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.*	§	

TEXAS'S RESPONSE TO DEFENDANTS' SECOND MOTION TO DISMISS FIRST AMENDED COMPLAINT

In their first motion to dismiss, Defendants asserted that the Attorney General lacks capacity to bring this action. Doc. 13.[1] The Court rejected that argument. Doc. 76. In response to Texas's objections to the Report and Recommendation, Defendants contended that this case should be dismissed because the Restoration Act does not provide an independent basis for Texas to maintain it. Doc. 71 at 5. The Court rejected that argument, too. *See* Doc. 77 at 9–25. In their second motion to dismiss—filed after the Court struck their "supplemental" motion to dismiss,[2] Docs. 74, 80—Defendants raise two additional purported jurisdictional defects: (1) they have immunity to this suit, and (2) a "fraternal organization" operating in the Tribe's name is a required party. Both arguments fail. The Court should decline, once again, to dismiss this case on jurisdictional grounds.

[1] Defendants also argued this in their motion to vacate the preliminary injunction hearing, Doc. 32.
[2] Defendants' supplemental motion to dismiss raised the same substantive arguments as their second motion to dismiss (often verbatim). The primary difference is that the supplemental motion also relied on the Report and Recommendation (the reasoning of which the Court has now rejected), and was filed under Federal Rule of Civil Procedure 12(b)(7), as opposed to 12(h). *Compare* Doc. 74 *with* Doc. 83.

ARGUMENT

I. Defendants are not immune from this cause of action.

To abrogate tribal immunity, Congress must "'unequivocally' express that purpose." C&*L Enter., Inc. v. Citizen Band of Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). This is not as lofty a burden as Defendants suggest. "[C]ourts considering tribal immunity waivers . . . have only found statutory language inadequately explicit when there was no language specifically establishing the cause of action at issue." *Osage Tribal Council v. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999). "Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the . . . requirement than that Congress unequivocally state its intent." *Id.* at 1182.

The Restoration Act unambiguously creates federal court jurisdiction for violations of the Restoration Act *by the Tribe and its members*. 25 U.S.C. §1300g-6(a), (c). Through this provision, Congress evinced its unequivocal intent to subject the Tribe to suit in federal court—otherwise, this express jurisdictional grant would be meaningless. *Cf. Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264 (10th Cir. 1998). ("Like the ICRA, the [Ute Partition and Termination Act] is devoid of any language clearly expressing an intent to subject the Tribe to lawsuits in federal court over the joint management of the indivisible tribal assets.").

Defendants acknowledge this abrogation of immunity, Doc. 83 at 4, but counter that it extends only to the federal government—not Texas. *Id.* To arrive at that

conclusion, Defendants must explain how §107(c) of the Restoration Act—which states 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," 25 U.S.C. §1300g-6(c)—fails to reflect Congress's unequivocal intent to subject the Tribe to injunctive actions by the State of Texas in federal court. All they can muster, however, is that "[§]107(c) represents not a jurisdictional grant, but a 'savings clause' that demands the Plaintiff identify an extrinsic law that unequivocally abrogates sovereign immunity in order for its claim to survive." Doc. 83 at 5. The Court has already rejected this ahistorical reading of the Restoration Act. *See* Doc. 77 at 18 ("the Fifth Circuit has explicitly held that the Restoration Act provides federal courts with power to issue an injunction sought by the State of Texas."); 20 ("it is difficult to deny that the statute was intended to provide an affirmative grant of authority to courts to issue injunctions if sought by the State of Texas."); 23 ("Congress intended to confer jurisdiction over suits by the State of Texas seeking injunctive relief.").

