October 5, 2015

Governor Hisa
Ysleta del Sur Pueblo
119 S. Old Pueblo Rd.
Ysleta del Sur Pueblo, TX 79907

RE: Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance and Resolution No. TC-021-14.

Dear Governor Hisa:

This letter responds to the Ysleta del Sur Pueblo's August 17, 2015, request through its attorneys, Johnson, Barnhouse & Keegan, to the National Indian Gaming Commission (NIGC) to review and approve the Pueblo's amendments to its Class II gaming ordinance. The amendments to the gaming ordinance were adopted by Resolution No. TC-021-14 by the Ysleta del Sur Pueblo Tribal Council.

Resolution No. TC-021-14 revises the Pueblo's current gaming ordinance to reflect the changes in the NIGC regulations in the last twenty years and to seek NIGC regulation of its bingo operations in light of federal case law.[1] Because the Pueblo's ordinance permits it to conduct gaming on its *Indian lands,*[2] an analysis of whether its lands are eligible for gaming was necessary.

Analysis

The Pueblo asserts in the ordinance that it has the authority to regulate Class II gaming on its *Tribal Lands* under IGRA.[3] It defines *Tribal Lands,* or alternatively *Pueblo Lands,* as all lands within the limits of the Pueblo's *Reservation.*[4] The Pueblo defines *Reservation*[5] as it is defined in the Pueblo's Restoration Act.[6]

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[1] *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325 (5th Cir. 1994).
[2] Ysleta Del Sur Pueblo Class II Tribal Gaming Ordinance § 5.
[3] *Id.* § 2.1
[4] *Id.* § 4.31.
[5] *Id.* § 4.37.
[6] 25 U.S.C. § 1300g(3) ("the term 'reservation' means lands within El Paso and Hudspeth Counties, Texas— (A) held by the tribe on August 18, 1987; (B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on August 18, 1987; (C) held in trust for the benefit of the tribe by the Secretary under section

As discussed in greater detail below, the *Tribal lands* specified in the ordinance amendment are *Indian lands* as defined by IGRA and are eligible for gaming under the Act. However, the Restoration Act provides a general grant of state jurisdiction over the Pueblo's lands, through Public Law 280,[7] and specifically applies state gaming laws to the Pueblo's lands,[8] with a caveat.[9] Accordingly, the Restoration Act must be taken into consideration as part of this ordinance review.

Further, because the definition in the Pueblo's ordinance incorporates the Restoration Act and the Secretary of the Interior administers tribal restoration acts,[10] 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.[11]

Jurisdiction

First, we must first examine the scope of IGRA to determine whether it has jurisdiction over the Pueblo's Restoration Act lands or phrased alternatively, whether the Pueblo's Restoration Act lands are exempt from IGRA's domain. In keeping with IGRA's purpose to establish federal standards for gaming on Indian lands and an independent federal regulatory authority for gaming on Indian lands,[12] NIGC has jurisdiction with over gaming on Indian lands.

However, Congress can prohibit tribes from gaming under IGRA by exempting them from IGRA's scope. For instance, Congress explicitly stated IGRA did not apply to the Catawba Indian Tribe of South Carolina when it ratified its settlement agreement with the Catawba.[13] And Congress amended the Narragansett Tribe's settlement act to specifically exclude its settlement

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1300g–4(g)(2) of this title; and (D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.").

[7] 25 U.S.C. § 1300g-4(f) ("[Texas] shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.").

[8] 25 U.S.C. § 1300g-6(a) ("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.").

[9] 25 U.S.C. § 1300g-6(b) ("Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.").

[10] *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1994) ("Deference is appropriate under Chevron only when an agency interprets a statute that it administers. Here, the question of the Gaming Act's applicability cannot be addressed in a vacuum, and the [NIGC], whatever else might be its prerogatives, does not administer the Settlement Act. That role belongs to the Secretary of the Interior ....").

[11] May 29, 2015, Letter to Deputy Solicitor, Indian Affairs Venus Prince from NIGC General Counsel, Eric N. Shepard.

[12] 25 U.S.C. § 2702(3) (2012).

