IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff,* v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant*.	§ § § § § § § § § § § § §	NO. 9:01-CV-00299

MOTION FOR RELIEF FROM JUDGMENT

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I. PRELIMINARY STATEMENT

The Alabama-Coushatta Tribe of Texas (the "Tribe") respectfully moves to dissolve the 2002 injunction barring the Tribe from virtually any gaming to permit the Tribe to operate a bingo facility that the federal agency overseeing Indian gaming has authorized the Tribe to open. That agency's authoritative interpretation in the Tribe's favor—which is entitled to controlling weight under Supreme Court precedent—both constitutes a change in law and eliminates the sole legal basis for the injunction. Continued application of the injunction in its broad form is no longer equitable or appropriate, and the permanent injunction entered against the Tribe should therefore be dissolved under Federal Rule of Civil Procedure 60(b)(5).

In 2015, the Tribe sought and secured the approval of the National Indian Gaming Commission (the "NIGC"), a federal agency, to open and operate an electronic bingo facility on the Tribe's trust lands. The NIGC was created by a 1988 congressional enactment intended to address the issue of unregulated Indian gaming—the Indian Gaming Regulatory Act ("IGRA"). *See* 25 U.S.C. § 2701 *et seq.* IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." *See* S. Rep. No. 100-446, at 6 (1988). Among its many responsibilities in implementing and administering IGRA's regulatory scheme, the NIGC reviews and approves tribal gaming ordinances for all gaming conducted on Indian lands.

In granting its approval of the Tribe's bingo gaming ordinance in 2015, the NIGC considered and rejected the 1994 Fifth Circuit precedent on which the injunction against the Tribe depends. That decision, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), held that IGRA did not cover the Tribe—placing the Tribe outside the NIGC's jurisdiction. *See Alabama-Coushatta Tribes of Tex. v. Texas*, 66 F. App'x 525 (5th Cir. 2003). Resolving unclear provisions in IGRA to reach the opposite conclusion from *Ysleta*, the NIGC held that the Tribe

fell within IGRA's coverage—that is, within the NIGC's jurisdiction—and approved the Tribe's electronic bingo ordinance authorizing the opening of the Tribe's bingo facility.

Under Supreme Court precedent, the NIGC's reasonable interpretation of IGRA is entitled to judicial deference, supersedes otherwise controlling Fifth Circuit precedent, and justifies relief from the injunction in this case. This Court should therefore grant this Motion for Relief From Judgment and dissolve the permanent injunction to permit the Tribe to continue operating its bingo facility.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Restoration Act

Texas and the United States have recognized the Alabama-Coushatta Tribe of Texas as a sovereign, self-governing Indian tribe for nearly two centuries. During that time, the two governments have alternated in maintaining a trust relationship with the Tribe. The last of these trust relationship transfers, from Texas to the federal government, was the least orderly. In 1983, then-State Attorney General Jim Mattox unexpectedly called into doubt the validity of the trust relationship between the Tribe and the State. *See* Tex. Att'y Gen. Op. No. JM-17 (Mar. 22, 1983). This development prompted the need for congressional action to reassume the federal trust relationship with the Tribe. In response, in 1987 Congress restored the federal government's trust relationship with the Tribe.[1]

The Restoration Act reestablished the trust relationship between the Tribe and the federal government, restored various federal legal rights that the Tribe enjoyed decades earlier that had been abrogated, and recognized the Tribe's Constitution and Council. *See* 25 U.S.C. § 733–734.

[1] In addition to the Alabama-Coushatta Tribe, the Restoration Act also reestablished the trust relationship between the United States and the Ysleta del Sur Pueblo (the "Ysleta") located in El Paso, Texas. *See* Pub. L. No. 100-89, 101 Stat. 666.

Regarding the issue of gaming on the Tribe's trust lands, the Restoration Act provided that "[a]ll gaming activities prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *Id.* § 737(a). At the same time, it prohibited Texas from asserting either criminal or civil regulatory control over legal gaming occurring on the Tribe's lands. *Id.* § 737(b). The Restoration Act also vested exclusive jurisdiction over violations of the State's gaming laws on the Tribe's land or by its members in federal courts, while limiting the State to pursuing an injunction for violations of its gaming laws. *Id.* § 737(c).

B. The Indian Gaming Regulatory Act

In February 1987, six months before Congress enacted the Restoration Act, the Supreme Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Interpreting Public Law 83-280, 67 Stat. 588 (1953) ("Public Law 280"), a federal law granting limited criminal law enforcement authority to states on certain Indian lands, the Supreme Court held that—despite nominal criminal enforcement provisions—California state law "regulated" gaming, rather than prohibiting it. *Cabazon Band*, 480 U.S. at 209. Therefore, the Court ruled that California could not rely on Public Law 280 to prohibit tribes from offering gaming activities on tribal lands. *Id.* at 211.

The *Cabazon Band* decision left Indian gaming broadly unregulated on tribal lands in states that regulated rather than prohibited gaming. States grew concerned that unregulated Indian gaming could result in crime or other social ills. In response to this concern, Congress enacted IGRA to govern Indian gaming on tribal lands.

IGRA "establish[ed] Federal standards for gaming on Indian lands" and created the NIGC to administer the act. 25 U.S.C. §§ 2702(3), 2704(a). IGRA defined three separate classifications of gaming that federally recognized tribes may offer on trust lands, denominated Class I, Class II, and Class III gaming. *See* 25 U.S.C. § 2703(4).

Class I gaming is defined as social gaming and includes traditional Indian games played as part of tribal ceremonies and celebrations. *See* U.S.C. § 2703(6). Tribes have exclusive authority to regulate Class I gaming. *See* 25 U.S.C. § 2710(a).

Class II gaming is defined as the game commonly known as bingo. *See* 25 U.S.C. § 2703(7). A tribe may offer bingo so long as the tribe is located in a state that permits bingo for any purpose, by any person, organization or entity. *See* 25 U.S.C. §§ 2710(b). Tribes have the authority to regulate Class II gaming under the jurisdiction of the NIGC, which must approve a tribe's self-regulatory ordinance. *See* 25 U.S.C. § 2710(b).

Class III gaming includes all forms of gaming that are not included under Class I or Class II. *See* 25 U.S.C. § 2703(8). A tribe may only offer Class III gaming if it is located in a state where such games are permitted by the state for any purpose, by any person, organization or entity, and the tribe and state enter into a tribal-state gaming compact that governs how the games are to be played and regulated. *See* 25 U.S.C. § 2710(d).

C. *Ysleta del Sur Pueblo v. Texas* And The 2002 Injunction

In 1993, the Ysleta tried to negotiate a compact with Texas to permit Class III gaming under IGRA. The State refused, and the Ysleta sued to compel the State to negotiate a compact. The district court agreed with the Ysleta and directed Texas to negotiate. On appeal, Texas advanced numerous theories as to why IGRA did not allow the Tribe to sue the State for failure to negotiate a gaming compact.

As relevant here, the Fifth Circuit viewed IGRA and the Restoration Act as in irreconcilable conflict, and concluded that the Restoration Act—and *not* IGRA—governed the Ysleta's ability to organize and conduct gaming on its lands. *Ysleta del Sur Pueblo*, 36 F.3d at 1334–35. The Fifth Circuit construed the Restoration Act's remedial provision, which authorized Texas to sue to enjoin violations of Texas gaming laws by Ysleta, as forcing the court

to choose between the two laws. *Id*. at 1335. Invoking the canons against implied repeal (as IGRA followed the Restoration Act), and of a specific statute controlling a general one (reasoning that the Restoration Act applied only to two tribes, and IGRA applied broadly), the court held that IGRA did not apply to the Ysleta. *Id*. at 1336. In reaching this conclusion, the court also rejected the Ysleta's argument that the Restoration Act provision prohibiting "[a]ll gaming activities which are prohibited by the laws of the State of Texas" must be read to extend only to gaming activities wholly prohibited, as opposed to merely regulated, in light of the Supreme Court's decision in *Cabazon Band*. *Id.* at 1333–34.

Although the Alabama-Coushatta Tribe was not party to the *Ysleta* litigation, as the only other tribe covered by the Restoration Act, it quickly felt *Ysleta*'s effects. In 2002, the State sought and received a permanent injunction based on *Ysleta* that ordered the Tribe to cease "gaming and gambling activities on the Tribe's Reservation which violate State law." The Fifth Circuit affirmed, observing that "[h]owever sympathetic [the court] may be to the Tribe's argument" that *Ysleta* was wrong, "[the court] may not reconsider *Ysleta*, even if [it] believed that the case was wrongly decided." *Alabama-Coushatta Tribe of Tex.*, 66 F. App'x at 525.

D. Subsequent Administrative Guidance

In 2015, the Tribe sought and secured the NIGC's formal administrative determination of whether, contrary to the Fifth Circuit's *Ysleta* decision, the Tribe fell within IGRA's scope. As required by IGRA, the Tribe's Council passed an ordinance authorizing Class II bingo gaming on the Tribe's lands, and the Tribe submitted its ordinance to the NIGC for approval.

The NIGC determined that IGRA applied to the Tribe—bringing the Tribe within the NIGC's jurisdiction—and that the Restoration Act did not bar the Tribe from conducting gaming

on its lands pursuant to IGRA.[2] *See* Nat'l Indian Gaming Comm'n, Approval of Alabama-Coushatta Tribe of Texas Class II Gaming Ordinance and Resolution No. 2015-038, at 2–3 (Oct. 8, 2015).[3] The NIGC first examined the scope of IGRA to determine whether it has jurisdiction over the Tribe's lands, and, reviewing other circumstances where Congress explicitly ousted the NIGC's jurisdiction, concluded that it retained jurisdiction over the Tribe. *Id.* at 2. In reaching this conclusion, the NIGC adopted a determination by the Department of the Interior—charged with administering the Restoration Act—that IGRA applied to the Tribe. *Id.* From there the NIGC determined that the Tribe was an "Indian tribe" proposing to conduct gaming on "Indian land" within the meaning of IGRA, and approved the Tribe's gaming ordinance. *Id.* at 2–3.

With the NIGC's approval, the Tribe began development of Naskila Entertainment ("Naskila") to establish its Class II gaming facility on its trust lands. The Tribe and State negotiated regarding Naskila's opening, and the State agreed to permit the Tribe to operate Naskila pending this Court's determination of the impact of the NIGC's final agency decision on the injunction and, if necessary, whether the gaming at Naskila qualifies as Class II gaming under IGRA.

III. ARGUMENT

A. The NIGC Is Entitled To *Chevron* Deference Over The Scope Of Its Regulatory Jurisdiction

Chevron deference reflects the judgment that gaps or inconsistencies in statutes reflect delegations of legislative power to administering agencies, rather than courts. *See Chevron,*

[2] The NIGC resolved materially identical inquiries from the Ysleta del Sur Pueblo and the Alabama-Coushatta Tribes in the same way, through two letters. The determination regarding the Alabama-Coushatta ordinance largely adopts and incorporates the NIGC's reasoning in approving the Ysleta ordinance; for convenience's sake, we do the same.

[3] The NIGC's ruling is attached as **Exhibit A**.

U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The NIGC is such an agency, and whether IGRA applies to the Tribe in the light of the Restoration Act—in other words, whether the NIGC has jurisdiction over the Tribe—is such a gap.

The NIGC is the agency entitled to administer IGRA; indeed, Congress created it for that purpose—to act as an "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. § 2702(3). To that end, Congress empowered the NIGC and its Chairman with broad regulatory powers over Indian gaming, including the power to promulgate regulations under the Act, *id*. § 2706(b)(10), to close Indian gaming facilities for substantial violations of IGRA, *id*. § 2713(b)(1), to impose substantial civil fines for violations of either the Act, regulations prescribed pursuant to the Act, or tribal regulations, *id*. § 2713(a)(1), and, as relevant here, to approve tribal ordinances as required to permit Class II gaming under the Act. *Id*. §§ 2705(a)(3), 2710(b)(1)(A)–(B), 2710(d)(1)(A). Numerous courts have determined that the NIGC is due *Chevron* deference in statutory gaps within IGRA, as should this Court. *See, e.g.*, *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003); *Diamond Game Enters., Inc. v. Reno*, 230 F.3d 365, 368–69 (D.C. Cir. 2000) (noting that Congress created the NIGC for its expertise on Indian gaming affairs and lamenting that the NIGC had not taken a position to which the Court might defer under *Chevron*); *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 263–64 (8th Cir. 1994) (applying *Chevron* to NIGC's determination of whether a particular game fell within Class II or Class III gaming in Section 2710). These cases all demonstrate that Congress has delegated to the NIGC the authority to interpret contradictory, indefinite, or ambiguous provisions in IGRA in the service of its mission.

Such a gap exists here: whether the Tribe falls within IGRA's scope, and thus the NIGC's jurisdiction. The gap arises from the broad provisions of IGRA: the procedures for approving Indian gaming apply, with one exception (relevant here), to all "Indian lands," defined as all reservations and all Indian lands held in trust, and all "Indian tribes," which include all recognized tribes retaining the right of self-government. 25 U.S.C. §§ 2703(4), (5). The Chairman of the NIGC is authorized to approve tribal gaming ordinances—and thus permit Class II gaming on Indian lands by Indian tribes—if, as relevant here, the gaming is located within a "State that permits such gaming for any purpose by any person, organization or entity," (which Texas does) and "such gaming is not otherwise specifically prohibited on Indian lands by federal law." *Id*. at § 2710(b)(1)(A). Because IGRA does not define what constitutes a "specific prohibi[tion] on Indian lands by Federal law," it is at least debatable whether § 207(a) of the Restoration Act imposes such a prohibition. *See* 25 U.S.C. § 737(a). If it does, the NIGC's jurisdiction is ousted under IGRA; if not, the NIGC may monitor and regulate the Tribe's gaming at Naskila.

The NIGC's decision reflects a judgment regarding the scope of its own authority—its "regulatory jurisdiction." As the Supreme Court has made clear, this type of decision is unequivocally entitled to *Chevron* deference. Just this question arose in *City of Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013), where the Federal Communications Commission interpreted two provisions of the Telecommunications Act of 1996. *Id*. at 1866–67. The provisions included a savings clause, which broadly reserved siting decisions over wireless towers to States and localities, and a provision that obligated localities to act on siting applications within a reasonable period of time. *Id*. The FCC determined in a ruling that a reasonable period of time was no longer than 90 or 150 days, depending on the type of application. The City of Arlington

argued that the Court owed the FCC no deference on whether its rule improperly expanded one of the narrow exceptions to localities' reserved powers, because this question involved the FCC's authority to regulate the localities at all—its jurisdiction. *Id*. at 1868. The Court briskly rejected the notion that a threshold question about an agency's power to rule differed from any other question under *Chevron*; indeed, the Court held, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 1871. Where the text does not foreclose an agency's interpretation, that space reflects a delegation by Congress—here, to the Commission.

These delegation-by-Congress principles of *Chevron* fit the NIGC not merely in theory, but in practice. The NIGC enjoys unique expertise in administering Indian gaming laws. Its members are appointed by the Department of the Interior, the agency typically charged with administering many other laws regarding Indian tribes and their welfare—giving the NIGC's members a general expertise in how IGRA interacts with other laws concerning Indian affairs. To the extent that the Court left any uncertainty regarding *Chevron*'s scope—and that seems doubtful—whether IGRA applies involves important, complex administrative questions over which the NIGC's expertise is critical. *See generally Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (discussing various bases for evaluating the propriety of *Chevron* deference).[4] *Chevron*

[4] Whatever force *Barnhart* and its kin once had in developing the scope of *Chevron*, the Court's recent guidance leaves little doubt that *Chevron* always applies when an agency entitled to administer a statute interprets a textual gap left in that statute. *See generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (Kagan, J.) (plurality) ("Under *Chevron*, the statute's plain meaning controls . . . . But if the law does not speak clearly to the question at issue, a court must defer . . . rather than substitute its own reading."); *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) ("We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language."); *City of Arlington*, 133 S. Ct. at 1874 ("[There] is [not] a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field."). This rule is ultimately sensible: a rule of

deference therefore requires this Court to defer to the NIGC's interpretation—provided only that the interpretation is reasonable. It is.

B. The NIGC's Interpretation Of IGRA Is Reasonable, And Therefore Entitled To Deference Under *Chevron*

The NIGC determined that, Restoration Act notwithstanding, the Tribe fell within IGRA's scope. IGRA's text and history confirm that this is not only a reasonable interpretation, but the best understanding of how these two laws interact. Subsequent enactments and background principles informing law touching on Indian concerns further confirm the NIGC's interpretation.

1. The Text and Structure of the Act Confirm The NIGC's Interpretation

IGRA's text—its general rule—plainly includes the Tribe. IGRA provides that "An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction, if" four conditions are met. 25 U.S.C. § 2710(b)(1). First, the State in which the gaming is to occur must allow that gaming for *some* individual in the State; in other words, a State is entitled to enforce an absolute ban, but not merely a selective or conditional one. 25 U.S.C. § 2710(b)(1)(A). The gaming that the Tribe proposes to engage in must not be "otherwise specifically prohibited on Indian lands by Federal law." *Id*. The Tribe must adopt an ordinance allowing for such gaming, *id*. § 2710(b)(1)(B), and, finally, the Chairman must approve that ordinance pursuant to certain statutory criteria. *Id*.; *see also id*. § 2710(2)–(4). Virtually none of these criteria or conditions is subject to serious question: the Alabama-Coushatta is an "Indian tribe" under the Act; Naskila is on "Indian lands"; Texas allows bingo within the State; the Tribe has passed an ordinance permitting bingo; the NIGC has approved

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deference if and only if a reviewing court first believes an agency is worthy of deference is no rule of deference at all.

that ordinance. *See* NIGC Ruling at 1–3; Alabama-Coushatta Tribal Council Resolution No. 2015-038 (July 10, 2015).[5] The only plausible textual basis for excluding the Tribe from IGRA's clear terms lay in the second of its four conditions: that the Restoration Act "otherwise specifically prohibit[s]" the gaming "on Indian lands by Federal law."