Moreover, while Defendants' principle case authority, *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), is certainly relevant—it is a recent Supreme Court pronouncement on tribal immunity—it hardly supports Defendants' proposition that Judge Hudspeth's ruling on the Tribe's immunity warrants revisiting.[3] Doc. 83 at 5. *Bay Mills* reiterated that Congress must "unequivocally

[3] In 1999, during litigation between Texas and the Tribe, Judge Hudspeth concluded that "§1300g-6 does represent an unequivocal waiver of tribal immunity and governs the sovereign immunity issue in this case." *Tex. v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999)

express" its intent to abrogate tribal immunity. *Id.* at 2031. The Court concluded that Michigan could not overcome tribal immunity to sue for gambling *off* a tribe's reservation when the Indian Gaming Regulatory Act—the only law that could have conceivably abrogated the tribe's immunity in that case—only authorized suits over gaming offenses "committed by the tribe, or by any member of the tribe, *on the reservation or on the lands of the tribe*." *Id.* at 2031–32 (citing 25 U.S.C. §2710(d)(7)(A)(ii) (emphasis added)).

To the extent *Bay Mills* is important to the Supreme Court's tribal immunity jurisprudence, it is more notable for what it did *not* do than what it did. Over Justice Thomas's powerful dissent (which was joined by three justices), the Court refused to overturn *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998), which held that sovereign immunity may bar suits arising out of a tribe's commercial activities conducted *outside* its reservation.

This case concerns gaming on the Tribe's reservation. *E.g.,* Doc. 8. The Restoration Act's jurisdictional grant extends to those activities; indeed, it contains language *identical* to the IGRA provision that the Court considered in *Bay Mills*. *See* 25 U.S.C. §1300g-6(c) (providing for federal court jurisdiction over gaming offenses "on the reservation or on the lands of the tribe.") But unlike Michigan's ultimately unsuccessful suit, Texas seeks to enjoin activity "on the lands of the Tribe"—just as the Restoration Act contemplates. Congress expressly abrogated Defendants' immunity for precisely such claims. *Bay Mills* does not contemplate a different outcome, and Defendants' claims of sovereign immunity do not defeat this action.

II. Joinder of the "fraternal organization" has no bearing on the Court's jurisdiction.

In their second motion to dismiss, Defendants argue[4] that Texas failed to name an indispensable party under Federal Rule of Civil Procedure 19(a)(1)(a)—namely, an entity Defendants identify as the "Ysleta del Sur Pueblo Fraternal Organization." Doc. 83 at 9. Defendants claim that "[a]s the corporation conducting charitable bingo activities, the Fraternal Organization must be joined, and because it cannot be joined, the Court has no option other than to dismiss this case." Doc. 83 at 10. This is wrong.

a. Because Rule 19 joinder is not jurisdictional, it cannot support dismissal on jurisdictional grounds.

Defendants filed their second motion to dismiss under Federal Rule of Civil Procedure 12(h). Doc. 83 at 2. The Supreme Court has construed this rule as supporting the proposition that "subject-matter-jurisdiction questions are always open-and must be resolved—at any stage of federal litigation." *Stone v. Powell*, 428 U.S. 465, 509 n.8 (1976) (citing, *inter alia*, FED. R. CIV. P. 12(h)). *See also*, *e.g.*, FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.") But under no circumstances does *Rule 19* divest a court of subject-matter jurisdiction. Instead, "[n]either [FRCP] 17(a) . . . nor [FRCP] 19 . . . requires plaintiffs or defendants to name and join any additional parties to this action. Both Rules . . . address party joinder, *not federal-court subject-matter jurisdiction*." *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 (2005) (citations omitted) (emphasis added).

[4] Defendants also made this argument in their supplemental motion to dismiss. *See* Doc. 80.

In fact, because of a tendency to incorrectly read Rule 19 as determinative of subject-matter jurisdiction, amendments to the Rule—which originally contemplated "indispensable parties"—eliminated the term "indispensable." As the Supreme Court has recognized:

> Under the earlier Rules the term "indispensable party" might have implied a certain rigidity that would be in tension with this case-specific approach. The word "indispensable" had an unforgiving connotation that did not fit easily with a system that permits actions to proceed even when some persons who otherwise should be parties to the action cannot be joined. . . . **[T]he use of "indispensable" in Rule 19 created the "verbal anomaly" of an "indispensable person who turns out to be dispensable after all."**…Required persons may turn out not to be required for the action to proceed after all.
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> In all events it is clear that multiple factors must bear on the decision whether to proceed without a required person. This decision "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."

