No. _____

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a non-purgable contempt sanction that requires an Indian Tribe indefinitely to allow state agents onto its reservation is a criminal sanction requiring criminal due process protections for the Tribe.

2. Whether it was a proper exercise of judicial civil contempt powers for the district court to grant unsupervised state regulatory oversight on an Indian reservation where Congress specifically denied the state that authority.

PARTIES

The parties to the proceeding before the United States Court of Appeals for the Fifth Circuit were the State of Texas, *Plaintiff – Appellee* and the Ysleta Del Sur Pueblo; Tigua Gaming Agency; Tribal Council; Albert Alvidrez, Tribal Governor; and Carlos Hisa, Tribal Lieutenant Governor, *Defendants – Appellants.*

RULE 29.6 STATEMENT

Petitioner Ysleta del Sur Pueblo is a federally recognized Indian Tribe and has no parent company, and no owners.

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PETITION FOR A WRIT OF CERTIORARI

The Ysleta del Sur Pueblo respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is an unpublished decision that is available at No. 10-50804, 2011 U.S. App. LEXIS 13534 (5th Cir. June 30, 2011) (App. A, 1a-10a). Petitioners' Petitions for Rehearing and Rehearing En Banc were denied by the court of appeals on August 1, 2011. (App. F, 57a-58a). The permanent injunction entered by the United States District Court, Western District of Texas, is available at No. EP-99-CA0320-GTE, 2001 U.S. Dist. LEXIS 22930 (W.D. Tex. September 27, 2001) (App. E, 51a-56a). The district court's order modifying the permanent injunction is available at No. 3:99-CV-320 GTE, 2002 U.S. Dist. LEXIS 9271 (W.D. Tex. May 17, 2002) (App. D, 24a-50a). The district court's order of contempt and sanctions is unpublished (App. C, 14a-23a) as is the order amending the sanctions (App. B, 11a-13a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 30, 2011, and the order denying the petitions for panel rehearing and rehearing en banc was entered on August 1, 2011. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3, because it is being filed within 90

days of the entry of the order denying rehearing en banc. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, codified at 25 U.S.C. § 1300g *et seq.*, and 18 U.S.C. § 401.

25 U.S.C. § 1300g-6 and 18 U.S.C. § 401 are reproduced at Appendix G, 59a-60a.

STATEMENT OF THE CASE

I. Background Facts and Issues.

The Ysleta del Sur Pueblo is the oldest continually inhabited community in Texas. Spanish colonists fleeing New Mexico during the Pueblo Revolt of 1680 brought the Ysleta del Sur as slaves south to what today is El Paso, Texas. The Ysleta del Sur retained their culture, religion and tribal identity under successive Spanish, Mexican, Texan and ultimately American governments.

Congress confirmed the Pueblo's federal trust relationship with the United States in 1968, and fully restored the government-to-government relationship in 1987 through the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act. 25 U.S.C. § 1300g *et seq*. The Restoration Act placed the Pueblo on an equal footing with all other federally recognized tribes. At the time

Congress was considering the Act, Indian gaming was an increasingly controversial topic. As a result, Congress included one section, with three brief subsections, in the Restoration Act:

> (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) [25 U.S.C. § 1300g-4(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.

25 U.S.C. § 1300g-6 (emphasis added).

Congress thus: 1) confirmed the Pueblo's right to engage in gaming; 2) provided exclusive jurisdiction over alleged violations of the Act's gaming provisions in the courts of the United States; 3) denied the State any regulatory jurisdiction over gaming on the Pueblo; and 4) limited remedies available to the State solely to injunctions.

II. The District Court's Decision.

The State of Texas brought a public nuisance claim against the Ysleta del Sur Pueblo, seeking an injunction pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 1300g-6 to prohibit the Pueblo from engaging in Class III gaming. In 2001 the United States District Court for the Western District of Texas entered a permanent injunction against the Pueblo "having the practical and legal effect of prohibiting illegal as well as legal gaming activities by the Defendants." Order modifying injunction. See App. D, 27a-28a.

The Pueblo fully complied with the injunction, and ceased all gaming activity. The district court then amended the injunction to allow the Pueblo to engage in "legal gaming operations if it *otherwise qualified* under Texas law." *Id*. at 33a (emphasis added). In amending its injunction, the district court confirmed:

> The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the [State Lottery] Commission. It is not. Upon the Tribe's *otherwise qualified* showing, and modification of the injunction, the Tribe's charitable bingo activities would not be subject to the Commission's regulatory scheme.

Id. at 46a (emphasis added). This "otherwise qualified" language is ambiguous at best, and underscores the complexity of, and problem with, the contempt sanction entered by the court.

Seven years after the district court modified the permanent injunction, Texas filed a motion for contempt challenging the Pueblo's use of gift cards as prizes offered in connection with legal, small-stakes video machines. The motion sought an order of contempt based entirely on one specific alleged violation of the Texas Penal Code: that the Pueblo was violating Tex. Penal Code Title 10 (offenses against public health, safety and morals); Chapter 47 (gambling); Subsection 47.01 (definitions); Subsection 4 (gambling device) by using mechanical devices that did not fall within any exception under Subsection 4(B). First Am. Mot. for Contempt, Dist. Ct. Doc. 205 at 5-6. There is no dispute between the parties that the mechanical devices at issue are legal in Texas if they meet the requirements of Subsection 4(B). Transcript ("Tr.") of July 30, 2008, Hearing on Mot. for Contempt, Dist. Ct. Doc. 330 at 1-48, lns 10-24.

At the time of the evidentiary hearing, the Pueblo offered entertainment using machines it believed met those requirements. The Texas Department of Public Safety, not a party to this case or the injunction, disagreed that the machines were compliant, and conducted an undercover criminal investigation on the Pueblo. Pl.'s Ex. 1, Dist. Ct. Doc. 330; *see also* Doc. 340. The Department of Public Safety did not ask the district court to allow its criminal agents to conduct the undercover criminal investigation, nor did it conduct the undercover criminal investigation pursuant to the Federal Rules of Civil Procedure.

Instead, the investigation was ordered by "superiors" at the Texas Department of Public Safety (Tr. at 1-15, lns 4-7), and was conducted pursuant to instructions from the State's lawyers (Tr. at 1-55, ln 21 through 1-56, ln 14). During their criminal investigation, the undercover criminal intelligence service agents bought cards which they used to win prizes on the mechanical devices at issue. Tr. at 1-31, lns 1-5; Tr. at 1-37, lns 1-4. None of the devices provided the criminal investigators a single award greater than the lesser of ten times the amount charged to play the game or $5, as required by the Texas penal code. Tr. at 1-37, lns 16-19. The criminal investigators received a representation of value redeemable for merchandise in the form of a gift card with restrictions against payment of cash to the cardholder. Tr. at 1-40, lns 1-2; Tr. at 1-63, lns 3-12; Tr. at 1-66, ln 7 through 1-68, ln 15; Tr. at 1-71, ln 21 through 1-73, ln 11 (and Defs.' Ex. 1, Dist. Ct. Doc. 330; *see also* Doc. 340). The single issue before the district court was whether receiving a gift card as a representation of value was beyond the scope of those prizes permitted to be offered by Subsection B compliant devices.

Following the hearing, the district court held that the gift cards were "cash equivalents" prohibited by the State penal code and held the Pueblo in contempt of the injunction as amended. The district court ordered the Pueblo to pay a fixed prospective fine of $500 a day for every day the Pueblo continued to use gift cards in connection with these mechanical devices, and as a further sanction ordered the Pueblo indefinitely to allow Texas state agents monthly access to the Pueblo's reservation unsupervised by the Court or any other authority. In entering its contempt sanction, the court stated:

> the gaming laws *and regulations* of the State of Texas operate as surrogate federal law on the Tribe's reservation.

August 3, 2009 Mem. Op. and Order Granting Mot. for Contempt, App. C, 16a (emphasis added)). The district court thus defined "other relevant Texas law" *to include state regulations*, notwithstanding Congress' decision to deny the State regulatory authority in the Restoration Act.

In response to the Pueblo's challenge of the contempt sanction, the district court partially amended the contempt order stating, "the language of the contempt order was over broad. The Plaintiff's motion for contempt, and the Court's order granting it, focused on the use and abuse of the devices known as 'eight-liners.'" App. B, 12a. As amended, the contempt order requires the Pueblo, as a sanction, to:

> allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to the records maintained by the Defendants with respect to the operation of the devices known as "eight-liners," for the purpose of verifying that such devices are not being operated in a manner contrary to the laws of the State of Texas or the terms of the injunction and contempt order in this case.

Id. at 13a.

In ordering the Pueblo to countenance state agents entering onto its reservation, the district court

fashioned a sanction Congress had prohibited. In doing so, the court imposed a sanction that for a sovereign Indian Tribe is worse than a criminal fine or indefinite imprisonment: perpetual subjugation to state agents on the Tribe's sovereign lands.

III. The Fifth Circuit Court of Appeals' Decision.

The Fifth Circuit Court of Appeals affirmed the District Court, and on August 1, 2011, denied the Pueblo's petitions for reconsideration. The Fifth Circuit Court's decision ignored the issue of unsupervised state agent intrusion onto an Indian reservation, and instead only addressed that part of the contempt sanction granting indefinite access to the Pueblo's books and records. On petition for rehearing the Pueblo asked the Fifth Circuit Court of Appeals to, among other requests, address that part of the contempt sanction ordering indefinite state agent access to the Pueblo's sovereign lands. The Fifth Circuit denied the petitions for rehearing.

REASONS FOR GRANTING THE PETITION

This Court should grant a petition for writ of certiorari and review the Fifth Circuit Court of Appeals' decision for two reasons.

First, the Fifth Circuit Court of Appeals' decision conflicts with this Court's precedent and decisions of other Circuit Courts of Appeals which require criminal due process protections when non-purgable, indefinite contempt sanctions are entered in complex preliminary injunction cases.

Second, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, decided by this Court: whether judicial contempt authority includes the power to order Indian Tribes to countenance state agents coming onto their reservations to determine compliance with state law when Congress has withheld all regulatory jurisdiction from the state.

I. THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

A. Contempt Proceedings Alleging Out-Of-Court Disobedience To Complex Injunctions Require Criminal Due Process Protections.

1. The Supreme Court requires criminal due process protections in contempt proceedings alleging out-of-court disobedience to complex injunctions.

In *Int'l Union v. Bagwell* this Court established the categorical rule that contempt proceedings involving alleged out-of-court disobedience of a complex injunction always require criminal procedural protections:

> Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable fact finding. Such contempts do not obstruct the court's ability to adjudicate the

> proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.

512 U.S. 821, 833-34 (1994) (citations omitted). In reaching this determination, the Court addressed the significant dangers inherent in contempt proceedings:

> the contempt power [] uniquely is "'liable to abuse.'" Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.

Id. at 831 (*citing Bloom v. Illinois*, 391 U.S. 194, 202 (1968), *quoting Ex parte Terry*, 128 U.S. 289, 313 (1888)). Justice Scalia, concurring in the *Bagwell* decision, noted:

> That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials. Only the clearest of historical practice could establish that such a departure from the

> procedures that the Constitution normally requires is not a denial of due process of law.

Id. at 840 (citations omitted) (Scalia, J., concurring). Justice Blackmun, writing for the Court, recognized:

> Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament," and its fusion of legislative, executive, and judicial powers "summons forth . . . the prospect of 'the most tyrannical licentiousness,'"

Id. at 831 (*citing Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in judgment), *quoting Anderson v. Dunn*, 19 U.S. 204, 228 (1821)).

To address the challenges inherent in contempt proceedings, and thereby allocate constitutional protections, this Court and others distinguish between civil and criminal contempt. As one commentator has noted:

> In the absence of meaningful legislative guidance, the Supreme Court has sought to guard against potential judicial bias and to cabin the power to adjudicate indirect contempts by imposing protective procedural constraints. The Court's principal vehicle for limiting the judicial contempt power has been the distinction between civil and criminal contempt.

Dudley, Earl C., Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the*

Regulation of Indirect Contempts, 79 Va. L. Rev 1025, 1031 (Aug. 1993). *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), is a path-marking case in this area. Yet the civil/criminal "classifications described in *Gompers* have come under strong criticism, particularly from scholars. Many have observed, as did the Court in *Gompers* itself, that the categories, 'civil' and 'criminal' contempt, are unstable in theory and problematic in practice." *Bagwell,* 512 U.S. at 845 (Ginsberg, J., concurring).