But this interpretation fails on close scrutiny. As relevant here, the Restoration Act provides that "[a]ll 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." 25 U.S.C. § 737(a). This is not a provision where "such gaming [bingo] is . . . otherwise specifically prohibited on Indian lands by Federal law" because it is neither specific, a specific prohibition, a "prohibit[ion] on Indian lands," nor under—in the most obvious sense—Federal law. *First*, it is not specific: it does not refer to bingo or Class II gaming in any granular way, but instead refers generally to "all gaming activities." *Second*, it is not a specific prohibition: a reader cannot discern whether *anything* is prohibited without resort to a separate body of law. *Third*, it is not a "prohibit[ion] on Indian lands." Read naturally, the phrase "prohibit[ion] on Indian lands" implies a prohibition on *all* Indian lands, rather than on *any* Indian lands.[6] *Finally*, nor is it plainly under "Federal law," with any prohibition in the Restoration Act expressly dependent upon Texas *state* law. Put another way, the Restoration Act is a contingent, general regulation of all gaming on some Indian lands under state law referenced in a Federal law. That is not a "specific[] prohibit[ion]" of "such gaming" "on Indian lands by Federal law"—and so IGRA applies to the Tribe.

[5] The full text of the Class II gaming ordinance is appended to the NIGC's ruling, reflected at pages 25 through 53 of Exhibit A.

[6] This reading comports best with ordinary English usage. The absence of a modifier before "Indian lands" in the phrase "prohibited on Indian lands" implies the *entire* set of "Indian lands," not merely one element of the set (*e.g.* just the Tribe's lands). An ordinary speaker would not describe a rule prohibiting Great Danes from entering Yellowstone as a rule "prohibiting pets in national parks."

The NIGC's interpretation also harmonizes both IGRA and the Restoration Act. This is a strong suggestion that its interpretation is correct—or at least reasonable. *See generally Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177-78 (2013) (discussing canon against superfluity and observing the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme"). Under the NIGC's interpretation, the Tribe may conduct Class II gaming at Naskila so long as it complies with IGRA's requirements, and its permission under that Act is not revoked. *See generally N. Cnty. Comm. Alliance, Inc. v. Salazar*, 573 F.3d 738, 748 (9th Cir. 2009) (noting that gaming undertaken off of Indian lands—and thus outside of IGRA—is subject to other, general regulation). If it fails to fulfill IGRA's requirements, then the Restoration Act's application of state law again controls, and the State may seek an injunction under the Restoration Act for a violation of those provisions. 25 U.S.C. § 737(c). Similarly, if the Tribe commences Class III gaming without fulfilling IGRA's requirements, the State may seek an injunction under the Restoration Act to the extent that gaming violates State law.

But the opposite interpretation simply dismisses IGRA as inapplicable to the Tribe. It wreaks avoidable textual violence on multiple provisions of IGRA, and it includes a restriction on two particular Indian tribes found nowhere in IGRA's text. An interpretation that avoids these problems—and that harmonizes IGRA and Restoration Act—is surely at least reasonable, and thus is due this Court's deference.

2. Legislative History and Subsequent Enactments Confirm The NIGC's Interpretation

The NIGC's interpretation—that the Restoration Act is not a specific prohibition in the meaning of IGRA—comports not only with IGRA's text, but also with its legislative history and with subsequent enactments.

IGRA's legislative history explains the effect of the "otherwise prohibited" condition in terms that confirm the analysis above. As the Senate Report explains, it "refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other statute . . . will preclude the use of otherwise legal devices . . . [for] gaming on or off Indian lands." S. Rep. No. 100-446 at 12 (citations omitted). Section 1175 is a paradigm example of a law that is federal, specific, a specific prohibition, and a prohibition on Indian lands: the statute makes it "unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device [a defined term] in the District of Columbia, in any possession of the United States, *within Indian country* . . . or within the special maritime and territorial jurisdiction of the United States . . . ." 15 U.S.C. § 1175(a) (emphasis added). That language stands in sharp contrast to the indirect, general, and ultimately non-federal prohibition in the Restoration Act.

It was also "the intention of the Committee that nothing in the provision will supersede any *specific* restriction . . . which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act . . . and the Maine Indian Claim Settlement Act." S. Rep. No. 100-446 at 12 (emphasis added). But here, too, the NIGC's interpretation proves correct. The key provision in the Rhode Island Indian Claims Settlement Act gave Rhode Island plenary regulatory jurisdiction over lands settled by the Narragansett Tribe: "Except as otherwise provided in this Act . . . the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Pub. L. No. 95-395, § 9, 92 Stat. 813, 817 (1978). A similar provision in the Maine Indian Claim Settlement Act, applied to all Indian tribes in Maine but two, subjects those tribes "to the civil and criminal jurisdiction of the State, the laws of the

State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." Pub. L. No. 96-420, § 6(a), 94 Stat. 1785, 1793 (1980). But the Restoration Act contains a flatly opposite provision, entitled "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. § 737(b). To the extent that Congress understood IGRA as not returning gaming authority to tribes subjected to the general criminal jurisdiction of the States in which they resided, then the NIGC's interpretation captures this intent: the Restoration Act did not subject the Alabama-Coushatta to Texas's general regulatory authority.

The legislative history therefore clearly denotes the sort of law that would suffice to displace IGRA: federal laws that in unequivocal terms prohibit either a specific form of gaming on all Indian lands, or that specifically granted the states regulatory jurisdiction over Indian lands.[7]

Further, IGRA's legislative history clearly demonstrates that Congress anticipated that Act would apply in Texas. As the Senate Report stated: "There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. [The Act] bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the

[7] The First Circuit ultimately held that the language in the Rhode Island Indian Claims Settlement Act was too weak—legislative history notwithstanding—to avoid application of IGRA, and that IGRA therefore *did* apply to the Narragansett tribe. *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 (1st Cir. 1994). By contrast, the First Circuit declined to apply IGRA in Maine, but only because the Maine statute expressly excluded application of "any federal law enacted after October 10, 1980 . . . for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine . . . unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." *See Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787, 791 (1st Cir. 1996) (quoting 25 U.S.C. § 1735(b)).

regulatory scheme set forth in the bill." S. Rep. No. 100-446 at 11-12. But as of the passage of IGRA, the Restoration Act covered two of the only three *possible* tribes in Texas to which IGRA could be applicable; thus the anticipation in the legislative history that IGRA would apply in Texas as one of "the other 45 States" strongly indicates that Congress contemplated its application to the Alabama-Coushatta and Ysleta del Sur Pueblo.

Subsequent enactments demonstrate that Congress spoke as one might expect when it intended to pass an "otherwise specific prohibition" within the meaning of IGRA. For example, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 leaves the matter in no uncertain terms. It provides, under a heading entitled "INAPPLICABILITY OF INDIAN GAMING REGULATORY ACT," that the "Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the [Catawba] Tribe." Pub. L. No. 103-116, § 14, 107 Stat. 1118, 1136 (1993). Likewise, the Native American Technical Corrections Act of 2004 declares that a certain parcel of land was held in trust for the Barona Band of Mission Indians of California "shall neither be considered to have been taken into trust for gaming, nor be used for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.))." Pub. L. No. 108-204, § 121(c), 118 Stat. 542, 545 (2004). And an extension of leases for the Mashantucket Pequot (Western) Tribe expressly states that "No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703) pursuant to a claim of inherent authority or any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) . . . on any land that is leased . . . in accordance with this section." 25 U.S.C. § 1757a(c). There has been no such enactment as to the Tribe.

This degree of clarity is especially appropriate in the context of legislation related to Indian governance. "The baseline position," as the Supreme Court "ha[s] often held," is that

tribes are entitled to self-government, because "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031–32 (2014). And so Congress, from time to time, passes a specific prohibition, typically naming IGRA. The Restoration Act is not such a prohibition. Congress did not expect that its patchwork system of references to state law—preceding IGRA's comprehensive solution—would inadvertently displace Texas Tribes' rights under IGRA. Congress did not, as it never does, intend to hide an issue of elephantine importance in the mousehole of a cross-reference to state law. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

IGRA's text, history, and subsequent legislative enactments not only support the NIGC's interpretation as a permissible one—but as the correct one. Yet this Court need not go so far: if the NIGC's position is simply reasonable, then the *Chevron* analysis is complete, and this Court should defer to the NIGC's interpretation.

C. Supreme Court Precedent Requires This Court To Defer To The NIGC, Notwithstanding The Fifth Circuit's Decision In *Ysleta*

Prior precedent is also no obstacle to this Court deferring to the NIGC's eminently reasonable interpretation of IGRA. Indeed, the Supreme Court and Fifth Circuit have held that courts generally must follow agencies' reasonable interpretations—and not judicial precedent—when the two conflict.

Chevron deference reflects a delegation of interpretative authority because it reflects a delegation of *policymaking* authority: when Congress passes a law, it delegates discretion to agencies by enacting terms in broad or vague language, and constrains agencies by using narrow

or specific language. *City of Arlington*, 133 S. Ct. at 1868. The necessary corollary of the power to make policy is the power to change policy—to "consider varying interpretations and the wisdom of its policy on a continuing basis," including by re-interpreting (or newly interpreting) provisions in the statute the agency administers. *Nat'l Cable & Telecommc'ns. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). And therefore "a court's prior judicial construction of a statute trumps an agency construction *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute." *Brand X*, 545 U.S. at 982 (emphasis added). The Fifth Circuit acknowledges the same: its interpretations control over a *Chevron*-entitled agency only where they follow from the statute's unambiguous text. *E.g.*, *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 397–98 (5th Cir. 2014).

Ysleta is not a decision about IGRA's text—much less one about its *unambiguous* text. The *Ysleta* court described the history surrounding *Cabazon Band*, how it led to IGRA, and IGRA itself only in general outlines. *See Ysleta*, 36 F.3d at 1329–31. The court rejected the argument that the Restoration Act incorporated *Cabazon Band* by diverging from the statutory text and instead analyzing the Restoration Act's legislative history in substantial detail. *Id*. at 1333 ("The Tribe's argument is appealing only because § 107 uses the word 'prohibit.' But our analysis of the legislative history of both the Restoration Act and [IGRA] leads us to a conclusion contrary to that sought by the Tribe."). And the court described the Restoration Act as "fundamentally at odds with the concepts of" IGRA. *Id*. at 1335. But the court mentioned the controlling provision of IGRA, § 2710(b)(1)(A), in a footnote, *Ysleta*, 36 F.3d at 1335 n.21, as part of an observation that Congress had not expressed a "clear intention" to repeal the Restoration Act. *Id*. at 1334–35.

Though surely binding precedent and entitled to *stare decisis* in any other context, a decision by the Fifth Circuit predicated on legislative history and the statute's "concepts" (per *Ysleta*) is not a "holding that its construction follows from the unambiguous" text of IGRA (per *Brand X*). Indeed, under "traditional canons of interpretation," legislative history is "irrelevant to an unambiguous statute." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977); *see also Direct Auto Imports Ass'n v. Townsley*, 804 F.2d 1408, 1411 (5th Cir. 1986) (observing that "no resort is made" to canons of construction and legislative history "where the statutory language is clear and unambiguous"). *Brand X* therefore warrants this Court following the NIGC's determination—not *Ysleta*.

D. The NIGC's Interpretation Is A Significant Change In Law That Precludes The Injunction's Prospective Application

And this Court can do so. This Court's 2002 injunction continues in force against the Tribe; this Court therefore has the power under Rule 60(b)(5) to relieve the Tribe of the injunction's prospective effects. Fed. R. Civ. P. 60(b)(5). The Court should exercise that power here: the change in law vis-à-vis the Tribe could not be more absolute.

A significant change in law permits a court to grant relief from an injunction. "If the relief sought is dissolution . . . of an injunction, the district court may grant a Rule 60(b)(5) motion when the party seeking relief . . . can show a significant change in . . . law." *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016) (internal quotation marks omitted). An agency interpretation is such a change. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013).

And a controlling change in law requires that relief. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the Supreme Court directed a bridge's owner to remove it as an unlawful obstruction of the Ohio River, and prohibited the owner from

rebuilding it. *Id*. at 429. But Congress intervened, explicitly declaring the bridge lawful—and the Court declared itself obligated to dissolve the injunction:

> But that part of the decree . . . [that] is executory . . . enjoins the defendants against any reconstruction or continuance. . . . If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain that the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law . . . . Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted that defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

Id. at 431–32.

Just so here. Put in modern language, "[i]t is well established that an injunction must be set aside when the legal basis for it has ceased to exist." *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1354 (Fed. Cir. 2015) (citing *Wheeling & Belmont Bridge*). An agency, and not Congress, has changed the law; the Tribe maintains an entertainment center, not a bridge. All else is the same. This Court should end the prospective application of this injunction just as the Supreme Court did in *Wheeling & Belmont Bridge*. The injunction should be dissolved to permit the Tribe to conduct Class II gaming with the NIGC's oversight.

IV. CONCLUSION

The 2002 injunction against the Tribe should be dissolved to permit the Tribe to continue conducting Class II gaming—bingo—in light of the NIGC's ruling. The NIGC is the federal agency charged with administering IGRA, and its decisions interpreting gaps in that statute are entitled to conclusive deference by the courts, provided only that they are reasonable. The NIGC's reading of the statute as bringing the Alabama-Coushatta within the agency's jurisdiction is reasonable: in addition to its logical appeal, it is the only interpretation of IGRA's

interplay with the Restoration Act that allows both statutes to have continuing effect. Therefore the NIGC's ruling approving the Tribe's Class II gaming ordinance effectively overrules the Fifth Circuit's decision in *Ysleta* and eliminates the sole legal basis for the injunction.

Dated: August 19, 2016

Respectfully submitted,

By: */s/ Danny S. Ashby*

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CERTIFICATE OF SERVICE

I, Danny S. Ashby, hereby certify that on August 19, 2016, I caused a true and correct copy of the foregoing *Motion for Relief from Judgment* to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: August 19, 2016

By: */s/ Danny S. Ashby*
Danny S. Ashby

CERTIFICATE OF CONFERENCE

I hereby certify that Frederick R. Petti and I, as counsel for the Alabama-Coushatta Tribe of Texas, have conferred with Assistant Attorney General Bill Deane, counsel for the State of Texas, on multiple occasions between June 2016 and August 2016 regarding the subject matter of this motion, including at in-person meetings and by telephone. Despite those efforts, counsel could not reach agreement on the relief sought, and Mr. Deane advised me that the State of Texas is opposed to the relief sought in this motion.

Dated: August 19, 2016

By: */s/ Danny S. Ashby*
Danny S. Ashby

Exhibit A

October 8, 2015

Nita Battise, Chairperson
Alabama-Coushatta Tribe of Texas
571 State Park Road 56
Livingston, TX 77351

RE: Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance and Resolution No. 2015-038.

Dear Chairperson Battise:

This letter responds to the request by the Alabama-Coushatta Tribe of Texas July 10, 2015, to the National Indian Gaming Commission to review and approve the Tribe's Class II gaming ordinance. The gaming ordinance was adopted by Resolution No. 2015-038 by the Alabama-Coushatta Tribal Council.

Resolution No. 2015-038 adopts the Tribal gaming ordinance, which was created to govern and regulate the operation of Class II gaming on the Tribe's *Indian lands.* Because the Tribe's ordinance permits it to conduct gaming on its *Tribal Indian lands,*[1] as defined by the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act)[2] an analysis of whether the Tribe's lands are eligible for gaming was necessary.

Analysis

The Alabama-Coushatta's ordinance permits it to conduct gaming on its *Tribal Indian lands.*[3] It defines *Indian Lands, Tribal Lands*, or *Tribal Indian lands* as all lands within the limits of the Tribe's Reservation. It additionally defines *Tribal Indian lands* "as lands acquired by the Secretary in trust prior to October 17, 1988, or those lands acquired by the Secretary in trust after October 17, 1988, that meet one or more of the exceptions set forth in 25 U.S.C. § 2719. Finally, the Tribe defines *Reservation* as it is defined in the Tribe's Restoration Act.

As discussed in greater detail below, the *Tribal lands* or *Tribal Indian lands* specified in the ordinance amendment are *Indian lands* as defined by IGRA and are eligible for gaming under

[1] Alabama-Coushatta Tribe of Texas II Tribal Gaming Ordinance § 5.
[2] 25 U.S.C. §§ 731 *et seq.*
[3] Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance § 5.

the Act. The Restoration Act, however, provides a general grant of state jurisdiction over the Alabama-Coushatta's lands, through Public Law 280, and applies state gaming laws to the Tribe's lands, with a qualification. Accordingly, the Restoration Act must be taken into consideration as part of this ordinance review.

Jurisdiction

Because a similar question regarding the Ysleta del Sur Pueblo's Restoration act arose when the Pueblo submitted its ordinance to the NIGC for the Chairman's approval, and the Secretary of the Interior administers tribal restoration acts, the NIGC Office of General Counsel sought the Department of Interior, Office of the Solicitor's opinion as to whether under the Restoration Act the Pueblo can game pursuant to IGRA on its Indian lands; specifically, whether the Pueblo possesses sufficient jurisdiction over its Restoration Act lands for IGRA to apply and if so, how to interpret the interface between IGRA and the Restoration Act.[4] Because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, that same jurisdictional analysis applies to the Alabama-Coushatta's portion of the Restoration Act.