Repub. of Philippines v. Pimentel, 553 U.S. 851, 863 (2008) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117, n.12; 119 (1968) (emphasis added). Because Rule 19 is not jurisdictional, it provides no support for jurisdictional dismissal under Rule 12(h) (or any other procedural mechanism).

b. Defendants cannot carry their burden to show that serious prejudice or inefficiency will result absent dismissal for nonjoinder.

"[F]ederal courts are extremely reluctant to grant motions to dismiss based on nonjoinder and, in general, dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result." 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure §1604 (3d ed. 2001).

Defendants' nonjoinder argument—raised for the first time in their supplemental motion to dismiss, filed *after* the deadline to join parties or amend pleadings—[5]also fails. In the context of a motion to dismiss for nonjoinder, the burden is on the movant to show that the non-joined party meets the Rule 19 criteria. *Payan v. Cont'l Tire N. Am., Inc.*, 2005 U.S. Dist. LEXIS 31418 (S.D. Tex. Aug. 10, 2005); *see also Fisher v. Blue Cross*, 879 F Supp. 2d 581 (N.D. Tex. July 17, 2012). Defendants fail.

i. The fraternal organization is not "required to be joined if feasible" under Rule 19(a)(1).

Rule 19(a)(1) provides two circumstances in which a "person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction"[6] is "required to be joined if feasible." The fraternal organization[7] satisfies neither.

A. The fraternal organization does not satisfy Rule 19(a)(1)(A), because the Court can accord complete relief among the existing parties.

"A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if, in that person's

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[5] "Equitable considerations govern the disposition of a litigant's argument that someone is an indispensable party." *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 482 (5th Cir. 1982) (citations omitted). Defendants did not assert absence of a required party until over six months after filing their motion to dismiss, despite numerous other motions seeking to delay or dismiss this suit. Nor did Defendants raise it at the preliminary injunction hearing. Because they failed to raise this argument until now, the applicable "equitable considerations" counsel against dismissal for nonjoinder. *Id.* The decision to raise this argument at this late hour also undermines Defendants' argument that prejudice will result if this case is litigated without the fraternal organization.

[6] Defendants' argument that the fraternal organization is a required party is inconsistent with the positions they have taken in discovery, which suggest Defendants do not believe the fraternal organization is, in fact, "subject to service of process." *E.g.,* Doc. 85-1, Exhs. 12, 13.

[7] Defendants have provided little information about the fraternal organization, despite Texas's good faith attempts to obtain reasonable discovery. *See* Doc. 85 at 3-5 and Exhibits cited therein. Given Defendants' obstructionist approach, even if there were a party that should be joined under Rule 19, Defendants can scarcely suggest that Plaintiff should have known to name that party as a defendant.

absence, the court cannot accord complete relief among existing parties[.]" FED. R. CIV. P. 19(a)(1)(A). Defendants argue that the fraternal organization meets this standard because it "is 'involved in the activities that give rise to this cause of action.'" Doc. 83 at 10 (quoting *Seven Seas Marine Servs. WLL v. Remote Int'l, LLC*, 2018 WL 704993, at *3 (S.D. Tex., 2018)). But this is a suit for an injunction, and "[e]very [i]njunction and [r]estraining [o]rder . . . binds" not only "the parties[,]" but also "the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation" therewith. FED. R. CIV. P. 65. Thus, any fraternal organization "involvement" in gambling on the Tribe's reservation will be subject to any injunction entered here. The Court, therefore, can accord complete relief among the extant parties.

