NO. 19-50400

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff – Appellee

v.

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,
Defendants – Appellants.

On Appeal from the United States District Court for the
Western District of Texas, El Paso Division
Civil Action No. 03:17-CV-00179-PRM

BRIEF OF APPELLANTS

Brant C. Martin
brant.martin@wickphillips.com

WICK PHILLIPS GOULD & MARTIN LLP
100 Throckmorton Street, Suite 1500
Fort Worth, Texas 76102
Telephone: (817) 332-7788
Facsimile: (817) 332-7789

Joseph Callister
joseph.callister@wickphillips.com
Ethan A. Minshull
ethan.minshull@wickphillips.com
Paul Merrill Chappell
paul.chappell@wickphillips.com

WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue, Suite 100
Dallas, Texas 75204
Telephone: (214) 692-6200
Facsimile: (214) 692-6255

ATTORNEYS FOR DEFENDANTS-APPELLANTS

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. The Ysleta del Sur Pueblo Tribe of Texas, the Tribal Council, and the Tribal Governor Carlos Hisa or his Successor were Defendants in the district court and are Appellants in this Court.

2. The Ysleta del Sur Pueblo Trible of Texas is a federally recognized Indian tribe with its reservation near El Paso, Texas.

3. On January 11, 2019, the district court entered an order substituting Michael Silvas or his Successor, as newly elected Governor of the Ysleta del Sur Pueblo Tribe, in place of Carlos Hisa.

4. Brant C. Martin, Joseph Callister, Ethan A. Minshull, and Paul Merrill Chappell, of the law firm Wick Phillips Gould & Martin, LLP, serve as counsel to Appellants in this Court.

5. Randolph H. Barnhouse, Michelle T. Miano and Justin J. Solimon, of Johnson Barnhouse & Keegan, LLP, serve as counsel to Appellants in the district court.

6. Richard Bonner and Joseph Daniel Austin, of Kemp Smith, LLP, serve as counsel to Appellants in the district court.

7. The State of Texas was Plaintiff in the district court and is Appellee in this Court.

8. David S. Coale and Paulette Miniter, of Lynn Pinker Cox & Hurst, LLP, serve as counsel to Nonparty-Appellant Ysleta del Sur Pueblo Fraternal Organization in this Court.

9. Jim Darnell and Jeep Darnell, of Jim Darnell, P.C., serve as counsel to Nonparty-Appellant Ysleta del Sur Pueblo Fraternal Organization in district court.

10. The Ysleta Fraternal Organization is a federally chartered, IRA Section 17 corporation.

11. Michael R. Abrams and Summer R. Lee, of the Texas Attorney General's Office, serve as counsel to Appellee in this Court.

12. Anne Marie Mackin, Michael R. Abrams, and Benjamin S. Lyles, all of the Texas Attorney General's Office, serve as counsel to Plaintiff in the district court.

/s/ Brant C. Martin
Counsel of Record for Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants (the "Pueblo") respectfully request oral argument and welcome an opportunity to address any questions the Court may have. This appeal centers on the statutory construction of central provisions of the Restoration Act that impact every dispute between the Pueblo, the Alabama-Coushatta Tribe of Texas, and the State of Texas. Appellants believe oral argument will assist the Court in arriving at its decision.

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Texas had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 1300g-6(c). The district court entered final judgment against the Pueblo and issued a permanent injunction on March 28, 2019. ROA.3021-3024.

The Pueblo filed a notice of appeal on April 26, 2019. ROA.3034-3035. This Court has jurisdiction over the Pueblo's appeal under 28 U.S.C. § 1291, which allows for an appeal of the district court's final judgment. Prior to filing the notice of appeal, the Pueblo moved to stay the district court proceedings pending appeal. ROA.2969-90. The District Court granted the Pueblo's motion and stayed the case on March 28, 2019. ROA.3025-31. The district court also entered a final judgment and entered the Permanent Injunction on March 28, 2019. ROA.3032-33.

STATEMENT OF ISSUES PRESENTED

This appeal focuses on the statutory construction of key provisions of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (the "Restoration Act") that continue to confuse the district courts, causing erroneous application of the laws governing a sovereign Indian nation.[1]

In entering the permanent injunction giving rise to this appeal ("Order No. 183"), the district court erroneously failed to apply Section 107(b) of the Restoration Act, which bars the State of Texas from exercising "regulatory jurisdiction" over the Pueblo. This appeal centers on the meaning and application of Section 107(b), its relationship to the other provisions in the Restoration Act, and, when Section 107 is properly construed, whether Congress intended the Pueblo to be subject to Texas gaming regulations and regulatory oversight.

This appeal also concerns the Texas Attorney General's lack of authority to bring an action against the Pueblo for a common nuisance. The Pueblo's gaming activities do not constitute a nuisance, and the Attorney General lacks statutory authority to bring this suit.

[1] The Restoration Act was formerly codified in the United States Code at 25 U.S.C. § 1300g, *et seq*. for the Pueblo, and at 25 U.S.C. § 731 *et seq*. for the Alabama-Coushatta Tribe. Those portions of the United States Code were omitted during the Code's last publication, and thus are no longer available using that citation format. The Pueblo refer to the Public Law version herein.

The questions presented are:

1. What is the correct meaning and application of Section 107(b)'s restriction against the State of Texas exercising "regulatory jurisdiction" over the Pueblo's gaming activities?

    a. Does Section 107(b) permit the State of Texas to regulate the Pueblo's gaming operations that are not prohibited by Texas law?

    b. Did the district court's entry of an injunction violate Section 107(b) in permitting the State of Texas to regulate the Pueblo's bingo activities?

    c. Did the district court violate Sections 107(a) and (b) in ruling that the Pueblo's bingo activities are prohibited by Texas law?

2. Did Congress intend for IGRA to work alongside the Restoration Act in providing a framework, outside of State control, to regulate the Pueblo's non-prohibited gaming activities?

3. Did the district court err in finding, based on summary judgment evidence, that the balance of equities favored entering a permanent injunction against the Pueblo's bingo activities?

4. Did the district court err in failing to dismiss the case based on the State's lack of standing?

PRELIMINARY STATEMENT

This appeal centers on the unsettled meaning of a central, case dispositive provision of the Restoration Act that the district court—and all prior courts grappling with related Tribal gaming disputes—have acknowledged "remains unclear"[2]: Section 107(b)'s restriction against the State of Texas exercising "regulatory jurisdiction" over the Pueblo's gaming activities.

This case is the latest attempt by the State of Texas to regulate gaming activities of the Pueblo through the federal courts. For nearly thirty years, the two tribes covered by the Restoration Act (the "Tribes") have litigated issues concerning legislation passed by Congress to govern gaming activities on their sovereign premises. The Pueblo do not seek to re-litigate issues previously before this Court, including the administrative law issues recently addressed in the appeal brought by the Alabama-Coushatta Tribe. Nor do the Pueblo ask this Court to reject the holding of *Ysleta Del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*").

Instead, the Pueblo seek to finally resolve critical unanswered questions that have confused prior courts, causing Judge Martinez to exclaim that "Defendants here exist in a ***twilight zone*** of state, federal, and sovereign authority where the outer legal limit of their conduct is difficult to assess with precision." ROA.943. This lack of precision has resulted in a series of experimental, ever-changing approaches to

[2] Order Staying Permanent Injunction. ROA.3027-3028.

regulating gaming offered by the Pueblo that has undermined the rule of law. It is time to finally bring the Tribes clarity and order by interpreting and harmonizing the governing laws passed by Congress.

The fundamental problem infecting Restoration Act related litigation has been the courts' inability to reconcile Section 107(b)'s "no regulatory jurisdiction" plain language with the Fifth Circuit's construction of Section 107(a) in *Ysleta I*. This tension has caused courts, including Judge Martinez in issuing Order No. 183, to erroneously believe they must choose between two difficult options:

> (1) Construe and apply Section 107(b) to bar the State from regulating the Pueblo's gaming activities, which appears to create tension with *Ysleta I*'s language that Section 107(a) incorporates all of Texas's gaming laws *and regulations* as surrogate federal law; or
>
> (2) Ignore Section 107(b), support the State in regulating the Pueblo's activities to avoid a potential *Ysleta I* problem, and manufacture judicially-created approaches to monitor and enforce Texas regulations on sovereign Tribal territory.

The second option, erroneously taken by Order No. 183 and the three preceding district courts when addressing challenges to the Pueblo's gaming, avoids any appearance of a challenge to *Ysleta I* as precedent. But there is no need interpret the Restoration Act and *Ysleta I* as a choice between these two options.

Section 107(b) is a critical provision in the Restoration Act that must be given meaning and equal weight to the Act's other gaming provisions. Indeed, when Section 107(b) is given its correct meaning, the Restoration Act's gaming provisions

fully harmonize with each other, the Supreme Court's contemporaneous decision on state regulation of tribal gaming in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and Congress's intent to provide legitimate regulation of such gaming through IGRA, rather than through State or judicial oversight. And, critically, Section 107(b) can be properly construed without offending the precedential holding of *Ysleta I*.

The Pueblo respectfully ask this Court to finally construe Section 107(b) as Congress intended to mean that the State has no authority to regulate Tribal gaming activities that are not prohibited by Texas law. The Pueblo further ask the Court to find that Congress intended for IGRA to work harmoniously with the Restoration Act in regulating the Pueblo's gaming activities that are not prohibited by Texas law. Finally, the Pueblo contend that the balance of equities, when based on a review of the evidence before the district court, does not support entering a permanent injunction against the bingo games in question. The district court's rulings fail to give the Restoration Act the meaning intended by Congress and should be overturned.

Furthermore, once this Court determines that the Pueblo's bingo operations do not violate the Restoration Act, the Court should further hold that the district court erred in not dismissing the case based on the State's lack of capacity to bring this action.