As a preliminary analysis, we must examine the scope of IGRA to determine whether the NIGC has jurisdiction over the Tribe's Restoration Act lands or phrased alternatively, whether the Tribe's Restoration Act lands are exempt from IGRA's domain. Nothing in the IGRA's language or its legislative history indicates that the Tribe is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Tribe's land.

Next, we must look to the Office of the Solicitor's opinion on the Ysleta del Sur Pueblo. On September 10, 2010, the Office of the Solicitor concurred with our conclusion that IGRA applies to the Pueblo and further opined the Pueblo possesses sufficient legal jurisdiction over its settlement lands for IGRA to apply, that IGRA governs gaming on the Pueblo's reservation, and IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA.[5] Again, because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, the Office of the Solicitor's analysis applies to the Alabama-Coushatta. Therefore, the only remaining questions are whether those lands qualify as Indian lands as defined in IGRA and whether they are eligible for gaming.

Indian Lands

IGRA permits an Indian Tribe to "engage in, or license and regulate, gaming on Indian lands with such Tribe's jurisdiction."[6] It defines *Indian lands* as all lands with the limits of any

[4] May 29, 2015, Letter to Deputy Solicitor, Indian Affairs Venus Prince from NIGC General Counsel, Eric N. Shepard.
[5] September 10, 2015, Letter to NIGC General Counsel, Michael Hoenig, from Deputy Solicitor for Indian Affairs, Venus McGhee Prince. (*Attachment A.)*
[6] 25 U.S.C. § 2710(b)(1).

Indian Reservation.[7] In 1987, the Restoration Act established a reservation for the Alabama-Coushatta,[8] comprised of the Tribe's land holdings at that time.[9] Because the Tribe has a reservation – established a year before Congress passed IGRA –it has IGRA-defined *Indian lands.* Further, the Tribe identified in its ordinance that it authorizes gaming on its *Tribal Indian lands* – defined as all lands within the limits of its *Reservation.* The Alabama-Coushatta's ordinance limits where it can operate a class II gaming facility to its *Reservation.* Accordingly, the Restoration Act lands qualify as *Indian lands* under IGRA.

Finally, because the Tribe's Restoration Act, which created the reservation, pre-dates IGRA, an after-acquired land analysis is not necessary.[10]

Conclusion

In conclusion, because the Tribe possesses sufficient legal jurisdiction over its Restoration Act lands, IGRA applies. Further, because the lands qualify as *Indian lands* under IGRA, the lands are eligible for gaming under IGRA.

Thank you for bringing the amended gaming ordinance to our attention. The ordinance is approved, as it is consistent with the requirements of IGRA and NIGC regulations.

If you have any questions, please contact staff attorney Heather Corson at (202) 632-7003.

Sincerely,

Jonodev O. Chaudhuri
Chairman

Enclosure

cc: Fred Petti
Petti and Briones (via email, only: fpetti@pettibriones.com)

[7] 25 U.S.C. § 2703(4)(A); 25 C.F.R. § 502.12(a): "*Indian lands* means: (a) Land within the limits of an Indian reservation."
[8] 25 U.S.C. § 736(a)
[9] 25 U.S.C. § 731(3).
[10] *See generally* 25 U.S.C. § 2719.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

SEP 10 2015

Michael Hoenig, General Counsel
National Indian Gaming Commission
90 K Street NE, Suite 200
Washington, DC 20002

Re: Ysleta del Sur Pueblo Restoration Act

Dear Mr. Hoenig:

This letter responds to the National Indian Gaming Commission ("NIGC") Office of General Counsel's letter dated May 29, 2015,[1] requesting our opinion regarding whether, in light of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act" or "Act"),[2] and the Indian Gaming Regulatory Act ("IGRA"),[3] the Ysleta del Sur Pueblo ("Tribe" or "Pueblo") can game pursuant to the IGRA on the Tribe's reservation and tribal lands.

Applying the Department's expertise in the field of Indian affairs,[4] this Office concludes that the Restoration Act did not divest the Tribe of jurisdiction over its reservation and tribal lands and, therefore, that the IGRA applies to such lands. In addition, we conclude that the IGRA impliedly repealed Section 107 of the Restoration Act, which concerns gaming.

I. BACKGROUND

In order to answer your question, we must interpret those provisions of the Restoration Act that concern jurisdiction, including jurisdiction over gaming. The Restoration Act was enacted in the midst of a sea change in gaming law; consequently, our analysis also considers the evolution of the Act's gaming provisions, the evolution of gaming law in the State of Texas ("Texas" or "State") between 1987 and 1991, and the enactment approximately one year after the Restoration Act of the IGRA. Finally, we evaluate the Tribe's current request in light of the long-running litigation between the State and the Tribe over the Tribe's attempts to game within the bounds of the Restoration Act.

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[1] Letter from Eric Shepard, General Counsel, Nat'l Indian Gaming Comm'n, to Venus Prince, Deputy Solicitor – Indian Affairs (May 29, 2015) [hereinafter "2015 NIGC Letter"].

[2] Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 731 *et seq.* (Alabama and Coushatta Indian Tribes of Texas), §§ 1300g *et seq.* (Ysleta del Sur Pueblo)). Title I of the Restoration Act addresses the Pueblo; Title II of the Restoration Act restores the Federal trust relationship with the Alabama and Coushatta Indian Tribes of Texas. *Id.*

[3] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

[4] *See, e.g., Cherokee Nation v. United States*, 73 Fed. Cl. 467, 479 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

Attachment A

A. History of the Ysleta del Sur Pueblo

The Pueblo of Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the Spanish.[5] When the Spanish retreated from Santa Fe, New Mexico, to El Paso, Texas, they forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them.[6] The Indians established a new Pueblo in Texas called Ysleta del Sur and, in 1682, built a church for their community.[7] In 1751, Spain granted to the inhabitants of the Ysleta del Sur Pueblo land measuring one league in all directions from the church doors.[8] However, in 1871, the Texas Legislature enacted a statute incorporating the Town of Ysleta in El Paso County, and subsequent actions by the town resulted in nearly all of the 23,000 acres of the Spanish land grant being patented to non-Indians.[9]

From 1870 through the 1960s, the Tribe "continued to reside in the area and maintain their ethnic identification as well as their basic political system . . . . Also during this time there is a record of increasing interactions between the [Tribe] and both the U.S. Government and the State of Texas."[10] In 1968, Congress passed An Act Relating to the Tiwa Indians of Texas,[11] wherein Congress transferred all Federal trust responsibility for the Pueblo to the State of Texas.[12]

B. The Restoration Act

In the 1980s, the State of Texas concluded that its trust relationship with the Tribe constituted a violation of the Texas Constitution and determined that the State could not continue to provide trust services to the Tribe.[13] In light of this determination, Congress acted to restore the Federal trust relationship with the Tribe and passed the Restoration Act in 1987.[14] Through the Restoration Act, Congress provided that the Tiwa Indians of Ysleta, Texas, would thereafter "be known and designated as the Ysleta del Sur Pueblo,"[15] and "restored" "[t]he Federal trust relationship between the United States and the tribe."[16] In addition, the Restoration Act designated as "a Federal Indian reservation" those lands within El Paso and Hudspeth Counties in Texas that were held by the Tribe on the date of the Act's enactment, held in trust by the State or by the Texas Indian Commission for the benefit of the Tribe, or held in trust by the Secretary for the benefit of the Tribe, as well as subsequently acquired lands acquired and held in trust by

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[5] S. Rep. No. 100-90, at 6 (1987) (hereinafter, "1987 Senate Report").

[6] *Id.*

[7] 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (statement of Rep. Coleman).

[8] 1987 Senate Report, *supra* note 5, at 6.

[9] *Id.* at 7.

[10] 131 CONG. REC. H12012 (statement of Rep. Coleman).

[11] Pub. L. No. 90-287, 82 Stat. 93 (1968), *repealed by* Restoration Act, *supra* note 2, § 106.

[12] *Id.*

[13] 1987 Senate Report, *supra* note 5, at 7.

[14] Restoration Act, *supra* note 2.

[15] *Id.* at § 102 (codified at 25 U.S.C. § 1300g-1).

[16] *Id.* at § 103(a) (codified at 25 U.S.C. § 1300g-2(a)).

the Secretary for the benefit of the Tribe,[17] and mandated that the Secretary take certain lands into trust for the benefit of the Tribe.[18] Furthermore, at Section 105(f) the Act incorporates Public Law 280,[19] as amended by the Indian Civil Rights Act,[20] by providing that the State has civil and criminal jurisdiction on the Tribe's reservation "as if such State had assumed such jurisdiction with the consent of the tribe under" 25 U.S.C. §§ 1321-1322.[21]

The original version of the Restoration Act, introduced in February 1985, contained no specific references to gaming.[22] However, the time between the bill's introduction and its final passage in 1987 was a period of great uncertainty surrounding Indian gaming.[23] The Act was amended multiple times to address gaming.[24]

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[17] *Id.* at§ 105(a) (codified at 25 U.S.C. § 1300g-4(a)) (establishing a Federal Indian reservation); at § 101(3) (codified at 25 U.S.C. § 1300g(3)) (defining "reservation").

[18] *Id.* at § 105(b)(1) (codified at 25 U.S.C. § 1300g-4(b)) (requiring that the Secretary (1) accept any offer by the State to convey to the United States land within the Tribe's reservation held in trust, and (2) hold such land in trust for the benefit of the Tribe).

[19] Pub. L. 83-280, 67 Stat. 588 (1953)

[20] Pub. L. 90-284, 82 Stat 77 (1968).

[21] Restoration Act, supra note 2, § 105(f) (codified at 25 U.S.C. § 1300g-4(f)).

[22] H.R. 1344, 99th Cong. (1985).

[23] In February 25, 1986, the Ninth U.S. Circuit Court of Appeals held that the State of California and Riverside County could not enforce their gaming laws on the reservations of the Cabazon and Morongo Bands of Mission Indians. *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (1986). One year later, the U.S. Supreme Court affirmed. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter, "*Cabazon*"]. The Fifth Circuit subsequently observed that the *Cabazon* decision "led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming." *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1330 (5th Cir. 1994) [hereinafter "*Ysleta del Sur*"]; *accord Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015) ("The Court's decision in *Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.").

[24] Following a committee hearing on October 1985, the House passed an amended version of the bill that would have allowed the Tribe to enact a gaming ordinance, but only if that ordinance mirrored the laws of Texas. H. Rep. No. 99-440, at 2-3 (1985) (amendments to H.R. 1344); 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Nonetheless, "various state officials and members of Texas' congressional delegation were still concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation." *Ysleta del Sur*, 36 F.3d at 1327. As a result, the Tribe enacted Resolution No. TC-02-86, which acknowledged the controversy over gaming and asked, in part, that the bill be amended to prohibit "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, . . . on the Tribe's reservation or tribal land." Ysleta del Sur Pueblo Resolution No. TC-02-86, *reprinted in Ysleta del Sur*, 36 F.3d at 1328 n.2.

In accordance with the Tribe's request, the bill was amended again to prohibit "[a]ll gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas . . . on the tribe's reservation and on tribal lands." 131 CONG. REC. S13635 (daily ed. Sept. 24, 1986) (text of H.R. 1344, § 107(a) as passed by the Senate). That version passed the Senate. *Id.* However, the very next day, before it could be reconciled with the House version, the Senate vitiated its passage of the bill, effectively killing any restoration of the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in the 99th Congress. 131 CONG. REC. S13735 (daily ed. Sept. 25, 1986).

A new version of the bill was introduced in January 1987, and subsequently was passed by the House; it, like the earlier Senate bill, would have expressly prohibited all gaming on the Tribe's reservation and tribal lands. 133 CONG. REC. H13735 (daily ed. Apr. 21, 1987). Later that year, the bill was amended again by the Senate, which deleted the express prohibition against gaming. 1987 Senate Report, *supra* note 5, at 3 (text of H.R. 318, § 107(a) as amended by the Senate). The Senate's version of H.R. 318 ultimately was enacted, with the gaming provisions contained in Section 107. *See* Restoration Act, *supra* note 2, § 107.

When the Restoration Act was enacted in 1987, Texas law generally prohibited gaming, with the exception of charitable bingo on a local-option basis.[25] In the Restoration Act, the first sentence of Section 107(a) makes the State's substantive gaming laws applicable on the Tribe's lands. Similarly, the second sentence extends to the Tribe's lands the penalties provided in State law for engaging in prohibited gaming. The final sentence explains, at least in part, why Congress included gaming provisions in the Act. Thus, through Section 107(a), Congress provided for a limited application of State gaming law on the Tribe's lands:

> SEC. 107. GAMING ACTIVITIES
>
> (a) IN GENERAL.–All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the Tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.[26]

Despite the application of Texas law, however, Section 107(b) expressly states that"[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."[27] In other words, the Tribe retained civil and criminal regulatory jurisdiction over its reservation and tribal lands, except to the extent expressly divested by the following subsection of the Act.

Finally, although another section of the Restoration Act generally granted the State "civil and criminal jurisdiction within the boundaries of the reservation,"[28] Section 107(c) expressly provides that federal courts, not state courts, are the forum in which the State may seek to enforce alleged violations of Section 107(a):

> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.–Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.[29]

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[25] Tex. Const. art. 3, § 47(b)-(c) (as amended 1980). The Texas Constitution provided that "[t]e Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in the State, as well as the sale of tickets in lotteries, gift enterprises, or other evasions involving the lottery principle, established or existing in other States." *Id.* at art. 3, § 47(a). In addition, wagering on dog and horse racing in Texas had been illegal since 1937. Texas Legislative Council, Info. Rep. No. 87-2: Analysis of Proposed Constitutional Amendments and Referenda Appearing on the November 3, 1987, Ballot, at 75 (Sept. 1987).

[26] Restoration Act, *supra* note 2, at § 107(a) (codified at 25 U.S.C. § 1300g-6(a)).

[27] *Id.* at § 107(b) (codified at 25 U.S.C. § 1300g-6(b)).

[28] *Id.* at § 105(f) (codified at 25 U.S.C. § 1300g-4(f)) (granting Texas civil and criminal jurisdiction equivalent to that granted by Public Law 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act, Pub. L. 90-284, 82 Stat 77 (1968).

[29] *Id.* at § 107(c) (codified at 25 U.S.C. § 1300g-6(c)).

Attachment A

C. Gaming in Texas

Almost immediately after the Restoration Act was enacted, Texas began to open itself up to gaming. On November 3, 1987—less than three months after the Restoration Act was enacted—the people of Texas by referendum ratified the Legislature's enactment of the Texas Racing Act, allowing for pari-mutuel dog and horse racing.[30] Two years later, the Texas Constitution was amended to allow for "charitable raffles."[31] A more momentous change occurred in 1991, when the Texas Constitution was amended to permit certain lotteries.[32] Texas now offers a variety of lottery games, including national Powerball and MegaMillions.[33] Thus, while charitable bingo was the only gaming permitted in Texas at the time the Restoration Act was enacted, a little more than four years later the State had dramatically expanded gaming to include raffles, pari-mutuel racing, and a state lottery. In Fiscal Year 2014, Texas Lottery sales totaled almost $4.4 billion, returning more than $1.2 billion to the State's coffers.[34] In addition, races at Texas racetracks generated more than $438 million in wagers during calendar year 2014.[35]

D. The Indian Gaming Regulatory Act

The expansion of State-sanctioned gaming in Texas was not the only change to the legal landscape in the years immediately following enactment of the Restoration Act. On October 19, 1988, a little more than one year after it enacted the Restoration Act, Congress enacted the IGRA. Among the IGRA's stated purposes were to establish a new nationwide regulatory framework for tribal gaming on Indian lands within a tribe's jurisdiction,[36] and to promote "tribal economic development, self-sufficiency, and strong tribal governments."[37]

---

[30] The Texas Racing Act ("Racing Act") was enacted by the Texas Legislature in 1986. *Id.* However, the Racing Act provided that wagering could be conducted pursuant to its provisions only after it was ratified by the State's voters. *Id.* On November 3, 1987, the voters in Texas approved the Racing Act by a wide margin. Bill Christine, *Texas Voters Finally End a 50-year Ban Against Betting on Horse Races*, L.A. TIMES, Nov. 5, 1987, *available at* http://articles.latimes.com/1987-11-05/sports/sp-18911_1_horse-racing-notes (last visited July 9, 2015).

[31] Tex. Const. art. 3, § 47(d) (as amended 1989).

[32] Tex. Const. art. 3, § 47(3) (as amended 1991).

[33] *See* Texas Lottery, *Play the Games of Texas*, http://www.txlottery.org/export/sites/lottery/Games/index.html (last viewed July 9, 2015).

[34] Texas Lottery Commission, *Summary of Financial Information* (undated; audited through FY2014, unaudited through March 2015), *available at* http://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited July 9, 2015).

[35] Texas Racing Commission, *Texas Pari-Mutuel Racetracks Wagering Statistics Comparison Report on Total Wagers Placed in Texas & on Texas Races For the Period: 01/01/13 – 12/31/13 to 01/01/14 – 12/31/14* at 1 (undated), *available at* http://www.txrc.texas.gov/agency/data/wagerstats/prevYr/20141231.pdf (last visited July 9, 2015).