Defendants offer two authorities in support of their argument to the contrary, but both are unhelpful. Doc. 83 at 10. *Seven Seas Marine Servs. WLL v. Remote Int'l, LLC* was a breach of contract suit where the non-joined party was "the *only* party involved in the activities that gave rise to th[e] cause of action," and was "*the* party in privity of contract with Plaintiffs." 2018 WL 704993, at *3 (emphasis added). Here, of course, the named Defendants are also "involved in the activities that give rise to" this lawsuit, rendering *Seven Seas* inapposite.

Wenner v. Texas Lottery Commission, 123 F.3d 321 (5th Cir. 1997)—while perhaps more topical in a broad sense—is not useful because it does not address the "complete relief among existing parties" inquiry under Rule 19(a)(1)(A). Rather, *Wenner* considered whether a contract between the Texas Lottery Commission and

an out-of-state Texas Lottery winner was unenforceable for illegality. 123 F.3d at 324. The plaintiff bought his winning lottery ticket in violation of a federal law, but did so while that law's enforcement was enjoined as unconstitutional. *Id.* at 325-26. *Wenner* therefore does nothing to refute the inevitable result that complete relief *can* be accorded among the existing parties through the injunction Texas seeks. Defendants have failed to show any non-party must be joined under Rule 19(a)(1)(A).

B. The fraternal organization does not satisfy Rule 19(a)(1)(B), either.

Rule 19(a)(1)(B) provides for joinder when a person

> who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction claims an interest relating to the subject of the action *and* is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1)(B) (emphasis added). Defendants have not shown that this standard is met here.

1. The Defendants adequately represent any fraternal organization interest at issue.

The record and posture of this litigation make clear that, "as a practical matter," Defendants will raise every possible argument and deploy any conceivable strategy to support Speaking Rock's continued operation. *See* FED. R. CIV. P. 19(a)(1)(B)(i), *see also, e.g.,* Doc. 85 (detailing Defendants' efforts to delay this

litigation). Thus, even assuming *arguendo* that this litigation implicated a fraternal organization interest, that interest would be adequately protected by the Defendants. Indeed, several Courts of Appeals have recognized the presumption that tribal litigants adequately represent the interests of nonparties affiliated with the same tribe, absent evidence otherwise.

The Court of Appeals for the District of Colombia Circuit recognized this principle (and rejected the very argument Defendants advance here) in litigation between the Cherokee Nation and its Freedmen (descendants of slaves owned by Nation members). *Vann v. United States Dep't. of Interior*, 701 F.3d 927 (D.C. Cir 2012), reh'g denied, 2013 U.S. App. LEXIS 5036 (D.C. Cir., Mar. 12, 2013), reh'g *en banc* denied, 2013 U.S. App. LEXIS 5037 (D.C. Cir., Mar. 12, 2013). The Nation determined that the Freedmen could no longer vote in tribal elections, and the Freedmen sued, arguing that this violated the federal law establishing the relationship between the Freedmen and the Nation. 701 F. 3d at 928. The Freedmen named the Nation's Principal Chief in his official capacity as a defendant under the *Ex parte Young* exception to sovereign immunity, which permits suits against sovereign officials to conform their future conduct to the requirements of federal law. *Id.* (citing, *inter alia*, *Ex parte Young*, 209 U.S. 123 (1908)).

The Nation argued that it was a required party under Rule 19 because its interests could not be adequately represented by the Chief. *Vann*, 701 F.3d at 929. The Court of Appeals rejected this argument, reasoning that "[t]he claim here is that the Principal Chief—and through him, the sovereign tribe—is violating federal law.

The defense is that the Principal Chief—and hence the sovereign tribe—is not violating federal law." *Id.* at 930. Under these circumstances, the Principal Chief adequately represented the non-party Tribe's interests. *Id.*

So, too, here. Texas's claim is that the Defendants are violating federal law—the Restoration Act. This action need not proceed through *Ex parte Young*, because the Restoration Act already provides for it. But, as in *Vann*, there is no indication that the named Defendants will not advance all available arguments to protect the fraternal organization's supposed interest in bingo, which Defendants assert on their behalf. *E.g.*, Doc. 83 at 11.