STATEMENT OF THE CASE

The over three decades of history relating to the enactment and interpretation of the Restoration Act highlights the difficulty the courts have experienced in applying its complex provisions to the different gaming activities offered by the Tribes. The Pueblo will summarize relevant legislative and judicial history with an eye towards the fundamental question underlying this case: have the courts correctly construed and applied Section 107(b)'s restriction on Texas exercising "regulatory jurisdiction" that Congress intended?

I. The Ysleta del Sur Pueblo.

The Ysleta del Sur Pueblo is one of only three recognized Indian nations in Texas and is the only Pueblo Indian nation within the exterior boundaries of Texas. The federal government has a trust relationship with federally recognized Indian nations.

In 1968, the United States Congress passed the Tiwa Indians Act, which confirmed the Pueblo as a federally recognized Indian nation, but then transferred the Federal Government's trust responsibilities for the Ysleta del Sur Pueblo to the State of Texas. In 1981, the Texas Attorney General issued Opinion JM-17, which concluded there could be no trust relationship between the State of Texas and the Alabama-Coushatta Tribe. ROA.475-485. After the publication of Opinion JM-17,

the Pueblo and Alabama-Coushatta Tribes sought federal legislation to restore their federal trust relationship with the Federal Government.

II. The Restoration Act and its History.

It took several years for the Pueblo and the Alabama-Coushatta Tribes and their members to secure restoration of their trust relationship with the Federal Government. During these years of negotiations, Congress made purposeful decisions concerning the final language in the Act that reflected contemporaneous decisions issued in the federal courts on key issues.

Congressmen Ronald Coleman and Charlie Wilson introduced the first version of the Restoration Act, H.R. 6391, on October 3, 1984. ROA.487. H.R. 6391 made no mention of gaming. Congress, however, adjourned prior to any action being taken on H.R. 6391. ROA.1700. On February 26, 1985, Congressmen Coleman and Wilson reintroduced the Restoration Act captioned H.R. 1344. ROA.489. There was no mention of gaming in H.R. 1344. H.R. 6391, 98th Cong., 2d Sess. (1984).

In a press release issued on November 22, 1985, Bob Bullock argued that H.R. 1344 would allow unregulated gaming (the "Bullock Press Release"). ROA.491-492. The Bullock Press Release stated that "if this bill passes like it is written we might as well get the highway department to put a sign at the state line that says, 'Gangsters Welcome.'" *Id.* The Bullock Press Release also requested that

Congressmen Coleman and Wilson amend the bill to provide for state regulation of gaming. *Id.*

In spite of Bullock's protestations, H.R. 1344 was amended on December 4, 1985, to include Congressman Coleman's amendment on gaming. ROA.489. The House passed H.R. 1344 as amended by voice vote on December 16, 1985. *Id.*

In 1985, Bullock and other Texas state officials were putting tremendous financial pressure on both the Pueblo and Alabama-Coushatta Tribes. ROA.467. In response to this pressure, the Pueblo and Alabama-Coushatta Tribal Councils passed resolutions asking that Congressman Coleman's House amendments to H.R. 1344 be struck and language prohibiting gaming be substituted. ROA.543-544, 523-524.

On June 25, 1986, the Senate Indian Affairs Committee held a hearing on H.R. 1344 at which Sections 107 (relating to the Pueblo) and 207 (relating to the Alabama-Coushatta Tribe) of the House bill were amended to read:

> All forms of gaming, gambling, betting, lottery, and bingo on the reservation of the Tribe or on any land acquired after the date of the enactment of this Title and added to the reservation or held in trust status for the Tribe is hereby prohibited. For the purposes of this Section, the term "gaming," "gambling," "betting," "lottery," and "bingo" shall have the meaning given those terms under the laws and administrative regulations of the State of Texas.

Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the Select Comm. on Indian Affairs, 99th Cong. (1986).

H.R. 1344 passed in the Senate by voice vote on September 24, 1986. However, on September 25, 1986, Senator Phil Gramm, through the administrative procedure of having a voice vote vitiated, killed H.R. 1344. S. REP. NO. 99-470 (1986). The 99th Congressional Session ended before any further action was taken on H.R. 1344.

On January 6, 1987, Congressmen Coleman and Wilson introduced H.R. 318. H.R. 318, 100th Cong., 1st Sess. (Jan. 6, 1987). Shortly thereafter, on February 25, 1987, the Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Supreme Court found that California state law permitted, rather than prohibited, gaming, subject to regulation.

After *Cabazon*, the House Committee on Interior and Insular Affairs voted to amend Sections 107 of H.R. 318 and 207 to strike the gaming language inserted into H.R. 1344, simplifying the prohibition on gaming to read that "all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." *See* H.R. REP. NO. 100-36 (1987).

On June 17, 1987, the Senate Committee on Indian Affairs met and amended H.R. *See* 318. S. REP. NO. 100-90 (1987). The Indian Affairs Committee amended Section 107 in three ways: (i) it rejected the absolute prohibition on all gaming; (ii) it added a new clause in Section 107 that addressed regulatory jurisdiction; and (iii) it added a third clause to Section 107 that concerned jurisdiction and enforcement.

On July 23, 1987, H.R. 318 as amended passed the Senate. On August 18, 1987, President Ronald Reagan signed H.R. 318 as amended by the Senate into law, which became Public Law 100-89.

III. The Indian Gaming Regulatory Act.

After *Cabazon Band*, Indian gaming spread nationwide, ultimately leading to regulation by the federal government. Just over a year after the Restoration Act, Congress enacted the Indian Gaming Regulatory Act ("IGRA"). IGRA was under review by Congress at the same time as the Restoration Act.

IGRA established federal standards for gaming on Indian lands and created the National Indian Gaming Commission ("NIGC") to regulate the act. 25 U.S.C. §§ 2702(3), 2704(a). Congress intended IGRA to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* §§ 2701(4), 2702(1). Moreover, Congress specifically found that existing federal law—which included the Restoration Act—failed to "provide clear standards or regulations of the conduct of gaming on Indian lands." *Id.* § 2701(3).

IGRA divides gaming into three classes of gaming activities: Class I, Class II, and Class III. Whether a specific type of gaming is allowed on a reservation and how the gaming is regulated depends on which class of gaming activity is applicable. *See id.* §§ 2703, 2710. Class II gaming—the gaming relevant to this case—includes bingo and limited card games explicitly authorized or not "explicitly prohibited" by

state law. *Id.* § 2703(7). A tribe may offer Class II gaming in a state that permits bingo "for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)." *Id.* § 2710(b)(1)(A). Indian tribes have the authority to regulate Class II gaming under the NIGC's jurisdiction. *Id.* § 2710(a)(2)-(b).

IV. Prior Litigation Regarding Gaming on the Pueblo Reservation.

A. *Ysleta I*.

In 1993, when the Pueblo's then Class III gaming activities were in dispute, the Pueblo sued the State and argued that, pursuant to IGRA, the State had failed to negotiate in good faith to form a Tribal-State compact concerning gaming on the Pueblo reservation. *Ysleta Del Sur Pueblo v. State of Tex.*, 852 F. Supp. 587, 590 (W.D. Tex. 1993), *rev'd*, 36 F.3d 1325 (5th Cir. 1994). As discussed in detail below, the Fifth Circuit reversed the district court on appeal and declared that the Restoration Act—and not IGRA—governs Pueblo gaming. This Court stated that "the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact." *Ysleta I*, 36 F.3d at 1335. After analyzing Section 107, the Court held that the Pueblo's suit against the State was barred by Eleventh Amendment immunity, and remanded the case with instructions that the

district court dismiss the Pueblo's suit, effectively shutting down the Class III gaming in question. *Id.* at 1337.

B. Subsequent Tribal Litigation Struggles to Reconcile *Ysleta I*'s Language with Section 107(b)'s Regulatory Restriction.

Since *Ysleta I*, the State of Texas and the Pueblo have repeatedly litigated the scope of gaming permitted under the Restoration Act. The ensuing decisions fail to create consistent interpretations of the Restoration Act, leading to ongoing uncertainty.

In 1999, the State sued the Pueblo seeking to enjoin gaming activities on the reservation. On September 27, 2001, summary judgment was granted in the State's favor. *Texas v. del Sur Pueblo* ("*Ysleta II*"), 220 F. Supp. 2d 668 (W.D. Tex. 2001) (subsequently modified and affirmed). Judge Eisele determined that the Pueblo cannot engage in "'regulated' gaming activities unless it complies with the pertinent regulations," and that the Pueblo's activities did not comply with Texas's laws and regulations." *Id.* at 690, 695-96. The Pueblo were permanently enjoined from continuing gaming operations. *Id.* at 690, 695-96.