[36] *See* 25 U.S.C. §§ 2701-2702 (Congress's findings and declaration of policy), § 2710 (governing tribal gaming ordinances); S. Rep. No. 100-446, at 6 (1988) [hereinafter "1988 Senate IGRA Report"] (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"); *see also Wells Fargo Bank v. Lake of the Torches*, 658 F.3d 684, 687 (7th Cir. 2011) (finding that among the IGRA's "stated goals was "to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes'" (quoting 25 U.S.C. § 2702(1)). *Cf. Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) [hereinafter "*Narragansett*"] ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.")

[37] 25 U.S.C. § 2702(1).

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The vast majority of tribal gaming in the United States is governed under the IGRA's framework, which has proven to be enormously successful. The IGRA helped spur dramatic growth in Indian gaming, from annual revenues of approximately $100 million in 1988 to approximately $28.5 billion in 2014.[38] Recent scholarship demonstrates that, as Congress intended, Indian gaming has helped strengthen tribal economies, increase household income for reservation Indians, and reduce reservation poverty and unemployment rates.[39]

E. Gaming by the Ysleta del Sur Pueblo and Resulting Litigation

Just as the public policy of the State of Texas with regard to gaming evolved in the years after the Restoration Act was enacted, so, too, did the public policy of Tribe. However, the Tribe's efforts to pursue gaming within the confines of the law have been thwarted at every turn by the State of Texas.

1. Litigation over the Application of the IGRA

On May 6, 1992, after Texas dramatically expanded the scope of gaming under State law, and after Congress enacted the IGRA to provide a comprehensive regulatory scheme for tribal gaming, the Tribe adopted a bingo ordinance.[40] The Tribe submitted Tribal Bingo Ordinance 00492 to the NIGC for approval, and on October 19, 1993, the ordinance was approved by the Chairman of the NIGC.[41] In February 1992, the Tribe petitioned the Governor of Texas, pursuant to the IGRA, to begin negotiations to enter a class III gaming compact.[42] The Governor, however, refused on the grounds that the State's law and public policy prohibited her from negotiating such a compact.[43] As a result, the Tribe sued to compel the State under the provision of the IGRA that allowed the Federal courts to order a state to the negotiating table.[44] The U.S. Court of Appeals for the Fifth Circuit held that the Restoration Act did not give the Tribe authority to bring such a suit and that the IGRA did not apply.[45]

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[38] *Compare* 1988 Senate IGRA Report, *supra* note 36, at 22 (Indian gaming "generate[s] more than $100 million in annual revenues to tribes"), *with* Nat'l Indian Gaming Comm'n, *Gaming Revenue Reports*, *available at* http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited Aug. 21, 2015) (Indian gaming revenue $28.5 billion in Fiscal Year 2014).

[39] Randall K.Q. Akee *et al.*, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 185-87, 196-99 (2015). In addition, the growth of Indian gaming in the wake of the IGRA has also proved to be a boon to local and state governments. *Id.* at 199-203.

[40] Ysleta del Sur Tribal Bingo Ordinance No. 00492 (as amended on Oct. 16, 1992; April 15, 1993; July 22, 1993; and Oct. 5, 1993), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/ysletadelsurpueblotrbe/ordappr101993.pdf.

[41] Letter from Anthony J. Hope, Chairman, NIGC, to Tom Diamond, counsel to the Ysleta del Sur Pueblo (Oct. 19, 1993).

[42] *Ysleta del Sur*, 36 F.3d at 1331.

[43] *Id.*

[44] 25 U.S.C. § 2710(d)(7)(B)(iii), *abrogated by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[45] *Ysleta del Sur*, 36 F.3d 1325. The Fifth Circuit's opinion in *Ysleta del Sur*, which was filed approximately seven months after the First Circuit filed its opinion in *Narragansett*, is discussed in greater depth in Part II, *infra*.

The question before the Fifth Circuit was whether the IGRA permitted the Tribe to sue the State for refusing to negotiate a Class III gaming compact.[46] The Fifth Circuit held that the Restoration Act, and not the IGRA, governed the dispute and, finding nothing in the Restoration Act that waived the State's Eleventh Amendment immunity, the court reversed and remanded with instructions to dismiss the Tribe's suit.[47]

First, after a lengthy review of the Restoration Act's legislative history and the *Cabazon* decision,[48] the Fifth Circuit held that "Congress -- and the Tribe -- intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas."[49] Next, after finding that the Restoration Act "establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA," the Fifth Circuit held that the IGRA did not effect a partial repeal of the Restoration Act.[50] The court observed that the IGRA did not expressly repeal conflicting sections of the Restoration Act, and that "[t]he Supreme Court has indicated that 'repeals by implication are not favored.'"[51] The court then observed that implied repeals are especially disfavored when it is suggested that a general statute has impliedly repealed a specific statute,[52] and opined that, with regard to gaming, the Restoration Act is a specific statute applying to two specific tribes in a particular state, while the IGRA is a general statute.[53] The court further asserted that two provisions of the IGRA that reference existing federal law demonstrate that that the IGRA was not intended to trump statutes such as the Restoration Act.[54] Finally, the court noted that Congress in 1993 expressly exempted the Catawba Tribe of Indians ("Catawba") in South Carolina from the IGRA, thereby "evidencing in our view a clear intension on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[55] Having concluded that the IGRA does not effect an implied repeal of contrary provisions of the Restoration Act, the Fifth Circuit wrote: "To borrow IGRA terminology, the Tribe has already made its 'compact' with the state of Texas, and the Restoration Act embodies that compact."[56] The court suggested the only way for the Tribe to game under IGRA would be to petition Congress to amend or repeal the Restoration Act.[57]

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[46] *Ysleta del Sur*, 36 F.3d at 1327.

[47] *Id.* at 1327, 1335-36.

[48] *Id.* at 1327-31.

[49] *Id.* at 1334 (emphasis added).

[50] *Id.* at 1334-35.

[51] *Id.* at 1335 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987)).

[52] *Id.* (citing *Crawford Fitting*, 482 U.S. at 445).

[53] *Id.*

[54] *Id.* (citing 25 U.S.C. § 2701(5) ("the Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law"); *id.* § 2710(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

[55] *Id.*

[56] *Id.* Having concluded that the IGRA did not apply, and that the Restoration Act contained no language abrogating the State's Eleventh Amendment immunity from suit, the Fifth Circuit held that the Eleventh Amendment barred the Tribe's suit and remanded to the district court with instructions to dismiss. *Id.* at 1335-36.

[57] *Id.* at 1335.

2. Litigation under the Restoration Act

Meanwhile, the Tribe opened the Speaking Rock Casino and Entertainment Center ("Speaking Rock") on its reservation in 1993.[58] Speaking Rock began as a bingo hall, but evolved into "a full-scale casino offering a wide variety of gambling activities played with cards, dice, and balls."[59] In 1999, after Speaking Rock had been open and operating for approximately six years, the State sued under Section 107(c) of the Restoration Act.[60] On September 21, 2001, the district court issued an injunction that "had the practical and legal effect of prohibiting illegal as well as legal gaming activities by the [Tribe]."[61] After an unsuccessful appeal, the Tribe in February 2002 ceased operating those gaming activities prohibited by the injunction.[62] In May 2002, at the request of the Tribe, the district court modified its injunction to allow the Tribe to offer certain specified sweepstakes promotions, but denied the Tribe's request to offer its own sweepstakes.[63] The following year, the Tribe requested permission to offer a sweepstakes promotion selling prepaid phone cards that provided patrons access to "sweepstakes validation terminal[s]"; that request, too, was denied by the district court.[64]

In 2008, upon discovering that the Tribe was operating devices at Speaking Rock that "resembled traditional eight-liner gambling devices and were operated by a card purchased with cash," the State accused the Tribe of violating the injunction and made a motion that the Tribe be held contempt of court.[65] The Tribe sought further clarification of the injunction and a declaration that its "Texas Reel Skill" sweepstakes game did not violate the injunction.[66] In August 2009, the district court granted the State's motion, issued a contempt order, and refused to declare that the Tribe's "Texas Reel Skill" game was legal.[67] A week later, the Tribe sought permission to operate yet another sweepstakes game, which the district court denied in October 2010.[68] The Tribe, however, did not cease operation of its sweepstakes games, and by 2012 it had opened a second sweepstakes operation at the Socorro Entertainment Center ("Socorro").[69] The State made another motion that the Tribe be held in contempt of court in September 2013, and amended that motion multiple times before withdrawing it in favor of a renewed motion for contempt made on March 17, 2014.[70] After holding a two-day evidentiary hearing and accepting more than a 1.5 million pages of documents into evidence,[71] the district court on March 6, 2015,

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[58] *State v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 U.S. Dist. LEXIS 28026, at *6 (W.D. Tex. Mar. 6, 2015) (hereinafter, "*State v. Ysleta del Sur Pueblo*").

[59] *Id.*

[60] *Id.* at 3.

[61] *Id.* at *6-7 (internal quotation and citation omitted; alteration in original).

[62] *Id.* at *8.

[63] *Id.* at *9-10.

[64] *Id.* at *11.

[65] *Id.* at *11-12.

[66] *Id.* at *12-13.

[67] *Id.* at *12-14.

[68] *Id.* at *14-15.

[69] *Id.* at *15.

[70] *Id.* at *15-16.

[71] *Id.* at *16-17.

held the Tribe in contempt and ordered that it cease all sweepstakes operations within sixty days or face civil penalties of $100,000 per day, unless the Tribe submitted "a firm and detailed proposal setting out a sweepstakes promotion that operates in accordance with federal and Texas law," the submission of which would result in a stay of the contempt sanctions while the court considered the Tribe's proposal and the State's response.[72] On May 5, 2015, the Tribe submitted its proposal,[73] which the State has opposed.[74]

F. The Tribe's Amended Gaming Ordinance and the NIGC Request

On August 17, 2015, the Tribe resubmitted[75] to the NIGC an amendment to its gaming ordinance.[76] The NIGC has asked the Solicitor's Office for clarification as to the Tribe's "eligibility to engage in Class II gaming under the [IGRA] in light of the [Restoration Act] and the Fifth Circuit Court of Appeal's interpretation of it in *Ysleta del Sur Pueblo v. State of Texas*."[77]

II. ANALYSIS

Congress has not spoken directly to the issue of whether the Restoration Act or the IGRA governs gaming on the Tribe's reservation and tribal lands. The Restoration Act neither expressly anticipates and provides for the possibility that subsequent legislation might render certain sections of it obsolete, nor does it expressly insulate its provisions from subsequently enacted contrary legislation. Likewise, the IGRA does not make any direct or indirect references to the Restoration Act, the Tribe, or the State. As explained in greater detail throughout our analysis, we recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands.[78] However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.[79]

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[72] *Id.* at *118-20.

[73] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 513 (May 5, 2015).

[74] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 514 (June 5, 2015).

[75] The Pueblo previously submitted this amendment to the NIGC Chairman on March 21, 2014; June 6, 2014; August 29, 2014; November 24, 2014; February 24, 2015; and May 19, 2015. 2015 NIGC Letter, *supra* note 1, at 1.

[76] Letter from Randolph H. Barnhouse, Counsel for Ysleta del Sur, to Jonodev Osceola Chaudhuri, Chairman, NIGC (Aug. 17, 2015).

[77] 2015 NIGC Letter, *supra* note 1, at 1 (footnotes omitted).

[78] *See generally Ysleta del Sur*, 36 F.3d 1325 (5th Cir. 1994).

[79] An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); *cf. Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). *See also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.

In interpreting a statute that we are charged with administering, we seek to effect the intent of the Congress that enacted the statute.[80] Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer "whether Congress has spoken directly to the precise question at issue" and, if the statute is clear, then the agency must give effect to "the unambiguously expressed intent of Congress."[81] If, however, the statute is "silent or ambiguous," as are both the Restoration Act and the IGRA, then the agency must base its interpretation on a "reasonable construction" of the statute.[82]

When confronted with a statute that was enacted for the benefit of Indians, as were both the Restoration Act and the IGRA, if that statute contains ambiguities we are guided by an additional principle:: "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[83]

Employing both the standard rules of statutory construction and the Indian canon, and applying the Department's expertise in the field of Indian affairs,[84] the Department interprets the IGRA as impliedly repealing the gaming provisions of the Restoration Act. Therefore, we conclude that the IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands.

Our interpretation contains four distinct subparts. First, having analyzed both the text and the legislative history of the IGRA, employing both the standard rules of statutory construction and the Indian canon, we concur in your conclusion[85] that Congress intended for the IGRA to apply to the Tribe. Second, we conclude that the Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA and, therefore, that the IGRA governs gaming on the Tribe's reservation and tribal lands. Third, we conclude that Section 107 of the Restoration Act is repugnant to the IGRA and, therefore, that the statutes cannot be harmonized. Finally, we conclude that in this conflict the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act.

A. Both the text of the IGRA and its legislative history demonstrated that Congress intended for the IGRA to apply to the Tribe.

The IGRA "is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands."[86] Among the IGRA's "stated goals [was] to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes as a means of promoting tribal

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[80] *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) ("The question whether federal law authorize[s] certain federal agency action is one of congressional intent.").

[81] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[82] *Id.* at 840.

[83] *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

[84] *Cherokee Nation v. United States*, 73 Fed. Cl. at 497 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

[85] *See* 2015 NIGC Letter, *supra* note 1, at 2. Although we have not seen your analysis, we reach the same conclusion and, therefore, concur.

[86] *Narragansett*, 19 F.3d at 689.

economic development, self-sufficiency, and strong tribal governments.'"[87] The text of IGRA, itself, contains no express exemption for the Tribe, or for any other tribe; rather, the IGRA is written broadly to encompass all federally recognized Indian tribes.[88] Thus, "[b]y its own terms, the [IGRA], if taken in isolation, applies to any federally recognized Indian tribe that possesses powers of self-governance."[89] Therefore, given IGRA's broad purposes, and the fact that nothing in the plain language of IGRA expressly excludes the Tribe, we conclude that, on its face, IGRA applies to the Tribe.

The Fifth Circuit, however, pointed to two sections of the IGRA that make reference to "other federal law," and that it believed demonstrated Congress's intent that the IGRA not supersede the gaming provisions of the Restoration Act and similar statutes. Noting that the IGRA was enacted scarcely a year after the Restoration Act, the court wrote that Congress "explicitly stated in two separate provisions of the IGRA that IGRA should be considered in light of other federal law,"[90] the Fifth Circuit interpreted these two sections as providing that the IGRA does not apply where Congress had previously spoken to gaming, as it had in the Restoration Act.[91]

We interpret these provisions differently than the Fifth Circuit. The Senate Report on the IGRA explains that this language instead "refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175."[92] In other words, the language that the Fifth Circuit relied upon in finding that the text of the IGRA expressly exempted tribes for whom prior Federal law addressed gaming was, instead, intended to make clear that the IGRA did not legalize certain *games* that were already illegal as a matter of Federal law.

The legislative history of the IGRA contains no specific evidence that Congress sought to exclude the Tribe from the IGRA's ambit. The 1988 Senate IGRA Report contains no specific

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[87] *Wells Fargo Bank*, 658 F.3d at 687 (quoting 25 U.S.C. § 2702(1)).

[88] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.")

[89] *Passamaquoddy*, 75 F.3d at 788 (citing 25 U.S.C. § 2703(5)).

[90] *Ysleta del Sur*, 36 F.3d at 1335 (citing 25 U.S.C. § 2701(5) ("The Congress finds that – (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming is not specifically prohibited by Federal law* and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (emphasis added)); and 25 U.S.C. § 2701(b)(1)(A) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (*and such gaming is not otherwise specifically prohibited on Indian lands by Federal law*)" (parenthetical in original, emphasis added))).

[91] *Id.*

[92] 1988 Senate IGRA Report, *supra* note 36, at 12. The 1988 Senate IGRA Report also explains that the IGRA was not intended to "supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act and the [Maine] Indian Claim Settlement Act (citations omitted). *Id.* This language does not change our analysis. The Restoration Act expressly provides that it *is not* a grant of Federal authority or jurisdiction with regard to gaming, but is instead merely an extension of the State's substantive gaming law with a specified federal court remedy. Restoration Act, *supra* note 2, at § 107(a) (applying State's substantive gaming law), § 107(b) (no grant of jurisdiction to the State), § 107(c) (remedy in federal court).

references to the Tribe, the State of Texas, or the Restoration Act.[93] That Report does explain that Congress did not intend for the IGRA to "supersede any specific restriction or grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute," citing as a specific example the Maine Indian Claims Settlement Act.[94] However, the Restoration Act contains no "specific restriction . . . of Federal authority," and although Section 105(f) provides for a general grant of jurisdiction to the State, Section 107(c) specifically states that that grant of jurisdiction *does not* give the State jurisdiction over gaming.[95]

The Fifth Circuit concluded that Congress's 1993 decision to exclude the Catawba in South Carolina from the IGRA's ambit was evidence of "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[96] However, the actions of the 103[d] Congress shed no light whatsoever on the intentions of the 100[th] Congress at the time that it enacted the IGRA; rather, the fact that specific legislation was required to place the Catawba outside the IGRA's ambit in South Carolina strongly suggests that, absent an explicit act such as that taken with the Catawba, a tribe must be presumed to fall within the IGRA's ambit. Consequently, because no act of Congress expressly places the Tribe outside of the IGRA's scope, we interpret the IGRA as including the Tribe within its ambit.

Therefore, we conclude that the gaming on the Tribe's reservation and Indian lands falls within the ambit of the IGRA.

B. The Tribe possesses and exercises jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA.

The IGRA is not applicable to all land owned by a tribe. First, the IGRA provides for gaming only on "Indian lands," a category which includes: (1) land located within the exterior boundaries of a tribe's reservation; and (2) trust land and restricted fee land over which a tribe exercises governmental authority.[97] Second, the IGRA requires that a tribe possess legal

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[93] *See generally* 1988 Senate IGRA Report, *supra* note 36.