Other Courts of Appeals have reached similar conclusions. *See, e.g., Salt River Proj. Ag. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012) (Navajo officials responsible for enforcing challenged tribal law "adequately represent the Navajo Nation's interests," particularly where there is "no suggestion that the officials' attempt to enforce the statute here is antithetical to the tribe's interests" and "no reason to believe the Navajo official defendants cannot or will not make any reasonable argument that the tribe would make if it were a party."); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) ("the potential for prejudice to the [] Tribe is largely nonexistent due to the presence in this suit of . . . tribal officials.")

By contrast, Defendants cite exclusively non-binding cases, all of which involve putative "required" parties who were not, in fact, affiliated with named defendants, and where there *was* reason to believe that the nonparty's interests would not be adequately represented. First, Defendants cite *American Greyhound Racing, Inc. v.*

Hull, 305 F.3d 1015, 1023 (9th Cir. 2002). *See* Doc. 83 at 12. There, non-Indian horse track owners and operators sued to enjoin Arizona's governor from negotiating or renewing IGRA gaming compacts with federally recognized tribes in the State. The injunction would have had the effect of "shut[ting] down virtually the entire Indian gaming industry in Arizona." *Hull*, 305 F.3d at 1022. The court found that "the Governor could not adequately represent the interests of the absent tribes" because "the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes." *Id.* at 1015 n.5 (citations omitted).[8]

But the fraternal organization is "so situated" that the Defendants—unlike the governor of Arizona in *Hull*—*can* defend any interest it has in the subject matter of this litigation. *Cf. id*. at 1015 n.5. The fraternal organization's Charter makes this clear, as does the evidentiary record from the preliminary injunction hearing, which demonstrates that the Tribe, Tribal Council, and Tribal Governor all benefit from Speaking Rock's continued operation. *See, e.g.,* Charter (Doc. 83-1) Arts. IV(B) ("The Corporation is a legal entity wholly controlled by the Ysleta del Sur Pueblo, a federally recognized Indian tribe…"); IV(C) ("The Corporation shall have the same immunities under federal law as the Tribe."); V(A) ("The Corporation shall be comprised of members of the Ysleta del Sur Pueblo…); V(B) ("Individuals who are enrolled tribal members of the Ysleta del Sur Pueblo shall qualify as a Corporation member."); V(C) ("[t]he Ysleta del Sur Pueblo and its members are the stakeholders of the Corporation").

[8] *See also id.* ("the Governor's and the tribes' interests under the compacts are potentially adverse.")

Because there is no basis to conclude that the fraternal organization's interests are not adequately represented in this litigation, Defendants have not carried their burden to show that it is a required party under Rule 19(a)(1)(B)(i).

2. No party is subject to a substantial risk of double, multiple, or otherwise inconsistent obligations because of any fraternal organization interest.

Joinder of the fraternal organization under Rule 19(a)(1)(B)(ii) is also inappropriate, for the simple reason that any injunction the Court enters will bind not only the Defendants, but also their "officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation" therewith. FED. R. CIV. P. 65. Thus, if Defendants' representations that the fraternal organization is operating the gambling on the Tribe's reservation are correct, any injunction issued against the Defendants will bind that fraternal organization. *Id.* Under these circumstances, there is no risk of triggering Rule 19(a)(1)(B)(ii)'s admonition against inconsistent obligations. *E.g., Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1970) ("Rule 19, as amended in 1966, was not meant to unsettle the well-established authority to the effect that joint tortfeasors or coconspirators are not persons whose absence from a case will result in dismissal for non-joinder").