In May 2002, the injunction was modified to clarify that the Pueblo may engage in ***legal*** gaming activities. *Id.* at 707. Judge Eisele, however, determined that the Pueblo are not entitled to conduct bingo without a license because "the Tribe is subject to Texas gaming law on all matters, including participation in charitable bingo activities." *Id.*

In 2009, the Pueblo requested clarification from the May 2002 modification. *Texas v. Ysleta Del Sur Pueblo* ("*2009 Clarification*"), No. EP-99-CA-320-H, 2009 WL 10679419, at *1 (W.D. Tex. Aug. 4, 2009). Judge Hudspeth recognized that although the 2002 modification to the permanent injunction "appeared to be a reasonable compromise, this noble experiment has not worked in practice." *Id.* at *3. Judge Hudspeth created a new approach, requiring the Pueblo to submit proposals for pre-approval to the federal courts before conducting gaming activities. *Id.*

In 2016, Judge Cardone reviewed and denied the Pueblo's Motion to Vacate the Injunction. *State of Texas v. Ysleta del Sur Pueblo* ("*2016 Order*"), No. EP-99-CV-320-KC, 2016 WL 3039991, at *1 (W.D. Tex. May 27, 2016). Judge Cardone rejected Judge Hudspeth's pre-approval process, and held that the new procedure would be for Texas to enforce violations of Texas regulations through federal litigation, effectively continuing the practice of state regulation through the federal courts. *Id.*

C. Current Litigation.

In 2017, the State filed the current action against the Pueblo to "enforce the Restoration Act" regarding the bingo games offered on the Pueblo's reservation (the "Complaint"). ROA.73. The State seeks to prohibit the conduct of bingo on the Pueblo's reservation as a common nuisance that does not conform to regulations imposed on bingo in Texas through injunctive relief. *Id.*

On August 29, 2017, the Pueblo filed a Motion to Dismiss the State's Amended Complaint. ROA.146-172. Through the Motion to Dismiss, the Pueblo argue that the Attorney General lacks the capacity to bring the suit because the Pueblo's gaming activities are authorized by federal law, and so do not constitute a nuisance. *Id*. In its Order Denying Motion to Dismiss ("Order No. 76"), the district court determined that it was faced with a "paradox" because it must first determine whether the Pueblo's gaming activities are authorized by federal law before it can dismiss the suit on that basis. ROA.894-906.

On February 14, 2019, the district court granted the State's Motion for Summary Judgment ("Order No. 183"), holding that the Pueblo are subject to Texas's gaming regulations, that the Pueblo's bingo activities violate Texas law, and that the Pueblo should be enjoined from continuing gaming operations at Speaking Rock. ROA.2836-2877.

On April 26, 2019, the Pueblo filed their notice of appeal. ROA.3034-3035.

SUMMARY OF THE ARGUMENT

The district court's ruling granting summary judgment to the State ("Order No. 183") should be reversed and remanded with instructions to dissolve the permanent injunction for three principal reasons:

First, Order No. 183 rests on the court's conclusion "that the Tribe is subject to the State's regulations," but this position violates Section 107(b) of the

Restoration Act. ROA.2853. In Section 107(b), Congress expressed that the State of Texas cannot exercise "regulatory jurisdiction" over the Pueblo's gaming activities. ROA.667. The district court expressed concern that Section 107(b) remained "unclear," that "the Restoration Act does not clearly define what 'regulatory jurisdiction' means," and that "*Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming." ROA.2855. District courts grappling with State challenges to the Pueblo's gaming activities have struggled to reconcile *Ysleta I*'s statement that Section 107(a) incorporated both Texas gaming law *and* "regulations," with Section 107(b)'s regulatory restriction, causing decades of experimental approaches to monitoring Tribal gaming. Section 107 must be read to give consistency and weight to each of its provisions. Order No. 183 improperly subjects the Pueblo to State regulation in violation of Section 107(b).

Second, when Section 107 is properly construed, the Restoration Act and IGRA harmonize as fully compatible regimes intended to work together, rather than as competing statutes that the courts must choose between. Instead of subjecting the Pueblo to gaming activities regulated but not prohibited by Texas law, IGRA provides a detailed framework for applying complex regulations to these permitted gaming operations. As Judge Cardone noted, "reviewing tribal gaming proposals is a task seemingly identical to the NIGC's responsibilities under IGRA." *2016 Order* at *20.

Finally, Order No. 183 erred in finding that the balance of equities favored entry of a permanent injunction. The evidentiary record overwhelmingly establishes that entry of the Injunction will substantially harm the daily lives of thousands of Pueblo members. The district court erred in granting summary judgment on this issue.

Order No. 183 perpetuates judicial avoidance of Section 107(b) of the Restoration Act and corresponding improper State regulation of permitted gaming activities. The Pueblo therefore request that this Court reverse Order No. 183 and vacate the Injunction.

Further, with a full understanding that the Pueblo's gaming activities are authorized by federal law, it becomes clear that the Texas Attorney General never had authority to bring this suit in the first place. The Pueblo ask that this Court reverse Order No. 76, and dismiss the suit in its entirety.

STANDARD OF REVIEW

Under Rule 60(b), a district court may relieve a party from a final judgment on the basis of "mistake" or "any other reason justifying relief from the operation of judgment." FED. R. CIV. P. 60(b)(1)-(6). Rule 60(b) allows a court to relieve a party from a final judgment or order (i) if "applying the [judgment] prospectively is no longer equitable," or (ii) for any other reason that justifies relief. FED. R. CIV. P. (60)(b)(5), (6). The standard of review for the denial of the Pueblo's Opposed

Motion and Memorandum in Support of Motion for Reconsideration of Order Granting Motion for Summary Judgment is abuse of discretion. *Flowers v. S. Reg'l Physicians Servs.*, 286 F.3d 798, 800 (5th Cir. 2002).

"A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (*en banc*) (citation omitted). "Under this standard, the district court's ruling is entitled to deference absent abuse of discretion. This Court reviews *de novo* all questions of law underlying the district court's decision, including any questions of law decided by the district court on summary judgment." *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (internal citations omitted).

ARGUMENT

I. The Injunction Violates Section 107(b)'s Restriction Against the State Regulating the Pueblo's Gaming Activities.

Even after decades of litigation concerning gaming permitted under the Restoration Act, one central statutory provision at the heart of every Tribal gaming dispute remains misunderstood: the meaning of Section 107(b)'s restriction against the State exercising regulatory jurisdiction over the Pueblo's gaming activities.

Congress expressed the scope of gaming permitted by the Pueblo in Section 107(a), and barred the State from regulating these activities in Section 107(b):

> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation . . . .
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this Section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

Pub. L. No. 100-89 (Aug. 18, 1987) (emphasis added). This appeal requires construction of whether the bingo activities in question are "prohibited" under the "laws of the State of Texas," and the scope of Texas's "regulatory jurisdiction."

The Restoration Act must be construed to give coherent meaning and equal weight to each of its provisions. Since *Ysleta I*, courts have wrestled with where to draw the line between inapplicable "regulation" and "prohibited" gaming activity, and to do so in a way that honors Congress's denial of "regulatory jurisdiction" to the State. The Pueblo maintain that the bingo games in question are not "prohibited" under Texas "laws," and therefore do not violate Section 107(a). More critically, ongoing confusion concerning Section 107(b)—acknowledged by the district courts in this and prior related cases—has effectively read the provision out of the law, causing ongoing, impermissible State regulation of the Tribes' gaming activities.

The Pueblo now ask this Court to finally construe Section 107(b) to mean what Congress clearly articulated: Texas may not exercise any regulatory authority over gaming activities offered by the Tribes that are not prohibited by Texas law. Correctly construing Section 107(b) will finally align the expressed intent of

Congress with the State's true authority over gaming activities offered by sovereign Tribes, and allow all involved parties to act in reliance on the rule of law.

With Section 107(b) correctly interpreted and applied, the Pueblo ask the Court to dissolve the Injunction as violative of Section 107(b)'s regulatory restriction and reverse Order No. 183.

A. *Ysleta I* Correctly Interpreted Section 107(b), but Created Later Confusion by Avoiding its Application.

Since the Restoration Act was passed in 1987, courts have struggled to understand or apply Section 107(b)'s regulatory prohibition. Consequently, the Tribes have suffered a series of experimental approaches to resolving gaming disputes, all of which have involved impermissible State or federal regulation of their respective gaming operations.

Judge Martinez's rulings throughout the present case highlight the decades of judicial frustration with understanding and applying Section 107(b). In granting the Pueblo's Motion to Stay enforcement of the Injunction pending this Appeal, Judge Martinez concluded:

> [T]he Court recognizes that a higher court—the Fifth Circuit panel, the Fifth Circuit sitting en banc, or the United States Supreme Court—may carefully consider the meaning of "regulatory jurisdiction" and determine that the Permanent Injunction subjects the Tribe to regulatory jurisdiction. **Significantly, the Court believes that the precise meaning of "regulatory jurisdiction," as used in § 107(b) of the Restoration Act remains unclear**. . . . Since § 107(b)'s practical effect is a serious legal question, the Court is of the opinion that the

> Tribe has a sufficient likelihood of success on the merits to support a stay.

ROA.3027-28. (emphasis added).

In the underlying Order No. 183 granting summary judgment, Judge Martinez remarked: "Admittedly, the Restoration Act does not clearly define what 'regulatory jurisdiction' means. . . . The Court recognizes the Tribe's frustration that ***Ysleta I*** **and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming**." ROA.3028 (emphasis added). And, in previously denying the State's initial application for an injunction, Judge Martinez exclaimed that "the Pueblo Defendants 'exist in a **twilight zone** of state, federal, and sovereign authority where **the outer legal limit of their conduct is difficult to assess with precision**.'" ROA.943 (emphasis added).

This difficulty in determining the precise meaning of Section 107 stems from a series of positions taken by the Fifth Circuit in *Ysleta I*, which subsequent courts have had difficulty reconciling when applied to later Tribal disputes. In *Ysleta I*, the Fifth Circuit discussed Section 107(b) once, briefly (and correctly) stating that the subsection "is a restatement of Public Law 280[3]," which grants certain states limited jurisdiction over crimes and other prohibited misconduct in those states. *Ysleta I*, 36 F.3d at 1334.

[3] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][a]-[b], at 537-39 (Nell Jessup ed., 2012).

As discussed in more detail below, the meaning of Public Law 280 was at issue in *Cabazon Band*, decided six months before the Restoration Act was passed, where the Supreme Court held that states could only exercise jurisdiction over criminal (or prohibited) misconduct, and had no authority to otherwise exercise civil (or regulatory) authority over Indian tribes, including with respect to bingo games. *Id.* at 222. Interpreting *Cabazon Band,* the Court in *Ysleta I* stated that "Congress did not intend to grant [states] general civil regulatory authority," and "California therefore could not prohibit the tribes from offering the [bingo activities] on their reservations." *Ysleta I*, 36 F.3d at 1330.