[94] *Id.* at 12 (citations omitted). The Maine Indian Claims Settlement Act provides in part that any subsequently enacted Federal laws "for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." 25 U.S.C. § 1735.

[95] *Compare* Restoration Act, *supra* note 2, *with* Maine Indian Claims Settlement Act, 25 U.S.C. § 1735. The Restoration Act – enacted by the very same Congress that enacted the IGRA scarcely a year later – contains no language whatsoever that would preserve its gaming provisions in the face of subsequently enacted Federal law, such as the IGRA.

[96] *Ysleta del Sur*, 36 F.3d at 1135.

[97] The IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). The NIGC's regulations further define "Indian lands" and specify that in order for land outside of a tribe's reservation to qualify as Indian lands the tribe must exercise governmental authority over that land. 25 C.F.R. § 502.12 (defining "Indian lands" as "land within the limits of an Indian reservation," "land over which an Indian tribe exercises governmental power . . . [and is] [h]eld in trust by the United States for the benefit of any Indian tribe or individual," or "land over which an Indian tribe exercises

jurisdiction over the land.[98] There is a presumption that tribes possess legal jurisdiction over land located within the exterior boundaries of their own reservations.[99] Where there is a question as to the tribe's jurisdiction, courts have found that a tribe must meet two requirements[100]: First, the provisions of the IGRA related to Class I and class II gaming require that a tribe must *have jurisdiction* over the land;[101] second, the provision defining the elements of "Indian lands" requires that a tribe must *exercise governmental power* over the land.[102]

Courts have found that possession of legal jurisdiction over land is a threshold requirement to the exercise of governmental power required for trust and restricted fee land.[103] Whether a tribe possess *legal jurisdiction* over a particular parcel of land often hinges on construing settlement or restoration acts that limit the tribe's jurisdiction[104] or on a determination of which tribe possesses jurisdiction over a particular parcel of land.[105] A showing of *governmental power* requires a concrete manifestation of authority and is a factual inquiry.[106] For trust or restricted fee land to qualify as Indian lands over which a tribe possess jurisdiction, the two requirements of having jurisdiction and exercising governmental authority must both be met. Once a tribe has established that its land qualifies as Indian lands and that the tribe possesses jurisdiction over that

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governmental power . . . [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

[98] 25 U.S.C. § 2710(b)(1) (providing that, subject to enumerated criteria, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction"); *id.* at § 2710(d)(1)(A)(i) (providing that, subject to enumerated criteria, "Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands").

[99] Letter from Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, to Jo-Ann Shyloski, Associate General Counsel, NIGC, at 4-5 n.26 and decisions cited therein (Aug. 23, 2013) [hereinafter "2013 Wampanoag Opinion Letter"], *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f20130823AquinnahSettlementActInterpretationsigned.pdf&tabid=120&mid=957.

[100] *Narragansett*, 19 F.3d at 701.

[101] *Id.* (citing 25 U.S.C. § 2710(b)(1)).

[102] *Id.* (citing 25 U.S.C. § 2703(4)).

[103] *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."); *Narragansett*, 19 F.3d at 701-03 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), *as stated in Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

[104] *See, e.g., Narragansett*, 19 F.3d at 701-02 (finding that Narragansett Indian Tribe possessed the requisite jurisdiction to trigger the IGRA in light of the tribe's settlement act); 2013 Wampanoag Opinion Letter, *supra* note 99, at 5 n.31 and authorities cited therein.

[105] Letter from Lawrence S. Roberts, General Counsel, NIGC, et al., to Tracie Stevens, Chairwoman, NIGC, at 10-13 (May 24, 2012) (determining that Muscogee (Creek) Nation had jurisdiction over land in question and that the Kialegee Tribal Town had not demonstrated that it had legal jurisdiction), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltownopinion52412.pdf&tabid=120&mid=957; 2013 Wampanoag Opinion Letter, *supra* note 99, at 5-6 n.32 and authorities cited therein.

[106] *Narragansett*, 19 F.3d at 703.

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land—making it eligible for Indian gaming—the tribe has the exclusive right to regulate gaming on that land, and a state can extent its jurisdiction only through a tribal-state compact.[107]

Approximately twenty years ago, the First Circuit in *Rhode Island v. Narragansett Indian Tribe*[108] determined whether a tribe's settlement act prohibited gaming. It created a two-step analysis, first asking whether the tribe possesses the requisite jurisdiction for the IGRA to apply to the tribe's lands; and next asking whether the tribe's settlement act and the IGRA can be read together, or whether the IGRA impliedly repealed the settlement act's gaming provisions.[109] This office has since used the *Narragansett* framework to evaluate whether the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 prohibited the Wampanoag Tribe of Gay Head (Aquinnah) from gaming.[110] Because the settlement act at issue in *Narragansett* and the Restoration Act at issue here raise similar questions with respect to gaming and the application of the IGRA, we employ that framework here.[111]

In applying the *Narragansett* court's framework to the present question, we begin by asking whether the Ysleta del Sur Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the application of the IGRA.[112] To determine whether the Tribe possesses the requisite jurisdiction for the IGRA to apply, we must first determine what the IGRA's reference to "jurisdiction" means.[113] A basic tenet of Indian law dictates that tribes retain attributes of sovereignty, and therefore jurisdiction, over their lands and members.[114] In *Narragansett*, the court explained that the jurisdiction required for the IGRA to apply is derived from a tribe's retained rights flowing from their inherent sovereignty.[115] Against that backdrop, we construe the IGRA's language.

As noted above, statutory interpretation begins with the plain meaning of the language itself. With respect to class II gaming, the IGRA states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands* within such tribe's jurisdiction."[116] With regard to class III gaming, the IGRA explains that "[a]ny Indian tribe having jurisdiction over the *Indian*

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[107] 25 U.S.C. § 2701(5) ("The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

[108] 19 F.3d 685 (1st Cir. 1994).

[109] *Id.*

[110] 2013 Wampanoag Opinion Letter, *supra* note 99, at 4-5 n.26 and decisions cited therein.

[111] *See generally id.* In *Narragansett*, the First Circuit held that the Narragansett Indian Tribe ("Narragansett Tribe") possessed and exercised jurisdiction under its settlement act that was sufficient to trigger the application of the IGRA. 19 F.3d at 700-03. Upon concluding that the IGRA was triggered, the court examined the interplay between the settlement act and the IGRA and concluded that the IGRA effected an implied partial repeal of portions of the settlement act. *Id.* at 703-05.

[112] 2013 Wampanoag Opinion Letter, *supra* note 99, at 7-15.

[113] *Id.* at 7.

[114] The U.S. Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon*, 480 U.S. at 207 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

[115] 19 F.3d at 701 ("We believe that jurisdiction is an integral aspect of retained sovereignty.").

[116] 25 U.S.C. § 2710(b)(1) (emphasis added).

lands upon which a class III gaming activity is being conducted" must enter into a compact with the state.[117] It further requires that a gaming ordinance authorizing class III gaming be "adopted by the governing body of the Indian tribe having jurisdiction over *such lands*."[118] In each of the IGRA's three references to its jurisdictional requirement, the statute clearly states that a tribe must possess jurisdiction over its lands.[119]

We, like the First Circuit, also view as important the amount of jurisdiction a tribe must possess in order to trigger application of the IGRA. Tribes possess aspects of sovereignty not ceded by treaty or withdrawn by statute or by implication as a necessary result of their dependent status.[120] In other words, tribes are presumed to have jurisdiction over their land unless it has been ceded or withdrawn. When Congress enacts a status depriving a tribe of jurisdiction, it must do so explicitly.[121] Furthermore, "acts diminishing the sovereign rights of Indian [t]ribes should be strictly construed."[122] This statutory rule is bolstered by the Indian canon of construction.

We require Congress's explicit divestiture of tribal jurisdiction to avoid the IGRA's application to Indian lands, as did the *Narragansett* court.[123] In other words, unless a tribe has been completely divested of jurisdiction, the IGRA applies. A mere grant of state jurisdiction is not enough to find the State has exclusive jurisdiction over the land.[124]

Here, the Restoration Act does not confer upon the State *jurisdiction* over gaming on the Tribe's reservation and tribal lands, but instead merely provides that "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."[125] This merely codified the distinction, set forth in *Cabazon* and affirmed in the IGRA, between *regulated* gaming activities, which a tribe may engage in pursuant to the IGRA, and *prohibited* gaming activities, which a tribe may engage in only under the terms of a compact

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[117] *Id.* § 2710(d)(3)(A) (emphasis added).

[118] *Id.* § 2710(d)(1)(A)(i) (emphasis added).

[119] 2013 Wampanoag Opinion Letter, *supra* note 99, at 8 n.57 and authorities cited therein.

[120] *Narragansett*, 19 F.3d at 701 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

[121] *Id.* at 702 ("Since the settlement Act does not *unequivocally articulate* an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive" (emphasis added)); Letter from Michael J. Anderson, Acting Assistant Secretary – Indian Affairs, to Patricia A. Marks, Attorney, Wampanoag Tribe of Gay Head, at 3 (Sept. 5, 1997) [hereinafter "1997 AS-IA Letter"] (pointing to "long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty" and explaining that "[i]n this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed" (citing *Bryan*, 426 U.S. at 392)).

[122] *Narragansett*, 19 F.3d at 702.

[123] *Id.* at 702. The Assistant Secretary also has emphasized this point. 1997 AS-IA Letter, *supra* note 121, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction.").

[124] 2013 Wampanoag Opinion Letter, *supra* note 99, at 9; *Narragansett*, 19 F.3d at 702 (because the Settlement Act's "grant of jurisdiction to the state is non-exclusive," the Narragansett Tribe "retain[s] that portion of jurisdiction they possess by virtue of their sovereign existence as a people – a portion sufficient to satisfy the Gaming Act's 'having jurisdiction' prong.").

[125] Restoration Act, *supra* note 2, § 107(a).

with a state. At most, Section 107(a) functions as a choice-of-law provision, employing the State's substantive gaming law to set the bounds of permissible gaming on the Tribe's reservation and tribal lands. Under either reading of the Restoration Act, Section 107(a) diminishes the Tribe's sovereign right to enact its own gaming laws; however, it does not diminish the Tribe's jurisdiction, on its reservation and tribal lands, to regulate gaming activities undertaken in accordance with the State's substantive gaming laws.

In addition, the application of the State's gaming laws on the Tribe's reservation and tribal lands must be strictly construed, under basic tenets of Indian law and the *Narragansett* framework. No provision of the Restoration Act expressly, or even impliedly, divests the Tribe of *regulatory* jurisdiction over its reservation and tribal lands. In fact, Section 107(b) of the Act provides: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Moreover, Section 107(c) of the Restoration Act provides that Federal courts "have exclusive jurisdiction over" alleged violations of Section 107(a), thereby impliedly divesting the Tribe only of its *adjudicatory* jurisdiction over gaming disputes that arise under the Act. Therefore, the Tribe retains nearly complete civil and criminal regulatory jurisdiction over its reservation and tribal lands, except for the narrow exception for Federal court jurisdiction provided in Section 107(c), which means that the State does not and cannot have exclusive jurisdiction over those lands.[126]

In addition, the Restoration Act's only grant of jurisdiction to the State, contained in Section 105(f), does not suggest that such State jurisdiction is exclusive. Instead, it merely provides that the State has civil and criminal jurisdiction on the Tribe's reservation and Indian lands consistent with Public Law 280, as amended by the Indian Civil Rights Act,[127] which does not extinguish the Tribe's inherent jurisdiction, but instead merely authorizes the State to exercise jurisdiction concurrent with that of the Tribe.[128] Section 105(f) does not use the words "exclusive" or

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[126] Both the Assistant Secretary and this Office have observed that the gaming provisions of the Restoration Act differed markedly from those contained in the Massachusetts Indian Land Claims Settlement act. 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95; 1997 AS-IA Letter, *supra* note 121, at 5. Neither letter contained an in-depth analysis of the Restoration Act, and neither concluded that the Restoration Act completely divested the Tribe of jurisdiction over gaming on its reservation and tribal lands; rather, both letters simply observed that the differences in the two statutes provided a reason not to follow the Fifth Circuit's *Ysleta del Sur* opinion in their respective analyses of the Massachusetts Indian Land Claims Settlement Act. *Id.* Even if those Letters had concluded that the Restoration Act completely divested the Tribe of jurisdiction over its reservation and tribal lands, they would not preclude us from reconsidering that opinion in this Memorandum. *See Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.").

We are aware of the Assistant Secretary's statement that the Restoration Act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas on the reservation and lands of the Ysleta del Sur Pueblo." 1997 AS-IA Letter, *supra* note 121, at 5; 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95 (quoting AS-IA Letter). This statement was not made in a detailed analysis of the Restoration Act, itself, but rather, in the Assistant Secretary's analysis of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, and therefore is not dispositive here.

[127] Restoration Act, *supra* note 2, § 105(f). Nothing in Section 105(f) suggests that the grant of jurisdiction to the State is exclusive.

[128] 1-6 Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2012) ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched" (internal citations omitted)).

"complete" in describing the jurisdiction conferred upon the State in Section 105(f).[129] It does, however, use the word "exclusive" in Section 107(c) to describe the grant of jurisdiction to the federal courts for resolution of gaming disputes arising from the provisions of Section 107(a).[130] "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[131]

In sum, the Restoration Act does not grant the State exclusive jurisdiction over the Pueblo's land and does not divest the Pueblo of its inherent jurisdiction. To the contrary, the Act specifically declares that it is not a grant of civil and criminal regulatory jurisdiction to the State.[132]

C. Section 107 of the Restoration Act and the IGRA are repugnant to each other.

Because the Tribe possesses sufficient jurisdiction to trigger application of the IGRA, we must determine whether the IGRA effected an implied repeal of any portion of the Restoration Act. When two federal statutes touch on the same subject matter, courts should attempt to give effect to both if they can be harmonized.[133] Therefore, "so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective."[134] However, if portions of the statutes are repugnant to each other, one must prevail over the other.[135] Even where the two statutes are not outright repugnant, "a repeal may be implied in cases where the later statutes covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.'"[136] When a later statute impliedly repeals a former statute, a partial repeal is preferred and only the parts of the former statute that are in plain conflict with the later should be nullified.[137]

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[129] *See Narragansett*, 19 F.3d at 702 ("omission of words such as 'exclusive' or 'complete'" in statute assigning jurisdiction was "meaningful"); *United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (finding absence of terms "exclusive" or "complete" in Federal statute's grant of jurisdiction over offenses committed by or against Indians meant the statute only extended to the state jurisdiction concurrent with that of the Federal government).

[130] *Compare id.* § 105(f) (no use of "exclusive" or "complete"), *with* § 107(c) ("Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) . . . ."). Section 107(c), would have been particularly important in the pre-IGRA environment in which the Restoration Act was negotiated and ultimately enacted. Because we conclude that the IGRA effects a partial implied repeal of the Restoration Act's gaming provisions, Section 107(c) is less relevant today.

[131] *Narragansett*, 19 F.3d at 702 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

[132] The second part of the Indian lands determination, whether the tribe exercises governmental power, is a more fact-based determination than the jurisdictional question, and does not require construction of the Restoration Act; therefore, we leave this determination to the NIGC. 2013 Wampanoag Opinion Letter, *supra* note 99, at 14-15. Nonetheless, we note that, unlike the settlement act at issue in *Narragansett*, which expressly limited the Narragansett's *exercise* of jurisdiction over its settlement lands, *see* 25 U.S.C. § 1771e, the Restoration Act contains no language whatsoever limiting the Tribe's exercise of governmental power on its reservation or tribal lands.

[133] *Narragansett*, 19 F.3d at 703.

[134] *Id.* at 703 (citing *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988); *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 82 (1871)).

[135] *Id.* (citing *Tynen*, 78 U.S. (11 Wall.) at 92).

[136] *Id.* at 703-04 (citing, *inter alia*, *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936); *Tynen*, 78 U.S. (11 Wall.) at 92).

[137] *Id.* at 704 n.19.

We and the Fifth Circuit agree that the gaming provisions of the Restoration Act cannot be read in harmony with the IGRA.[138]

The Fifth Circuit concluded that, by enacting the Restoration Act, "Congress . . . intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas."[139] Approximately one year later, however, in enacting the IGRA, Congress "expressly preempt[ed] the field in the governance of gaming activities on Indian lands"[140] by creating a nationwide regulatory framework that "struck a 'finely-tuned balance between the interests of the states and the tribes' to remedy the *Cabazon Band* prohibition on state regulation of Indian gaming."[141] If, as the Fifth Circuit concluded, Section 107(a) was enacted to serve as surrogate federal law on the Tribe's reservation, and the IGRA was enacted to "expressly preempt the field" and to "str[ike] a 'finely-tuned balance between the interests of the states and the tribes,'" then Section 107(a) cannot be harmonized with the IGRA.

Although the Department, too, concludes that the Restoration Act and the IGRA cannot be reconciled, we respectfully follow a different path than did the Fifth Circuit. We interpret Section 107(a) as codifying the distinction, set forth in *Cabazon* and enacted in the IGRA, between civil/regulatory laws and criminal/prohibitory laws. In Section 107(a), Congress ensured that gaming prohibited by the State of Texas could not take place on the Tribe's reservation and tribal lands.[142] Under this interpretation, Section 107(a), in and of itself, is not repugnant to the IGRA.

However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of their provisions. The Restoration Act provides that violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas."[143] Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a).[144] The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme.[145]

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[138] *See* Part II.A, *supra*.