Because any injunction would bind all those involved in the gambling at issue here, there is certainly no risk of "double, multiple, or otherwise inconsistent obligations *because of* the" the fraternal organization's supposed interest in that gambling. FED. R. CIV. P. 19(a)(1)(B)(ii) (emphasis added). *Cf., e.g., Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1312 (5th Cir. 1986) (Rule 19(a)(1)(B)(ii) satisfied where,

without joinder, existing party could "be forced to pay twice for the same alleged misconduct causing the same harm.")

Defendants offer only one authority in support of their argument to the contrary: a Tenth Circuit case, *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1292 (10th Cir. 2003). There, the plaintiffs were members of the Seminole Indian Tribe, and were also of African ancestry. They sued the Department of the Interior and Bureau of Indian Affairs for Certificates of Degree of Indian Blood ("CDIBs"). They also sought an injunction compelling the defendant agencies to force the Tribe to give plaintiffs access to programs funded by a 56 million dollar "Judgement Fund" which the Tribe restricted to CDIB holders. *Davis*, 343 F.3d at 1287-88. The Seminole Tribe, however, was not made a party to the suit.

Reasoning that the "Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants," the court concluded that the "Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe." *Id.* at 1292 (citation omitted). Even the plaintiffs recognized that it would be "absurd" to expect the Seminole Tribe to "not react to losing access to the $56 million Judgment Fund," *Id.* at 1292—that is, to immediately sue the Bureau of Indian Affairs when—pursuant to the requested injunction—it cut off its funding.

It would, however, be equally absurd to expect the fraternal organization to sue the Tribe after the conclusion of the instant proceedings, because the Tribe and the Fraternal Organizations interests are aligned. In this respect, *Davis* is

instructive: it "note[d] that in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected." *Davis*, 343 F.3d at 1291–92.

Thus, Defendants have not show that the fraternal organization is a required party under Rule 19(a)(1)(B)(ii).

ii. If the fraternal organization were a required party under Rule 19(a)(1), the remedy would be for the Court to join it, rather than dismiss this case.

If a litigant objects that a party must be joined under Rule 19(a)(1)—and the court agrees—"the court must order that the person be made a party." FED. R. CIV. P. 19(a)(2). Thus, if the Court concludes the fraternal organization "should be joined if feasible" under Rule 19(a)(1), the next step is to make the fraternal organization a party to this case. FED. R. CIV. P. 19(a)(2). Defendants, however, claim that joinder is infeasible because the fraternal organization has sovereign immunity. Doc. 83 at 13-14. This is wrong.

The fraternal organization has "the same immunities under federal law as the Tribe." Charter Art. IV(C).[9] Because its immunity is identical to the Tribe's, the fraternal organization is not immune from this action for injunctive relief under the Restoration Act, because Congress expressly abrogated that immunity in the case of the Tribe and its members. *See, e.g.,* Doc. 68 at 18-26; Doc. 73 at 2-7.[10] Thus,

[9] The fraternal organization is charted under 25 U.S.C. §5124, which provides that "[t]he Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe[.]"

[10] Indeed, "Indian tribes are…no longer 'possessed of the full attributes of sovereignty.'" *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citing *United States v. Kagama*, 118 U.S. 375, 381 (1886)). Rather, "[t]heir incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *Id.* That is, "[b]y specific treaty provision they yielded up other sovereign powers; by statute, in the

Defendants' claim that the fraternal organization has "authorization to…waive its sovereign immunity, if it so decides" Doc. 83 at 14, and the authorities it cites for that proposition, are inapposite—it never had immunity to this cause of action in the first place.

Thus, Defendants have failed to show that joinder of the fraternal organization—even if required by Rule 19(a)(1)—is not feasible. As such, should the Court determine that the fraternal organization is "required to be joined if feasible," the Rules provide that that the fraternal organization be made party to this case. FED. R. CIV. P. 19(a)(2).

iii. If joinder under Rule 19(a)(1) were required but not feasible, this action should continue in the interest of equity and good conscience.