[13] 25 U.S.C. § 941l(a).

lands from IGRA,[14] after the First Circuit found IGRA applied.[15] Finally, Congress exempted the Maine tribes – Passamaquoddy, Penobscot, and Maliseet – from all federal Indian legislation enacted after their settlement act, including IGRA, unless Congress makes those laws specifically applicable,[16] which IGRA did not.[17] In contrast to those examples, the Pueblo's Restoration Act does not explicitly prohibit IGRA's authority over the Pueblo. Further, nothing in IGRA's legislative history indicates that the Pueblo is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Pueblo.

Next, the Solicitor's Office 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.[18] 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."[19] It defines *Indian lands* as all lands with the limits of any Indian Reservation.[20] In 1987, the Restoration Act established a reservation for the Pueblo,[21] comprised of the Pueblo's land holdings at that time.[22] Because the Pueblo has a reservation – established a year before Congress passed IGRA – the Pueblo has IGRA-defined *Indian lands.* Further, the Pueblo identified in its ordinance that it authorizes gaming on its *Tribal lands* – defined as all lands within the limits of its *Reservation.* The Pueblo's ordinance limits where it can operate a class II gaming facility to its established reservation. Accordingly, the Restoration Act lands qualify as *Indian lands* under IGRA.

Finally, because the Pueblo's Restoration Act, which created the reservation, pre-dates IGRA, an after-acquired land analysis is not necessary.[23]

Conclusion

[14] 25 U.S.C. § 1708(b).
[15] *Rhode Island v. Narragansett,* 19 F.3d 685, 697-700(1st Cir. 1994).
[16] 25 U.S.C. § 1735(b).
[17] *Passamaquoddy Tribe v. State of Me.*, 75 F.3d 784 (1st Cir. 1996).
[18] September 10, 2015, Letter to NIGC General Counsel, Michael Hoenig, from Deputy Solicitor for Indian Affairs, Venus McGhee Prince. *(Attachment A.)*
[19] 25 U.S.C. § 2710(b)(1).
[20] 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."
[21] 25 U.S.C. § 1300g-4(a)
[22] 25 U.S.C. § 1300g (3).
[23] *See generally* 25 U.S.C. § 2719.

In conclusion, because the Pueblo 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: Randolph H. Barnhouse
Johnson, Barhouse, & Keegan (via email, only: rbarnhouse@indiancountrylaw.com)

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.

Attachment A

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]

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[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).

Attachment A

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.

Attachment A

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

Ysleta del Sur Pueblo
TRIBAL RESOLUTION

TC-021-14
Amending No 00492, the
Class II Tribal Gaming Ordinance

WHEREAS, the Ysleta del Sur Pueblo (the "Pueblo") is a federally recognized Indian Tribe possessing the inherent sovereign powers of self-governance and exercising power and authority over the lands within the exterior boundaries of the Pueblo's Indian Reservation and its federal trust lands; and,

WHEREAS, the Tribal Council ("Council") of the Pueblo, is the duly constituted traditional governing body of the Ysleta del Sur Pueblo exercising all inherent governmental power, fiscal authority, and tribal sovereignty as recognized in sections 101 and 104 of the Act of August 18, 1987 (the Ysleta del Sur Pueblo Restoration Act, 101 Stat. 666, Public Law No. 100-89); and,

WHEREAS, the Pueblo has operated from time immemorial as a Native American political sovereign without organic or written constitution, charter, or by-laws; and,

WHEREAS, the Pueblo governs itself by oral tradition; and,

WHEREAS, the civil and criminal law authority of the Pueblo is vested in the Council consisting of the Cacique, Governor, Lt. Governor, Aguacil, War Captain and four (4) Council members; and,

WHEREAS, the Council adopted the Tribal Bingo Ordinance 00492 on May 6, 1992; and thereafter amended it on October 16, 1992, April 1993, July 22, 1993, and October 1993, and submitted said ordinance as amended as the Pueblo's Class II Tribal Gaming Ordinance to the National Indian Gaming Commission which approved said ordinance on October 19, 1993; and,

WHEREAS, the Council desires to amend its Tribal Bingo Ordinance to coordinate its provisions with Tribal Council Ordinance TO-001-10 amending Article 62 of the Tribal Code of Laws; .