The sanction entered here against the Ysleta del Sur Pueblo is an unfortunate example. Without providing the criminal due process protections required by this Court under *Bagwell*, the district court entered a non-purgable sanction that for an Indian Tribe is worse than an indeterminate fine or imprisonment: indefinite subjugation to state agents on the Tribe's reservation. The district court entered this sanction notwithstanding that Congress denied the state all regulatory authority in the very Act which gave the district court jurisdiction to enter the underlying injunction in the first instance. Because this Court's decision in *Bagwell* mandates criminal protections in contempt actions addressing alleged out-of-court violation of a complex injunction, and because the district court did not provide those protections here, the Fifth Circuit Court of Appeals' decision affirming the district court's contempt sanction conflicts with this Court's *Bagwell* decision.

2. The Courts of Appeals require criminal due process protections in contempt proceedings alleging out-of-court disobedience of complex injunctions.

a. The Second Circuit.

In *N.Y. State Nat'l Org. for Women v. Terry*, 41 F.3d 794, 796-97 (2d Cir. 1994), the court reversed and remanded contempt sanctions entered where criminal due process protections were not provided, stating, "as in *Bagwell*, the punished conduct did not occur in the court's presence and involved something akin to 'an entire code of conduct that the court itself had imposed.'"

b. The Eighth Circuit.

In *Jake's, Ltd. v. City of Coates*, 356 F.3d 896, 903-04 (8th Cir. 2004) the court reversed sanctions characterized by the district court as civil because, "although we sympathize with the district court's view that its prior orders had been repeatedly disobeyed, we conclude that the court was required to afford Jake's the protections of a criminal contempt proceeding before imposing an unconditional $68,000 fine for conduct not previously adjudged to violate its broad and complex injunction."

c. The District of Columbia Circuit.

In *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 660-61 (D.C. Cir. 1994) the court vacated contempt fines, noting "the injunction here may be somewhat less 'complex' than that in *Bagwell*, which the Supreme Court characterized as prescribing 'an

entire code of conduct' for UMWA officials. But on a scale of complexity ranging from simple affirmative acts like turning over a key or paying a judgment where civil contempt proceedings may be appropriate, to highly complex *Bagwell*-type prohibitory injunctions barring broad classes of illegal acts where criminal process is required, the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum." (Internal citations omitted.)

B. Contempt Proceedings Resulting in Criminal Sanctions Require Criminal Due Process Protections.

1. The Constitution requires criminal due process protections before criminal contempt sanctions can be imposed.

Both this Court and the Circuit Courts of Appeals uniformly have confirmed that the Constitution requires district courts to provide criminal due process protections before entering criminal contempt sanctions. *Hicks v. Feiock*, 485 U.S. 624, 632 (1988) ("criminal [contempt] penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt").[1] Yet

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[1] Circuit Courts of Appeals decisions include *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 820 (4th Cir. 2004) (vacating contempt sanction); *Johnson v. United States*, 344 F.2d 401, 411 (5th Cir. 1965) (criminal contempt "partakes so much of the nature of a criminal proceeding that comparable procedural safeguards must be accorded one charged with criminal

the district court did not afford those protections to the Pueblo in these proceedings.

2. The sanction here is criminal.

a. The sanction is criminal because it is not tied to the alleged contumacious activity, which has stopped.

A sanction "is civil only if the contemnor is afforded an opportunity to purge." *Bagwell*, 512 U.S. at 829. If the sanction cannot be purged by any action of the contemnor, the sanction is criminal. Where, as here, the contemnor does not "carry 'the keys of their prison in their own pockets,'" the contempt sanctions are criminal. *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (citation omitted). *Harris v. City of Philadelphia*, 47 F.3d 1311, 1328 (3d Cir. 1995) ("To the extent that 'a sanction operates whether or not a party remains in violation of the court order, it obviously does not coerce any compliance'" (*quoting In re Magwood*, 785 F.2d 1077, 1082 (D.C. Cir. 1986)); *see also Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965) ("the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself").

The violation giving rise to the contempt sanction here was offering gift cards as prizes on otherwise legal small stakes gaming devices. The Pueblo no longer offers gift cards in connection with those devices; indeed, the Pueblo has ceased operating those

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contempt"); *Law v. NCAA*, 134 F.3d 1438, 1442 (10th Cir. 1998) (reversing sanctions order).

devices altogether. Status Reports, Dist. Ct. Doc. Nos. 289, 308, 319 and 322. Yet the sanction at issue continues even though no further coercive pressure can be exerted. That alone makes the sanction criminal:

> Unlike the civil contemnor, who has refused to perform some discrete, affirmative act commanded by the court, *Gompers* explains, the criminal contemnor has "done that which he has been commanded not to do." 221 U.S. at 442. The criminal contemnor's disobedience is past, a "completed act," 221 U.S. at 443, a deed no sanction can undo. See 221 U.S. at 442. Accordingly, the criminal contempt sanction operates not to coerce a future act from the defendant for the benefit of the complainant, but to uphold the dignity of the law, by punishing the contemnor's disobedience. 221 U.S. at 442-443. Because the criminal contempt sanction is determinate and unconditional, the Court said in *Gompers*, "the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense." 221 U.S. at 442.

Bagwell, 512 U.S. at 845 (Ginsberg, J., concurring). As the Seventh Circuit Court of Appeals held when rejecting a sanction similar to that entered by the district court here:

> The trouble with the infomercial ban is that it lasts for three years no matter what Trudeau does. Trudeau could take all the steps in the world to convince the FTC and the district court that he will be truthful in his next infomercial, but even if he offers to read his book word-for-

> word and say nothing else, he cannot free himself of the court's sanction. Rather, the three-year ban is like a "prison term [] of a definite, pre-determined length without the contemnor's ability to purge," which we have held is "generally considered punitive and therefore criminal contempt."

FTC v. Trudeau, 579 F.3d 754, 777 (7th Cir. 2009) (*quoting In re Grand Jury Proceedings*, 280 F.3d 1103, 1108 (7th Cir. 2001)).

Continued imposition of the sanction here – although the contumacious activity has stopped – makes the sanction criminal. Indeed, "conclusions about the civil or criminal nature of a contempt sanction are properly drawn . . . 'from an examination of the character of the relief itself.'" *Bagwell*, 512 U.S. at 828 (*quoting Feiock*, 485 U.S. at 636); *cf. Shillitani*, 384 U.S. at 370-71 ("The conditional nature of the imprisonment – *based entirely upon the contemnor's continued defiance* – justifies holding civil contempt proceedings absent the safeguards of indictment and jury" (emphasis added)). Subjecting an Indian Tribe to indefinite, non-purgable state agent intrusion onto its reservation provides no mechanism by which the Pueblo can "comply" and thereby avoid the sanction. *Bagwell*, 512 U.S. at 828-29 (a contumacious witness can no longer be confined if he has no further opportunity to purge himself of contempt).

As a result, the sanction here is criminal. *Bagwell*, 512 U.S. at 829 ("When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect" and is therefore punitive in nature); *id.* at 828 (describing a sanction as

criminal "if it is imposed retrospectively for a 'completed act of disobedience'" (*quoting Gompers*, 221 U.S. at 443)).

b. The plaintiff and the district court treated the proceedings as criminal.

The district court's characterization of a proceeding is not conclusive:

> this Court has recognized that . . . the label affixed to a contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law."

Bagwell, 512 U.S. at 838 (*quoting Feiock*, 485 U.S. at 631). Instead, how the case is pursued by the plaintiff and allowed to proceed by the district court all inform the analysis of whether the proceedings require heightened criminal due process protections. *Nye v. United States*, 313 U.S. 33, 43 (1941) (holding proceedings were for criminal contempt where "[t]he prayer for relief and the acts charged carry the criminal hallmark").

Here, the State treated these proceedings in all respects as criminal. For example, the State's prayer for relief was for the very perpetual sanction ultimately ordered by the district court:

> Plaintiff requests that this Court . . . enter an order containing appropriate sanctions against Defendants including . . . that the State of Texas be allowed monthly access to the Pueblo premises and access to all books and records of gaming activities proposed to be conducted

> thereon **in order to assure future compliance** with this Court's injunction . . . .

Pl.'s Mot. for Contempt, Dist. Ct. Doc. 204 at 6-7 (emphasis added). Similarly, the State's witnesses never testified that the scope of their undercover investigation was to determine compliance with the civil injunction. Instead, they testified the scope was: "To enter the facility and to see if they were in possession of illegal gambling devices and promoting gambling." Tr. at 1-15, lns 10-11. The State's primary witness, when asked why certain action was taken, testified: "It was part of the criminal investigation that we were doing at the time." Tr. at 1-55, lns 24-25.

Any doubt that the State viewed this as a criminal proceeding is eliminated by its decision to use criminal stickers on its exhibits at the evidentiary hearing, and to the State's reference to its exhibits as "State's exhibit" as opposed to "plaintiff's exhibit." Tr. at 1-16, ln 18 through 1-17, ln 11. The State's lawyer confirmed that the State understood this to be a criminal investigation through his objections to questioning by the Pueblo's lawyer. For example, when the Pueblo's lawyer asked the State's primary witness whether he knew if any other DPS officers had gone to the Pueblo, the State's lawyer objected, stating:

> MR VINSON: Your Honor, I'm going to object as referring to the details of [a] potential *criminal investigation*. And to that extent, it's protected by privilege.

Tr. at 1-43, lns 6-8 (emphasis added). And when the Pueblo's lawyer asked about a supplemental report that was not made available to the Pueblo or

introduced into evidence, the State's lawyer again objected, stating:

> MR. VINSON: Your Honor, I'm again going to object as relating to the details *of an ongoing criminal investigation* and therefore, subject to privilege.

Tr. at 1-44, lns 16-18 (emphasis added).

The Texas Department of Public Safety, not a party to this civil litigation, initiated its criminal investigation after receiving information from a local police department. Based on that criminal investigation, the State's legal counsel conducted a hearing counsel treated, in all respects, as a criminal proceeding. *Nye*, 313 U.S. at 43 ("When there is added the 'significant' fact that Nye and Mayers were strangers, not parties, to Elmore's action, there can be no reasonable doubt that the punitive character of the order was dominant" (citation omitted)).

Although seeking to avoid the appearance of a criminal action,[2] the district court also in many respects treated this as a criminal proceeding. For example, the court ordered a determinate fine of $500 a day for each day the Pueblo was not in compliance. A determinate fine payable to the court and not based on any evidence of damage to the plaintiff is a criminal sanction, evidencing the district court's own view of the proceedings here. *Bagwell*, 512 U.S. at 834 ("At no

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[2] The district court refused to allow the State to use criminal exhibit stickers at the hearing. Tr. at 1-16, ln 18 through 1-18, ln 9.

point did the trial court attempt to calibrate the fines to damages caused by . . . contumacious activities"). Finally, civil sanctions generally are not appealable. *Cobell v. Norton*, 334 F.3d 1128, 1140 (D.C. Cir. 2003) ("an order holding a party in civil contempt in an on-going proceeding is not appealable as a final order"). Yet here, neither the State nor either of the lower courts ever questioned that the indefinite sanction of forced state access onto sovereign Tribal land was subject to review on appeal.

II. THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Important Question of Federal Law is the Permissible Scope of the Judiciary's Contempt Power.

The boundary between civil and criminal contempt is "unstable in theory and problematic in practice." *Bagwell*, 512 U.S. at 845 (Ginsberg, J., concurring) (*citing Gompers*, 221 U.S. 418). Because of this uncertainty, the federal courts continue to wrestle with the civil/criminal contempt distinction in a host of contexts. This case is an unfortunate example, incorporating a number of the problems with contempt sanctions that have been identified by this Court, and specifically raising the question of whether it was a proper exercise of judicial civil contempt powers for the district court to grant unsupervised state regulatory oversight on an Indian reservation where Congress denied the state that authority. As described in greater detail below, the district court's sanction,

which was affirmed by the Fifth Circuit Court of Appeals, exceeded the court's judicial contempt powers, and should be reviewed on writ of certiorari.

B. The District Court's Sanction Exceeds Congressional Limitations.

1. Congress has the authority to limit contempt sanctions available to the judiciary.

Congress controls the power of, and remedies available to, the lower courts:

> [T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to [the Supreme] Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (*quoting Cary v. Curtis*, 44 U.S. 236, 245 (1845)). *See also Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (noting the "concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes"). Although the judiciary's right to enter contempt orders

may be inherent, Congress may limit available sanctions. As noted in a similar context:

> Congress, after mature deliberation, concluded that these sanctions were adequate, and for that reason made them exclusive. In no other way can its repeated and final refusals to confer the strenuously sought equitable remedies be made consistent with the legislative and general history or be given meaning and effect. To construe the Act as permitting what Congress thus so explicitly refused to allow is to go beyond our function and intrude upon that of Congress. This we have no right or power to do.