Despite noting that (1) Section 107(b) incorporated Public Law 280, and (2) the Supreme Court in *Cabazon Band* had interpreted Public Law 280 to reject state regulation of tribal gaming that was not prohibited by state law, the *Ysleta I* Court ultimately stated that Texas *did* have authority to regulate the Class III games at issue. *Id.* at 1336. This position was based on a misreading of the Restoration Act's plain language and legislative history, interpreting Section 107(a) as incorporating all of Texas's gaming laws and regulations, despite Congress's purposeful decision to omit "regulations" within Section 107(a)'s language.

Moreover, the misreading of Section 107(a) acted to effectively read Section 107(b) out of the Act. If Section 107(b) incorporated Public Law 280 (as interpreted by *Cabazon Band*) to forbid State regulation, and the State could still exercise

authority to enforce compliance with all Texas gaming regulations, then what exactly does 107(b) mean? By failing to fully interpret and apply Section 107(b), the *Ysleta I* court reduced Section 107(b) to mere surplusage, ignoring Supreme Court guidance instructing against such reduction. As a fundamental principle of statutory interpretation, a court is required to give effect to every word Congress uses in a statute. *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979). The Pueblo here seek only to promote Section 107(b) from surplusage to its proper place in the Restoration Act. Moreover, as discussed below, *Ysleta I*'s analysis of Section 107 was not ultimately material to the Court's holding that the case should be dismissed under Eleventh Amendment sovereign immunity.

B. Following *Ysleta I*, Subsequent District Courts Failed to Apply Section 107(b).

Subsequent courts have struggled to reconcile *Ysleta I*'s interpretation of Section 107(a) with Section 107(b)'s plain language. As a result, the approach taken by the district courts following *Ysleta I* has been to briefly acknowledge the Section 107(b) problem, but ultimately sidestep the provision and proceed to endorse the very State regulation that is expressly prohibited.

For example, in 2002, Judge Eisele of the Western District of Texas recognized "that Section 107(b) of the Restoration Act provides that Texas does not hold regulatory jurisdiction over the Tribe," but nonetheless required the Tribe "to procure a license" from the Lottery Commission concerning any charitable bingo

activities. *Ysleta II*, 220 F. Supp. 2d at 707. Of course, requiring licensing from the Texas Lottery Commission unavoidably required State *regulation* of the Pueblo's bingo games, in direct contravention of Section 107(b)'s prohibition.

In 2009, Judge Hudspeth reviewed and modified Judge Eisele's 2002 injunction, holding that this lottery commission process was a "noble experiment" that violated Section 107(b):

> While recognizing that the Defendants are not subject to the regulatory jurisdiction of any State agency, including the Texas Lottery Commission, [Judge Eisele] nevertheless concluded that the Defendants should be required to procure a license to conduct bingo games from that Commission. . . .
>
> Although it appeared to be a reasonable compromise, **this noble experiment has not worked in practice**. It is time for a new approach to resolving the obvious tension between federal law and state law in relation to the conduct of charitable bingo.

Ysleta Del Sur Pueblo, 2009 WL 10679419, at *3 (emphasis added). Judge Hudspeth proceeded to replace the lottery commission process with a new regulatory experiment: "The new procedure will be for the Defendants to petition the Court directly to make an exception to the overall prohibition of gaming contained in the 2001 injunction in this case." *Id.* In other words, the federal courts would take the place of the lottery commission in *regulating* the gaming activities in question by reviewing detailed prior "proposals" and responses from the Tribe and State before gaming would be permitted.

In 2016, it was Judge Cardone's turn to review and modify the injunction, and she changed course for the third time. Again wrestling with Section 107(b)'s regulatory prohibition ("nothing in the plain language of the Restoration Act operates as a grant of civil or criminal regulatory jurisdiction *to the federal courts*"), Judge Cardone removed the requirement that the Pueblo submit a proposal to the federal courts for pre-approval, and instead held that the State would be tasked with monitoring and enforcing any violations of Texas law through the district court. *Ysleta del Sur Pueblo*, 2016 WL 3039991, at *20. Judge Cardone commented that "reviewing tribal gaming proposals is a task seemingly identical to the NIGC's responsibilities under IGRA," recognizing discomfort with the State or courts assuming that role. *Id.*

Order No. 183 in this case continues this pattern of confusion over the meaning of Section 107(b) and resulting impermissible State regulation of Tribal gaming. Again acknowledging (but not applying) Section 107(b), the district court ultimately permits State enforcement of detailed Texas bingo *regulations* through the federal courts: "For the reasons discussed below, the Court concludes that the Tribe is subject to the State's regulations." ROA.2853. But how can the Pueblo be subject to "the State's regulations" if the State cannot exercise "regulatory jurisdiction" over the Pueblo? These directly contradictory positions cannot be reconciled, which triggered Judge Martinez's discomfort with the ruling. It is time

for a clarified interpretation of Section 107(b) that finally harmonizes with the meaning Congress intended.

C. What Did Congress Intend Section 107(b) to Mean?

The history of litigation relating to the Pueblo's gaming activities evidences the need to clarify a fundamental question at the heart of this and all related Restoration Act litigation:

> What constitutes regulatory jurisdiction with respect to the Tribes' gaming activities?

When applied:

> What does Section 107(b) restrict the State from doing when challenging the various gaming activities in question?

Despite judicial difficulty in applying Section 107(b), the answer to these questions can be determined by looking to what Congress and the Supreme Court stated on the issue of regulatory jurisdiction at the time the Restoration Act was passed.

The Restoration Act was a culmination of years of negotiating and resolving critical issues of tribal sovereignty. The final plain language of Section 107(b) unequivocally bars Texas from regulating the Pueblo's gaming. In February 1987, six months before passage of the Restoration Act, the Supreme Court issued its decision in *Cabazon Band*, and determined the exact meaning of Section 107(b)'s "regulatory jurisdiction" that Congress shortly thereafter enacted into law. 480 U.S. at 211 (1987).

Cabazon Band resolved whether California could apply provisions in the California and local county bingo regulations to enjoin bingo games offered on Indian lands. *Id.* at 202-222. Interpreting Public Law 280, the Supreme Court held that states may exercise criminal jurisdiction over activities that are outright "prohibited" by state law, but may not exercise civil—or *regulatory*—jurisdiction over activities that are permitted, but regulated by applicable state law:

> If the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.

Id. at 209.

The Supreme Court applied this prohibited/regulated dichotomy to classify the bingo activities in question—which are materially the same as in this appeal—as regulated rather than prohibited, and thus not subject to state control:

> **[W]e must conclude that California regulates rather than prohibits gambling in general and bingo in particular**. California argues, however, that high stakes, unregulated bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations. **But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280**.

Id. at 211 (emphasis added). The Supreme Court disallowed state enforcement of the relevant bingo games, finding that granting "general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."

Id. at 208. In reaching this holding, the Supreme Court reaffirmed its prior holding in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and this Court's holding in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

The Restoration Act passed six months after *Cabazon Band*, on August 18, 1987, with knowledge of the Supreme Court's ruling and its implications for the Restoration Act language. During debate on the Senate version of H.R. 318, Representative Morris Udall, then the Chairman of the House Committee on Interior and Insular Affairs—the committee charged with issuing regulations governing the Tribes—requested that the House act on the Senate amendments to the Restoration Act by unanimous consent, stating:

> The Senate amendment makes changes to Section 107 and 207 of the bill. **These sections deal with the regulation of gaming** on the respective reservations of the two tribes. It is my understanding that **the Senate amendments to [Section 107] are in line with the rational[e] of the recent Supreme Court decision in the Cabazon Band of Mission Indians versus California. This amendment in effect would codify for those tribes the holding and rational[e] adopted in the Court's opinion in the case.**

133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (emphasis added). As is shown here, "Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Cabazon Band's interpretation of Public Law 280 is the only way to unlock Congress's intended meaning of Section 107(b): "no regulatory jurisdiction" means

that Texas cannot exercise regulatory authority over Pueblo activities that are not prohibited by Texas law. This interpretation of Section 107(b) provides clarity when resolving challenges concerning the scope of gaming offered at the Pueblo, avoiding the "confusion" expressed by Judge Martinez, and the ever-changing regulatory approaches taken by the district courts in this Circuit. This confusion would end by determining that Section 107(b) adopts Public Law 280 to mean what the Supreme Court said in *Cabazon Band*, six months before the Act was passed, as expressed by the House Committee Chairman at the time the final version of the Act was enacted.

The alternative is to give Section 107(b) no meaning, leaving future courts and the Tribes unable to act in reliance on the rule of law. The district court's ruling only applies *Ysleta I*'s non-binding construction of Section 107(a), and fully avoids application of Section 107(b), a contemporaneous governing statute issued by Congress, and binding Supreme Court precedent in *Cabazon Band*. This Court should construe the Restoration Act to *harmonize* all applicable laws, rather than choosing one (misread) subsection over other binding laws.

Critically, the Pueblo's position is *not* inconsistent with *Ysleta I*'s position as to Section 107(b). The Fifth Circuit there acknowledged that Section 107(b) "is a restatement of Public Law 280" and reaffirmed *Cabazon Band*'s construction of Public Law 280. *Ysleta I*, 36 F.3d at 1334. The problem is not that *Ysleta I* incorrectly interpreted Section 107(b), but rather that the decision—and future district courts

following *Ysleta I*'s lead—failed to *apply* Section 107(b), or to harmonize Section 107(b) with Section 107(a) to create a coherent construction of the Act. Thus, interpreting Section 107(b) as the Pueblo contend is consistent with prior Fifth Circuit law.

