



1. Pueblo Defendants admit the averments in paragraphs 1, 2, 3, and 6 of the First Amended Complaint.
2. Pueblo Defendants deny the averments in the unnumbered introduction to the First Amended Complaint, deny the averments in paragraphs 4, 5, 11, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27 and 28, and deny Plaintiff's claims for relief in paragraphs 29, 31, 32, 33, 34, 35, 36 and 37.
3. The statutes and case law referenced in paragraphs 7, 8, 9, 10, 12, 13, 23, and 30 of the First Amended Complaint speak for themselves. Moreover, these paragraphs aver legal conclusions to which no response is required; however, to the extent a response to averments in those paragraphs is deemed necessary, the averments are denied.
4. Pueblo Defendants admit they govern Ysleta del Sur Pueblo, however they deny all other averments in paragraph 14 of the First Amended Complaint.
5. Pueblo Defendants deny Plaintiff's prayer for relief.
6. Except as expressly admitted herein, Pueblo Defendants deny each and every averment in the First Amended Complaint.

#### **AFFIRMATIVE DEFENSES**

7. Pueblo Defendants' sovereign immunity denies the Court subject matter jurisdiction.
8. As confirmed in the Court's "preliminary determination regarding Plaintiff's capacity to sue," ECF No. 76, pp. 7-9, the Plaintiff does not have the capacity to sue to enforce Texas gambling laws.

9. Texas's nuisance statute "does not apply to an activity exempted, authorized, or otherwise lawful activity regulated by federal law." TEX. CIV. PRAC. & REM. CODE § 125.0015(e). Because the bingo activity challenged in this action is exempted by federal law from Texas's civil and regulatory jurisdiction, is authorized by federal law to occur, and is an "otherwise lawful activity regulated by federal law," it cannot be a violation of Texas nuisance law.
10. Plaintiff's action seeking injunctions "requiring Defendants to cease all electronic and paper bingo activities," relying on Section 47.01(7) and Section 125.002(a) of the Texas Civil Practice and Remedies Code, is barred by the doctrine of desuetude.
11. Plaintiff's action seeking injunctions "requiring Defendants to cease all electronic and paper bingo activities," relying on Texas Penal Code Annotated, Section 125.002(a) of the Texas Civil Practice and Remedies Code and Texas Constitution article 3, Section 47 is barred by the Equal Protection guarantees in the United States Constitution which prohibit state action that treats persons differently under the law based on a suspect classification. U.S. Const. amend. XIV, § 1.
12. Because the Ysleta del Sur Pueblo Fraternal Organization operates the bingo games at issue in this action, it is a required party under Federal Rule Civil Procedure 19. Plaintiff has failed to join the Fraternal Organization as a party, and cannot do so because of the Fraternal Organization's sovereign immunity. The Court must dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(7).

13. Limitations on the Court's ability to enjoin the commission of a crime precludes subject matter jurisdiction, and thus the case must be dismissed under Federal Rule of Civil Procedure 12(b)(1).
14. Although the Restoration Act does not preclude Plaintiff from seeking an injunction in this Court, it does not provide an affirmative grant of authority to seek an injunction. Because Plaintiff has not identified any source of authority to seek an injunction in this Court outside of the Restoration Act, this action must be dismissed.
15. Plaintiff is not entitled to recover against the Pueblo Defendants pursuant to the doctrine of estoppel.
16. Plaintiff is not entitled to recover against the Pueblo Defendants pursuant to the doctrine of res judicata.
17. Pueblo Defendants having fully answered, respectfully request that Plaintiff's First Amended Complaint be dismissed, and that they be awarded costs, and for such other and further relief as is just and proper.