United States v. United Mine Workers, 330 U.S. 258, 350 (1947) (Rutledge, J., dissenting).

Here, the district court's jurisdiction to enter and enforce its injunction is the product of positive congressional enactment in the Restoration Act:[3]

> For cases brought under an Act of Congress rather than the Constitution, the problem, formally at least, is not difficult. The courts can be said to be engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives.

Chayes, Abraham, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1314 (1976). Where, as here, the district court is engaged in carrying out

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[3] 25 U.S.C. § 1300g-6(c).

the legislative will, and the legislative directive specifically limits the remedies available to a party plaintiff, or against a party defendant, the courts are bound by, and cannot exceed, that limitation:

> The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct. Thus, the mere fact that a statute grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity.

United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992) (citations and internal quotations omitted). Although it granted Texas the right to access the federal courts in the Restoration Act, Congress limited the remedies available to the State in the congressionally sanctioned proceedings.

2. Congress has limited contempt sanctions to fines and imprisonment.

In addition to the limitation of remedies Congress included in the Restoration Act, Congress specifically has limited the contempt sanctions available to the lower federal courts to "fine[s] or imprisonment or both." 18 U.S.C. § 401. The sanction ordering the Pueblo to countenance state agents on the Pueblo's sovereign land is neither fine, nor imprisonment, and therefore exceeds the court's authority under Section 401:

> The law happily prescribes the punishment which the court can impose for contempts. The seventeenth section of the Judiciary Act of 1789

> declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void.

Ex parte Robinson, 86 U.S. 505, 512 (1874).

Section 401 is rooted in the Act of 1789 (ch. 20, 1 Stat. 73, 83) referenced by this Court in *Robinson*. The Act of 1789 provided that courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." *Nye*, 313 U.S. at 45. Congress believed the federal courts were abusing this statutory contempt power, a view reinforced by entry of a contempt sanction that led to impeachment proceedings against federal Judge James H. Peck. *Id.* Judge Peck was acquitted, "but the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789." *Id.*

The day after Judge Peck's acquittal Congress took steps to change the Act of 1789:

> The House directed its Committee on the Judiciary "to inquire into the expediency of

> defining by statute all offences which may be punished as contempts of the courts of the United States, *and also to limit the punishment for the same*."

Id. (emphasis added) (*citing* Cong. Deb., 21st Cong., 2d Sess., Feb. 1, 1831, Cols. 560-561, and House Journal, 21st Cong., 2d Sess., p. 245). Nine days later James Buchanan, who had prosecuted Judge Peck's impeachment, introduced a bill which became the Act of March 2, 1831 (ch. 99, 4 Stat. 487). That Act eventually became Section 268 of the Judicial Code, 28 U.S.C. § 385, which has since been codified in Section 401. *Id.* at 39; *see also* revised title table for 28 U.S.C. § 385. Although organizationally placed in the criminal title section of the United States Code, this Court has not limited Section 401's application to criminal contempt. *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 594 (1947).

The congressional limitation in Section 401 notwithstanding, federal district courts have imposed a range of sanctions beyond fines or imprisonment, as the district court did here. *E.g., FTC*, 579 F.3d at 777 (reversing contempt sanction banning contemnor from appearing in infomercials for three years because it could not be purged); *accord* Hostak, Philip A., *Note: International Union, United Mine Workers v. Bagwell; A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 Cornell L. Rev. 181 at 218-19 (1995) ("the sanctions that can flow from an adjudication of civil contempt are potentially limitless. The risks a defendant faces from a biased fact finder are thus enormous and distressingly difficult to predict

given the wide latitude that judges have in fashioning sanctions").[4]

However, if in spite of Section 401 sanctions other than fines or imprisonment are to be imposed by the lower courts, then at a minimum this "potentially limitless" range of sanctions should be treated as extraordinary and require the district courts to either: 1) first exhaust "fine or imprisonment" sanctions; or 2) provide criminal due process protections before entering a sanction that exceeds Section 401's limitations. *Accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 61 (1991) (Kennedy, J., dissenting) ("the proper exercise of inherent powers requires exhaustion of express sanctioning provisions"). This is especially so here, given that the underlying complaint is for *public* nuisance:

> While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, *and is not intended as a deterrent to offenses against the public*.

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[4] *See also Martin v. Trinity Indust., Inc.*, 959 F.2d 45 (5th Cir. 1992) (reversing contempt sanction ordering employer to require its employees to wear certain testing equipment); *De Parcq v. U.S. Dist. Court*, 235 F.2d 692, 696 (8th Cir. 1956) (reversing contempt sanction denying lawyer right to continue as counsel for plaintiff or otherwise appear in any proceeding in the Southern District of Iowa).

Nye, 313 U.S. at 42 (emphasis added), (*quoting McCrone v. United States*, 307 U.S. 61, 64 (1904)). As this Court has recognized:

> Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

Bloom, 391 U.S. at 208.

3. Congress' limitation of remedies here is grounded in the special relationship between Indians and the federal government.

a. Tribal sovereign immunity prohibits state regulation absent congressional grant of regulatory authority to the states.

Indian Tribes have the authority to regulate activity on their sovereign lands absent congressional grant of that authority to others. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-10 (1987) (states cannot regulate on tribal land an activity that is not prohibited off reservation). This sovereign right is held sacred, and rightly so, by Tribes across the Nation. *See* Clinton, Robert N., *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. Rev. 434, 437 (1981) ("The spirit of most treaties negotiated with the Indian tribes, and the explicit language of some, guaranteed that Indian tribal communities would never be

included within the legislative power of the states or subjected to state law or courts"). And it is the important principle of tribal sovereignty that so significantly raises the stakes for the Pueblo in this case. Hostak, 81 Cornell L. Rev. at 183, n.17 ("Because of the limitless and open-ended nature of coercive sanctions, coercive contempt can be extremely harsh, particularly for those whose disobedience is predicated on ethical or religious principles").

State regulation of gaming on the Ysleta del Sur Pueblo has never been authorized by Congress. Indeed, just the opposite is true – Congress specifically denied Texas that authority:

> **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.

25 U.S.C. § 1300g-6(b). In contravention of this congressional prohibition, the district court ordered the Tribe to subjugate itself to state agents on its own reservation for the purpose of enforcing State gaming regulations – not statutory law or policy, but every regulation or other condition adopted by the State at any level. August 3, 2009 Mem. Op. and Order Granting Mot. for Contempt. App. C, 16a. ("the gaming laws *and regulations* of the State of Texas operate as surrogate federal law on the Tribe's reservation" (emphasis added)). Ignoring congressional limitations, the district court entered a sanction much worse than fine or imprisonment for a sovereign Native American nation: indefinite subjugation on its own reservation to state government authority. F. Cohen's *Handbook of Federal Indian*

Law § 2.01[2], 117 (Nell Jessup Newton ed., 2005) ("Federal supremacy in Indian law is a bedrock principle of Indian law . . . . The field of federal Indian law has been centrally concerned with protecting Indian tribes from illegitimate assertions of state power over tribal affairs").

b. The sanction ordered by the district court is state regulation.

There is a difference between "law" and "regulation" as used in statutory enactments. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979) ("properly promulgated, substantive agency regulations have the 'force and effect of law'"). Yet although regulations may have the "force and effect of law," that does not make them "law" as that term is used in congressional enactments. *E.g., Bailey v. Gardebring*, 940 F.2d 1150, 1157 (8th Cir. 1991) ("regulations are not 'laws' for ex post facto purposes").

Here, Congress specifically stated that Texas does not have civil or criminal regulatory jurisdiction over gaming activities on the Ysleta del Sur Pueblo. Giving those words their logical meaning, as required by canons of statutory construction, confirms that the regulations of the State do not apply to Ysleta del Sur gaming activities, and that the State may not regulate gaming activities on the Pueblo. Applying the canon of construction requiring statutes to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, only strengthens this conclusion. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Yet the district court ignored this congressional limitation, and instead entered an order that turned the court from

the traditional model of arbiter into an investigative judge more similar to the continental system of justice. Chayes, at 1298, text at n.78.[5] Indeed:

> a judicial decree establishing an ongoing affirmative regime of conduct is *pro tanto* a legislative act. But in actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.

Id. at 1302. The district court's enforcement and application of law through the sanction it selected here necessarily is implementation of regulatory policy and regulatory authority denied by Congress in the Restoration Act. *Accord* Chayes at 1304.

As a result, the district court exceeded Congress' grant of injunctive authority, and ignored Congress' limitation on state regulatory authority, when it entered an unconditional criminal sanction empowering state agents to exercise state regulatory authority on an Indian reservation. *McDaniel v. Camp*, 59 F.3d 548, 551 (5th Cir. 1995) ("even if a court has general jurisdiction to act, a judgment is void if the actual action taken orders a remedy not within the court's jurisdiction"); *accord Santa Rosa Band of*

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[5] This case is a classic example of the "public law model" described by Chayes. The district court's permanent injunction is the centerpiece, it seeks to adjust future behavior, it provides for a complex, on-going regime of performance, and it prolongs and deepens the court's involvement with the dispute. Chayes at 1298.

Indians v. Kings County, 532 F.2d 655, 666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) ("the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement").

In *Nevada v. Hicks*, this Court addressed the interplay between tribal and state jurisdiction. In *Hicks*, the tribal court was attempting to extend its jurisdiction over state agents for claims arising from state agent activities on tribal land (*i.e. tribal* jurisdiction over on-reservation non-member conduct).[6] Here, the State (through the federal court by way of contempt sanction) is attempting to extend its jurisdiction onto the Pueblo's reservation without consent of the Pueblo or a tribal-state compact allowing such jurisdiction (*i.e. state* jurisdiction over on-reservation Tribal conduct). In other words, in *Hicks*, tribal sovereignty was being used as a sword against state officers. Here, tribal sovereignty is a shield that protects the Pueblo's sovereign territory from regulatory incursion onto the reservation by state agents.

[6] 533 U.S. 353 (2001).

C. The District Court's Sanction Violates Other Limitations on the Judiciary's Authority to Enter Contempt Sanctions.

1. The district court cannot empower state agents to serve as federal law enforcement officers.

The law at issue in this civil litigation is federal law, not state law. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). Yet even where Congress has "federalized" certain state laws, states themselves may not enforce those "federalized" state laws on Indian reservations. For example, although the Organized Crime Control Act makes certain violations of state and local gambling laws violations of federal law, the Act does not incorporate state regulation, and instead simply allows enforcement by federal agents if tribal activities violate the "public policy" of the State. *Cabazon*, 480 U.S. at 213 (discussing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), and *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983)).

State agents, unless Congress specifically grants them federal police power to enforce federal law, do not have the jurisdiction to do so. As noted in another context:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. . . . It is appropriate to recall these

> origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838-39 (1995) (Kennedy, J., concurring). *See also Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (the federal government "can act only through its officers and agents, and they must act within the States").

When Congress chooses to do so, it has passed its regulatory authority directly to tribes, confirming the lack of state power in the first instance. *E.g.*, 15 U.S.C. § 6312 (regulation of boxing); *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) (regulation of water quality). When Congress believes it appropriate to establish a mechanism to grant state government police power to enforce federal laws, Congress has specifically done so. *E.g.*, 18 U.S.C. § 3055 (extension of federal authority to non-federal officers to enforce liquor laws); 25 U.S.C. § 2804 (procedures to extend federal enforcement authority to state law enforcement in Indian country). When doing so, Congress has incorporated protections and limitations into the process. *E.g.*, 25 U.S.C. § 2804(c) ("Limitations on use of personnel of non-Federal agency"). The practical effects of this division of jurisdiction are significant, both to the states and to the federal government. *E.g.*, *Grimes v. United States*, 234 F.2d 571 (5th Cir. 1956) (evidence obtained in unauthorized search by state officers is admissible in a prosecution by the United States for violation of federal law); *accord* 28 U.S.C. § 2671 (federal tort claims procedures); *Provancial v. United States*, 454 F.2d 72, 75 (8th Cir. 1972) (city police officer "deputized special officer of the

Department of Interior" subject to suit under federal Tort Claims Act).