[139] *Ysleta del Sur*, 36 F.3d at 1334.

[140] 1988 Senate IGRA Report, *supra* note 36, at 6.

[141] *Texas v. United States*, 497 F.3d 491, 506-507 (5th Cir. 2007) (quoting *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1988)); *see also Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 526 (D.S.D. 1993) (citing 1988 Senate IGRA Report, *supra* note 36), *aff'd* 3 F.3d 273 (8th Cir. 1993).

[142] We are aware that the Fifth Circuit expressly rejected this interpretation. *Ysleta del Sur*, 36 F.3d at 1333-34. As set forth *supra*, the Department, as the agency with responsibility for implementing the Restoration Act, may adopt an alternative interpretation.

[143] Restoration Act, *supra* note 2, § 107(a).

[144] *Id.* § 107(c).

[145] 18 U.S.C. §§ 1166-1168 (IGRA criminal laws and penalties; 25 U.S.C. § 2706(b)(10) (NIGC has authority to promulgate regulations for implementation of the IGRA; 25 U.S.C. § 2713 (civil penalties for violation of the IGRA); 25 C.F.R. Part 573 (Compliance and Enforcement); 25 C.F.R. Part 575 (Civil Fines).

Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

D. In the conflict between Section 107 of the Restoration Act and the IGRA, the IGRA prevails, thus impliedly repealing Section 107.

As the Fifth Circuit noted in *Ysleta del Sur*, "repeals by implication are not favored."[146] Nonetheless, when two statutes cannot be reconciled, one must prevail over the other.[147] Here, our analysis diverges more sharply from that of the Fifth Circuit.

The general rule, as set forth by the *Narragansett* court, is that "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[148] In the conflict between Section 107 of the Restoration Act and the IGRA, this general rule suggests, absent good cause to the contrary, that the IGRA prevails. In addition, in its analysis of the interplay between the Restoration Act and the IGRA, not only did the Fifth Circuit neglect to apply or even acknowledge the Indian canon, it also failed to employ or even acknowledge "the general rule . . . that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[149] IGRA was enacted approximately one year after the Restoration Act.

The Fifth Circuit held that the Restoration Act prevails because it, being applicable to only two tribes in a single state, is a specific statute and the IGRA, being of nationwide application, is a general statute.[150] However, the IGRA also is a specific statute because it is specifically directed to the issue of Indian gaming, while the Restoration Act is a general statute because its primary purpose is to restore the Federal trust relationship, with gaming constituting only one part of that statute. The district court in *Narragansett* concluded as much with respect to the Rhode Island Settlement Act.[151] Moreover, where "the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging the presumption" that Congress did not intend its later statute to act upon the earlier one.[152]

In addition, our conclusion that the IGRA prevails preserves the core of both acts. The primary purpose of the Restoration Act was to restore the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas.[153] The Act's gaming provisions were enacted to fill a legal and jurisdictional void that existed at that time, before the IGRA was enacted.[154] Consequently, an interpretation of the two

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[146] *Ysleta del Sur*, 36 F.3d at 1335 (quoting *Crawford Fitting*, 482 U.S. at 442).

[147] *Narragansett*, 19 F.3d at 703.

[148] *Id.* at 704.

[149] *Narragansett*, 19 F.3d at 704 (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

[150] *Ysleta del Sur*, 36 F.3d at 1335.

[151] *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 804 (D.R.I. 1993) (holding that, for purposes of gaming, the IGRA is a specific act and the tribe's settlement act is a general act), *aff'd* 19 F.3d 685.

[152] *Narragansett*, 19 F.3d at 704 n.21.

[153] Restoration Act, *supra* note 2, Title.

[154] *See* Part I.B, *supra*.

statutes that finds that the IGRA impliedly repeals Section 107 of the Restoration Act nevertheless leaves the core of the Restoration Act intact.[155] Moreover, the IGRA filled the legal and jurisdictional gap that existed at the time the Restoration Act was enacted, further mitigating any harm from finding an implied repeal of Section 107. On the other hand, the IGRA by its plain language was intended to apply to all Indian tribes,[156] and one of its stated purposes was "to expressly preempt the field in the governance of gaming activities on Indian lands"[157] Although Congress has expressly exempted certain tribes from the operation of the IGRA,[158] to find such an exemption without any express statutory exemption would undermine the goal of a "comprehensive regulatory framework"[159] the IGRA.

Finally, our conclusion that the IGRA effects an implied repeal of the gaming provisions of the Restoration Act is the only conclusion that is consistent with the Indian canon of construction. When choosing between two reasonable interpretations of a statute enacted for the benefit of Indians, the Indian canon itself is not dispositive of the issue, but rather, it is an essential lens through which statute's text, "the 'surrounding circumstances,' and the 'legislative history' are to be examined."[160] The IGRA is a statute enacted for the benefit of Indians and Indian tribes.[161] Although the Fifth Circuit had previously recognized the role that the Indian canon plays in interpreting statutes enacted for the benefit of Indian tribes,[162] it did not employ, or even acknowledge, the relevance of the Indian canon to the determination of whether the IGRA governs gaming on the Tribe's reservation and tribal lands. Therefore, we depart from the Fifth Circuit and apply the construction that favors the Tribe.

We conclude that the IGRA effects an implied repeal of Section 107 of the Restoration Act. In doing so, however, we note that our opinion does nothing to undermine the gaming prohibitions that currently exist in Texas law. The State already provides for bingo, which is the functional equivalent of the Class II gaming governed by the gaming ordinance that the Tribe submitted to

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[155] *Cf. Narragansett*, 19 F.3d at 704 (reading the IGRA and the settlement act at issue such that the IGRA prevailed "leaves the heart of the Settlement Act untouched").

[156] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means *any* Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government" (emphasis added).).

[157] 1988 Senate IGRA Report, *supra* note 36, at 6.

[158] *See, e.g.*, 25 U.S.C. § 9411 (the IGRA does not apply to the Catawba Indian Tribe of South Carolina); 25 U.S.C. § 1708(b) (Narragansett settlement lands are not "Indian lands" for purposes of the IGRA); *see also Passamaquoddy*, 75 F.3d 784 (holding that savings clause in the Maine Indian Claims Settlement Act, paired with the IGRA's lack of any specific reference to any applicability in the State of Maine, effectively exempted tribes within the State of Maine from operation of the IGRA).

[159] *Wells Fargo Bank*, 658 F.3d at 687.

[160] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

[161] 25 U.S.C. § 2702(1) (among purposes of the IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments"); *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes" (citing IGRA's declaration of policy contained in 25 U.S.C. § 2702(1))).

[162] *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (1981) ("The Supreme Court . . . has stated that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" (quoting *Bryan*, 426 U.S. at 392)).

the NIGC. Under the IGRA, the Tribe may not engage in Class III gaming unless it first reaches a compact with the State. In other words, our conclusion that the IGRA governs gaming on the Tribe's reservation and tribal lands preserves the authority of both the Tribe and the State to pursue their respective public policies toward gaming.

III. CONCLUSION

A comprehensive reading of the interplay between the Restoration Act and the IGRA leads us to conclude that the IGRA applies to the Ysleta del Sur Pueblo. The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by the enactment of the IGRA, scarcely one year after the Restoration Act.

Because Section 107 of the Restoration Act contains enforcement provisions that are at odds with the IGRA, the two statutes cannot be harmonized. In that conflict, the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act. Our conclusion is consistent with the rule that favors the later-enacted statute, which in this case is the IGRA. In addition, an implied repeal of Section 107 leaves the core of the Restoration Act intact, while an implied exception to the IGRA would undermine the national regulatory scheme at that statute's core, and undermine its goal of providing opportunities for tribal economic development. This interpretation is consistent with the text of the IGRA, the legislative histories of both the Restoration Act and the IGRA, and the Indian canon of construction.

Therefore, in answer to your question, we conclude that the Restoration Act does not prohibit the Ysleta del Sur Pueblo from gaming on its Indian lands under IGRA.

Sincerely,

Venus McGhee Prince
Deputy Solicitor for Indian Affairs

Attachment A

ALABAMA-COUSHATTA TRIBE OF TEXAS
571 State Park Road 56 • Livingston, Texas 77351 • (936) 563-1100

Tribal Chiefs

Principal Chief
Chief Colabe III
Clem F. Sylestine

Second Chief
Chief Skalaaba
Herbert G. Johnson, Sr.

Tribal Council

Nita Battise, Chairperson
Ronnie Thomas, Vice-Chairman
Johnny Stafford, Secretary
Pete Polite, Treasurer
Clint Poncho, Member
Roland Poncho, Member
Maynard Williams, Member

July 10, 2015

ALABAMA-COUSHATTA TRIBAL COUNCIL
ACITC Resolution #2015-38

PERTAINING, to the Tribal Council exercising its delegated powers under Article VI, Section I – Powers, Constitution and Bylaws of the Alabama-Coushatta Tribe of Texas:

WHEREAS, the Tribal Council seeks to provide or assist in the provision of social, cultural, legal, economic and other needs for the Tribal members; and

WHEREAS, the Tribal Council, as the governing body of the Tribe, has the power to exercise its full authority, rights and responsibilities available under the Tribe's sovereign nation status; and

WHEREAS, the Tribal Council in exercising this authority, rights and responsibilities, establishes ordinances or otherwise act by resolution to promote and protect the health, peace, morals, education, sovereignty, jurisdiction, community, children, lands, resources, and general welfare of the Tribe and its members including but not limited to, the promotion and establishment of legal gaming operations within the Reservation Lands of the Tribe; and

WHEREAS, the Tribal Council is empowered and authorized to enact Resolutions and Ordinances governing the order and the administration of justice; and

WHEREAS, the Tribal Council created a Class II Gaming Ordinance, titled the Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance for the purpose of establishing Gaming Operations on the Tribe's Indian lands and to govern and regulate the operation of Class II Gaming Operations on the Tribe's Indian lands.

NOW THEREFORE BE IT RESOLVED, the Alabama-Coushatta Tribal Council hereby approves this Resolution and thereby authorizes the creation, funding, regulation, and establishment of the Tribe's Class II Gaming Operations on the Tribe's Indian lands.

CERTIFICATION

I, the undersigned, Chairperson of the Alabama-Coushatta Tribe of Texas, do hereby certify that the Alabama-Coushatta Tribal Council is composed of seven (7) members, of whom 7 were present at a specifically called meeting duly called in accordance with Article IV of the Tribal Bylaws on July 10, 2015 and that the Tribal Council adopted this Resolution by a vote of 7 in favor, 0 opposed, and 0 abstained.

Johnny Stafford
Secretary, Tribal Council

Nita Battise
Chairperson, Tribal Council

ALABAMA-COUSHATTA TRIBE OF TEXAS

CLASS II TRIBAL GAMING ORDINANCE

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Section 1. Title

This Ordinance shall be known as the Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance, or the Gaming Ordinance.

Section 2. Purpose

The Tribal Council of the Alabama-Coushatta Tribe of Texas ("Tribe"), empowered by the Tribe's Constitution, Article VI, Section I, Subsection h, enacts this Ordinance to promote and establish Gaming Operations on the Tribe's Indian lands and to govern and regulate the operation of Class II Gaming Operations on the Tribe's Indian lands.

Section 3. Applicability

Unless specifically indicated otherwise, all provisions of this Ordinance shall apply to Class II Gaming on the Tribe's Indian lands.

I. PROVISIONS

Section 4. Definitions

Unless a different meaning is clearly indicated in this Ordinance, the terms used herein shall have the same meaning as defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and the NIGC's regulations, 25 C.F.R. § 500 *et seq.* Specifically:

1. "Bingo" means the game of chance (whether or not electronic, computer or other technological aids are used) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations; in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards. "Bingo" includes, if played at the same location, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to Bingo.

2. "Board of Directors" or "Board" means the governing body of TEDA.

3. "Class I Gaming" shall have the same meaning as defined in the Indian Gaming Regulatory Act at 25 U.S.C. § 2703(6), and the NIGC's Regulations at 25 C.F.R. § 502.2.

4. "Class II Gaming"' shall have the same meaning as defined in the Indian Gaming Regulatory Act at 25 U.S.C. § 2703(7) and the NIGC's Regulations at 25 C.F.R. § 502.3.

5. "Director" means a member of TEDA's Board of Directors.

6. "Electronic, computer or other technological aid" shall have the same meaning as the NIGC's Regulations at 25 C.F.R. § 502.7.

7. "Equipment" means the receptacle and numbered objects drawn from it, the master board upon which such objects are placed as drawn; the cards or sheets bearing numbers or their designations to be covered and the objects used to cover them; the board or sign, however operated, used to announce or display the numbers or designations as they are drawn; the public address system; and other articles essential to the operation, conduct, and playing of Bingo or other Class II games.

8. "Facility License" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.23.

9. "Games Similar to Bingo" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.9.

10. "Gaming Employee" means any natural person employed in the operation or management of the Gaming Operation, whether employed by or contracted with the TEDA or TGA, or by any person or enterprise providing on or off-site services to the TEDA, within or without the Gaming Operation, regarding any Class II Gaming activity, including, but not limited to, Primary Management Officials, Key Employees, Gaming Operation employees, and any other natural person whose employment duties require or authorize access to restricted areas of the Gaming Operation not otherwise opened to the public.

11. "Gaming Operation" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.10.

12. "Gaming Operation License" means a separate license issued by the TGA to each economic entity that operates the games, receives the revenues, issues the prizes, and pays the expenses.

13. "Gaming Ordinance" means this Tribal Gaming Ordinance of the Alabama-Coushatta Tribe of Texas, as amended from time to time, and any rules and regulations promulgated thereunder.

14. "Gaming Services" means the providing of any goods or services to the TEDA directly in connection with the operation of Class II Gaming in a Gaming Operation, including but not limited to, Equipment, maintenance, or security services for the Gaming Operation.

15. "Gross Revenue" means the total revenue from the conduct of the Gaming Operation.

16. "Indian" shall mean an individual as defined by 25 U.S.C. § 2201(2).

17. "Indian Tribe" shall have the same meaning as defined by the NIGC's Regulations at 25 C.F.R. § 502.13.

18. "Indian Gaming Regulatory Act" or "IGRA" means the Indian Gaming Regulatory Act, Public Law 100-497 as codified in 25 U.S.C. § 2701 *et seq.*

19. "Indian Lands," "Tribal Lands" or "Tribal Indian Lands" means all lands within the limits of the Alabama-Coushatta Tribe of Texas Reservation; and any land(s) title to which is either held in trust by the United States for the benefit of the Alabama-Coushatta Tribe of Texas subject to restriction by the United States against alienation and over which the Tribe exercises governmental power. For purposes of this Gaming Ordinance, Tribal Indian Lands only refers to lands acquired by the Secretary in trust prior to October 17, 1988 or those lands acquired by the Secretary in trust after October 17, 1988 that meet one or more of the exceptions set forth in 25 U.S.C. § 2719.

20. "Key Employee" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.14.

21. "Licensee" means a tribally owned Class II Gaming Operation or a person licensed by the Tribal Gaming Agency as a Primary Management Official, Key Employee or other Gaming Employee under the provisions of this Ordinance.

22. "Management Contract" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.15.

23. "Minimum Internal Control Standards" or "MICS" means detailed procedural controls designed to protect the assets of the Gaming Operation, ensure the accuracy and reliability of accounting methods, and protect the integrity of gaming on Tribal Lands.

24. "Net Revenues" shall have the same meaning as defined in the Indian Gaming Regulatory Act at 25 U.S.C. § 2703(9) and the NIGC's Regulations at 25 C.F.R. § 502.16.

25. "NIGC" means the National Indian Gaming Commission established and existing pursuant to the Indian Gaming Regulatory Act.

26. "Non-Banking Card Games" means any card game in which two or more players play against each other and the players do not wager against the house.

27. "Operating Expenses" means expenses necessary for the Gaming Operation which include, but are not necessarily limited to, the following:

a. The payment of salaries, wages and benefit programs for employees engaged at the Gaming Operation;

b. Materials and supplies for the Gaming Operation;

c. Utilities;

d. Routine remodeling, repairs and maintenance of the Gaming Operation;

e. Interest on installment contract purchases by the Gaming Operation;

f. Insurance and bonding;

g. Advertising and marketing, including busing and transportation of employees to the Gaming Operation;

h. Professional fees;

i. Security costs;

j. Reasonable and necessary travel expenses for employees of the Tribe, the TEDA and of a management company pursuant to a Management Contract, subject to an approved budget;

k. Equipment which costs less than $500 per item or unit;

l. Trash removal;

m. Costs of goods sold;

n. Cost depreciation as defined by Generally Accepted Accounting Principles ("GAAP");

o. Other expenses designated as Operating Expenses in the annual budget of the Gaming Operation;

p. Expenses specifically designated as Operating Expenses in a Management Contract and ordinarily considered as such in accordance with GAAP;

q. Such other expenses which are determined by an annual audit to be Operating Expenses; and

r. Any payments in lieu of taxes made to any governmental entity.

28. "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, partnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual cooperative, fraternal or nonprofit doing business within the Tribal Indian Lands. The Tribe, Tribal Council, TEDA, and the Tribal Gaming Agency is not within the definition of Person.

29. "Player" or "Patron" means any person who is a customer or guest of the Gaming Operation participating in Class II Gaming activities.

30. "Primary Management Officials" or "PMO" shall have the same meaning as defined in the NIGC's Regulations at 25 C.F.R. § 502.19.