Moreover, as discussed in Section II.C below, this Court can apply Section 107(b) to this appeal and revisit *Ysleta I*'s interpretation of Section 107(a) without disturbing the precedential holding of *Ysleta I*. Incorporating a full understanding of Section 107(b) serves only to ***augment*** the Court's understanding of the Restoration Act, supplying an answer to a question that was not addressed in *Ysleta I*.

When applying the proper interpretation of Section 107(b) to the bingo operations in dispute, the district court's Order No. 183 must be reversed and the injunction dissolved. The State cannot exercise regulatory authority over the relevant games, including through seeking enforcement of Texas bingo regulations in federal court.

II. The Bingo Activities in Question Are Not Prohibited by Texas Law Under Section 107(a) of the Restoration Act.

If Section 107(b) is correctly interpreted to forbid Texas regulation of non-prohibited gaming, then the second step in the Section 107 analysis is whether the Pueblo's bingo games are "prohibited" by Texas law. As Judge Eisele stated in *Ysleta II:* "Not all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law." *Ysleta II*, 220 F. Supp. 2d at 707. When

properly construing Sections 107(a) and (b) together, any Tribal gaming activities that are prohibited may be enjoined by the courts, and those which are only regulated are not subject to State or judicial oversight. Order No. 183 erred in enjoining the Pueblo's bingo activities because they are not prohibited by Texas law.

A. Congress Did Not Intend for Section 107(a) to Include Texas's Gaming Regulations.

The plain language of Section 107(a) bars only those "gaming activities which are ***prohibited*** by the laws of the State of Texas." ROA.2997 (emphasis added). This language does not include the word "regulations," and this omission was a purposeful and consequential decision by Congress when enacting the final version of the Restoration Act. Order No. 183 misreads Section 107(a) as subjecting the Pueblo to Texas's bingo "regulations," which violates the plain language of Section 107(a), and, as discussed *supra*, Section 107(b)'s prohibition on State regulation.

There is a clear distinction between a "law" and a "regulation," and thus between gaming that is "prohibited" by law, and activity that is permitted but "regulated" in applicable gaming regulations. Congress and the Supreme Court understood this distinction, as evidenced by the careful choice of language contained in Section 107(a) and *Cabazon Band*'s prohibited/regulatory dichotomy. Any attempt to harmonize Section 107 in its entirety must recognize this critical distinction between prohibited and regulated activity; failure to do so results in choosing to apply one subsection of Section 107 to the exclusion of another.

The Pueblo's interpretation of Section 107(a) is entirely consistent with: (1) the provision's plain language (which fails to reference "regulations"), (2) Section 107(b)'s restriction on the State exercising "regulatory jurisdiction," (3) the legislative history showing purposeful omission of the "administrative regulations" language in the final version of the Act, (4) the Supreme Court's contemporaneous *Cabazon Band* decision on the distinction between state gaming laws and regulations, and (5) the Committee Chair's unequivocal confirmation that the Act was adopting *Cabazon Band*'s "rationale" at the time the Act was finally enacted. Order No. 183 is inconsistent with each of these pieces of support, and instead adopts dicta from *Ysleta I*, all while acknowledging confusion and "frustration" over *Ysleta I*'s analysis.

Order No. 183 errs in construing Section 107(a) to hold "that the Tribe is subject to the State's regulations," and therefore in violation of Texas bingo requirements. ROA.2853. In reaching this decision, Judge Martinez felt bound by his reading of *Ysleta I*: "The Court recognizes the Tribe's frustration that *Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming. Nonetheless, the Court is bound by Fifth Circuit precedent and understands Fifth Circuit case law to require the Tribe follow Texas gaming regulations." ROA.2855-2856. Indeed, Judge Martinez was so troubled by the tension between his reading of *Ysleta I*'s interpretation of Section 107(a) and the

plain language of Section 107(b) that he took the unusual step of urging the Tribes to "petition Congress to modify or replace the Restoration Act." *Id.* at 40.

Ysleta I's interpretation of Section 107(a) was based on an unnecessary reading of inapplicable legislative history. As an initial matter, Section 107(a) can be construed based on its plain language, without looking to its legislative history. Where a statutory scheme is coherent and consistent, there is no need for a court to inquire beyond the plain language of the statute. *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 241 (1989). Moreover, "[t] he baseline position," as the Supreme Court "ha[s] often held," is that tribes are entitled to self-government, because "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self- government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Rather, courts have required Congress to "unequivocally express" limitations on tribal sovereignty, including prohibitions against tribal gaming. *See id*. at 790 (citation omitted).

Section 107(a) is unambiguous in only applying to those gaming activities that are "prohibited" by "Texas laws." As the Fifth Circuit and Supreme Court made clear in *Butterworth* and *Cabazon Band*, respectively, "prohibited" is a term of art in Indian law with a precise meaning that is specifically contrasted with "regulations." Section 107(b)'s bar on Texas regulating the Pueblo's activities

further reinforces Congress' intent to distinguish between "laws" that "prohibit" certain gaming and those that merely "regulate" other gaming.

The Fifth Circuit acknowledged that this reading was persuasive in *Ysleta I* ("The Tribe's argument is appealing only because § 107(a) … uses the word 'prohibit'"), but nevertheless looked past the plain language to the Restoration Act's legislative history in interpreting Section 107(a). *Ysleta I*, 36 F.3d at 1333-34. The problem, however, is that the Court relied on inapplicable and incomplete legislative history.

Of particular importance to the *Ysleta I* court was Tribal Resolution T.C.–02–86 (the "1986 Resolution"), which was approved and certified on March 12, 1986. In the 1986 Resolution, despite severe reluctance, and under obvious duress, the Pueblo agreed that "[g]aming, gambling, lottery or bingo as defined by the laws and ***administrative regulations*** of the State of Texas is hereby prohibited on the tribe's reservation and on tribal lands." *See Ysleta I*, 36 F.3d at 1327-29 (emphasis added). But even with this agreement, the proposed legislation died and the final law removed any referencing subjecting the Pueblo to "administrative regulations." *Ysleta I* relied on legislative history for versions of the Act that were <u>never enacted into law</u>.

The following year, the 100th Congress removed the language from the 1986 Resolution, redrafting to what was ultimately memorialized in the Restoration Act:

"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." ROA.2997. There is no mention of "administrative regulations." *Id.* There is no such mention because "[nothing in the gaming] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Restoration Act Section 107(b). Congress enacted this version of the Act on August 18, 1987, with Section 107(a) specifically omitting any referencing to "administrative regulations."

Furthermore, the Restoration Act specifically states in its preamble that "The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act." Pub. L. No. 100-89, Section 2, 101 Stat. 666. The Pueblo understood that the Restoration Act failed when it included the language from the 1986 Resolution, and only passed when the regulatory language was removed. Moreover, the Committee Chairman for the House Committee on Interior Affairs explained that the changes were made to "codify' the Supreme Court's holding in *Cabazon Band*, issued six months prior in February 1987. ROA.470.

The change made in the 100th Congress was not merely an amendment of the previous version of Section 107(a), but rather an "amendment in the nature of a substitute." Committee Report June 26, 1987. H.R. 318 replaced H.R. 1334, substituting the previous language with the language that would become law. The

Restoration Act, as expressed in H.R. 318, conspicuously removes the phrase "administrative regulations" that had been present in its abandoned predecessor. ROA.535. Not only does imposing such administrative regulations on the Pueblo's gaming read an absent, omitted phrase into the statute, it creates an internal inconsistency that does not otherwise exist.

"It is not a function of this Court to presume that Congress was unaware of what it accomplished." *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (internal quotations omitted). H.R. 318 omitted "administrative regulations" from its predecessor, replacing that broad restriction with the narrower exclusion of gaming activities that are "prohibited by the laws of the State of Texas . . . ." ROA.535. Courts must presume that this change was intentional. "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). The Restoration Act does refer to "law" and "laws" throughout (*see, e.g.,* § 103(a): "laws and rules of law of the United States…;" § 103(c): "Notwithstanding any other provision of law…;" § 105(g)(1)(B): "lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State."). ROA.535. The Restoration Act also distinguishes between "laws" and "regulations" (§ 105(d): "Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other

instrument…."). *Id*. The Supreme Court in *Dep't of Homeland Sec. v. MacLean* came to the conclusion that "Congress's choice to say 'specifically prohibited by law' rather than 'specifically prohibited by law, rule, or regulation' suggests that Congress meant to exclude rules and regulations." 135 S. Ct. at 919. The same principle should govern Congress's choice to exclude "administrative regulations" from the text of H.R. 318.

Furthermore, even if the omission of "administrative regulations" in H.R. 318 was "inadvertent," it is of no significance. As the Court made clear in *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83 (1991), "it is not our function to eliminate clearly expressed inconsistency of policy, ... The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation." *Id*. at 101. The Fifth Circuit's interpretation of Section 107 in *Ysleta I* was "not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Id*. (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). But the plain reading of the Restoration Act does not permit the court to step back in time to supply the conspicuously omitted phrase "administrative regulations," especially in light of the fact that such language had been present in a previous, substituted bill. "To supply omissions transcends the judicial function." *Id*.

Order No. 183 is inconsistent with the plain language and legislative history of Section 107(a), which confirm that Congress did not intend to subject the Tribes to the "administrative regulations" of Texas. Furthermore, the Pueblo's interpretation harmonizes with and gives meaning to Section 107(b), and is consistent with Supreme Court and Fifth Circuit precedent in *Cabazon Band* and *Butterworth*. Accordingly, this Court should construe Section 107(a) as barring only those gaming activities that are "prohibited" by Texas law.

B. The Pueblo's Bingo Games Are Not Prohibited by Texas Law.

The Texas statutes governing bingo, and the *Cabazon Band* and *Butterworth* decisions confirm that bingo is a regulated, rather than prohibited, activity, and therefore is not subject to State regulation under Sections 107(a) and (b).