Moreover, here the State is not acting in a sovereign capacity, and instead is nothing more than a party in a civil public nuisance proceeding. As such, the district court has no authority to grant the State authority to enforce federal law, especially in connection with these contempt proceedings. *Young*, 481 U.S. at 813-14 (district court acted unconstitutionally when it appointed counsel for interested party in civil proceeding to represent the United States in the investigation and prosecution of conduct allegedly contumacious of the court's injunctive order); *accord United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988) (dismissing writ of certiorari to review criminal contempt prosecution brought to vindicate the authority of the judiciary and to punish disobedience of a court order where petition for writ was not approved by Solicitor General); *Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2190 (2010) (Roberts, C.J., dissenting) ("A basic step in organizing a civilized society is to take [the] sword out of private hands and turn it over to an organized government, acting on behalf of all the people").

The rule limiting the exercise of federal police power to federal agents is particularly significant in the context of the federal government's relationships with Indian Tribes. Because the law in this case is federal, and because the State is a party to civil litigation and as such has no applicable federal police power, the district court cannot give the State authority to enforce federal law on an Indian reservation.

2. Appointment of a party to oversee enforcement of contempt sanctions is improper.

This Court has confirmed that it is improper for a district court to appoint the lawyer for an opposing party to "oversee" compliance with a contempt order and sanction. *Young,* 481 U.S. at 814 (it is constitutionally impermissible for a district court to appoint a "prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated"). Yet that is exactly what the district court ordered here. This aspect of the sanction alone warrants issuance of a writ of certiorari. *Accord Crowe v. Smith*, 151 F.3d 217, 227-28 (5th Cir. 1998) ("the argument that [counsel for a party seeking contempt] was not actually acting as a prosecutor – in the sense that he only investigated and presented the evidence, leaving to the judge and defendants the entirety of the legal argument – is of no moment in this context").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-50804

Filed June 30, 2011

STATE OF TEXAS	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; TRIBAL COUNCIL; ALBERT ALVIDREZ, Tribal Governor; CARLOS HISA, Tribal Lieutenant Governor	)
	)
Defendants-Appellants	)

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:99-CV-320

Before WIENER, BENAVIDES, and STEWART, Circuit Judges. PER CURIAM:[*]

Defendant-Appellant Ysleta del Sur Pueblo (the "Tribe") has been locked in litigation with the State of Texas (the "State" or "Texas") for many years over gaming activities conducted at the Tribe's casino. In this appeal — the third in a series of related appeals spanning almost twenty years — the Tribe contests a contempt order issued by the district court. The Tribe asserts that the contempt order is improper because (1) it is criminal in nature, but the district court treated it as a civil contempt order, and (2) the district court exceeded its authority when it granted state agents monthly access to the Tribe's gaming records. Disagreeing with the Tribe and concluding that the contempt order was properly issued and is valid, we affirm that order and dismiss the Tribe's appeal.

I. FACTS & PROCEEDINGS

The controversy underlying this case has a long history.[1] Since the mid-1980's, the gaming endeavors of the Tribe, a federally recognized Indian[2] tribe

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See Ysleta del Sur Pueblo v. Texas* (*Ysleta I*), 36 F.3d 1325, 1327-1332 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) (documenting in depth the history of the Tribe and the federal statutes governing Native American gambling).

[2] In the interests of consistency and because we used the term "Indian" in *Ysleta I*, we employ it now rather than the often preferred term "Native American."

located near El Paso, Texas, have been governed by the Restoration Act,[3] which sharply curtails the Tribe's right to engage in gaming activities and limits such activities to those expressly permitted by Texas law.[4] The Restoration Act permits Texas to seek an injunction in federal court if the Tribe should engage in gaming activities prohibited by Texas law.[5]

In a reversal of its original position on gambling,[6] the Tribe filed a civil action in 1993, seeking to force the State to negotiate a Tribe-State compact that would allow gaming activities on the reservation.[7] When that case was appealed to this court, we concluded that (1) the gaming laws and regulations of Texas operate as surrogate federal law on the Tribe's reservation,[8] and (2) the Tribe must conform to those laws unless it can persuade Congress to amend or repeal the Restoration Act.[9]

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[3] 25 U.S.C. § 1300g.

[4] *Id.* § 1300g-6(a).

[5] *Id.* § 1300g-6(c).

[6] *Ysleta I*, 36 F.3d at 1328 ("[T]he Tribe, at the time of the resolution's adoption, ha[d] no interest in conducting high stakes bingo or other gambling operations on its reservation and remain[ed] firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation." (first alteration added, second and third alterations in original, and internal quotation marks omitted)).

[7] *Id.* at 1331.

[8] *Id.* at 1335.

[9] *Id.*

Despite this ruling, the Tribe began to offer a variety of gambling games at the Speaking Rock Casino (the "Casino") located on tribal lands. The Casino started as a bingo hall, but its operations were expanded to include slot machines, poker, blackjack, dice, and other forms of gambling prohibited by Texas law. In 1999, the Attorney General of Texas, using the avenue of relief permitted to the State under the Restoration Act,[10] filed a civil suit in the district court to enjoin the activities of the Casino deemed to be in violation of Texas law. In 2001, the district court granted the State's motion for summary judgment and entered the requested injunction.[11] Once again, the Tribe appealed to us, and once again, its appeal was unsuccessful.[12] Following that second appeal, the district court modified the injunction to clarify that the Tribe was not prohibited from engaging in the few gaming activities that are lawful in Texas.[13]

In 2008, the Texas Attorney General filed a motion for contempt based on asserted violations of the amended injunction. The State contended that the

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[10] 25 U.S.C. § 1300g-6(c) ("[N]othing 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.").

[11] *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 697-98 (W.D. Tex. 2001).

[12] *See generally Texas v. Ysleta del Sur Pueblo* (*Ysleta II*), 69 F. App'x 659 (5th Cir.) (unpublished), *cert. denied*, 540 U.S. 985 (2003).

[13] Order Modifying September 27, 2001, Injunction, 220 F. Supp. 2d at 709.

Tribe was operating "eight-liner" gaming devices[14] in the Casino in a manner that Violated TEX. PENAL CODE § 47.01(4). Texas only permits the operation of eight-liners if the machines reward players "exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less."[15] In violation of this restriction, the Casino was issuing Visa debit cards[16] to winning players in amounts in excess of five dollars.

The district court held an evidentiary hearing on the State's motion for contempt, explicitly limiting the scope of the hearing to determining whether the Tribe's operation of the eight-liner machines violated Texas law. The district court ultimately granted the State's contempt motion and ordered the Tribe to allow representatives of the State monthly access to the Casino's records and all of the Tribe's books and records relating to its gaming operations. The Tribe moved to amend the court order to limit the State's inspections to records pertaining to eight-liners only. After the district court granted that motion late in

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[14] An eight-liner is an electronic device often described as video poker or video lottery. *See Owens v. State*, 19 S.W.3d 480, 481 (Tex. App.—Amarillo 2000, no pet.).

[15] TEX. PENAL CODE ANN. § 47.01(4)(B).

[16] "Cash" in this context is not limited to coins and paper money, but also includes other mechanisms of payment. *See Hardy v. State*, 102 S.W.3d 123, 131-32 (Tex. 2003).

July 2010, the Tribe appealed the contempt order (*Ysleta III*).

II. STANDARD OF REVIEW

We review a contempt order de novo.[17] We review sanctions granted by the district court for abuse of discretion[18] and review its factual findings that underlie sanctions for clear error.[19]

III. ANALYSIS

A. Contempt Order

The Tribe contends that the sanctions imposed by the district court were criminal in nature, so that the civil contempt proceedings conducted by that court were inappropriate. Concluding that the contempt order was civil in nature, we hold that the district court properly granted that order.

We consider several factors when determining whether a contempt proceeding is criminal or civil in nature. Several key distinctions between the two are:

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[17] *Positive Software Solutions, Inc. v.New Century Mortg. Corp.*, 619 F.3d 458, 460 (5th Cir. 2010) (citing *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 590 (5th Cir 2008)).

[18] *Maxxam*, 523 F.3d at 590 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 54 (1991)).

[19] *See Crowe v. Smith*, 151 F.3d 217, 238-39 (5th Cir. 1998).

> (1) civil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act;
> (2) a judgment of civil contempt is conditional, and may be lifted if the contemnor purges himself of the contempt, while punishment for criminal contempt is unconditional;
> (3) civil contempt is a facet of the original cause of action, while criminal contempt is a separate cause of action brought in the name of the United States;
> (4) the notice for criminal contempt must indicate the criminal nature of the proceeding.[20]

Another factor is the purpose of the order, namely, whether the order is meant to be punitive or merely coercive and remedial.[21]

In this instance, all factors confirm that the contempt order is civil in nature, not criminal. When the Tribe offered cash prizes in excess of five dollars, it violated the terms of the injunction, i.e., that it adhere to Texas gaming law, and thus was refusing to do a commanded act. Next, the contempt order is conditional because the Tribe "carr[ies] the keys of their prison in their own pockets."[22] For instance, the

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[20] *Skinner v. White*, 505 F.2d 685, 688-89 (5th Cir. 1974) (citations omitted).

[21] *In re Hunt*, 754 F.2d 1290, 1293 (5th Cir. 1985) (citations omitted).

[22] *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (internal quotation marks and citation omitted). *See also Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965) ("[S]anctions imposed

Tribe could cease to operate eight-liners at the Casino until the court ruled on future operations, or it could submit evidence of compliance to the district court and ask for the contempt order to be removed or modified. Further, the State brought its motion for contempt in the context of a larger, lengthy, civil litigation proceeding.[23] And, the State was acting not in a prosecutorial role or as a representative of the public, but directly as the complainant, as it was entitled to do under the Restoration Act. Morever, the sanctions contained in the contempt order confirm that its purpose was remedial — to ensure compliance with the terms of the injunction — rather than punitive for violating those terms. As the contempt order was indisputably civil in nature, the district court did not need to provide the additional procedural safeguards required for criminal contempt orders.

B. Judicial Authority

The Tribe also contends that the district court exceeded its authority when it entered an order that would permit state agents to conduct regulatory inspections on a federal enclave to enforce federal law.

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in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself.").

[23] *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911) ("Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause.").

Stated differently, the Tribe asserts that the district court exceeded the statutory authority granted by Congress by giving the State regulatory authority and the power to enforce federal law over the Tribe. The Tribe also claims that the district court improperly delegated its judicial authority to the state agents. Once again, we conclude that the district court acted properly and that the Tribe's position on this issue is simply wrong.

The district court did not grant Texas either regulatory or enforcement authority over the Tribe when it authorized state agents to conduct inspections of the Tribe's gaming records. According to the specific wording of the order, the state agents are only empowered to *inspect* those records. Then, if they should find any irregularities, the State would have to return to the district court for further action. As noted above, the Tribe, not the State, controls the duration of the inspection regime, as it may either cease to operate the machines in question or file evidence of its compliance in the district court and seek modification or removal of the order. As Texas can neither issue sanctions nor control the duration of the inspections, the contempt order does not grant the State regulatory or enforcement power over the Tribe.

Neither has the district court improperly delegated an adjudicatory role to the State. The limited right of inspection in the instant case is analogous to discovery. We have previously noted that district courts have broad discretion when it comes to matters relating to discovery, and that "it is unusual to find

abuse of discretion in these matters."[24] The district court has been taking an active role in overseeing the "discovery" at issue here, as evidenced by its modification of the original contempt order to narrow its focus to the Tribe's use of eight-liners.

As the district court only authorized additional discovery and did not delegate any regulatory, enforcement, or adjudicatory power to the State, it did not exceed its authority when it granted the contempt order authorizing state agents to inspect the Tribe's gaming records.

IV. CONCLUSION

The district court did not abuse its discretion or otherwise err when it granted the contempt order, an order that was clearly civil in nature. Neither did the court's contempt order impermissibly delegate any regulatory, enforcement, or adjudicatory authority to the State when it permitted monthly inspections of tribal records pertaining to the operation of eight-liners. We affirm the district court's contempt order allowing inspection of tribal records by state agents with respect to the operation of eight-liners.

AFFIRMED.

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[24] *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969) (citation omitted). *See also Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1012 (5th Cir. 1986) (citations omitted)("Control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

No. EP-99-CA-320-H

[Filed August 3, 2010]

STATE OF TEXAS,	)
	)
Plaintiff,	)
	)
v.	)
	)
YSLETA DEL SUR PUEBLO, et al.,	)
	)
Defendants.	)
	)

ORDER REGARDING DEFENDANTS' MOTION TO MODIFY PREVIOUS ORDER

Plaintiff State of Texas filed a motion requesting the Court to find the Defendants in contempt of the injunction entered in this case on September 27, 2001, as modified May 17, 2002. On July 30, 2009, the Court entered an order granting the motion for contempt (Docket No. 281). Among other things, the order granting the motion for contempt ordered the Defendants to allow designated representatives of the State to have access on a monthly basis to their Casino

and "access to all books and records relating to the conduct of gaming to insure continued compliance with the terms of the injunction" (Memorandum Opinion and Order, p. 9). The Defendants later filed a motion to amend that order (Docket No. 294). The Court, having considered that motion, and the Plaintiff's response, finds that the motion to modify should be granted in part and denied in part.