31. "Principal" means with respect to any entity: (i) each of its officers and directors; (ii) each of its principal management employees, including any chief executive officer, chief financial officer, chief operating officer, or general manager; (iii) each of its owners or partners, if an unincorporated business; (iv) each of its shareholders who own more than ten percent of the shares of the corporation, if a corporation; (v) each person other than a banking institution who has provided financing constituting more than ten percent of the total financing of the Gaming Operation; and, (vi) any person or entity set forth and described in 25 C.F.R § 537.1.

32. "Prize" means any U.S. currency, cash or other property or thing of value awarded to a Player or Patron, or received by a Player or Patron as a result of their participation in Class II Gaming activities.

33. "Regulations" means Rules and Regulations promulgated from time to time by the NIGC pursuant to the Indian Gaming Regulatory Act and any regulations promulgated thereunder.

34. "Tribal Regulations" means rules and regulations promulgated from time to time by the TGA, and this Gaming Ordinance, as amended, as the case may be.

35. "Regulator" means a Tribal Gaming Agency Regulator.

36. "Reservation" means Alabama-Coushatta Tribe of Texas lands as defined by 25 U.S.C. § 731(3) (A), (B) and (C).

37. "Secretary" shall have the same meaning as defined in the Indian Gaming Regulatory Act at 25 U.S.C. § 2703(10) and the NIGC's Regulations at 25 C.F.R. § 502.20.

38. "State" means the State of Texas.

39. "Tribal Council" or "Council" means the Tribe's governing body as established by Article V of the Constitution and Bylaws of the Alabama-Coushatta Tribe of Texas.

40. "Tribal Court" means the Alabama-Coushatta Tribe of Texas Tribal Court.

41. "Tribal Economic Development Authority" or "TEDA" means an economic entity authorized to conduct Class II Gaming Operations and related activities on the Alabama-Coushatta Tribe of Texas' Tribal Indian Lands pursuant to this Gaming Ordinance. TEDA may be operated by the Tribe directly or by a Person under a Management Contract.

42. "Tribal Gaming Agency" or "TGA" means such agency of the Tribe as the Tribe may from time to time designate as the single Tribal agency responsible for regulatory oversight of entertainment and gaming activities conducted by the TEDA.

43. "Tribal Member" means an individual who is an enrolled member of the Alabama-Coushatta Tribe of Texas as determined by the Tribe.

44. "Tribe" means the Alabama-Coushatta Tribe of Texas being duly recognized by the Secretary of the Department of the Interior, and other agencies of the United States of America, and having special rights of self-government as set forth in the Alabama-Coushatta Tribe of Texas Restoration Act, Public Law 100-89, 25 U.S.C. § 731 *et seq.*, and its authorized officials, agents and representatives.

Section 5. Class II Gaming Authorization and Regulation

Operation of Class II Gaming is authorized on Tribal Indian Lands and shall be subject to the provisions of this Gaming Ordinance. All Class II Gaming shall be regulated by the Tribe through the Alabama-Coushatta Tribal Gaming Agency, and shall only be operated consistent with the provisions of this Gaming Ordinance.

Section 6. Exclusive Ownership by the Tribe

The Tribe shall be the primary beneficiary and have the sole proprietary interest in and responsibility for the conduct of any Gaming Operation pursuant to this Gaming Ordinance.

Section 7. Use of Revenue from Class II Gaming Activities

1. Net Revenues from Class II Gaming activities shall be used by the Tribe to:

   a. Fund tribal government operations or programs;

   b. Provide for the general welfare of the Tribe and Tribal members;

   c. Promote tribal economic development;

   d. Fund operations of local government agencies; and

   e. Donate to charitable organizations.

   f. If the Tribe elects to make per capita payments to tribal members, it shall authorize such payments only upon approval by the Secretary of the Interior under 25 U.S.C. § 2710(b)(3) and 25 C.F.R. §§ 522.4(b)(2)(ii) and 522.6(b).

Section 8. Environmental and Public Health and Safety

Each Gaming Operation shall be constructed, maintained, and operated in a manner that adequately protects the environment and the health and safety of the public.

Section 9. Prizes; Assignments and Forfeiture

1. Non Assignable, exception.

   a. The right of any person to a Prize shall not be assigned except that payment of any Prize may be made to the estate of a deceased Prize winner or to a person pursuant to an order of the Tribal Court.

2. Forfeiture

   a. Any unclaimed Prize of the Gaming Operation shall be retained by the Gaming Operation for ninety (90) days after the Prize is available to be claimed. Any person who fails to claim a Prize during such time shall forfeit all rights to the Prize, and the amount of the Prize shall be awarded to the TEDA.

   b. Any Prize won by a person who is ineligible to game under this Ordinance or regulations promulgated thereunder, shall be forfeited. Any such Prize shall be awarded to the TEDA.

   c. Any Prize monies forfeited to the TEDA pursuant to this Section shall be paid into a fund at the direction of the Board and shall be treated as an expense of the Gaming Operation to the extent allowable under Generally Accepted Accounting Principles.

II. ADMINISTRATION

Section 10. Alabama-Coushatta Tribe of Texas Tribal Gaming Agency ("TGA")

1. Establishment, Composition, and Compensation of the TGA

   a. The Tribe hereby establishes a Tribal Gaming Agency ("TGA") to regulate the Tribe's Gaming Operations. The Tribe recognizes the importance of an independent Tribal Gaming Agency in maintaining a well-regulated Gaming Operation. The TGA shall be independent of, and act independently and autonomously from, the Tribal Council in all matters within its purview. No prior, or subsequent, review by the Tribal Council of any actions of the Tribal Gaming Agency shall be required or permitted except as otherwise explicitly provided in this Ordinance.

   b. The TGA's Board of Regulators shall consist of three members, including a Chair, Vice-Chair and Secretary/Treasurer. Terms of office for the Board of Regulators shall be as follows: the Chair shall serve an initial term of one (1) year, with subsequent Chairs serving 3-year terms; and the Vice-Chair and Secretary/Treasurer shall serve an initial term of two (2) years, with subsequent Vice-Chairs and the Secretary/Treasurer serving 3-year terms. A majority of the Board of Regulators shall constitute a quorum.

The concurrence of a majority of the Board of Regulators shall be required for any final determination by the Board of Regulators. The Board of Regulators may act in its official capacity, even if there are vacancies on the Board of Regulators.

c. The Board of Regulators shall be compensated at a level determined by the Tribal Council. In order to ensure the Board of Regulators is not improperly influenced, a Regulator's compensation shall not be based on a percentage of Gaming Revenue.

2. Purpose

a. The TGA will conduct oversight to ensure compliance with Tribal and federal laws and regulations. It will serve as the licensing authority for individuals employed in the Gaming Operation and will administer background investigations as part of the licensing process. The TGA will also have a role in monitoring compliance with the Gaming Operation's internal controls and in tracking Gaming Revenues. In order to carry out its regulatory duties, the TGA shall have unrestricted access to all areas of the Gaming Operation and to all of its records. The TGA shall have authority to take enforcement actions, including suspension or revocation of an individual gaming license, when appropriate.

3. Appointment and Eligibility

a. Board of Regulator positions shall be filled through appointment by the Tribal Council.

b. Nominees for Board of Regulator positions must satisfy the eligibility standards set forth for Primary Management Officials and Key Employees found in Section 11(6) of this Ordinance. All requisite background investigations shall be performed under the direction of Tribal Council. The Tribal Council shall require a criminal history check for each Board of Regulator candidate; shall review the candidate's criminal history check results; and shall make an appropriate eligibility determination before appointing an individual to any position on the Board of Regulators.

c. The following persons are not eligible to serve on the Board of Regulators: Tribal Council members, while serving as such; current employees of the Gaming Operation; gaming contractors (including any principal of a management, or other, contracting company); persons sharing a residence with any of the above; and persons ineligible to be Key Employees or Primary Management Officials. Non-tribal members previously convicted of any felony or misdemeanor offense of embezzlement, theft or any other money-related or honesty-related misdemeanor offense, such as fraud, cannot serve as a Board of Regulator member. Tribal members previously

convicted of any felony or misdemeanor offense of embezzlement, theft or any other offense related to money or honesty, such as fraud, will only be allowed to serve as a Board of Regulator member if the Tribal Council specifically finds that a significant amount of time has passed and the person is now of trustworthy character.

d. To avoid potential conflicts of interest between the management and regulation of the Gaming Operation, the Tribe requires that, at a minimum:

1. No present member of the Tribal Council or TEDA may be employed by the Tribal Gaming Agency;

2. No one sharing a residence with a present Tribal Council member or TEDA Board of Directors' member may be employed by the Tribal Gaming Agency;

3. Tribal Gaming Agency employees and Board of Regulator members are prohibited from gambling in the Gaming Operation;

4. Tribal Gaming Agency employees and Board of Regulator members are prohibited from accepting complimentary items from the Gaming Operation, excepting food and beverages valued under twenty-five dollars ($25.00); and

5. Board of Regulator members may only be removed from office by the Tribal Council, prior to the expiration of their respective terms, for neglect of duty, misconduct, malfeasance or other acts that would render a Board of Regulator Member unqualified for the position.

4. Powers of the Tribal Gaming Agency

The Tribal Gaming Agency shall administer the provisions of this Gaming Ordinance and shall have the power to:

1. Conduct background investigations, or cause such investigations to be conducted, for Primary Management Officials and Key Employees;

2. Review and approve all investigative work conducted in connection with the background investigations of Primary Management Officials and Key Employees;

3. Create and maintain investigative reports based on the background investigations of Primary Management Officials and Key Employees;

4. Obtain and process fingerprints, or designate a law enforcement agency to obtain and process fingerprints;

5. Make licensing eligibility determinations, which shall be signed by the Chair of the Board of Regulators;

6. Submit a notice of results to the NIGC of the background investigations done for each Primary Management Official and Key Employee applicant;

7. Issue gaming licenses to Primary Management Officials and Key Employees of the Gaming Operation, if warranted by the eligibility determination;

8. Establish standards for licensing the Gaming Operation;

9. Issue Facility License(s) to Gaming Operations;

10. Inspect, examine and monitor all of the Tribe's gaming activities, and have immediate access to review, inspect, examine, photocopy and audit all records of the Gaming Operation;

11. Ensure compliance with all Tribal or federal laws, rules and regulations regarding Indian gaming;

12. Investigate any suspicion of wrongdoing associated with any gaming activities;

13. Hold hearings on patron complaints, in accordance with procedures established in this Ordinance and the Tribal gaming regulations;

14. Comply with any and all reporting requirements under IGRA, the NIGC's regulations and any other applicable law;

15. Promulgate and issue regulations necessary to ensure compliance with applicable minimum internal control standards for Class II Gaming activities;

16. Promulgate and issue regulations on the levying of fees and/or taxes associated with gaming license applications;

17. Promulgate and issue regulations on the levying of fines and/or the suspension or revocation of gaming licenses for violations of this Ordinance or any Tribal or federal gaming regulations, if applicable;

18. Establish a list of persons not allowed to game in the Tribe's gaming facilities in order to maintain the integrity of the Gaming Operation;

19. Establish a list of persons who have voluntarily agreed to be excluded from the Gaming Operation, and create regulations for enforcing the exclusions;

20. Provide referrals and information to the appropriate law enforcement officials when such information indicates a violation of Tribal or federal statutes, ordinances, regulations, codes or resolutions;

21. Create a list of regulatory authorities that conduct background investigations of, and license, vendors who are recognized as trustworthy;

22. Promulgate regulations exempting vendors from the licensing and/or background investigation requirements if they have received a license from a recognized regulatory authority;

23. Perform such other duties the TGA deems appropriate for the proper regulation of the Gaming Operation; and

24. Promulgate such regulations and guidelines as deemed appropriate to implement the provisions of this Ordinance, so long as they are in furtherance of, and not in conflict with, any provisions of this Ordinance.

25. Except in emergency situations where comment and review is not practical, before adopting, amending and repealing regulations, the TGA shall give notice of any such proposed action to the Tribal Council, the Gaming Operation(s) and all other persons whom the TGA has reason to believe have a legitimate interest in the proposed action. The notice shall invite comments and describe the general nature of the proposed action and the manner in which comments on the proposed action shall be received by the TGA. In the rare circumstance that comment and review is not practical, such emergency regulation shall be in effect no longer than thirty (30) days, during which comment and review for a permanent regulation shall occur.

5. Record Keeping Requirements

a. The TGA shall ensure that all records and information obtained as a result of an employee background investigation shall remain confidential and shall not be disclosed to any persons who are not directly involved in the licensing and employment processes. Information obtained during the course of an employee background investigation shall be disclosed to members of management, human resource personnel and/or others employed by the Gaming Operation on a need-to-know basis, for actions taken in their official capacities.

b. The Board of Regulators shall keep a written record of all its meetings.

Section 11. Licensing

1. Authority to License

The TGA shall have the sole and exclusive authority to grant, renew, deny, revoke, suspend, limit, or modify gaming licenses and regulate Class II Gaming activities on Tribal Lands as permitted by this Gaming Ordinance and applicable law.

2. License Locations

Each place, facility, or location on Tribal Lands where Class II Gaming is conducted under this Gaming Ordinance shall be issued a separate license.

3. Types of Licenses to be Issued

The TGA shall issue the following licenses for gaming on Tribal Lands:

a. Facility License

b. Key Employment / Primary Management Official Licenses

c. Gaming Operation License

d. Other Licenses necessary and appropriate

4. License Fees; Application Fees and Continuing Yearly Fees

a. Any person applying for any gaming license pursuant to this Gaming Ordinance shall submit his or her application, and required forms and information, as set forth by the TGA, together with an application fee as determined by the TGA. The TGA may waive fees in its discretion if an applicant is unable to pay fees.

b. A Licensee shall, at least sixty (60) days prior to the expiration of such license make an application for renewal, as required by the TGA, and shall submit the application, required forms, and information together with a renewal fee as determined by the TGA, if any.

5. License Validity; Effective Period and Place

a. Period. Tribal gaming licenses shall be valid and effective for a period of one (1) year from the date of issue, unless same is sooner suspended or revoked for cause after notice and hearing, pursuant to this Gaming Ordinance.

b. Place. A tribal gaming license shall be valid for any Gaming Operation located on Tribal Lands.

6. License; Qualification and Requirements

a. General

(1) An application to receive a license or to be found suitable to receive a license shall not be granted unless the TGA is satisfied, after review of a background investigation that such applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and association do not pose a threat to the public interest of the Tribe, its members or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices and methods and activities in the conducting of gaming or the carrying on of the business and financial arrangements incidental thereto;

(c) In all other respects is qualified to be licensed or found suitable consistent with the declared policy of the TGA; and,

(d) An application to receive a license or to be found suitable constitutes a request for a determination of the applicant's general character, integrity and ability to participate or engage in, or be associated with gaming. Any written or oral statement made in the course of an official proceeding of the TGA or the NIGC established pursuant to 25 U.S.C. § 2704, by any member thereof, or any witness testifying under oath, which is relevant to the purpose of the proceeding is absolutely privileged and does not impose liability or defamation constituting a ground for recovery in any civil action.

(2) No Non-Tribal member shall be employed in a Gaming Operation on Tribal Lands who:

(a) Has been convicted of or who has pled guilty or nolo contendere to any felony within ten (10) years, or has ever been convicted of or has ever plead nolo contendere to any gaming offense, or other offense involving moral turpitude; or,

(b) Is under the age of eighteen (18), except that, no person shall be employed as a Primary Management Official or Key Employee, or in any position wherein the employee might be required to serve alcoholic beverages who is under the age of twenty one (21).

(3) No Tribal member shall be employed in a Gaming Operation on Tribal Lands who:

(a) Has been convicted of or who has pled guilty or nolo contendere to any felony within ten (10) years, or has ever been convicted of or has ever plead nolo contendere to any gaming offense, or other offense involving moral turpitude; unless Tribal Council specifically finds that a significant amount of time has passed and the Tribal member is now of trustworthy character.

(b) Is under the age of eighteen (18), except that, no person shall be employed as a Primary Management Official or Key Employee, or in any position wherein the employee might be required to serve alcoholic beverages who is under the age of twenty one (21).

(4) No person shall be employed as a Primary Management Official or Key Employee in a Class II Gaming activity who:

(a) Has not first applied for and obtained a tribal gaming license, pursuant to this Gaming Ordinance, and, has been made the subject of a background investigation conducted by the TGA, its agents, or designee pursuant to the requirements of this Gaming Ordinance.

(b) Is ineligible for fidelity bonding or similar insurance covering employee dishonesty.

7. Primary Management Officials, Key and Other Employees; Identification

Every person employed at a Gaming Operation operated on Tribal Lands shall wear an identification card issued by the TGA which conspicuously states the place of employment, the first name of the person and their position of employment. The card shall include a photo, first

name and four digit identification number unique to the individual which shall also include a Tribal seal or signature, and a date of expiration.

8. License Suspension and Revocation

a. Suspension and Revocation notices for Gaming Employees, Key Employees and Primary Management Officials shall be as follows:

(1) The TGA reserves the right to suspend or revoke a gaming license issued to a Gaming Employee.

(2) Any Key Employee or Primary Management Official gaming license issued by the TGA shall be suspended, without prior notice, if the NIGC, after notification by the Board of Regulators of the issuance of a license, and after appropriate review, indicates that a Primary Management Official or Key Employee does not meet the standards established and set forth herein, pursuant to 25 U.S.C. § 2710.

(3) Upon receipt of such notification by the NIGC, the TGA shall immediately suspend the license and shall provide the Licensee with written notice of suspension and proposed revocation.

(4) A Licensee, whose gaming license is suspended or terminated, shall be notified of the time and place for a hearing on the proposed revocation of a license.