Under Texas law, there is no outright prohibition of bingo. In fact, Texas law encourages bingo to the extent that it is fairly conducted, and the proceeds derived therefrom are used for an authorized purpose. The Bingo Enabling Act expressly authorizes bingo with a detailed regulatory scheme overseen by the Texas Lottery Commission. *See* TEX. OCC. CODE ANN. § 2001.001 *et seq*.; *see also* TEX. ADMIN. CODE § 402.200; *see also Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) (holding that the Bingo Enabling Act creates a regulatory regime that grants charities a benefit in the form of a license to conduct bingo games, rather than a government subsidy). In addition, the Attorney

General of Texas has issued a decision confirming that there is no authority to regulate bingo on Indian reservations. Tex. Att'y Gen. Op. No. JM-1040 (1989).

As discussed above, the Supreme Court's decision in *Cabazon Band*, and the Fifth Circuit's decision in *Butterworth*, likewise confirm that bingo is regulated, rather than prohibited, by state law. In *Butterworth*, an Indian tribe sued to prevent enforcement by local Florida government officials pursuant to bingo laws that authorized only certain organizations, not including Indian tribes, to conduct bingo games. 658 F.2d at 312-13. The Fifth Circuit analyzed whether bingo was prohibited as contrary to the public policy of the state, and held that the activity was regulated. *Id.* at 316. In *Cabazon Band*, the Supreme Court applied the same rationale in holding that California could not enjoin an Indian tribe from providing the bingo games in dispute because they were regulated, rather than prohibited, under California gaming ordinances: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211.

The Pueblo's bingo operations are not prohibited by Texas law, and therefore cannot be regulated by Texas under Section 107(a) and (b) of the Restoration Act. Order No. 183 should be reversed for erroneously holding that the bingo activities violated the Act.

C. The Panel May Withdraw the Injunction Without Overruling *Ysleta I*.

A critical question hanging over this appeal is whether the Court can interpret and apply Section 107 of the Restoration Act as detailed herein without overturning *Ysleta I* and violating the Rule of Orderliness. The Pueblo maintain that there is no need for this Panel to reject the holding of *Ysleta I* for three reasons.

First, the Fifth Circuit's statements in *Ysleta I* interpreting Section 107(a) as incorporating Texas "regulations" were not related to the holding of the decision. Fundamental to American jurisprudence is the limiting of precedent to actual and necessary holdings of a court decision and recognizing that dicta is not binding. *See e.g. Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (noting that "it is to the holdings of our cases, rather than their dicta, that we must attend"); *see also Bennis v. Michigan,* 516 U.S. 442, 450 (1996) (quoting *Kokkonen*, 511 U.S. at 379); *see Crose v. Humana Ins. Co.*, 823 F.3d 344, 349 n.1 (5th Cir. 2016) ("We are free to disregard dicta from prior panel opinions when we find it unpersuasive.") (internal citations omitted).

While the decision reviewed legislative history and discussed the meaning of Section 107(a), the Court ultimately dismissed the Pueblo's suit based on Eleventh Amendment sovereign immunity: "We find nothing in the record indicating that the state of Texas consented to the Tribe's suit. Likewise, in enacting the Restoration Act, Congress said nothing whatsoever which could be construed as an abrogation

of the State's sovereign immunity. Accordingly, we … dismiss the Tribe's suit for lack of jurisdiction." 36 F.3d at 1336-37. The decision to dismiss the case based on sovereign immunity did not require any determination of whether Section 107(a) or (b) restricted the State from regulating the Pueblo's gaming activities. Any statements made by the Fifth Circuit concerning Section 107(a) and its legislative history do not carry precedential impact.

Second, the Court was concerned with Class III gaming (as defined by IGRA) then taking place on the Tribe's land. The present dispute, however, concerns wholly distinct Class II bingo activities. This distinction carries significant consequences for this appeal. Critically, even if not dicta, *Ysleta I* applied Section 107(a) to Class III gaming, which is more likely to be construed as "prohibited" under Texas law, and inapposite to the facts of *Cabazon Band* and *Butterworth*, which are materially the same in this case. So construing Section 107 as not prohibiting the Pueblo's current bingo operations would not disturb any conclusion reached in *Ysleta I*.

Third, even if the Court determines that the present issues were resolved in *Ysleta I*, panels of this Court have frequently overruled or clarified prior panel rulings which were incorrectly decided. *See, e.g., Brown v. Bryan Cty., OK*, 219 F.3d 450, 475 (5th Cir. 2000) (DeMoss, H., dissenting) ("[T]he current panel majority simply ignores both the existing Fifth Circuit precedent and our prudential rule of orderliness."); *DeLeon v. Abbot*, 687 Fed. Appx. 340, 344 (5th Cir. 2017) (Elrod,

J.W., dissenting) (stating that majority decision violated rule of orderliness); *Grabowski v. Jackson County Pub. Defs. Office*, 47 F.3d 1386, 1398 (5th Cir. 1995) (Smith, J., dissenting) (same). The rule of orderliness doctrine is "prudential in nature and [does] ***not actually subtract from a court's power to decide***." *See Brown*, 219 F.3d at 475 (Demoss, H., dissenting) (emphasis added). As detailed *infra*, the district courts throughout this Circuit remain deeply confused concerning the meaning of Section 107(b) and its relationship to Section 107(a). There is a substantial need to finally resolve this issue to provide clarity to the Tribes, State, and district courts concerning the meaning of "regulatory jurisdiction" in Section 107(b).

This Panel has power to determine that the Restoration Act does not prohibit the Pueblo's Class II gaming activities and, that Texas cannot regulate such gaming.

III. The Restoration Act and IGRA Must be Harmonized to Give Meaning to Each.

If Section 107 is properly construed to forbid State regulation of the Pueblo's gaming, directly or through enforcing Texas gaming regulations in federal court, then how will non-prohibited gaming at the Pueblo be regulated? Congress answered this question in passing IGRA, which was also under review at the time the Restoration Act was passed. As Judge Cardone aptly noted in rejecting judicial approval of Tribal gaming proposals: "reviewing tribal gaming proposals is a task seemingly identical to the NIGC's responsibilities under IGRA." *Ysleta del Sur*

Pueblo, 2016 WL 3039991, at *20. When Section 107 is properly construed then the Restoration Act fully harmonizes with IGRA as compatible regimes that Congress intended to work together.

Unlike the question presented to the court in *Ysleta I*, the Pueblo here do not argue that IGRA impliedly repeals the Restoration Act, but rather that the two are intended to work in tandem to ensure "regulation" is conducted by the body appointed by Congress, rather than expressly forbidden State regulation. *See Ysleta I*, 36 F.3d at 1334. The alternative is to permit continued State regulation of the Pueblo's sovereign activities, in violation of Section 107(b), and outsource to the federal courts the role of parsing complex Texas gaming regulations, when the NIGC was created for that very purpose.

A. IGRA Is not a Fundamentally Different Regime from The Restoration Act.

The Pueblo agree with the court in *Ysleta I* on a significant subject: IGRA did not repeal the Restoration Act. But the *Ysleta I* court, in reaching this conclusion, took a further step by stating that the Restoration Act and IGRA are fundamentally different regimes. *Ysleta I* at 1334. Instead of creating different regimes, IGRA ***supplements*** the Restoration Act, just as it has done for other agreements between the United States and sovereign tribes. The very purpose of IGRA is to provide the regulatory framework under which these agreements are to be realized in practice.

IGRA's express purpose is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). When Congress passed IGRA, it certainly was aware of the strong of statutes, treaties, and laws implicating gaming on tribal reservations. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580–581 (1978)).

And the Pueblo were not the only ones who believed that the IGRA governed the Pueblo's gaming activities. Indeed, in 1991, the Texas Attorney General—citing the last-in-time rule—opined that "a court would a court would conclude that the Indian Gaming Regulatory Act controls" gaming on Indian land in Texas:

> The Indian Regulatory Gaming Act was enacted in 1988 after the 1983 enactment of the [Restoration Act,] restoring the federal trust relationship with two of the three Indian tribes in Texas. The Indian Gaming Regulatory Act does not explicitly repeal those provisions of the federal act restoring a federal trust relationship that proscribe the tribes' engaging in gaming activities that are not permitted by Texas law. However, the "last-in-time" rule, which provides that a statute enacted after the passage of an earlier statute controls in the event of

> conflict, applies to· statutes governing Indian tribes. This rule would support a construction that Congress intended the Indian Gaming Regulatory Act to apply to all Indian tribes that would otherwise fall within the ambit of the act.

Tex. Att'y Gen. Op. No. DM-32 at 152–53 (1991), https://www2.texasattorneygeneral.gov/opinions/opinions/48morales/op/1991/pdf/dm0032.pdf (citing *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)). The Attorney General thus concluded that if the Texas authorized "Class III gaming within Texas waters, such gaming activity could also be conducted on Indian lands located within the state" and that if Texas "delegate[d] regulatory authority [over gaming] to units of local government, the [state] statute would sill satisfy the requirements of the [IGRA] and thereby permit such gaming activities to be conducted on Indian lands." *Id*. at 153.

"Indeed, the only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W. Div. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004) (citing 25 U.S.C. § 2702(1)); *see id.* ("The force of this interpretive canon can be overcome only when other circumstances evidencing congressional intent demonstrate that the statute is fairly capable of two interpretations . . . [or] that the [conflicting] interpretation is fairly possible.") (alterations in original; internal quotation marks omitted) (quoting *Chickasaw Nation v. United States*, 534 U.S. 84,

94 (2001)). To the extent there is any argument that IGRA conflicts with the Restoration Act, that argument is solely due to the court's false dichotomy created in *Ysleta I*, which ignored the plain language of the Restoration Act and the legislative history regarding its passage into law, and the subsequent passage of IGRA.