The Defendants contend that the portion of the Court's order which granted representatives of the State of Texas periodic access to the books and records of the Defendants' Casino constituted a grant of regulatory jurisdiction to the State which was not authorized by Congress in the Restoration Act, 25 U.S.C. § 1300g-6. The Court disagrees. The thrust of the order was to grant representatives of the State limited authority to conduct discovery to insure the Defendants' compliance with the injunction and contempt order.

Upon review, however, the Court concludes that the language of the contempt order was over broad. The Plaintiff's motion for contempt, and the Court's order granting it, focused on the use and abuse of the devices known as "eight-liners." The Plaintiff contended, and after hearing evidence the Court found, that the manner in which these devices were being used violated Texas law and the injunction in this case. That portion of the order which granted periodic access to the books and records of the Casino should have been limited to that particular issue, rather than being a broad grant of authority to rummage through all the books and records maintained by the Defendants. Accordingly, that particular paragraph of the contempt order should be modified to reflect more accurately the

Court's intention to authorize continuing, limited discovery to verify the Defendants' compliance with the injunction and contempt order.

It is therefore ORDERED that the Defendants' motion to amend the order granting motion for contempt (Docket No. 294) be, and it is hereby, GRANTED in part and DENIED in part.

It is further ORDERED that the next to last paragraph of the Memorandum Opinion and Order granting motion for contempt entered herein on August 3, 2009 (Docket No. 281) be, and it is hereby, AMENDED to read as follows:

> It is further ORDERED that the Defendants above named, and all persons or entities acting in concert with them, allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to the records maintained by the Defendants with respect to the operation of the devices known as "eight-liners," for the purpose of verifying that such devices are not being operated in a manner contrary to the laws of the State of Texas or the terms of the injunction and contempt order in this case.

SIGNED AND ENTERED this 29th day of July, 2010.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

NO. EP-99-CA-320-H

[August 3, 2009]

STATE OF TEXAS,	)
	)
Plaintiff,	)
	)
v.	)
	)
YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR FRANCISCO PAIZ OR HIS SUCCESSOR, and LIEUTENANT GOVERNOR CARLOS HISA OR HIS SUCCESSOR,	)
	)
Defendants.	)

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR CONTEMPT

Plaintiff State of Texas ("the State") filed a motion requesting the Court to find the Defendants in contempt of the injunction entered in this case on September 27, 2001 and modified on May 17, 2002.

The Defendants filed a response in opposition to the Plaintiff's motion for contempt, and the Court heard evidence supporting and opposing the motion. The Court's findings of fact and conclusions of law are included in this opinion.

A. LITIGATION HISTORY

This case lends new meaning to the term protracted litigation. The matters brought before the Court by the Plaintiff's motion for contempt represent the latest chapter in a dispute which began in 1993 and has proceeded, in fits and starts, ever since. On one side is the State, and on the other, the Ysleta Del Sur Pueblo ("the Tribe"). The underlying issue has been, and continues to be, the right of the Tribe to conduct gaming activities on its tribal lands in El Paso County, Texas.

The members of the Ysleta Del Sur Pueblo were recognized as a tribe as early as 1968, under the name "Tiwa Indians of Ysleta, Texas." The Tiwa Indians Act, Pub.L. 90-287, 82 Stat.93 (1968). However, full federal trust relationship between the United States Government and the Tribe was not established (or "restored") until the passage in 1987 of the Restoration Act, Pub.L. 100-89, 25 U.S.C. § 1300g. The Act re-designated the Tribe as the "Ysleta Del Sur Pueblo," and, critical to this case, provided the following:

> All gaming activities which are prohibited by the laws of the state of Texas are hereby prohibited on the reservation and lands of the tribe. 25 U.S.C. § 1300g-6(a).

Exclusive jurisdiction over violations of this subsection by the Tribe itself or any of its members was conferred upon the Courts of the United States. Section 1300g-6(c).

Notwithstanding the explicit restrictions on gaming activity enacted by Congress and accepted by the Tribe,[1] the latter filed a civil action in 1993, seeking to force the State to negotiate a tribal-state compact allowing gaming activities on its reservation. The Tribe's effort reached a dead end in the Court of Appeals, which held that (1) the gaming laws and regulations of the State of Texas operate as surrogate federal law on the Tribe's reservation, and (2) the Tribe must conform to those provisions of Texas law unless it persuades Congress to amend or repeal the Restoration Act. **Ysleta Del Sur Pueblo v. State of Texas**, 36 F.3d 1325, 1334-35 (5th Cir. 1994).

Undaunted by this legal setback, the Tribe proceeded to offer a variety of games of chance in the Speaking Rock Casino located on its reservation in the Ysleta neighborhood of El Paso, Texas. Although started as a bingo hall, the Casino expanded its operations to include slot machines, poker, blackjack, craps, and many other forms of gambling not authorized under Texas law. Members of the public by the thousands, who had no connection with the Tribe or its members, were invited to the Casino to indulge in the gambling it offered. In 1999, the Attorney General of Texas filed the instant civil action seeking

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[1] **See** Tribal Resolution No. T.C.-02-86, approved and certified on March 12, 1986 and referenced in 25 U.S.C. § 1306g-6(a).

to enjoin these operations.[2] After lengthy litigation, including appeals, this Court (Honorable G. Thomas Eisele) granted the relief sought by the State and ordered the Tribe to cease within 60 days all gambling operations in its Casino or any location on its reservation or lands. **State of Texas v. Ysleta Del Sur Pueblo, et al.**, 220 F.Supp.2nd 668, 697-98 (W.D. Tex. 2001).

Following another unsuccessful appeal by the Tribe, the case returned to this Court, and the injunction was modified to clarify that the Tribe was not prohibited from engaging in those narrow categories of gaming activities which other private individuals and organizations are permitted to conduct. Specifically, the injunction was modified to permit the Tribe to do the following: (1) sell lottery tickets as an agent of the State of Texas; (2) operate amusement devices which comply with the provisions of section 47.01(4) of the Texas Penal Code; and (3) participate in third-party giveaway contests conducted by national vendors. 220 F.Supp.2d at 708 (W.D. Tex 2002).

B. AMUSEMENT DEVICES

In 2008, the Attorney General received information that the Casino was operating gaming devices which might be illegal under Texas law, and therefore in violation of the injunction in this case. Two officers of

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[2] The Restoration Act provided in section 1306g-6(c) that the State is not precluded from bring suit to enjoin such violations. Due to State law limitations on the authority of the Attorney General to initiate civil litigation, the suit took the form of an action to abate a nuisance.

the Texas Department of Public Safety, Sergeants Wilbourn and Rodriguez, were dispatched to the Casino to investigate. What they found is not in substantial dispute. Inside the Casino were hundreds of machines commonly called "eight-liners." An eight-liner is an electronic or mechanical device that has been described as a "video poker" or "video lottery" machine. **See Owens v. State**, 19 S.W.3d 480, 481 (Tex.App.-Amarillo 2000, no pet.) The devices operate at least partially, if not entirely, by chance. At the Casino, a player operates the machine using a card which is purchased for cash. He decides how much to "bet," and if he is successful, the machine returns several times the amount of the bet.[3]

The crucial fact lies in the manner in which the player's winnings are redeemed. The Casino issues the player a Visa debit card in the appropriate amount. In this case, both Welbourn and Rodriguez received a $20.00 Visa card. It is undisputed that the debit cards can be used to purchase merchandise at any retail outlet that honors Visa cards. Welbourn verified this fact by using his card to buy a pair of jeans at a Walmart store the following day.

An electronic or mechanical device like an eight-liner is not prohibited under Texas law if it meets certain strict criteria. The definition of a "gambling device" in the Penal Code excludes any machine which "rewards the player exclusively with **noncash** merchandise prizes, toys or novelties, or a

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[3] Wilbourn testified that it was possible to win up to 400 times the amount of the bet. Neither he nor Rodriguez, in limited play, came close to hitting that kind of "jackpot."

representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less." Tex. Penal Code § 47.01(4)(B) (emphasis added). In the instant case, the Visa debit cards issued by the Tribe's Casino are not "noncash merchandise." The word "cash" is not limited to coins and paper money; it includes also the equivalent of money. **Hardy v. State,** 102 S.W.3d 123, 131 (Tex. 2003). A Visa card which can be used as a medium of exchange at most retail outlets simply does not qualify as a noncash merchandise prize, toy or novelty item which would fall within the exclusion in section 47.01(4)(B). **See Ysleta Del Sur Pueblo**, 220 F.Supp.2d at 704 n.5 (gift cards); **Hardy**, 103 S.W.3d at 132 (same).

During his visit to the Casino, Sergeant Wilbourn observed at least two prominently displayed signs which invited the visitor to "come on in and win some cash." While not dispositive of the issue in and of itself, the presence of these signs verifies the Court's conclusion that Casino payouts in cash or cash equivalents were fully intended, and not based on mistake or accident.

At the time Judge Eisele modified the injunction in this case to permit the operation of amusement devices of the kind allowed by section 47.01(4)(B), he admonished the Tribe "to strictly adhere" to the language of the statute and the case law interpreting it, and not to venture outside its boundaries. It appears that the Tribe has not heeded that admonition with respect to its prize awards.

In its response to the State's motion and amended motion for contempt, the Tribe has argued for the first time that section 47.01(4)(B) of the Penal Code is unconstitutional. That argument is untimely. If the Tribe believed that the statute was unconstitutional and void, it should have raised the issue years ago when the Court modified the injunction to permit the operation of eight-liners in conformity with the limitations contained in section 47.01(4)(B). It did not do so. In any event, the contention has no merit. Texas courts have had no difficulty in upholding the statute against constitutional challenges in cases specifically involving the operation of eight-liners. **See, e.g., Owens**, 19 S.W. 3d at 484. This Court agrees that the statute is not void for vagueness, and that it passes both State and federal constitutional muster.

In an apparent afterthought, the Tribe also contends that the Plaintiff's motion for contempt amounts to "selective enforcement" of the Texas laws prohibiting illegal gaming. This argument is out of place. The Defendants are accused of violating the specific terms of an outstanding injunction, not with violating Texas gaming laws in general. In the context of this case, and the Plaintiff's motion for civil contempt, that "defense" is no defense at all.

In summary, the Plaintiff has shown by clear and convincing evidence that the Defendants are operating eight-liner devices in a manner that violates the terms of the modified injunction in this case, and that they are in contempt of that injunction.

C. SWEEPSTAKES

The Plaintiff's motion and amended motion for contempt focused solely upon the Defendants' operation of eight-liners. For reasons which are not at all clear, the subject of sweepstakes was first broached by the Defendants in their response to the Plaintiff's motion for contempt. It does not appear that the Defendants intended to interpose some form of counterclaim or request for declaratory relief. A response to a motion for contempt was clearly not a proper vehicle for either. The practical effect, however, was to draw a reply from the Plaintiff that offering Casino patrons a form of gaming with prepaid internet cards (another activity observed by Wilbourn and Rodriguez) was illegal under Texas law and not a permissible sweepstakes. Although the issue is outside the scope of the contempt motion, the Court will make the following comments.

The Court's order modifying the injunction in this case denies the Tribe's request to conduct a sweepstakes contest "absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law." 220 F.Supp.2d at 706. The Court never approved the activity described by Defendants as a "sweepstakes" in which the player pays cash to obtain a prepaid internet access card, then uses the card to activate a video terminal in search of a cash prize. Furthermore, the procedures which have been described bear more resemblance to a prohibited lottery than to a legal sweepstakes operation. **See** Tex. Penal Code § 47.01(7). They also resemble a sweepstakes proposal previously submitted by the Defendants, but disapproved by the Court in 2003. The bottom line is that the conduct of a

sweepstakes by the Defendants requires Court approval of "a firm and detailed proposal."

D. CONCLUSION

The plaintiff has sustained its burden of proving that the Defendants have been operating gambling devices in violation of Texas law and in a manner prohibited by the injunction issued September 27, 2001 and modified May 17, 2002. Therefore, the motion for contempt should be granted.

It is therefore ORDERED that the motion of Plaintiff State of Texas to hold the Defendants in civil contempt be, and it is hereby, GRANTED.