### **COUNTERCLAIMS**

Defendants the Ysleta del Sur Pueblo ("Pueblo"), the Tribal Council and Governor Carlos Hisa or his Successor, for their Counterclaims, state:

### **JURISDICTION AND VENUE**

18. This Court has jurisdiction over the subject matter of this counterclaim pursuant to 28 U.S.C. §§ 1331 (federal question) and 1362 (suit by Indian tribe).
19. This Court has jurisdiction to grant the declaratory relief requested in this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

**CROSS PLAINTIFFS' FACTUAL AVERMENTS**

20. The Ysleta del Sur Pueblo is a federally recognized Indian Tribe.
21. As a federally recognized Indian Tribe, the Pueblo has sovereign immunity.
22. The Pueblo's sovereignty is dependent on, and subordinate to, only the Federal Government, not the State of Texas.
23. Plaintiff has no criminal or civil regulatory jurisdiction over gaming activities conducted on the Pueblo's reservation and on lands of the Pueblo.
24. The Pueblo has a gaming ordinance that has been approved by the federal government.
25. The federal government has important interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development.
26. Federal agencies, acting under federal laws, have sought to implement the important federal interests in Indian self-government and encourage tribal self-sufficiency and economic development by promoting and overseeing tribal bingo and gambling enterprises.
27. Federal policies and actions are of particular importance in this action because the tribal bingo games at issue provide over ninety percent of the revenues for the operation of the Pueblo's government.
28. Federal policies and actions are of particular importance in this action because the tribal bingo games at issue provide the revenues to support over ninety percent of the employment for tribal members.

29. Bingo is offered at Speaking Rock Entertainment Center on the reservation and on lands of the Pueblo.
30. Plaintiff seeks to prevent the bingo games at issue in this litigation, while permitting regulated off-reservation bingo games.
31. Any state interest in preventing the bingo games at issue in this action is not sufficient to overcome the pre-emptive force of the federal and tribal interests in this action.
32. Plaintiff's Constitution allows the Texas Legislature by law to 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.  
TEX. CONST. art. III § 47(b).
33. The Texas Constitution's list of organizations that may be permitted to conduct bingo does not include the United States Army nor its Installation Management Command.
34. Texas Occupation Code Annotated Section 2001.101 only allows the following to qualify as authorized organizations to conduct bingo in Texas: religious societies; nonprofit organizations; fraternal organizations; veterans organizations; volunteer fire departments and a volunteer emergency medical services provider that has existed in this state for at least three years.
35. The list of organizations in Texas Occupational Code Annotated Section 2001.101 that may be permitted to conduct bingo does not include the United States Army nor its Installation Management Command.

36. The State of Texas contends that the Pueblo cannot conduct bingo because it is not included within the list of organizations allowed to conduct bingo in Texas Occupational Code Annotated Section 2001.101.
37. Plaintiff does not prohibit the conduct of bingo by the United States Army or its Installation Management Command within the State's exterior boundaries.
38. Plaintiff has never regulated or challenged in court the conduct of bingo on federal military reservations within the State's exterior boundaries by the United States Army or its Installation Management Command.
39. A game room is a for-profit business located in a building or place that contains six or more:
  - (A) amusement redemption machines; or
  - (B) electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.
40. The Plaintiff allows certain counties to regulate the operation of game rooms. Tex. Loc. Gov't Code § 234.133.
41. Electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes are not prohibited by the laws of the State of Texas.

42. Amusement redemption machines are not prohibited by the laws of the State of Texas.
43. Amusement redemption machines are electronic, electromechanical, or mechanical contrivances that accept money or other consideration and reward a player with a prize determined solely or partially by chance.
44. The game played on an amusement redemption machine is a gaming activity.
45. An amusement redemption machine is not a gaming activity.
46. Bingo is a gaming activity.
47. Bingo is not prohibited by the laws of the State of Texas.
48. How bingo is played in Texas is regulated by the State of Texas.
49. Bingo cards are not a gaming activity.
50. Bingo cards are not prohibited by the laws of the State of Texas.
51. Bingo card minders are not a gaming activity.
52. Bingo card minders are not prohibited by the laws of the State of Texas.
53. Pre-drawn bingo games are not prohibited by the laws of the State of Texas.
54. Electronic machines that accept money are not a gaming activity.
55. Electronic machines that accept money are not prohibited by the laws of the State of Texas.
56. Machines that use an entertaining video display are not a gaming activity.
57. Machines that use an entertaining video display are not prohibited by the laws of the State of Texas.
58. Machines that provide something of value to a person after money, a credit card, or specially designed card is inserted into the machine are not a gaming activity.



59. Machines that provide something of value to a person after money, a credit card, or specially designed card is inserted into the machine are not prohibited by the laws of the State of Texas.
60. Harrison County, Texas has an ordinance that allows game rooms in the County to make available for play to the public electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.
61. On information and belief, there are game rooms in operation in Harrison County, Texas that make available electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.
62. Harris County, Texas has an ordinance that allows organizations in the County to make available electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.
63. On information and belief Harris County has issued at least seventy-two permits for game rooms to operate in the county.