Moreover, the *Ysleta I* court also disregarded the last-in-time canon: "where there is a conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs." *See ICC v. S. Ry. Co.*, 543 F.2d 534, 539 (5th Cir. 1976); *see also In re S. Scrap Material Co.*, 541 F.3d 584, 593 (5th Cir. 2008) (discussing "the longstanding principle that when two statutes irreconcilably conflict, the more recent statute controls"); *Inter-Cont'l Promotions, Inc. v. MacDonald*, 367 F.2d 293, 301 (5th Cir. 1966) ("the conflicting provision which is last in time . . . prevails").

Judge Cardone, in the *2016 Order*, acknowledged that IGRA created the NIGC specifically to "oversee Indian gaming activities for qualifying tribes…." *Ysleta del Sur Pueblo*, 2016 WL 3039991, at *20. Judge Cardone also recognized that it was improper for the federal courts to impose regulatory oversight concerning the Pueblo, a previous solution created to fill a gap in regulation created by the court in *Ysleta I*. *Id*. That gap does not, in fact, exist. IGRA was created to fill that role, and the Restoration Act does not conflict with IGRA.

B. The First Circuit Held that IGRA Repealed Similar Legislation that ***Did*** Grant Regulatory Authority to the State.

Other circuit courts have held that IGRA can be harmonized with acts akin to the Restoration Act, with the important difference being the plain-language grant of state regulatory powers. The First Circuit in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)* went beyond harmonizing IGRA with the act at issue and instead held that IGRA impliedly repealed the act's restrictions on gaming on the Wampanoag Tribe Counsel of Gay Head's (the "Wampanoag") trust lands. 853 F.3d 618, 626-29 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 639 (Jan. 8, 2018).

The Settlement Act of 1987 (the "Settlement Act") at issue in *Aquinnah*—which is substantially similar to and was passed on the same day as the Restoration Act—provides that the Wampanoag's trust lands "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of [Massachusetts] . . . (including ***those laws and regulations*** which prohibit or regulate the conduct of bingo or any other game of chance)." *See* 25 U.S.C. § 1771g (emphasis added). Thus, the Settlement Act goes a step beyond the language of the Restoration Act by expressly stating that gaming on the Wampanoag's land must abide by the "laws ***and regulations***" of Massachusetts.

The First Circuit determined that IGRA impliedly repealed the gaming restrictions set forth in the Settlement Act based on two general philosophies: (i) the general rule is that where two acts are in irreconcilable conflict, the later act prevails;

and (ii) that courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. *See Aquinnah*, 853 F.3d at 627 (quoting *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704-05 (1st Cir. 1994)). In its analysis, the First Circuit determined that reading IGRA and the Settlement Act to restrict state jurisdiction over gaming honors IGRA and, at the same time, leaves the heart of the Settlement Act untouched; while reading IGRA and the Settlement Act in such a way to defeat tribal jurisdiction over gaming on the Wampanoag's trust lands would "honor the Settlement Act, but ***would do great violence to the essential structure and purpose of [IGRA]***." *Id.* (quoting *Narragansett Indian Tribe*, 19 F.3d at 704-05).

The Pueblo do not argue here for the same result, because the Settlement Act and the Restoration Act are distinct in that the Settlement Act specifically subjects the Wampanoag to state regulation, thereby creating a conflict with IGRA, whereas the Restoration Act, as stated above, does not impose a state regulatory scheme that must be supplanted by IGRA. A reading of the Restoration Act that grants regulatory powers to the State of Texas would force a conflict with IGRA that is not present in the text, and one that would require a repeal of that imposed structure. Reading the Restoration Act in such a way to defeat the Pueblo's jurisdiction over gaming on its lands destroys the essential structure and purpose of IGRA. Such an outcome becomes more evident when considering the facts and circumstances leading to

IGRA's enaction. This Court should harmonize the Restoration Act with IGRA and allow the Pueblo to conduct Class II gaming on its lands without the State's intervention.

C. The House Has Passed Legislation Proposed by the Tribes That Expressly Clarifies IGRA's Application to the Tribes.

Since *Ysleta I*, courts have instructed the Pueblo to seek redress not from the courts, but from Congress.

> "If the [Pueblo] wishe[d] to vitiate [the restrictive gaming provisions] of the Restoration Act," we declared, "it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA." *Ysleta I*, 36 F.3d at 1335.

While the Pueblo assert rights in this Court, legislation does indeed move forward. On January 24, 2019, a bipartisan group of fourteen House representatives led by Representative Brian Babin introduced H.R. 759, titled Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act.[4] H.R. 759 seeks a simple, elegant solution to rectify decades of confusion: to amend the Restoration Act to make clear that the Act does not preclude the applicability of IGRA. In fact, H.R. 759 would add a single sentence to the Restoration Act:

> Nothing in this Act shall be construed to preclude or limit the

[4] Rep. Babin is joined by Rep. Conaway [R-TX-11], Rep. Cuellar [D-TX-28], Rep. Gallego [D-AZ-7], Rep. Gibbs [R-OH-7], Rep. Gonzalez [D-TX-15], Rep. Gonzalez-Colon [R-PR-At Large], Rep. Hurd [R-TX-23], Rep. LaMalfa [R-CA-1], Rep. Peterson [D-MN-7], Rep. Scott [R-GA-8], Rep. Vela [D-TX-34], Rep. Weber Sr. [R-TX-14], and Rep. Young [R-AK-At Large].

> applicability of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq*.).

Since its introduction, twelve additional representatives from both parties sponsored H.R. 759, bringing the total sponsors to 25 Representatives representing nine states, Puerto Rico, and American Samoa.[5] On July 24, 2019, the House passed H.R. 759, and sent it to the Senate for consideration.[6]

H.R. 759 and its 25 sponsors understand exactly the issues raised in this appeal, that the Restoration Act should not be construed to deny the applicability of IGRA. H.R. 759 does not seek to rewrite the Restoration Act, as it is clear on its face. But due to the confusion created by the holding in *Ysleta I* and its progeny, H.R. 759 intends to codify what has been the understanding of the Pueblo and Alabama-Coushatta since passage in 1987.

The courts, however, are not powerless to correct the misinterpretation of the Restoration Act, notwithstanding the availability of legislative action. The "twilight zone of state, federal, and sovereign authority" in which the Pueblo Defendants find themselves is largely a construct of judicial, not legislative, action. An alternative to legislative change—understandably a large undertaking—would be for this Court to

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[5] Rep. Allred [D-TX-32], Rep. Cardenas [D-CA-29], Rep. Clay [D-MO-1], Rep. Coleman Radewagen [R-AS-At Large], Rep. Crenshaw [R-TX-2], Rep. Escobar [D-TX-16], Rep. Garcia [D-TX-29], Rep. Gooden [R-TX-5], Rep. Gosar [R-AZ-4], Rep. Haaland [D-NM-1], Rep. O'Halleran [D-AZ-1], and Rep. Veasey [D-TX-33].

[6] Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 759, 116th Cong. (2019).

clarify *Ysleta I*, and correct the flawed interpretation that has bound the hands of courts for 25 years.

IV. The District Court Erred in Finding that the Balance of Equities Supported the Injunction.

Order No. 183 should further be reversed because the summary judgment record did not establish that the balance of equities supported a permanent injunction. The Order acknowledged that "an injunction will have a ***substantial impact*** on the Pueblo's community" that will cause harm that is "truly irreparable." Order at 40 (emphasis added). ROA.3029. This is not a just a "substantial impact"; it is an irreparable impact that is already reverberating throughout the Pueblo. The Pueblo and the entire El Paso region face the same "immediate, immense, and irreparable" consequences from the Court's Order that they faced after the State moved for a preliminary injunction. ROA.2996. Furthermore, "[w]here, as here, enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty, federal courts have found the irreparable harm requirement satisfied." *Seneca Nation of Indians v. Paterson*, No. 10–CV–687A, 2010 WL 4027795, at *2 (W.D.N.Y. Oct. 14, 2010).

The Pueblo, a sovereign Indian nation, has a population of approximately 4,320 members. ROA.2976. In 2016 at last measure, 47% of Pueblo members live below federal poverty levels; the medium personal income is $16,722 and the medium household income is $29,122. *Id.* The Pueblo depend on funds allocated

from the current bingo game revenue to support the welfare of its members. *Id.* These funds are either now uncertain or in the process of being terminated due to the injunction. Although the Pueblo may fund some of its social programs through other means, revenue from bingo activities is overwhelmingly the primary funding source for these services. *Id.*

Speaking Rock's continued operation of bingo activities causes no direct financial injury to the State. In fact, a stay will have the opposite effect by enabling those who provide for themselves through the current bingo gaming to continue to do so without straining federal and state resources.

The economic consequences of discontinuing the current bingo operations on the Pueblo are severe, and will be felt by tribal members, employees, and the surrounding community. Hundreds of jobs at the Tribe's gaming facility will be lost—impacting not only the Tribe but all of Deep East Texas. The district court recognized when it granted a stay pending appeal, if the Tribe's gaming facility is permanently closed, "the local economy cannot supply comparable employment" to the hundreds of individuals who will lose their jobs at the gaming facility. ROA.2660. The district court also observed that "the evidence also points to residual effects, including impact on the local economy through a drop in consumer spending and a potential strain on social services due to a large increase of local unemployment." ROA.2660.

The State will suffer no injury from Speaking Rock's continued operation. *United States v. 1020 Elec. Gambling Machines*, 38 F. Supp. 2d 1219, 1225 (E.D. Wash. 1999). Imposing yet another confusing and detrimental restriction on the Pueblo's right to engage in sovereign gaming has critical implications for its self-governance, self-sufficiency, and self-determination.

This Court should overturn the grant of summary judgment, and permit the Pueblo the self-determination that had been intended by the Restoration Act. Alternatively, the Pueblo contends there is a fact issue on the question of whether the balance of equities favors an injunction that requires trial, and summary judgment should be reversed on that basis.