It is further ORDERED that Defendants Ysleta Del Sur Pueblo, Tigua Gaming Agency, the Tribal Council, Tribal Governor Francisco Paiz or his successor, and Lieutenant Governor Carlos Hisa or his successor forthwith CEASE and DESIST in the operation of gaming devices in a manner that rewards the player with cash or the equivalent of cash, including but not limited to gift cards, credit cards, or debit cards, in violation of the Texas Penal Code and the injunction and modified injunction in this case.

It is further ORDERED that the Defendants above named, and all persons or entities acting in concert with them, allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to all books and records relating to the conduct of gaming to ensure continued compliance with the terms of the injunction.

It is further ORDERED that the Defendants pay a civil penalty in the amount of Five Hundred and no/100 Dollars ($500.00) a day until they bring themselves into full compliance with the injunction of September 27, 2001 as modified on May 17, 2002, with such penalty to be paid into the Registry of the Court.

SIGNED AND ENTERED this 30th day of July, 2009.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PAS0 DIVISION

NO. 3:99-CV-320 GTE

[Filed May 17, 2002]

STATE OF TEXAS	)
PLAINTIFF	)
VS.	)
	)
YSLETA DEL SUR PUEBLO, et al.	)
DEFENDANTS	)
	)

ORDER MODIFYING
SEPTEMBER 27, 2001, INJUNCTION

Before the Court is the Defendants' Motion for Clarification of Order Granting Summary Judgment and Injunction. The State has responded, and the Defendants have submitted a reply brief. After reviewing the submissions, the Court is prepared to rule. The Defendants' requests will be granted in part and denied in part, and the Court's September 27, 2001, Injunction will be modified accordingly.

I. Factual and Procedural Background

The State of Texas filed this action against the Defendants on September 27, 1999, seeking to stop the operation of the Speaking Rock Casino and Entertainment Center (hereinafter "Casino") by the Ysleta Del Sur Pueblo Indian Tribe[1] (hereinafter "Tribe"). The Casino, located on the Tribe's reservation in El Paso County, Texas, opened in 1993 as a bingo hall, but subsequently expanded its gaming operations to include a wide variety of games of chance. The State sought to shut down the Casino as a nuisance in violation of the Texas Penal Code and the Restoration Act, 25 U.S.C. § 1300g.

The parties filed cross-motions for summary judgment. On September 27, 2001, the Court granted the State's motion and denied the Defendants' motion. The Court found that the Tribe "does not, as regards gambling, share a parallel sovereign status with the State of Texas," and shall be treated as any other private citizen or organization in regards to gaming questions. *See* 9/27/2001 Memorandum Opinion at 27. As such, the Court recognized that the Tribe is not prohibited from participating in all gaming activities, only those gaming activities that are prohibited to private citizens and organizations under Texas law. *See* 9/27/2001 Memorandum Opinion at 27-28. However, the Court noted that the Tribe had not attempted to qualify to participate in the permitted gaming activities:

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[1] The Ysleta Del Sur Pueblo Indian Tribe is also known as the Tigua Indian Tribe.

> There are certain gaming activities that private citizens and/or certain organizations, such as charities, may engage in lawfully in Texas if they comply with those State rules, regulations, and licensing requirements that pertain to such gambling activities. The State has acknowledged that the Tribe, if it qualified under such rules and regulations and, if it complied with those established rules and regulations, could participate in such limited gaming activities. The problem here is that the Defendant Tribe has not even attempted to qualify under the rules, regulations or licensing requirements of the State of Texas with respect to any of the gaming activities presently being conducted at the casino on its Reservation. And, since the [*California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987)] criminal and prohibitory civil-regulatory distinction does not apply under the Restoration Act with respect to gambling, the Tribe cannot engage in these "regulated" gaming activities unless it complies with the pertinent regulations.

9/27/2001 Memorandum Opinion at 28.

The Court concluded as a matter of law that the "Defendants' gaming activities on its reservation violate the Texas Penal Code and the Restoration Act." 9/27/2001 Memorandum Opinion at 37.[2] Finding the

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[2] The Court concluded as a matter of law:

> 7. The evidence in this case has established, and the Court so finds, that the Defendants in this case have embarked upon a long-continued habitual course of conduct clearly

Casino to be a common and public nuisance under Texas law, the Court enjoined the Defendants from operating the Casino, having the practical and legal effect of prohibiting illegal as well as legal gaming

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> violative of the Gambling Laws of the State of Texas and that such parties, unless enjoined, will continue such habitual illegal activities at Speaking Rock Casino. More specifically, such Defendants, YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, and GAMING COMMISSIONER FRANSICO HERNANDEZ have habitually used, and threatened or contemplated the continued habitual use of a place located in El Paso County, Texas, known as, referred to and advertised as the Speaking Rock Casino, which is geographically a part of the Ysleta del Sur Pueblo Indian land and which has a street address of 122 S. Old Pueblo Rd., El Paso, Texas 79907 for the purpose of illegal gambling, gambling promotion and communicating gambling information prohibited by law by providing a place where Defendants charge and collect monetary fees from the public resulting in an economic benefit to them based upon patrons, guests and customers playing gambling games and betting money on games played with cards, dice and other gambling devices in violation of § 47 of the Texas Constitution; Chapter 47 of the Texas Penal Code; § 125.002 and § 125.021 of the Texas Civil Practice and Remedies Code; and 25 U.S.C. § 1300g-1 *et seq*.
>
> 8. The operation of all games played with dice, cards, wheels, slot machines, KENO boards, off track betting and BINGO cards at Speaking Rock Casino are violations of Texas Penal Code § 47.02 and constitute both a common and public nuisance under Texas Civil Practice and Remedies Code § 125.001 Common Nuisance and § 125.021 Public Nuisance.

9/27/2001 Memorandum Opinion at 37-38.

activities by the Defendants. *See* 9/27/2001 Order Granting Summary Judgment and Injunction. Because the scope of said injunction is presently at issue, the Court quotes its relevant terms:

> **INJUNCTION**
>
> It is the Order of the Court, by this Injunction, that all such acts, activities, and conduct set forth above and also set forth below shall permanently CEASE, DESIST, and TERMINATE according to the time-table specified below.
>
> **PERSONS AND PARTIES SUBJECT OF INJUNCTION**
>
> The Persons and Parties enjoined are as follows:
>
> 1. Ysleta del Sur Pueblo
> 2. Tigua Gaming Agency
> 3. The Tribal Council of the Ysleta del Sur Pueblo
> 4. Tribal Governor Albert Alvidrez
> 5. Tribal Lieutenant Governor Filbert Candelaria
> 6. Gaming Commissioner Francisco Hernandez
> 7. The officers, agents, servants, employees, and attorneys of the foregoing persons and parties.
>
> **ACTIVITIES ENJOINED**
>
> The persons and parties enjoined and listed as being subject of injunction are hereby ORDERED to CEASE, DESIST, TERMINATE

AND REFRAIN FROM engaging in, permitting, promoting, and conducting activities at the Speaking Rock Casino in violation of Chapter 47 of the Texas Penal Code, and 25 U.S.C. § 1300g of the Restoration Act, including but not limited to the following activities

A. Gambling activities played with cards, dice, balls, or any other gambling device where some, any or all of the persons and parties enjoined receive an economic benefit. Specifically prohibited are: all card games; all dice games; all games using one or more balls and or a spinning wheel; and games involving a vertical spinning wheel, which require players to pay a monetary fee, whether such fee is designated an "Ante," "Rake," Service Charge or otherwise.

B. Gambling activities played with cards, dice, balls, or any other gambling device some, any or all of the persons and parties enjoined charge or collect or attempt to collect any monetary fee as a requirement for any person to bet on or play any game played with cards, dice, ball or any other gambling device, whether such fee is designated by "Ante," "Rake," Service Charge or otherwise.

C. Gambling activities played with cards, dice, balls, Keno tickets, bingo cards, slot machines, or any other gambling device where some, any or all of the persons and parties enjoined act directly or indirectly as the "house" or "banker" in the same fashion as the operator of the gambling casino.

D. Providing to any person for his/her use a slot machine, the operation of which results in or is calculated to result in an economic benefit to the owner or lessor of the slot machine.
E. Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to:
    1. Bingo or any variation thereof;
    2. Scratch tickets, peel tickets, or pull tabs;
    3. Keno or any variation thereof;
    4. Tigua Dice, Craps, or any variations thereof;
    5. Slot Machines;
    6. Poker card games;
    7. Betting on horse races or dog races;
    8. Tigua 21, Blackjack, or any variations thereof;
    9. Wheel of Fortune, Big Six Wheel, or any variations of wheel games.
F. Allowing other persons or entities to engage in any of the above activities on the premises of the Speaking Rock Casino or anywhere upon the reservation lands of the Ysleta del Sur Pueblo or upon any other lands of said Tribe.

TIME FOR COMPLETE COMPLIANCE

For the reasons set forth in its Memorandum Opinion of even date herewith, the Court gives the Defendants until November 30, 2001, within

> which to bring themselves into full and complete compliance with the Injunction set forth herein.

9/27/2001 Order Granting Summary Judgment and Injunction at 2-5.

On October 12, 2001, the Defendants filed a motion for reconsideration of the Court's grant of summary judgment.[3] The Defendants also asserted that the injunction is overly broad, in that it prohibits legal as well as illegal gambling activity on the reservation. On November 2, 2001, the Court denied the motion for reconsideration, concluding that the Defendants had presented nothing more than "a rehash of old arguments." In response to the broadness question, the Court recognized that the Tribe would eventually, if it qualified, "be permitted to engage in those gaming activities that any other citizen of Texas could lawfully engage in." 11/2/2001 Order at 3. However, as the deadline for compliance with the injunction had not passed, and the Defendants were not yet in compliance, the Court opted not to modify the injunction, even to allow legal activities, until the illegal gaming activities ceased. The Court provided that once in compliance, the Defendants could petition for a modification of the injunction that would permit participation in legal gaming activities. Specifically, the Court stated:

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[3] The Defendants actually filed a Motion for New Trial and Motion to Amend Judgment. Because there had been no trial the motion was treated as a motion for reconsideration.

> The Court believes it is unnecessary, and, indeed, that it would be unwise, to change the injunction in anticipation of possible future actions by the defendants to engage in legal gambling on the Tribe's reservation. The Court has enjoined the defendants' operations as a common and public nuisance under Texas law for violating the Restoration Act. After the illegal operations cease and the nuisance is fully abated, the defendants are, of course, free to petition the Court for a modification of any of the terms of the injunction that they believe might limit their ability to participate in any legal gaming activity for which they have qualified under Texas law. As of the date of the injunction, and as of this date, the defendants have not, so far as the record reveals, taken any of the steps necessary to qualify.

11/2/2001 Order at 3-4.

The Defendants timely appealed the grant of summary judgment to the United States Court of Appeals for the Fifth Circuit. Pending the appeal, the Fifth Circuit granted the Defendants' motion to stay the injunction, and the Tribe continued operation of the Casino. On January 17, 2002, the Fifth Circuit affirmed this Court's decision. On February 12, 2002, this Court having received the Fifth Circuit's mandate, the Defendants complied with the injunction, ceasing operation of the Casino.

II. Discussion

On March 1, 2002, the Defendants filed the instant motion. Styled as a motion for reconsideration, the

Defendants seek a declaration that various proposed activities do not violate this Court's injunction. Furthermore, to the extent the injunction limits the Tribe's ability to participate in legal gaming activities for which they qualify under Texas law, the Defendants seek a modification of the injunction.

The State generally contends that the Defendants' motion should be denied as moot because, it argues, the injunction only enjoined illegal gaming activities by the Tribe, and not legal activities. Thus, the Tribe is not prevented from otherwise participating in legal gaming activities. The Court disagrees with the State's position. As noted, the legal and practical effect of the Court's injunction was to cease all gaming activities by the Defendants. Though the Court recognized that the Tribe would ultimately be permitted to participate in legal gaming activities under Texas law, if it so qualified, the Court determined that to ensure the illegal gaming activities ceased, all gaming activities should be enjoined on the reservation. Once in compliance, the Court provided that the Defendants could petition the Court for a modification of the injunction that would permit the Tribe to conduct legal gaming operations if it otherwise qualified under Texas law.

Therefore, the Court will consider the Defendants' request for declarations that various proposed activities do not violate the injunction, or, if an activity does violate the injunction and is a legal activity the Tribe is otherwise qualified to participate in under Texas law, that the injunction be modified to permit said activity. The Defendants seek a review of the following proposed activities: (1) conducting state lottery activities as an agent of the State;

(2) amusement devices; (3) carnival contests; (4) sweepstakes; (5) charitable bingo; (6) player pool activities; and (7) card games.

