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

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	**No. 03:17-CV-00179 PRM**
v.	§	
	§	
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA or his SUCCESSOR,	§	
	§	
Defendants.	§	
	§	

REPLY IN SUPPORT OF PUEBLO DEFENDANTS' SECOND MOTION TO DISMISS FIRST AMENDED COMPLAINT

I. The Restoration Act Does Not "Equivocally" Abrogate the Pueblo Defendants' Sovereign Immunity Against the States.

Michigan v. Bay Mills Indian Cmty. is the single most important precedent applicable to this Court's resolution of the tribal sovereign immunity issue. 134 S. Ct. 2024 (2014) (holding limited waiver of tribal sovereign immunity in IGRA did not apply to state suit challenging activities not within the scope of the limited waiver). *Bay Mills* controls here because, although the Restoration Act contains a limited waiver of the Pueblo's sovereign immunity, that waiver applies only to actions by the federal government. It cannot be expanded by the courts to include action by a state. *Bay Mills,* 134 S.Ct. at 2037 ("it is fundamentally Congress's job, not [the federal courts], to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress").

Ignoring *Bay Mills*, and black letter law confirming that any language purporting to waive a tribe's immunity must "unequivocally express that purpose,"[1] Plaintiff works to persuade this Court that statutory language is "explicit enough" if it does no more than establish a cause of action, citing *Osage Tribal Council v. Dep't. of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999).[2] But *Osage* dealt solely with a *definitional* waiver issue involving the whistle blower provision in the Safe Drinking Water Act (SDWA), and in that context held:

> The definitional sections of the SDWA define the term "person" to include a "municipality." 42 U.S.C. § 300f(12). In turn, "municipality" is defined to include "an Indian tribe." 42 U.S.C. § 300f(10). Thus, under the express language of the Act, Indian tribes are included within the coverage of the whistle blower enforcement provisions.

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[1] *C&L Enters., Inc. v. Citizen Band of Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Martinez*, 436 U.S. at 58).

[2] *Compare* Plaintiff's reliance on this single Tenth Circuit decision *with* Plaintiff's criticism of Defendants' citation to "non-binding" cases at ECF No. 75 at 10.

Id. at 1181. There is no definitional language at issue in the Restoration Act. And *Osage* does not stand for the proposition that the Restoration Act's waiver of the Pueblo's sovereign immunity vis-à-vis the federal government can be expanded by courts to include suits by a state.

Plaintiff's concession in its Response that *Bay Mills* is a recent "Supreme Court pronouncement on tribal immunity" is precisely why *Bay Mills* is controlling in this case, and is precisely why *Bay Mills* upends Judge Hudspeth's prior order in *Yselta I*. *See* ECF No. 86 at 3. Like Michigan in *Bay Mills*, Texas is attempting to "fit its suit" into a federal law – here the Restoration Act – to sidestep the issue of tribal immunity, but it cannot. *Bay Mills,* 134 S.Ct. at 2032. Plaintiff correctly notes that "the Restoration Act unambiguously creates jurisdiction over the Tribe by providing exclusive jurisdiction in the federal courts for violations of the Restoration Act *by the Tribe and its members*. 25 U.S.C. §1300g-6(a), (c)." ECF No. 86 at 2 (emphasis in original). Plaintiff correctly states that "through this provision, Congress evinced an unequivocal intent to subject the Tribe to suit in federal court" *Id. Bay Mills*, 134 S. Ct. at 2032 ("courts will not lightly assume that Congress in fact intends to undermine Indian self-government"). However, Plaintiff decidedly shies away from the ultimate holding of *Bay Mills*, which confirms the role of the U.S. Congress as the only entity that can abrogate a tribe's sovereign immunity, and even then, Congress must do so "unequivocally." There is no reading, especially given *Bay Mills*, that can be interpreted to show that Congress unequivocally intended to have the Pueblo's sued in federal court by any state, including Texas in this action.

