paper bingo cards, and can use aids to play including hand held bingo cardminders and stationary card minders.").

defense applies that would prevent application of those Penal Code provisions to the Tribe's gaming activities, the Tribe is violating the Restoration Act. These violations of criminal law also amount to a common nuisance. *See* TEX. CIV. PRAC. & REM. CODE § 125.0015(a)(5) (providing that "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code" is a common nuisance). The Tribe's contention that there have been no public complaints about the gaming at Speaking Rock, Doc. 154 at 18, is simply not relevant to the inquiry under the Texas Civil Practice and Remedies Code. Thus, Texas's motion for summary judgment on Count One of its Amended Complaint should be granted.

C. An injunction should issue.

Texas is not seeking an "obey the law" injunction. *Contra* Doc. 154 at 18. Instead, Texas is requesting an injunction tailored to the violations of law detailed in its motion for summary judgment. This injunction would serve the public interest, because it would vindicate the will of the voters, and it would be an appropriate exercise of the Court's balancing of the equities, as the remedy the Tribe desires must be found in a change in the law, rather than in upending long-established precedent. *Cf. Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 697 (W.D. Tex. 2001) ("What the Defendants characterize as 'equities' in this case are not such in the eyes of the law. They are matters which might, however, be brought to the attention of the Congress of the United States or the legislature of the State of Texas, for it is only through legislative change that the Defendants could possibly be permitted to carry on a casino operation of the type they presently conduct on the Pueblo's reservation.").

For these reasons, the Court should enjoin the Tribe and those acting in concert with the Tribe (including the Ysleta del Sur Pueblo Fraternal Organization) from operating the one-touch gaming machines and live-called bingo games that do not comport with Texas law.

CONCLUSION

Texas's motion for summary judgment and permanent injunction should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 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.

/s/ Michael R. Abrams
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