A. State Lottery

The Tribe, as an agent of the State, conducts state lottery activities in the reservations' fuel stations. The Defendants seek a declaration that such activities are not in violation of the Court's injunction. The State contends that this is a legal gaming activity not prohibited by the injunction. As discussed above, the Court disagrees with the State's interpretation of the injunction. Because conducting state lottery activities on behalf of the State is a legal gaming activity the Tribe is otherwise qualified to participate in, the injunction will be modified to permit the Tribe to so conduct state lottery activities.

B. Amusement Devices

The Defendants propose to operate various amusement devices, specifically: "electronic, electromechanical, and mechanical contrivances made and used solely for bona fide amusement purposes in compliance with Section 47.01(4)(B) of the Texas Penal Code." Gambling devices are illegal in Texas. Section 47.01(4) defines "gambling device":

> (4) "Gambling device" means any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or

not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) *does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.*

Tex. Penal Code Ann. § 47.01(4) (emphasis added). The Tribe proposes to offer "amusement devices" within the gambling device prize exception provided by § 47.01(4)(B). It has adopted the quoted language from § 47.01(4)(B), but not the remainder of § 47.01(4), in a

recently enacted Tribal ordinance. *See* Tribal Ordinance 003 (undated) at 2.01.

The State objects to this amusement device proposal because Tribal Ordinance 003 does not track the complete language of § 47.01(4), only the language from subsection (B). The Court concludes that this is not a basis to deny the Defendants' proposal. Whether Tribal Ordinance 003 contains the complete language of § 47.01(4) is immaterial; the Tribe is nevertheless bound by the Restoration Act to adhere to Texas state gambling law *in toto*. Merely because Tribal Ordinance 003 omits the complete language of § 47.01(4) does not mean that the Tribe may ignore pertinent state law. Furthermore, the Defendants assure the Court that the Tribe intends to abide by all the provisions of § 47.01(4) and otherwise operate within the gambling device prize exception. Therefore, the injunction will be modified to permit the Tribe to offer the proposed amusement devices, but only to the extent that the Tribe adheres to all the provisions of § 47.01(4), as well as other relevant Texas Penal Code sections.

The State also specifically objects to one particular gaming activity within the Defendants' amusement device proposal: "eight-liners." A Texas state court has described eight-liners as "video poker or video lottery machines." *See Owens v. State*, 19 S.W.3d 480, 481 (Tex. App. 2000). Another court indicated that the machines "resemble slot machines." *See State v. One Super Cherry Master Video 8-Liner Machine*, 55 S.W.3d 51, 54 (Tex. App. 2001).[4] The State contends

[4] A witness testified in a Texas state court criminal case that "eight liners are electronic machines resembling slot machines

that all eight-liners are illegal in Texas. The Defendants disagree, contending that the Tribe's proposed use of eight-liners is legal in that it complies with the gambling device prize exception of § 47.01(4)(B). The Court agrees with the Defendants.

As a threshold matter, the Court recognizes that eight-liners have been found to be "gambling devices" under § 47.01(4), and thus illegal. *See Allstar Amusement v. State*, 50 S.W.3d 705 (Tex. App. 2001); *Hardy v. State*, 50 S.W.3d 689 (Tex. App. 2001). However, the eight-liners in these cases were found to be illegal in that they did not comport to the gambling device exception provided in § 47.01(4)(B). It is clear that if an eight-liner falls under the § 47.01(4)(B) exception, it is not illegal. The *Hardy* court recognized this, holding that eight-liners fall "within the exclusion provided by section 47.01(4)(B) only if it 'rewards the player exclusively with *noncash* merchandise, prizes, toys or novelties, or a representation of value redeemable for those items.'" *Hardy*, 50 S.W.3d at 697 (emphasis in original) (quoting Tex. Penal Code Ann. § 47.01(4)(B)). Other Texas courts have recognized that eight-liners are not illegal if they fall under the § 47.01(4)(B) exception. *See generally Legere v. State*, 2002 WL 560963, n.4 (Tex. App. 2002) ("Excluded from the definition are those devices that reward the player 'exclusively with noncash merchandises, prizes, toys or novelties, or a representation of value redeemable for

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and are commonly called eight liners because they can pay out in eight separate ways—three across, three down, and two diagonally. These machines operate by displaying a three-by-three grid of symbols or 'icons' with a winning combination being any three matching symbols in a line." *State v. Wofford*, 34 S.W.3d 671, 676 (Tex. App. 2000).

those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.' As subsection 47.01(4)(B) exempts certain types of devices, not all eight-liners are necessarily gambling devices."); *One Super Cherry*, 55 S.W.3d at 53 ("Consequently, the State bore the additional burden of negating the applicability of section 47.01(4)(B) in order to prove that the eight liners were gambling devices within the meaning of the entire statute.").

The Court concludes that the Tribe shall be permitted to offer eight-liners as an amusement device, but only to the extent that it strictly adheres to the prize limitations provided in § 47.01(4)(B). That is, the device must exclusively offer "noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less." The Court cautions that the Tribe in offering amusement devices is to strictly adhere to this language, and the case law interpreting it.[5]

C. Carnival Contests

The Defendants propose to participate in "carnival contests conducted at carnivals sponsored by qualified organizations, either as agent of the sponsor or as

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[5] The Court notes its view that gift certificates are *not* a noncash merchandise prize. *See Hardy,* 50 S.W.3d at 697.

proprietor of the contest, as set forth in Section 47.01(1)(C) of the Texas Penal Code." Section 47.01(1)(C) provides:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include: (C) an offer of merchandise, with a value not greater than $25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

Tex. Penal Code Ann. § 47.01(1)(C). The Defendants note that the Tribe enacted a tribal ordinance including the above-quoted language. *See* Tribal Ordinance 003 (undated) at 2.03.

The State objects to this proposal, contending that the Tribe cannot be categorized as one of groups permitted to participate in carnival activities. The Court agrees with the State. The Tribe is not a religious, school, law enforcement, youth, agricultural, or civic group. Furthermore, the record evidences no indication that the Tribe has taken steps to become a non-profit entity under Texas state law, *see generally* Tex. Civ. Stat. Art. 1396-1.01 *et seq.,* or otherwise qualifies as a fraternal group.

D. Sweepstakes

The Defendants' sweepstakes proposal encompasses two pursuits: third-party giveaway contests conducted by national vendors and Tribal sweepstakes activities. The Court will first address the national vendors' contests.

According to the Defendants, the Tribe presently permits national third party vendors to conduct contests on the reservation. Contests conducted at Big Bear Lube Express Stores include:

(1) The Mobil 1 Advantage—receive a Mobil 1 Road Atlas / Travel Guide or Trip Maker CD with a purchase of Mobil 1 synthetic service;

(2) The Mobil 1 25th Anniversary Dream Lease Sweepstakes—register to win a two year lease on a Corvette / Mercedes-Benz / Porsche; and

(3) Mobil 1 Synthetic Service—replica NASCAR promotion

Contests conducted at Running Bear Stores:

(1) Nestles Crunch—win instantly a SUV or tickets to the 2002 NBA Finals;

(2) M&M's Crispy—win one of one million instant prizes;

(3) Corn Nuts—win a trip to Wrestle Mania;

(4) Kalil (7Up)—win instantly a home theater;

(5) Pepsi—win Final Four tickets;

(6) Doritos—win a home theater;

(7) Nestles Coca—win a ski vacation;

(8) Arm & Hammer Baking Soda—free CD with purchase/shipping;

(9) Cherries—win a vacation;

(10) Coca-Cola—win a TV, Sony Playstation II, or Mini-Fridge; and

(11) Speedpass—win a vacation.

Though the record does not include specific information about each of these contests or giveaways, the Court will presume that they are of a type that are common at fuel stations and grocery stores across the country. For this reason, the injunction will be modified to permit these and other like-national third party vendor contests, provided that no specific contest violates Texas gaming law.[6] To the extent any such contest violates Texas gaming law, it continues to be prohibited by the injunction.

As for the Tribe itself, it proposes that it be permitted to "conduct sweepstakes activities in compliance with the provisions of Chapter 43 of the

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[6] To the extent that these activities have taken place since February 12, 2002, the date of the Tribe's compliance with the injunction, the Court determines any violation of the injunction to be *de minimus*.

Texas Business and Commerce Code." The Tribe has enacted an ordinance adopting provisions of Chapter 43. *See* Tribal Ordinance 003 (undated).

The State acknowledges that "if the tribe operated a sweepstakes in compliance with Chapter 43 of the Texas Business and Commerce Code and with the Texas Penal Code such activities would be legal, but the tribe has provided no facts to assess and determine whether its proposed 'sweepstakes' activities fit within the limits of Texas law." Furthermore, the State asserts that the Defendants provide no description of the proposed Tribal sweepstakes, nor any rules or regulations for such a proposal. Finally, the State notes that "it is difficult to imagine what activities the tribe envisions operating under the sweepstakes provisions. The relied-upon chapter sets out consumer protections and prohibitions for sweepstakes conducted *through the mail*. *See, e.g.*, Tex. Bus. & Comm. Code § 43.002."

The Defendants, in their reply brief, do not address these concerns and otherwise fail to apprise the Court of the type of sweepstakes it proposes. Without a specific proposal for a sweepstakes, legal under Texas law, before it, the Court will deny the Defendants' request to offer one. The Court will not modify the injunction to permit the Tribe to conduct a sweepstakes absent a firm and detailed proposal showing that said sweepstakes would be in compliance with Texas law.

E. Charitable Bingo

Chapter 2001 of the Texas Occupations Code permits the performance of charitable bingo activities

by qualified organizations and entities, and regulates the conduct of such activities in Texas. The Defendants propose that the Tribe be permitted to conduct charitable bingo activities, and the Tribe has adopted an ordinance the Defendants contend track the provisions of Chapter 2001. *See* Tribal Charitable Bingo Ordinance 002-02 (March 1, 2002).

Chapter 2001 provides, in part, that the Texas Lottery Commission (hereinafter "Commission") shall administer the provisions of Chapter 2001. *See* Tex. Occ. Code Ann. § 2001.051(a). In order to participate in charitable bingo activities in Texas, an entity must apply for and receive a license from the Commission. *See* Tex. Occ. Code Ann. 2001.101 *et seq*.

The Tribe has not applied for a license, and contends that they may conduct charitable bingo activities in Texas without such a license, provided this Court so modifies the injunction. The Defendants rely on Section 107(b) of the Restoration Act, codified at 25 U.S.C. § 1300g-6(b), to contend that the Tribe is not subject to the regulatory jurisdiction of the State of Texas. Because the Tribe is not subject to the regulatory jurisdiction of Texas, they need not seek a license from the Commission or adhere to the other administrative provisions of state law to participate in charitable bingo activities.

The Court notes that while the Restoration Act provides that the Tribe is subject to Texas gaming law, the Act does not provide Texas any regulatory jurisdiction over the Tribe:

> (a) All gaming activities which are prohibited by the laws of the State of Texas are hereby

> prohibited on the reservations 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) *Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.*

25 U.S.C. § 1300g-6(a)-(b) (emphasis added).

The State objects to the Tribe's charitable bingo proposal, contending that the Tribal ordinance does not fully track Chapter 2001. For instance, the ordinance provides: the Tribe holds the exclusive authority to operate and regulate charitable bingo activities on the Tribe; the Tribe, not the Commission, will act as the governing, auditing, and taxing agency for charitable bingo activities; and "charitable purpose" is defined in relation to benefits for the Tribe. The State further asserts:

> The decision of this Court and the 1994 and 2002 decisions of the Fifth Circuit made clear that under the Restoration Act, Texas law defines the legality of any gambling activities by the tribe. The tribe is proposing that it operate bingo not according to Texas law, but according to its own ordinance. That suggestion flies in the face of decisional law that, by way of the Restoration Act's adoption of Texas law as

> surrogate federal law, the legality of any gambling activities are defined by *Texas* law.

The Court notes that the Tribe waived any parallel sovereign status, as regards gaming questions, that it might have when it made its compact with Texas in order to obtain federal trust status. The Tribe is bound, through the terms of the Restoration Act, to adhere to Texas gaming law. Not all gaming activities are prohibited to the Tribe, only those gaming activities that are prohibited by Texas law to private citizens and other organizations. As such, the Tribe may participate in legal gaming activities. However, because of the scope and nature of the Tribe's violation of the Texas Penal Code, the Court's September 27, 2001, injunction enjoined all gaming activities on the Tribe, whether legal or illegal. The Court provided that once the Tribe complied with the terms of the injunction and ceased their gaming operations, it could petition the Court for a modification of the injunction to permit it to participate in legal gaming activities, provided that the Tribe *otherwise qualified* to participate is said activities. The Court further recognizes that Section 107(b) of the Restoration Act provides that Texas does not hold regulatory jurisdiction over the Tribe.