V. The District Court Erred in Finding That the State Had Standing to Bring this Litigation.

The Pueblo contends that the district court further erred in denying its Motion to Dismiss due to the State's lack of standing under Order No. 76. It is undisputed that the Texas Attorney General lacks capacity to bring suit on behalf of the State of Texas unless an affirmative grant of statutory authority empowers him or her to bring that specific type of suit. *See Texas v. Ysleta del sur Pueblo*, 79 F. Supp. 2d 708, 714 (W.D. Tex. 1999), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000) ("The burden of proof rests with the AG to identify a source of power authorizing him to [bring suit] on behalf of the state."). In previous litigation between the parties, courts have ruled that a suit to abate a common nuisance

pursuant to Texas Civil Practice & Remedies Code § 125.002 provides a source of affirmative relief for the Attorney General to sue on behalf of Texas (the "Nuisance Statute"). *Id.* at 714 n.13. Even if the Attorney General could point to a statutory authority empowering him to bring this action, the Attorney General is barred from bringing this case under the principle of *res judicata*. *See* ROA.155-156.

Moreover, the Nuisance Statute was amended in 2017. The Nuisance Statute now provides that "[t]his section does not apply to an activity exempted, authorized, or otherwise lawful activity regulated by federal law." TEX. CIV. PRAC. & REM. CODE § 125.0015(e). As discussed thoroughly above, the Restoration Act, when harmonized with IGRA, exempts, authorizes, or makes lawful the Pueblo's gaming activities on their lands. Thus, the Nuisance Statute does not apply to the Pueblo's gaming activities and, accordingly, the Texas Attorney General does not have authority to bring suit on behalf of Texas to restrict such activities.

Due to the procedural posture of the case at the time, the district court denied the Motion to Dismiss, stating that it must first determine "whether the gaming activity at issue here is legal—*i.e.*, determining the merits of this case…." ROA.902. As detailed above, this appeal requires the Court to resolve whether the Pueblo's gaming activity is prohibited by federal law under the Restoration Act, and the Court can therefore determine that the State lacked standing to bring this action.

The Pueblo request that this Court reverse the district court's Order No. 76, ROA.894-906, and dismiss the case because the Pueblo's gaming activities are not a nuisance under the law, and because the Attorney General lacks capacity to bring the case.

CONCLUSION

The Pueblo respectfully request that the Court reverse the district court's Order No. 183, dissolve the Permanent Injunction, and remand for further proceedings in the district court.

The Pueblo further request that the Court reverse the district court's Order No. 76 denying the Pueblo's Motion to Dismiss, and render judgment of dismissal, or remand for the district court to render such appropriate orders.

Dated: August 9, 2019

Respectfully submitted,

/s/ Brant C. Martin

Brant C. Martin
State Bar No. 24002529
brant.martin@wickphillips.com
WICK PHILLIPS GOULD & MARTIN LLP
100 Throckmorton Street, Suite 1500
Fort Worth, Texas 76102
Telephone: (817) 332-7788
Facsimile: (214) 692-6255

Joseph R. Callister
State Bar No. 24059054
joseph.callister@wickphillips.com
Ethan A. Minshull
State Bar No. 24081045
e*than.minshull@wickphillips.com*
Paul Merrill Chappell
State Bar No. 24097489
paul.chappell@wickphillips.com
WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue, Suite 100
Dallas, Texas 75204
Telephone: (214) 692-6200
Facsimile: (214) 692-6255

ATTORNEYS FOR DEFENDANTS-APPELLANTS YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, THE TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR

CERTIFICATE OF SERVICE

The undersigned certifies that on August 9, 2019, the foregoing document was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit, and that all counsel of record were served by electronic means on that same date.

Michael R. Abrams
michael.abrams@oag.texas.gov
Benjamin S. Lyles
benjamin.lyles@oag.texas.gov
Summer R. Lee
summer.lee@oag.texas.gov
Assistant Attorneys General
General Litigation Division
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548, Capitol Station (MC019)
Austin, Texas 78711-2548

Attorneys for Appellee

/s/ Brant C. Martin
Brant C. Martin

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32 because, according to the Microsoft Word 2016 word count function, it contains 12,863 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), and Fifth Circuit Rule 32, because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. I further certify that I have made all privacy redactions pursuant to Fifth Circuit Rule 25.2.13, that the electronic submission of this brief is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1, and that this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Brant C. Martin
Brant C. Martin

Case No. 19-50400

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff – Appellee

v.

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL,
THE TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,
Defendants – Appellants.

ADDENDUM TO APPELLANTS' BRIEF

Pursuant to Federal Rule of Appellate Procedure 28(f), the Pueblo present this Addendum to aid the Court's determination of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Public Law 100-89, 101 Stat. 666 (Aug. 18, 1987) (the "Restoration Act"). The Restoration Act was formerly codified in the United States Code at 25 U.S.C. § 1300g, *et seq*. for the Pueblo, and at 25 U.S.C. § 731 *et seq*. for the Alabama-Coushatta Tribe. Those portions of the United States Code were omitted during the Code's last publication, and thus are no longer available using that citation format. The Pueblo provide the Public Law version of the Restoration Act in this Addendum for the Court's convenience.

Public Law 100-89
100th Congress

An Act

Aug. 18, 1987
[H.R. 318]

To provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act. 25 USC 731 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

25 USC 731 note.

SEC. 2. REGULATIONS.

The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act.

TITLE I—YSLETA DEL SUR PUEBLO RESTORATION

25 USC 1300g.

SEC. 101. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 102);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas—

(A) held by the tribe on the date of the enactment of this title;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on such date;

(C) held in trust for the benefit of the tribe by the Secretary under section 105(g)(2); and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on the date of enactment of this Act, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

25 USC 1300g-1.

SEC. 102. REDESIGNATION OF TRIBE.

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after the date of the enactment of this title, be known and designated as the Ysleta del Sur Pueblo.

Any reference in any law, map, regulation, document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

SEC. 103. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE. 25 USC 1300g-2.

(a) FEDERAL TRUST RELATIONSHIP.—The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation. 25 USC 461.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) FEDERAL SERVICES AND BENEFITS.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 104. STATE AND TRIBAL AUTHORITY. 25 USC 1300g-3.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) TRIBAL AUTHORITY.—The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity— Contracts. Grants.

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement.

SEC. 105. PROVISIONS RELATING TO TRIBAL RESERVATION. 25 USC 1300g-4.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (25 U.S.C. 1321, 1322).

(g) ACQUISITION OF LAND BY THE TRIBE AFTER ENACTMENT.—

(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe—

(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act and take title to such land in fee simple, and

(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal Council, the Secretary may—

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act, and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

25 USC 1300g-5.

SEC. 106. TIWA INDIANS ACT REPEALED.

82 Stat. 93.

The Tiwa Indians Act is hereby repealed.

25 USC 1300g-6.

SEC. 107. GAMING ACTIVITIES.

(a) IN GENERAL.—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. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance

with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, 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.

SEC. 108. TRIBAL MEMBERSHIP. 25 USC 1300g-7.

(a) IN GENERAL.—The membership of the tribe shall consist of—

(1) the individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC-5-84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC-85-005 adopted on January 16, 1985; and

(2) a descendant of an individual listed on that Roll if the descendant—

(i) has ⅛ degree or more of Tigua-Ysleta del Sur Pueblo Indian blood, and

(ii) is enrolled by the tribe.

(b) REMOVAL FROM TRIBAL ROLL.—Notwithstanding subsection (a)—

(1) the tribe may remove an individual from tribal membership if it determines that the individual's enrollment was improper; and

(2) the Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

TITLE II—ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS

SEC. 201. DEFINITIONS. 25 USC 731.

For purposes of this title—

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 202);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushatta Indian Reservation in Polk County, Texas, comprised of—

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 1 of the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes." and approved August 23, 1954 (25 U.S.C. 721);

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an

act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

25 USC 732. SEC. 202. ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS CONSIDERED AS ONE TRIBE.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this title and any other law or rule of law of the United States.

25 USC 733. SEC. 203. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP.—The Federal recognition of the tribe and of the trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), 25 USC 461. as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members 25 USC 721. thereof; and for other purposes" and approved August 23, 1954, are hereby restored and such Act shall not apply to the tribe or to members of the tribe after the date of the enactment of this title.

(c) FEDERAL BENEFITS AND SERVICES.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

25 USC 734. SEC. 204. STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) CURRENT CONSTITUTION AND BYLAWS TO REMAIN IN EFFECT.—Subject to the provisions of section 203(a) of this Act, the constitution and bylaws of the tribe on file with the Committee on Interior and Insular Affairs is hereby declared to be approved for the purposes of section 16 of the Act of June 18, 1934 (48 Stat. 987; 25

U.S.C. 476) except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) AUTHORITY AND CAPACITY OF TRIBAL COUNCIL.—No provision contained in this title shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b). The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity— Contracts. Grants.

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 205 as the successor in interest to the Tribal Council.

SEC. 205. ADOPTION OF NEW CONSTITUTION AND BYLAWS. 25 USC 735.

Upon written request of the tribal council, the Secretary shall hold an election for the members of the tribe for the purpose of adopting a new constitution and bylaws in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

SEC. 206. PROVISIONS RELATING TO TRIBAL RESERVATION. 25 USC 736.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the bound-

aries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

25 USC 737.

SEC. 207. GAMING ACTIVITIES.

(a) IN GENERAL.—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. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 206(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, 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.

Approved August 18, 1987.

LEGISLATIVE HISTORY—H.R. 318:

HOUSE REPORTS: No. 100-36 (Comm. on Interior and Insular Affairs).
SENATE REPORTS: No. 100-90 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 133 (1987):
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July 23, considered and passed Senate, amended.
Aug. 3, House concurred in Senate amendments.