Rule 19 "instructs that nonjoinder even of a required person does not always result in dismissal." *Repub. of the Phil. v. Pimentel*, 553 U.S. 851, 862 (2008). Instead, "[w]hen joinder is not feasible, the question whether the action should proceed, turns on the factors outlined in subdivision (b)." *Id.*; FED. R. CIV. P. 19(b).

The first factor is "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." FED. R. CIV. P. 19(b)(1). In one analogous case, Kansas sued to enjoin an NIGC decision that land in the State leased to the Miami Tribe qualified as "Indian lands" eligible for IGRA gaming.

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exercise of its plenary control, Congress has removed still others." *Id.* As Texas has briefed and this and other courts have recognized, the Restoration Act is one such instance. *See* Doc. 68 at 18-26; Doc. 73 at 2-7 (citing, *inter alia*, *Tex. v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999) ("§1300g-6 does represent an unequivocal waiver of tribal immunity and governs the sovereign immunity issue in this case.")

Kansas v. United States, 249 F. 3d 1213 (10th Cir. 2001). The Tenth Circuit concluded that "the potential for prejudice to the Miami Tribe is largely nonexistent due to the presence in this suit of not only the NIGC and other Federal Defendants," who were defending the NIGC decision, "but also the tribal officials and Butler National," parties who "desire to begin constructing a gaming facility and reaping its economic benefits on a tract of land the Tribe claims as its own." *Id.* at 1227, 1228. The Court noted that "[t]hese Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests in upholding the NIGC's decision." *Id.* at 1227. "Accordingly," the court concluded, "we reject the Miami Tribe's claim that it" was a required party under Rule 19. *Id.*

This factor applies similarly here. The Tribal Governor is a Director of the Fraternal Organization, Tribal members are stakeholders in the fraternal organization as a corporate entity, and the Tribe and its members benefit from the profits of gambling on the reservation. Defendants have identified no meaningful way in which their interests differ from the fraternal organization's. Instead, all indications are that their interests "are substantially similar, if not identical." *Id.* In fact, the Defendants' own filing concedes as much, when it asserts that "there is nothing the Court can do to limit the impact of its decision to only Pueblo Defendants[.]" Doc. 83 at 15.

The second factor is "the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment; shaping the relief; or other measures." FED. R. CIV. P. 19(b)(2). Here, because Defendants have not identified a

divergence between their interests and the fraternal organization's, the asserted prejudice need not be minimized, as there is none. *E.g., Kansas v. United States*, 249 F. 3d. at 1227-28.

The third factor is "whether a judgment rendered in the person's absence would be adequate." FED. R. CIV. P. 19(b)(3). "[A]dequacy refers to the 'public stake in settling disputes by wholes, whenever possible.'" *Repub. of Phil. v. Pimentel*, 553 U.S. at 870 (quoting *Provident Bank*, 390 U.S. at 111). In *Pimentel*—a case where the non-joined parties were the Republic of the Philippines and a Commission established under its authority—the Court considered that "[g]oing forward with the action without the Republic and the Commission would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound by the judgment in an action where they were not parties." *Pimentel*, 553 U.S. at 871. Here, the opposite is true—because the fraternal organization will be bound by any injunction the Court enters, the relief will meet the adequacy requirement of Rule 19(b)(3). *See* FED. R. CIV. P. 65.

The fourth factor is "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." FED. R. CIV. P. 19(b)(4). This factor, too, weighs in Texas's favor. As noted repeatedly in this case, "the courts of the United States shall have exclusive jurisdiction over any offense in violation of [Texas gambling law] 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). If dismissed for nonjoinder, Texas would be left without an adequate remedy to vindicate its rights.

Thus, if the Court concludes joinder is appropriate but not feasible, it furthers the interests of "equity and good conscience" that this "action should proceed among the existing parties." FED. R. CIV. P. 19(b)(1).

CONCLUSION

Defendants' Second Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of May, 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/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General