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

STATE OF TEXAS,	§	
Plaintiff	§	
	§	
v.	§	
	§	NO. EP-99-CA-0320-DB
YSLETA DEL SUR PUEBLO,	§	
TIGUA GAMING AGENCY, THE TRIBAL	§	
COUNCIL, TRIBAL GOVERNOR ART	§	
SENCLAIR, and TRIBAL LIEUTENANT	§	
GOVERNOR CARLOS HISA,	§	
Defendants	§	

PLAINTIFF'S MOTION FOR CONTEMPT FOR VIOLATION OF THE SEPTEMBER 27, 2001 INJUNCTION

TO THE HONORABLE JUDGE DAVID BRIONES:

The State of Texas ("State"), Plaintiff in the above styled action, files this its Motion for Contempt to enforce the September 27, 2001 Injunction, and in support thereof, would respectfully show the Court the following:

I.

INTRODUCTION

1. In *Ysleta Del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*") the Court found that the Pueblo is organized pursuant to the Restoration Act, 25 U.S.C. §1300g-6 (c) and that "All gaming activities which are prohibited by the laws of the state of Texas are prohibited on the reservation and on lands of the tribe." *Ysleta I, id.* at 1332. The Fifth Circuit went further and held that under the Restoration Act, Texas law "functions as surrogate federal law . . . the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the

Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA." *Ysleta I, id.* at 1335.

2. This Court in *Texas v. Ysleta Del Sur Pueblo,* 220 F.Supp.2d 668 (W.D. Tex. 2001 & Order Modifying Opinion 2002) (*"Ysleta II"),* entered a permanent injunction, finding that:

> ...the Tribe operates, *inter alia*, high-stakes bingo, keno games, a form of blackjack called Tigua 21, poker games, slot machines, crap games, a "ABig-Six" wheel game, and off-track betting on horse and dog races, all as described in the State's Motion for Summary judgment under the heading "games at the Casino." Pp 10-17. And the Court notes that the summary judgment record cited therein fully supports this finding.
>
> And the Court makes the following additional conclusions of law:
>
> The Speaking Rock Casino and Entertainment Center is a building which has as one of its uses, the making or settling of bets, as defined by Section 47.01(3) of the Texas Penal code.
>
> The Speaking Rock Casino and Entertainment Center is a place where, among other activities, one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, as defined by Section 47.01(7) of the Texas Penal Code.
>
> The Speaking Rock Casino and Entertainment Center is a place where activities are conducted which include one or more of the activities described in Section 47.02(a), 47.03(a), 47.04(a), 47.05(a) and 47.06(a) of the Texas Penal Code.
>
> The Defendants knowingly maintain the Speaking Rock Casino as a place where persons repeatedly and habitually go for purposes of gambling and that these activities are frequent and continuous.
>
> The Defendants habitually make the Speaking Rock Casino available to members of the general public for gambling, gambling promotion and the communication of gambling information, all of which are prohibited by law.
>
> The Defendants operate the Speaking Rock Casino as a place where plays and bets are made upon games played with cards, dice and other gambling devises.
>
> The Speaking Rock Casino is not a "private place" as defined by Texas Penal Code § 47.01(8), but rather is a public place to which the general public is invited and has ready access.

Ysleta II at 690-691.

3. The *Ysleta II* opinion of this Court entered conclusions of law including:

> 7. The evidence in this case has established, and the court so finds, that the Defendants in this case have embarked upon a long-continued habitual course of conduct clearly violative of the Gambling Laws of the State of Texas and that such

parties, unless enjoined, will continue such habitual illegal activities at Speaking Rock Casino. More specifically, such Defendants, **YSLETA DEL SUR** PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR ALBERT ALVIDREZ, TRIBAL LIEUTENANT GOVERNOR FILBERT CANDELARIA, and GAMING COMMISSIONER FRANCISCO HERNANDEZ have habitually used, and threatened or contemplated the continued habitual use of, a place located in El Paso County, **Texas** known as, referred to and advertised as the Speaking Rock Casino, which is geographically a part of the **Ysleta del Sur** Pueblo Indian land and which has a street address of 122 S. Old Pueblo Rd., El Paso, **Texas** 79907 for the purpose of illegal gambling, gambling promotion and communicating gambling information prohibited by law by providing a place where Defendants charge and collect monetary fees from the public resulting in an economic benefit to them based upon patrons, guests and customers playing gambling games and betting money on games played with cards, dice and other gambling devices in violation of § 47 of the **Texas** Constitution; Chapter 47 of the **Texas** Penal Code; §125.002 and §125.021 of the **Texas** Civil Practice and Remedies Code and 25 U.S.C. §1300-g-1 et seq. Ysleta Del Sur Pueblo Restoration Act.

8. The operation of all games played with dice, cards, wheels, slot machines, KENO board, off track being and BINGO cards at Speaking Rock Casino are violations of Texas Penal Code § 47.02 and constitute both a common and public nuisance under Texas Civil Practice and Remedies Code§ 125.001 Common Nuisance and §125.021 Public Nuisance.