Though a close question, the Court concludes that, pursuant to its September 27, 2001, Memorandum Opinion, the Defendants have not shown that the Tribe is "otherwise qualified" to participate in charitable bingo activities under Texas law. While the Tribe is not subject to the regulatory jurisdiction of the State, including the Commission, it is clear that the Tribe is subject to Texas law on all gaming matters, including participation in charitable bingo activities.

To make the otherwise qualified showing, and to ensure that its charitable bingo proposal is not in violation of the Texas Penal Code, the Court concludes that the Tribe should be required to procure a license from the Commission. Only upon making this otherwise qualified showing, and proper motion to this Court, will the Court consider modifying the injunction to permit charitable bingo activities by the Tribe.

The Court's determination does not mean that the Tribe is subject to the regulatory jurisdiction of the Commission. It is not. Upon the Tribe's otherwise qualified showing, and modification of the injunction, the Tribe's charitable bingo activities would not be subject to the Commission's regulatory scheme. Nevertheless, the Tribe would still be bound by the Restoration Act to adhere to the Texas Penal Code and other relevant law in regards to gaming issues. If the Tribe's charitable bingo activities ever violated relevant Texas law, the State would be free under the terms of the Restoration Act to seek appropriate relief in a federal forum.

F. Player Pool Activities and Card Games

The Defendants propose that the Tribe be permitted to conduct "drawings and tournaments" in which "Player Pool members" compete for "Player Pool funds." Specifically, the Defendants propose:

> to conduct free promotional activities such as drawings and tournaments in which the Player Pool members may compete for the funds remaining in the Player Pool fund in which the Tribe does not charge any fee or require any other compensation on the part of the players.

> The winners of the games will receive various prize amounts from the Player Pool fund. The promotional activities will be conducted on the Tribe's reservation at no cost or charge to Player Pool members. The promotional activities will continue until the funds remaining in the Player Pool have been disbursed to Player Pool members through such promotional activities.

The Tribe has adopted a Tribal resolution "authorizing" such activities. *See* Tribal Resolution TC-17-02 (Feb. 26, 2002). The resolution provides:

> Player Pool permits players to play against each other as opposed to playing against a banker. Except for the advantage of skill or luck, the risks of losing and the chance of winning are the same for all players. Assets accumulated in the pool are maintained to provide prizes in which all players shall have an opportunity to participate. The pool shall consist of cash and non-cash prizes. If a prize other than cash is offered, it must be acquired by the pool at fair market value and not in excess thereof. The rules and regulations of Player Pool shall be made available to all players.
>
> Player Pool funds shall be held in separate non-interest bearing bank accounts, and when deposited shall not be commingled with any funds of the Enterprise or Pueblo. The Enterprise shall provide an accounting of pool wins, losses, and contributions for each day of operation. The accounting shall be completed as soon as practicable after the close of each day in

> accordance with the Enterprise operations. As a result of the accounting, adjustments for each day will be made between the pool and the Enterprise. Those adjustments are not contributions. The holding of daily receipts, including the sale of chips, pending distributions, is not commingling of funds. The Pueblo may, from time to time, disburse funds to Player Pools as a non-obligated contribution and shall have no right to recoup same. If for any reason a Player Pool game with assets in the pool ceases to be played, all assets remaining on hand in that pool shall be distributed to Player Pool members through promotional events conducted by the Pueblo, at the discretion of the Pueblo.

Tribal Resolution TC-17-02 (Feb. 26,2002) at 1.

The Defendants also propose that the Tribe be permitted to conduct "promotional activities in which participants will play card games, in which the players compete for various prizes offered by the Tribe, at no charge to the players or participants in the promotional activities. The Tribe will realize no economic benefit or fee from the conducting of the activities or the play of such activities by participants."

The State opposes the two proposals. The State concedes that the Tribe will not charge any fee for participating in the Player Pool or card games, but contends that the Tribe may still charge admission or membership fees or collect other monies under both proposals. The resolution also provides that "adjustments" would be made between the Player Pool and the Tribe. Thus, the proposals are just as illegal

under the Texas Penal Code as past Tribe activities, no matter that players compete "against each other as opposed to playing against a banker." But even if the Tribe received no consideration from the players, the Tribe would not qualify under Texas law to permit this activity within the Casino because the Court specifically found that the Casino is not a "private place" under Tex. Penal Code Ann. § 47.02(b). *See* 9/27/2001 Memorandum Opinion at 30.

The Court agrees with the State that the injunction should not be modified to permit the "Player Pool" and card game proposals. The proposed activities are closely akin to the activities offered by the Casino prior to the injunction, and the Court is not satisfied on the present record that the proposed activities are, in fact, legal under state gambling laws. The Court envisions various ways in which the Tribe can realize consideration for the individuals participating in the proposed gaming activities. Furthermore, the Court is unsure what the Tribal resolution means by the "adjustments" made between the Player Pool and the Tribe. Finally, the Court continues to conclude that the Tribe's Casino is not a "private place" under Tex. Penal Code Ann. § 47.02(b). All this, coupled with the State's opinion that the proposed activities are illegal, leads the Court to conclude that the injunction will not be modified to permit the Player Pool and card game activities.

III. Conclusion

IT IS THEREFORE ORDERED that the requests made in the Defendants' Motion for Clarification of

Order Granting Summary Judgment and Injunction[7] be, and are hereby, GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that the Court's September 27, 2001, Injunction be, and it is hereby, MODIFIED to permit the Tribe to participate in the following activities as provided herein:

1. State lottery activities as an agent of the State of Texas;

2. Amusement devices, but only to the extent the Tribe adheres to all the provisions of Tex. Penal Code Ann. *5* 47.01(4) and other relevant Texas law; and

3. Third-party giveaway contests conducted by national vendors.

Dated this 14th day of May, 2002.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

[7] Doc. No. 160.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PAS0 DIVISION

NO. EP-99-CA0320-GTE

[Filed September 27, 2001]

STATE OF TEXAS	)
PLAINTIFF	)
	)
VS.	)
	)
YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ	)
DEFENDANTS	)
	)

ORDER GRANTING SUMMARY JUDGMENT AND INJUNCTION

On this day came to be considered The State of Texas's Motion for Summary Judgment and Injunction. Based upon the facts established by the record and the conclusions of law set forth in its Memorandum Opinion of even date herewith, the

Court concludes and orders that said Motion should be, and it is hereby, **GRANTED**.

IT IS FURTHER ORDERED, for the reasons set forth in said Memorandum Opinion, that the prayer of the Plaintiff, State of Texas, for injunctive relief be, and it is hereby, **GRANTED** as set forth below, in accordance with the Restoration Act, 25 U.S.C. § 1300g-6 Chapter 47 of the Texas Penal Code, §§ 125.001, 125.002 and 125.021 of the Texas Civil Practice and Remedy Code, and Rule 65 of the Federal Rules of Civil Procedure.

REASONS FOR ISSUANCE OF PERMANENT INJUNCTION

The Court finds and concludes that the summary judgment proof in this case has established that the Defendants have violated and are violating 25 U.S.C. §1300g-6 by engaging in an habitual course of conduct in violation of Chapter 47 of the Texas Penal Code, and that such parties, unless enjoined, will continue to engage in such habitual illegal activities and conduct. More specifically, the named Defendants, Ysleta del Sur Pueblo, Tigua Gaming Agency, the Tribal Council, Tribal Governor Albert Alvidrez, Tribal Lieutenant Governor Filbert Candelaria, and Gaming Commissioner Francisco Hernandez knowingly maintain a place located in El Paso County, Texas, known as, referred to and advertised as the Speaking Rock Casino, which is geographically located on the Ysleta del Sur Pueblo reservation and which has a street address of 122 S. Old Pueblo Rd., El Paso, Texas 79907, to which persons habitually and regularly go at the invitation of and with the permission of the Defendants, for the purpose of illegal gambling,

gambling promotion and communicating gambling information prohibited by, and in violation of the Texas Penal Code, by *inter alia,* providing a place where, among other things, Defendants charge and collect monetary fees resulting in an economic benefit to them based upon patrons, guests, and customers playing gambling games and betting money on games played with cards, dice and other gambling devices in violation of § 47 of Article III of the Texas Constitution, Chapter 47 of the Texas Penal Code, § 125.001 and § 125.021 of the Texas Civil Practice and Remedies Code, and 25 U.S.C. §1300g-6. The widespread nature and frequency of such illegal activities as engaged in by Defendants constitute a common nuisance and a public nuisance and rightfully should be enjoined.

INJUNCTION

It is the Order of the Court, by this Injunction, that all such acts, activities and conduct set forth above and also as set forth below shall permanently CEASE, DESIST, and TERMINATE according to the time-table specified below.

PERSONS AND PARTIES SUBJECT OF INJUNCTION

The Persons and Parties enjoined are as follows:

1. Ysleta del Sur Pueblo

2. Tigua Gaming Agency

3. The Tribal Council of the Ysleta del Sur Pueblo

4. Tribal Governor Albert Alvidrez

5. Tribal Lieutenant Governor Filbert Candelaria

6. Gaming Commissioner Francisco Hernandez

7. The officers, agents, servants, employees, and attorneys of the foregoing persons and parties.

ACTIVITIES ENJOINED

The persons and parties enjoined and listed as being subject of injunction are hereby ORDERED to CEASE, DESIST, TERMINATE AND REFRAIN FROM engaging in, permitting, promoting, and conducting activities at the Speaking Rock Casino in violation of Chapter 47 of the Texas Penal Code, and 25 U.S.C. § 1300-6 of Restoration Act, including but not limited to the following activities:

A. Gambling activities played with cards, dice, balls, or any other gambling device where some, any or all of the persons and parties enjoined receive an economic benefit. Specifically prohibited are all card games; all dice games; all games using one or more balls and or a spinning wheel and games involving a vertical spinning wheel, which require players to pay a monetary fee, whether such fee is designated an "Ante," "Rake," Service Charge or otherwise.

B. Gambling activities played with cards, dice balls, or any other gambling device where some, any or all of the persons and parties enjoined, charge or collect or attempt to collect any monetary fee as a requirement for any person to

bet on or play any game played with cards, dice, balls or any other gambling device, whether such fee is designated by "Ante," "Rake," Service Charge or otherwise.

C. Gambling activities played with cards, dice, balls, Keno tickets, bingo cards, slot machines, or any other gambling device where some, any or all of the persons and parties enjoined act directly or indirectly as the "house" or "banker" in the same fashion as the operator of the gambling casino.

D. Providing to any person for his/her use a slot machine, the operation of which results in or is calculated to result in an economic benefit to the owner or lessor of the slot machine.

E. Conducting any gambling game from which any person or party enjoined herein is likely to receive any economic benefit other than personal winnings, including, but not limited to:

1. Bingo or any variation thereof;

2. Scratch tickets, peel tickets, or pull tabs;

3. Keno or any variation thereof;

4. Tigua Dice, Craps, or any variations thereof;

5. Slot Machines;

6. Poker card games;

7. Betting on horse races or dog races;

8. Tigua 21, Blackjack, or any variations thereof;

9. Wheel of Fortune, Big Six Wheel, or any variations of wheel games;

F. Allowing other persons or entities to engage in any of the above activities on the premises of the Speaking Rock Casino or anywhere upon the reservation lands of the Ysleta del Sur Pueblo or upon any other lands of said Tribe.

Time for Complete Compliance

For the reasons set forth in its Memorandum Opinion of even date herewith, the Court gives the Defendants until November 30, 2001, within which to bring themselves into full and complete compliance with the Injunction set forth herein.

Court costs are hereby assessed against the Defendants jointly and severally.

SO ORDERED this 27th day of September, 2001.

/s/ Garrett Thomas Eisele
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-50804

[Filed August 1, 2011]

STATE OF TEXAS,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; TRIBAL COUNCIL; ALBERT ALVIDREZ, Tribal Governor; CARLOS HISA, Tribal Lieutenant Governor,	)
	)
Defendants - Appellants	)

Appeal from the United States District Court
for the Western District of Texas, El Paso

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 6/30/11, 5 Cir., _____, _____ F.3d _____)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX G

18 U.S.C. § 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

25 U.S.C. § 1300g–6. 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 1300g–4 (f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section 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.