II. Plaintiff's Failure to Join the Fraternal Organization Under Rule 19 Requires Dismissal of this Case.

A. Plaintiff's Jurisdictional Argument is Irrelevant to Dismissal Under Rule 12(h)(2).

As both Pueblo Defendants and Plaintiff note, federal courts use the word "required" and not the word "indispensable" in connection with Rule 19; however this change in terminology is "stylistic only." ECF No. 83 at 7, n. 2; ECF No. 86 at 6. Although Rule 19 is not jurisdictional, as confirmed in Pueblo Defendants' Memorandum in Support, it is when applied in combination with Rule 12(h)(2). *See, e.g., Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 628 (5th Cir. 2009). The Fifth Circuit has explicitly held that "Rule 12(h)(2) allows [for] the filing of a second motion." *Doe v. Columbia-Brazoria Indep. Sch. Dist. by and through Bd. of Trs.*, 855 F.3d 681, 686 (5th Cir. 2017).

B. The Fraternal Organization is a Required Party Under Rule 19(a)(1).

a. Complete relief cannot be accorded to existing parties in the absence of the Fraternal Organization.

Plaintiff's only argument regarding "complete relief" is its claim that if this Court were to enter Plaintiff's requested injunction, the injunction would be binding on the non-party Ysleta del Sur Pueblo Fraternal Organization ("Fraternal Organization"). While that argument, if true, might be complete enough for Plaintiff, it flies in the face of the very reason for Rule 19 in the first instance. Quite simply, "Rule 19 protects the rights of an absentee party." *Johnson v. Qualawash Holdings, L.L.C.*, 990 F. Supp. 2d 629, 635 (W.D. La. 2014). *See also Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968) ("When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party"). Plaintiff's effort to bind an absent party through an injunction entered in that party's absence is the very harm against which Rule 19 protects.

b. The Fraternal Organization's Interest Relating to the Subject Matter in this Action.

In arguing the Fraternal Organization has no interest in this litigation, Plaintiff asks this Court to rule on its claims in advance of trial. But the very "question in this case is whether the specific

Pueblo gaming activity at issue constitutes legal gaming or illegal gaming pursuant to Texas law." ECF No. 77 at 28. And as to the evidence presented on that issue to date, this Court has held it "fails to establish a clear, substantial likelihood that the machines violate Texas law." *Id.* at 29. Moreover, courts routinely reject the argument that a non-party's "'interest' is not worthy of consideration because its position is wrong on the merits. [] Rule 19's concern is with a '*claimed* interest.' . . . 'The underlying merits of the litigation are irrelevant.'" *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1291 (10th Cir. 2003) (quoting *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001)). As the entity conducting the bingo activities Plaintiff seeks to enjoin, the Fraternal Organization possesses that claimed interest.

(i) Disposition of the action in the absence of the Fraternal Organization will impair and impede the Fraternal Organization's ability to protect its interest.

Plaintiff believes other parties will "adequately represent" the Fraternal Organization's interests and argues that its belief in that regard is sufficient to eliminate the Fraternal Organization's rights to defend its own interests. ECF No. 86 at 10. But adequate representation by an existing party is an element of Rule 24(a) intervention. *Entergy Gulf States Louisiana, L.L.C. v. U.S. E.P.A.*, 817 F.3d 198 (5th Cir. 2016). Simply because the Pueblo might raise some of the defenses available to the Fraternal Organization does not make Rule 24 analysis applicable to the question of the need to require participation of the Fraternal Organization in this action. While the interests of the Pueblo and Fraternal Organization can be aligned in certain instances, their interests are not always consistent and there are many potential conflicts that could arise. For example, the Fraternal Organization as the entity conducting bingo is the party to contract with bingo vendors. It has different contractual duties and fiduciary duties to bingo vendors and to the Ysleta Del Sur Pueblo that are not consistent. Concerning these divergent interests, "Rule 19 speaks to *possible* harm, not only to certain harm."

Aguilar v. Los Angeles County, 751 F.2 1089, 1094 (9th Cir. 1985); *McShan v. Sherill*, 283 F.2d 462, 463-64 (9th Cir. 1960).