9. The State of Texas is entitled to the issuance of an injunction against the Defendants, their agents, employees, and attorneys pursuant to the Texas Civil Practice and Remedies Code §125.002 and §125.022 and Rule 65 of the Federal Rules of Civil Procedure requiring said Defendants to cease and desist from operating, conducting, engaging in or allowing others to conduct, operate or engage in gaming and gambling activities on the Pueblo's reservation held herein to be in violation of the Texas Penal Code and prohibited by the Restoration Act, 25 U.S.C. §300g-b. The Restoration Act makes it clear that the State of Texas may seek injunctive relief in federal courts to enforce the Act's gaming ban.

Id. at 696-97.

4. Thereafter, the *Ysleta II* opinion sets out the terms of the injunction as follows:

INJUNCTION

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

PERSONS AND PARTIES SUBJECT OF INJUNCTION

The Persons and Parties enjoined are as follows:

1. Ysleta del Sur Pueblo
2. Tigua Gaming Agency
3. The Tribal Council of the Ysleta del Sur Pueblo
4. Tribal Governor Albert Alvidrez
5. Tribal Lieutenant Governor Filbert Candelaria
6. Gaming Commissioner Francisco Hernandez
7. The officers, agents, servants, employees, and attorneys of the foregoing persons and parties.

ACTIVITIES ENJOINED

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

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

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

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

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

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

1. Bingo or any variation thereof;
2. Scratch tickets, peel tickets, or pull tabs;
3. Keno or any variation thereof;

4. Tigua Dice, Craps, or any variations thereof;
5. Slot Machines;
6. Poker card games;
7. Betting on horse races or dog races;
8. Tigua 21, Blackjack, or any variations thereof;
9. Wheel of Fortune, Big Six Wheel, or any variations of wheel games.

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

Id. at 700-01.

5. As shown in the two Affidavits of Conrad Rodriguez and David Wilbourn, attached hereto as Exhibits 1 and 2 respectively, the illegal gaming activities at the Speaking Rock Casino and Entertainment Center are continuing at this time. In particular, there is eight-liner gambling going on with ultimate cash payout which violates the injunction order above. The Order of this Court stated that:

> As a threshold matter, the Court recognizes that eight-liners have been found to be "gambling devices" under § 47.01(4), and thus illegal. *See Allstar Amusement v. State,* 50 S.W.3d 705 (Tex.App.2001); *Hardy v. State,* 50 S.W.3d 689 (Tex.App.2001). However, the eight-liners in these cases were found to be illegal in that they did not comport to the gambling device exception provided in § 47.01(4)(B). It is clear that if an eight-liner falls under the § 47.01(4)(B) exception, it is not illegal. The *Hardy* court recognized this, holding that eight-liners fall "within the exclusion provided by section 47.01(4)(B) only if it 'rewards the player exclusively with *noncash* merchandise, prizes, toys or novelties, or a representation of value redeemable for those items.'" *Hardy,* 50 S.W.3d at 697 (emphasis in original) (quoting Tex. Penal Code Ann. § 47.01(4)(B)). Other Texas courts have recognized that eight-liners are not illegal if they fall under the § 47.01(4)(B) exception. *See generally Legere v. State,* 82 S.W.3d 105, 113 n. 4 (Tex.App.-San Antonio 2002) ("Excluded from the definition are those devices that reward the player 'exclusively with noncash merchandises, prizes, toys or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.' As subsection 47.01(4)(B) exempts certain types of devices, not all eight-liners are necessarily gambling devices"); *One Super Cherry,* 55 S.W.3d at 53 ("Consequently, the State bore the additional burden of

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

Id at 704.

6. As shown in Paragraph 23 of the Investigation Report attached as "Exhibit A" to the two affidavits, the visa cards provided in the eight-liners here are convertible to cash and therefore do not meet the exception for prize limitations set out in Penal Code § 7.01(4)(b). As a result, the gaming now occurring at the location of 122 S. Old Pueblo Rd., El Paso, Texas 79907 violates this Court's previous injunction.

7. On information and belief, the actions of Defendants are in direct conflict with the September 27, 2001 injunction previously entered by this Court and therefore constitute civil contempt of this Court's prior order. *International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 114 S.Ct. 2552, 2557 (1994). As a result, Plaintiff requests that this Court issue a SHOW CAUSE ORDER to require Defendants to appear and following presentation of evidence, to enter an order containing appropriate sanctions against Defendants including the cessation of all gaming activities on reservation lands, or alternatively, that the State of Texas be allowed monthly access to the Pueblo premises and access to all books and records of gaming activities proposed to be conducted thereon in order to assure future compliance with this Court's injunction order of

September 27, 2001, and for such other and further relief to which Plaintiff may show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. Certified Mail, return receipt requested, on March 14, 2008, to:

Mr. Tom Diamond
DIAMOND RASH, P.C.
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El Paso, Texas 79901

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