64. On information and belief, the following game rooms are permitted to offer electronic, electromechanical, or mechanical contrivances that accept money or other consideration and reward a player with a prize determined solely or partially by chance: Joker's Wild Aces High; Golden 7 Game Room; Horseshoe Game Room; Lucky 77 Game Room; Lucky Seven Game Room; Golden Pot Game Room; Game Room King; Treasure Island Too Game Room; Super Seven; Four Aces Game Room; Wild Aces; Mr. Lucky; Caesars Palace Game Room; Easy Money; High Rollin Game Room; and Jacks or Better Game Room.
65. The towns of Dangerfield and Lone Star are located in Morris County, Texas.
66. On information and belief, Morris County is not authorized under Texas law to license and regulate game rooms.
67. Mobil, Texas Stop #2 and Shop n Go, in Lone Star, both offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.
68. Rite Track in Dangerfield offers electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.
69. The town of McKinney is located in Colin County, Texas.
70. McKinney, Texas has an ordinance that allows organizations in the County to make available electronic, electromechanical, or mechanical contrivances that, for

consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

71. Lucky Gem Game room and Lucky's Game room in McKinney offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.
72. The City of El Paso is located in El Paso County, Texas.
73. Bingo Plus, Golden Sweepstakes, Red's Game Room, West Texas Machines Game Room in El Paso offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.
74. The Improved Order of the Red Men is a federally chartered fraternal organization.
75. The Improved Order of the Red Men's national office is in Waco, Texas.
76. The Improved Order of the Red Men works to "Perpetuat[e] the beautiful legends and traditions of a once-vanishing race and the keeping alive some of the traditional customs, ceremonies, and philosophies."
77. On information and belief, thirty out of the fifty-one chartered chapters of the Improved Order of the Red Men sponsor bingo games.
78. The Improved Order of the Red Men offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

79. On information and belief Plaintiff has never filed an action seeking an injunction against any other defendant in Texas relying on Texas Penal Code Annotated Section 47.01(7) and Section 125.002(a) of the Texas Civil Practice and Remedies Code.
80. As a result of the virtually uninterrupted litigation brought by the Plaintiff against the Pueblo Defendants for over a decade, and the resulting threat that the Pueblo could be forced to discontinue offering gaming activities that are conducted by non-Indians throughout the State of Texas, Counter Plaintiffs and other tribal members have been prevented from or deterred in the lawful exercise of their rights under the Restoration Act.
81. The well-being of the Pueblo Defendants and the members of the Ysleta del Sur Pueblo is threatened by the State's actions because if the Pueblo Defendants' bingo activities are shut down, all tribal programs will be affected, leaving the Pueblo without the means to provide government services and employment for its members.
82. By bringing this counterclaim, Counter Plaintiffs seek to prevent future violations by the State and its agents of the rights secured to them in the Restoration Act.

### **REQUEST FOR RELIEF**

The Ysleta del Sur Pueblo ("Pueblo"), the Tribal Council and Governor Carlos Hisa or his Successor, respectfully requests the following relief:

1. A declaratory judgment holding:
  - A. That bingo is a gaming activity;
  - B. That the laws of the State of Texas do not prohibit bingo;

- C. That the machines used at Speaking Rock as an aid to bingo are not a gaming activity;
  - D. That the manner in which bingo is conducted at Speaking Rock is not a gaming activity;
  - E. That the State of Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act; and
  - F. That the State of Texas is violating the Pueblo Defendants' right to equal protection under the laws and Constitution of the United States, including U.S. Const. amend. XIV, § 1.
- 2. An award of attorney's fees and costs from the date of the May 17, 2017 physical inspection which the Pueblo Defendants allowed the Plaintiff to conduct until the date of the Court's final judgment; and
  - 3. Such further relief to which the Pueblo Defendants may be entitled.

**JURY DEMAND**

Pueblo Defendants, as provided by Fed. R. Civ. P. 38, demand trial by jury in this action of all issues so triable.

Dated: May 7, 2018

Respectfully Submitted,

/s/ Randolph H. Barnhouse

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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