(ii) Disposition of the action in the absence of the Fraternal Organization will leave the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Once again Plaintiff bases its argument that disposition of this action in the absence of the Fraternal Organization is proper on Plaintiff's belief that the injunction would bind the Fraternal Organization. And once again this argument fails because the purpose behind Rule 19 is not to protect the party plaintiff, but instead to protect the absent party. *Provident Tradesmens Bank & Tr. Co.*, 390 U.S. at 111; *Johnson*, 990 F. Supp. 2d 629 at 635. To bolster its argument, Plaintiff adds an assertion that "under the circumstances" of its action, "there is no risk of triggering Rule 19(a)(1)(B)(ii)'s admonition against inconsistent obligations." ECF No. 86 at 13. But that is not the law. Plaintiff's only citation to support this contention is *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970). However in that case the Fifth Circuit addressed all aspects of the Rule 19 question, including a specific finding that the absent parties "do not appear to be so situated that disposition of this action might as a practical matter impair or impede their ability to protect the interests." *Id.* at 817. Although the *Herpich* court did mention "joint tortfeasors or coconspirators," it did so specifically in citation to Advisory Committee's Note to Rule 19, which states in pertinent part:

> The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

Fed. R. Civ. P. 19. In sum, neither *Herpich* nor any other law stands for the proposition that if a party is potentially bound by an injunction, it can never be a required party that must be joined.

Instead, disposition of this action in the absence of the Fraternal Organization would be improper because doing so will either: (1) impair and impede the Fraternal Organization's ability to protect its interest or (2) leave existing parties subject to a substantial risk of incurring multiple or inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(B)(i)-(ii). "If the answer to either of those questions is affirmative, then the party is necessary and must be joined.'" *White v. Univ. of California*, 765 F.3d 1010 (9th Cir. 2014). Rule 19 "is designed to protect 'a party's right to be heard and to participate in adjudication of a claimed interest.'" *Id.* at 1026. Having "only a 'claim' to an interest" is all that is required of the rule. *Id.*

Finally, Plaintiff argues it would be "absurd" to expect the Fraternal Organization to sue the Tribe because their interests are aligned. But Rule 19 requires a "claimed interest" only. *Davis*, 343 F.3d at 1291. Nor should the Court accept Plaintiff's argument that multiple litigation is "absurd." *Id.* at 1292. Should an injunction issue in this case, and should that injunction force closure of the Fraternal Organization's operations, subsequent litigation is likely to result between the Fraternal Organization and its contract partners. The Ysleta del Sur Pueblo does not represent those interests of the Fraternal Organization in this lawsuit, as the Organization is a distinct federally charted corporation with its own powers, privileges and responsibilities. *See* ECF No. 83-2.

C. Because the Fraternal Organization Cannot be Named as a Party in this Action, The Case must be Dismissed Under Fed. R. Civ. P. 19(b).

a. Joinder of the Fraternal Organization is not feasible.

Sovereign immunity precludes joining the Fraternal Organization in this case. The Fraternal Organization is a chartered under Section 17 of the IRA, making it "an entity separate and distinct" from the Ysleta del Sur Pueblo. *Memphis Biofuels v. Chickasaw Ntn. Indus.*, 585 F.3d 917 (2009). Plaintiff is therefore wrong when it asserts that the Fraternal Organization's immunity

is identical to the Pueblo's. ECF No. 86 at 15. The Fraternal Organization's immunity is derived from the Indian Reorganization Act, and directly derived through the congressional grant of immunity provided in that Act. 25 U.S.C. § 5124; *See* ECF No. 83-1. Even if Congress waived the Pueblo's sovereign immunity in the Restoration Act, that waiver does not apply to the Fraternal Organization. *Ramsey Const. Co. Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982).