(5) A right to a hearing under this part shall vest only upon receipt of a license granted pursuant to an Ordinance approved by the Chair of the NIGC.

9. Revocation Notice

a. The Revocation Notice shall include:

(1) The effective date of suspension and/or revocation;

(2) The reason(s) for the suspension and/or revocation;

(3) The right of the Licensee to appeal the suspension and/or revocation to the Tribal Court within ten (10) days of the Licensee's receipt of the revocation notice.

b. A copy of any suspension and/or revocation notice for Key Employees or Primary Management Official licenses shall be sent to the NIGC.

10. Revocation Hearing

a. After a revocation hearing, the TGA shall decide to revoke or to reinstate a gaming license. In circumstances where the revocation is the result of receiving notification

from the NIGC pursuant to Section 11(8)(a)(2) of this Ordinance, the TGA shall notify the NIGC within forty-five (45) days, pursuant to 25 C.F.R. §558.4(e), of its decision regarding the revocation or reinstatement of a Key Employee or Primary Management Official license.

b. A Licensee may appeal the suspension and/or revocation of his/her license to the Tribal Court by sending a written notice of appeal of the suspension and/or revocation to the Tribal Court and the TGA within ten (10) days after the Licensee receives notice that his/her license has been revoked. The notice of appeal shall clearly state the reason(s) why the Licensee believes his/her license should not be revoked.

c. Upon receipt of the notice of appeal of the license revocation, the Tribal Court shall schedule a revocation hearing to be conducted within twenty (20) days of receipt of the Licensee's notice of appeal. Written notice of the time, date and place of the hearing shall be delivered to the Licensee no later than five days before the scheduled date of the hearing.

d. The Licensee, at his/her own cost, and the TGA may be represented by legal counsel at the revocation hearing. The Licensee and the TGA may present witnesses and evidence and cross examine witnesses presented by the opposing side.

e. The Tribal Court shall issue its decision no later than ten (10) working days following the revocation hearing. The decision of the Tribal Court shall be final and conclusive.

f. A copy of the Tribal Court's decision regarding the revocation of a license shall be sent to the TGA and the NIGC.

Section 12. Background Investigation of Gaming Employees

11. Background Investigations Prior to Employment

a. The TEDA, prior to hiring a prospective Gaming Employee (including Primary Management Officials and Key Employees), shall obtain sufficient information and identification from the applicant to permit a thorough background investigation of the applicant. The applicant shall provide to the TEDA a written release authorizing the TGA or its agents, to conduct a background investigation.

b. Prior to providing such release, Key Employees and Primary Management Officials shall be notified of their rights under the Privacy Act of 1974 as specified in 25 C.F.R. § 556.2 and as required by 25 C.F.R. § 522.2(b). The application shall state:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. 2701 *et seq.* The purpose of the requested information is to determine the eligibility of individuals to be granted a gaming license. The information will be used by the Tribal gaming regulatory authorities and by the Commission members and staff who have need for the information in the performance of their official duties. The Information may be disclosed by the Tribe or the NIGC to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to

civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a tribe or the NIGC in connection with the issuance, denial, or revocation of a gaming license, or investigations of activities while associated with a tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a tribe's being unable to license you for a Primary Management Official or Key Employee position.

The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.

c. Additionally, prior to filling out the application, Key Employees and Primary Management Officials shall be notified on the application of the following:

A false statement on any part of your license application may be grounds for denying a license or the suspension or revocation of a license. Also, you may be punished by fine or imprisonment (18 U.S.C. § 1001).

d. The TGA shall be responsible for the performance of such background investigations. The information shall be provided in writing to meet the requirements of 25 C.F.R. § 556.4 and § 537.1 as to background investigations. In conducting a background investigation, the TGA and its agents shall keep confidential the identity of each person interviewed in the course of the investigation. The information obtained shall include:

(1) Full name, including any aliases or other names which the applicant has used or has ever been known whether oral or written;

(2) Social Security number(s);

(3) Date and place of birth;

(4) Citizenship of the applicant;

(5) Gender of the applicant;

(6) All languages spoken or written by the applicant;

(7) Currently and for the previous five (5) years an itemization or description of all:

(a) Business and employment positions held;

(b) Any ownership interests in those businesses listed;

(c) Business and residence addresses; and

(d) Current driver's license number(s).

(8) Provide the names and current addresses of at least three (3) personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under Subsection (7)(c), above;

(9) A current business and residence telephone number(s);

(10) A description of any current, as well as, previous business relationships with Indian tribes, including ownership interests in those businesses;

(11) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;

(12) The name and address of any licensing or regulatory agency with which the applicant has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;

(13) A description of all criminal proceedings in which the applicant was or is currently involved, including the following:

(a) for each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition thereof;

(b) for each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within ten (10) years as of the date of the application, the name and address of the court involved and the date and disposition thereof, and

(c) for each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within ten (10) years of the date of application and is not otherwise listed pursuant to the provisions of Subsection (a) and (b) above, the criminal charge, the name and address of the court involved and the date and disposition thereof.

(14) The name, address of any licensing or regulatory agency with which the applicant has filed an application for an occupational license or permit, whether or not such license or permit was granted;

(15) A current photograph;

(16) A set of fingerprints prepared by an authorized state, local, federal or tribal law enforcement agency; and

(17) A statement as to any civil litigation involving fraud in which the applicant has been involved, and a statement as to any other civil litigation in which the applicant has been involved within ten (10) years of the date of application.

e. A criminal history check conducted by a law enforcement agency shall include a check of criminal history records information maintained by the Federal Bureau of Investigation.

f. When a Key Employee or Primary Management Official is employed, the TGA shall maintain a complete application file containing the information listed under Section 12(1)(d)(1-17).

g. Before issuing a license to a Key Employee or Primary Management Official, the TGA shall create and maintain an investigative report on each background investigation. An Investigative report shall include all of the following:

(1) Steps taken in conducting a background investigation;

(2) Results obtained;

(3) Conclusions reached; and

(4) The basis for those conclusions.

h. When a Key Employee or Primary Management Official begins employment for the Gaming Operation, the TGA shall forward a completed application for employment to the NIGC.

i. Within sixty (60) days after a Key Employee or Primary Management Official begins work for the Gaming Operation, the TGA shall submit a notice or results of the applicant's background investigation conducted and a copy of the eligibility determination to the NIGC. The notice of results shall contain:

(1) The applicant's name, date of birth, and social security number;

(2) The date on which the applicant began or will begin work as a Key Employee or Primary Management Official;

(3) A summary of the information presented in the investigative report, which shall at a minimum include a listing of:

(a) Licenses that have previously been denied;

(b) Gaming licenses that have been revoked, even if subsequently reinstated;

(c) Every known criminal charge brought against the applicant within the last ten (10) years of the date of application; and

(d) Every felony of which the applicant has been convicted or any ongoing prosecution.

j. If within thirty (30) days, the NIGC provides the TGA with a statement itemizing objections to the issuance of a license to a Key Employee or to a Primary Management Official for whom the TGA has provided an application and notice of results, the TGA shall reconsider the application, taking into account the objections itemized by the NIGC. The TGA shall make the final decision whether to issue a license to such applicant.

k. The TGA may license a Gaming Employee after any prospective Gaming Employee who represents, in writing, that he or she meets the standards set forth in this Section, until such time as the written report on the applicants' background investigation is completed. The TGA may also license a Primary Management Official or Key Employee, on a probationary basis, after the TGA has submitted a notice of results to the NIGC, but before receiving the NIGC's statement of objections, provided that notice and the Licensee's right to a hearing are provided to the Licensee, or the TGA shall notify the NIGC within thirty (30) days after a license is issued to a Primary Management Official or Key Employee. Additionally, the TEDA shall comply with the Tribal employment preference policy in effect, if any.

l. If the TGA issues a Primary Management Official or Key Employee a gaming license and upon receiving the NIGC's statement of objections, notice and hearing shall be provided to the Licensee pursuant to Section 11(8)-(10) of this Gaming Ordinance.

m. The TGA shall not license as a Gaming Employee, Primary Management Official or Key Employee and shall terminate any probationary employee, if:

(1) An employee does not have a license after ninety (90) days;

(2) The report on the applicant's background investigation finds that the applicant:

(a) Has been convicted of or has pled nolo contendere to any felony within the previous ten (10) years or has ever been convicted or has ever pled nolo contendere to any gaming offense;

(b) Has knowingly or willfully provided materially important false statements or information on his employment application; or

(c) Has been determined to be a person whose prior activities, criminal record, if any, or reputation, habits, and association pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto.

n. If the TGA does not license a Primary Management Official or Key Employee applicant, the TGA shall notify the NIGC and shall forward copies of its eligibility determination and notice of results to the NIGC for inclusion in the Indian Gaming individuals Record System.

o. The TGA shall retain for Inspection by the NIGC Chair or his or her designee all applications for licensing, investigative reports and eligibility determination for Primary Management Official or Key Employee applicants for no less than three (3) years from the date of termination of employment.

12. Background Investigation of Gaming Employee During Employment

p. The TGA shall retain the right to conduct such additional background investigations of any Primary Management Official, Key Employee, or other Gaming Employee at any time during the term of that person's employment. Any Gaming Employee found to fall within the provision of Section 12(13)(a)-(c) above shall be immediately suspended and shall be dismissed, after notice to the employee and hearing pursuant to Section 11(8)-(10) of this Gaming Ordinance.

13. Background Investigation of any Principal

q. The TGA shall retain the right to conduct background investigations of any Principal of an entity which provides management services to the Tribe or the Gaming Operation.

Section 13. Management Contracts

The TEDA may enter into a Management Contract for the Gaming Operation and management of Class II Gaming activities. Each contract must comply with the provisions of this Gaming Ordinance, other applicable provisions of tribal law (including, but not limited to any tribal employment preference ordinance), and provisions of federal law (including, but not limited to, 25 U.S.C. §§ 2710 and 2711).

III. CLASS II GAMES GENERALLY

Section 14. Class II Games Permitted

1. The Gaming Operation may conduct Bingo, other games similar to Bingo, Class II Non-Banking Card Games or a combination of Bingo and Class II Non-Banking Card Games.

2. The Gaming Operation shall conduct regular Bingo games and such other Class II games as are permitted by the TGA pursuant to the requirements of applicable law.

Section 15. Hours of Operation; Approval by Regulatory Commission

Class II Gaming may be conducted twenty-four (24) hours a day, seven days a week, subject to approval by the TGA.

Section 16. Patron Disputes

Patrons with complaints against the Gaming Operation shall have as their sole remedy the right to file a petition for relief with the TGA. Complaints shall be submitted in writing. The TGA shall hold a hearing within thirty (30) days of receipt of the petitioner's complaint. The petitioner may have counsel present at the hearing. The petitioner may be allowed to present evidence, at the discretion of the TGA. After the hearing, the TGA shall render a decision in a timely fashion. All such decisions will be final when issued. Any Patron complaint must be submitted to the TGA within thirty (30) days of the incident giving rise to the complaint. All claims by Patrons shall be limited to a maximum recovery of actual proven damages, except disputes relating to a Patron's entitlement to a game prize, which shall be limited to the amount of such prize. The TGA's decision shall constitute the complainant's final remedy.

IV. RECORDS AND AUDITS

Section 17. Records Maintenance

1. Each Gaming Operation regulated by the TGA shall maintain accurate and up to date records for each gaming activity conducted. Records shall include:

a. All financial transactions;

b. All gaming machine testing, malfunctions, maintenance and repairs;

c. Personnel;

d. Complaints of Patrons;

e. Gaming Operation in house investigations of any kind;

f. Incidents and accidents;

g. Actions by the TGA against Players or Gaming Operation visitors; and

h. Actions by TGA against or in reprimand of employees.

Section 18. Independent Audits

1. Gaming Operations Conducted by the Tribe

The TGA shall require, and the Tribal Council shall cause, an audit to be conducted each year of all Class II Gaming Operations conducted on Tribal Lands. Such audit(s) shall be conducted by an Independent auditing firm, selected at the sole discretion of the Tribal Council, or by the TGA on its behalf. However, nothing in this Subparagraph shall prohibit the annual audit of Gaming Operations activities from being encompassed within the Tribe's existing audit system.

2. Contracts for Supplies, Services or Concessions

Each contract for supplies, services or concessions with a contract amount in excess of $25,000 annually, except contracts for professional legal or accounting services, shall be subject to the independent audit required by Section 1, Subparagraph (1), above.

3. Annual Audit Report to be Provided to Commission

The TGA shall furnish a copy of each annual gaming audit report to the NIGC.

V. VIOLATIONS

Section 19. Crimes and Civil Penalties

1. It shall be unlawful for any person to:

a. Operate or participate in gaming on Tribal Lands in violation of the provisions of this Gaming Ordinance, any rules and/or regulations promulgated by the TGA pursuant to the authority of this Gaming Ordinance;

b. Knowingly make a false statement in an application for employment with a Gaming Operation on the Tribe's Tribal Lands;

c. Bribe or attempt to bribe, or unduly influence or attempt to unduly influence, any person who operates, conducts, assists, or is otherwise employed by the Gaming Operation.

d. Alter or misrepresent the outcome or other event on which wagers have been made after the outcome is made sure but before it is revealed to the Players.

e. Place, increase or decrease a bet or to determine the course of play after acquiring knowledge, not available to all Players of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing, or decreasing a bet or determining the course of play contingent upon that event or outcome.

f. Claim, collect or take or attempt to claim, collect, or take, money or anything of value in or from a gambling game, with the intent to defraud without having made a wager thereon or claim, collect, or take an amount greater than the amount won.

2. Civil fines provided for in this Section may be imposed in addition to criminal penalties.

3. Any Person or Licensee who violates any provisions of this Gaming Ordinance or any rule or regulation promulgated by the TGA, shall be punished by fine in the nature of a civil penalty, not to exceed an amount applicable under federal or tribal law for each violation or for each day the violation continues or by suspension of their license for a period not to exceed one year or by revocation of their license, or by both such fine and license suspension or revocation.

4. Such fine may be assessed only after the Person or entity has been given notice and an opportunity to be heard before the Tribal Court.

5. Any Person who violates any provision of this Gaming Ordinance or any rule or regulation promulgated by the TGA, shall also be guilty of a criminal offense punishable by imprisonment not to exceed an amount of time applicable under federal or tribal law.

6. Any person who violates any provision of this Gaming Ordinance or any rule or regulation promulgated by the TGA may have their property, equipment, material and supplies used in conducting the unlawful activity seized and impounded by the TGA or their agents. The owner of the property shall be afforded an opportunity to object and be heard in accordance with the principles of due process. If no objection is raised, or the objection is not sustained, the TGA may dispose of the seized property.

7. The Tribal Court shall have jurisdiction over all violations of the Gaming Ordinance. Nothing, however, in this Gaming Ordinance shall be construed to authorize or require a criminal trial and punishment by the Tribe of non-Indians except to the extent allowed

or required by any applicable present or future, federal law, act of Congress or any applicable federal court decision.

8. TGA, in its sole discretion, has the authority to require licensing for any class of vendors it determines and to promulgate regulations regarding such licensure. The TGA shall retain the right to revoke the license of any vendor who engages in conduct not authorized by this Gaming Ordinance or the vendor's agreement with the TEDA which involves moral turpitude, dishonesty or any act which is punishable as a felony or misdemeanor involving moral turpitude under Tribal, State or Federal laws.

9. Any non-member of the Tribe, including non-Indians, who violates a provision of this Ordinance may be excluded from the Tribal Lands within the jurisdiction of the Alabama-Coushatta Tribe of Texas.

Section 20. Enforcement

After any Person or entity fails or refuses to pay a final assessment levied pursuant to Section 22 above, the Tribe or its agencies or economic entities may proceed to collect the assessment by initiating a civil action against the Person or entity in Tribal Court or in a federal court of competent jurisdiction. In such civil action, validity and amount of the assessment shall not be subject to judicial review. The Tribe or its agencies or economic entities shall be entitled to all remedies in law or in equity that are available to civil litigants generally and/or specially, by law.

VI. VALIDITY OF ORDINANCE

Section 21. Severability

If any provision or provisions in this Gaming Ordinance are held invalid by the Tribal Court or a federal court of competent jurisdiction, this Gaming Ordinance shall continue in effect as if the invalid provision(s) were not a part hereof.

Section 22. Amendments

The Gaming Ordinance may be amended by action of the Tribal Council and documented by Tribal Council Resolution. Any proposed amendments must be presented for approval to the NIGC.

Section 23. Effective Date of Ordinance

This Gaming Ordinance, as amended, shall take effect after adoption by the Tribal Council and upon approval of the Chairman of the NIGC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff,* v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant.*	§ § § § § § § § § § § §	NO. 9:01-CV-00299

[PROPOSED] ORDER GRANTING DEFENDANT TRIBE'S
MOTION FOR RELIEF FROM JUDGMENT

Defendant the Alabama-Coushatta Tribe of Texas (the "Tribe") has moved for an Order pursuant to Federal Rule of Civil Procedure 60(b)(5) dissolving the permanent injunction entered in this case on June 25, 2002, by the Honorable John Hannah, Jr. [Doc. No. 36] (the "Permanent Injunction"). Having considered the Tribe's motion, the State of Texas's opposition thereto, and any further briefing, argument, and evidence, the Court finds that prospective application of the injunction is no longer equitable and therefore **ORDERS** that:

A. the Tribe's Motion for Relief from Judgment is **GRANTED**; and

B. the Permanent Injunction is hereby **DISSOLVED**.

SO ORDERED this _____ day of _____, 201___.