The Fraternal Organization has not waived its sovereign immunity by incorporating under Section 17 of the Indian Reorganization Act. Congress provided a limited waiver of the Pueblo's complete immunity in the Restoration Act, but limited that waiver to "the tribe, or [] any member of the tribe." Pub. L. No. 100-89, 101 Stat. 666 (1987) § 107(c). However, a limited congressional waiver of the Pueblo's immunity does not impliedly extend to the Section 17 corporation. As a Section 17 corporation, the Fraternal Organization is wholly owned by the Ysleta del Sur Pueblo "but is an entity separate and distinct" from the Pueblo. *Memphis Biofuels*, 585 F.3d at 920 (2009). Further, an incorporation "under Section 17 does not automatically divest an entity of its tribal sovereign immunity." *Id.* at 920 (citing *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F. 3d 1091, 1099 (9th Cir. 2002)). Because Section 17 does not explicitly waive sovereign immunity "it should not be interpreted to do so impliedly." *Id.* at 921. A more accurate reading of Section 17 would be "that it creates 'arms of the tribe' that do not automatically forfeit tribal-sovereign immunity." *Id.*

b. This Action Should Not Proceed Without the Fraternal Organization.

(i) A judgment rendered in the absence of the Fraternal Organization would prejudice it and the existing parties.

Section 17 corporations, "although composed of the same members of the political body, [are] a separate entity, and thus more capable of obtaining credit and otherwise expediting the

business of the tribe . . . ." ECF No. 83-2. As a result the *powers, privileges, and responsibilities of these tribal organizations materially differ*." *Id.* (emphasis added). The Plaintiff assumes, without a factual showing, that because both the Pueblo and the Fraternal Organization share certain goals their separate interests are indistinguishable. But the burden in that regard is on the Plaintiff. *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986) ("when an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder"). The two are separate legal entities with materially different "powers, privileges and responsibilities." ECF No. 83-2. The Texas constitution allows fraternal organizations to conduct charitable bingo, and the Ysleta del Sur Pueblo Fraternal Organization is an independent corporate entity governed by a board of directors with the authority to act independently of the Pueblo's Tribal Council. If not included as a defendant, the Fraternal Organization will be bound by the strategies and arguments of others. And the Fraternal Organization has defenses, and perhaps counterclaims, not available to the existing defendants, such as the lack of a congressional waiver of its sovereign immunity.

(ii) Prejudice from judgment in its absence cannot be lessened or avoided.

The Response ignores the argument that because Plaintiff's claims in this action are of an "all-or-nothing nature," prejudice to the Fraternal Organization cannot be lessened or avoided by including protective relief, reshaping the relief or through any other measures. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1282 (10th Cir. 2012) (finding "equity and good conscience" required the case to be dismissed under Rule 19(b)). Because the Fraternal Organization is directly involved in the commercial transactions the litigation seeks to halt, no protective provisions could insulate the corporation from the effects of an adverse judgment. "Any attempt to fashion a

judgment which would lessen this harm would result in a meaningless decree." *Schutten v. Shell Oil Co.*, 421 F.2d 869, 875 (5th Cir. 1970).

(iii) Judgment in Fraternal Organization's absence would not be adequate.

The Fraternal Organization is a separately chartered corporation with its own powers and privileges. It can conduct bingo under the Texas constitution. It controls bingo operations at Speaking Rock. It is subject to regulation by the Pueblo's Regulatory Commission. It collects funds generated by its charitable bingo operations, pays its bills, and distributes the remainder of funds for charitable causes. Only two of its five board members are on the Pueblo's Tribal Council. It has a right to defend its operations. A judgment entered without granting the Fraternal Organization that right would not be adequate.

(iv) The Plaintiff Has an Adequate Remedy.

Although the Court did not adopt the magistrate judge's suggestion that the Court lacks authority to issue an injunction in this situation, the Court did not reach the magistrate judge's discussion of alternative remedies available to the Plaintiff should this case be dismissed. *E.g.,* ECF No. 64 at 4-5, 8. Plaintiff's Response does not dispute these alternatives could be available as stated in Defendants Second Motion to Dismiss. ECF No. 83 at 16-17.

CONCLUSION

For these reasons, the Court should dismiss this action in its entirely.

Dated: May 9, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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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