WHEREAS, the Council has authorized the Governor or in his absence the Lieutenant Governor to act for the Pueblo in the signing of this resolution;

NOW, THEREFORE, BE IT RESOLVED, by the Ysleta del Sur Pueblo Tribal Council as follows:

1. That the preambles hereto shall be incorporated herein and made part of the Resolution; and,

2. That all action of Tribal Council in adopting and amending Tribal Bingo Ordinance 00492 as approved by the National Indian Gaming Commission are hereby ratified; and,

3. That Tribal Ordinance No. TO-001-14, which amends Tribal Bingo Ordinance 00492 as approved by the National Indian Gaming Commission, a true and correct copy of which is attached hereto as Exhibit "A" and, by reference, is incorporated herein for all purposes as if set forth at length, is hereby enacted to be effective immediately.

ADOPTED this the 18th day of March, 2014.

CERTIFICATION

I, the undersigned, Governor/Lt. Governor of the Ysleta del Sur Pueblo hereby certify that the members of Ysleta del Sur Pueblo Tribal Council were contacted individually on the 18th day of March 2014, and that 5 voted for, 0 opposed, and 0 abstained.

YSLETA DEL SUR PUEBLO:

Tribal Governor

ATTEST:

Tribal Council Secretary

EXHIBIT
A

TRIBAL ORDINANCE NO. TO-001-14

CLASS II TRIBAL GAIMING ORDINANCE
(Amending Tribal Bingo Ordinance 00492)

Pursuant to the authority vested in the Tribal Council (the "Council") as the duly constituted traditional governing body of the Ysleta del Sur Pueblo (the "Pueblo") a federally recognized Indian Tribe, exercising all inherent governmental powers, fiscal authority and tribal sovereignty as recognized in the Ysleta del Sur Pueblo Restoration Act (Public Law 100-89 as codified in U.S.C. § 1300g, hereinafter the "Restoration Act"), and its lawful authority to provide for health, safety, morals, welfare, tribal economic development and self-sufficiency of the Pueblo, the Council of the Pueblo hereby enacts this ordinance for the purpose of regulating land use of Tribal trust and fee lands for the reasons stated in the attached "Class II Tribal Gaming Ordinance." Therefore, be it resolved and ordained by the Council of the Pueblo:

That the attached "Class II Tribal Gaming Ordinance," which, by reference, is incorporated herein as if set forth at length, is hereby adopted to be effective immediately.

YSLETA DEL SUR PUEBLO

By: _____

Title: Lt. Governor

ATTEST:

By: _____

Title: TC Adm Asst.

Date: March 18, 2014

YSLETA DEL SUR PUEBLO

CLASS II TRIBAL GAMING ORDINANCE

No. 00492

AS AMENDED

YSLETA DEL SUR PUEBLO
CLASS II TRIBAL GAMING ORDINANCE
No. 00492

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YSLETA DEL SUR PUEBLO

CLASS II TRIBAL GAMING ORDINANCE

NO. 00492

AS AMENDED

The Tribal Council is the duly constituted traditional governing body of the Ysleta del Sur Pueblo. The Pueblo is a federally recognized Indian Tribe, exercising all inherent governmental powers, fiscal authority and tribal sovereignty as confirmed in the Ysleta del Sur Pueblo Restoration Act (Public Law 100-89 codified in 25 USC § 1300g. Under its authority to provide for the health, safety, morale, welfare, tribal economic development and self-sufficiency of the Pueblo, the Council adopted the Bingo Ordinance No. 00492 on May 6, 1992, pursuant to the requirements of the Indian Gaming Regulatory Act (Public Law 100-497, 25 USC § 2701, et. seq.) The Council adopted the 1992 Bingo Ordinance for the purpose of regulating the conduct of Class II Gaming on the Pueblo's Lands. The Council amended the Bingo Ordinance on October 16, 1992, April 15, 1993, July 22, 1993, October 5, 1993, and December 10, 2013, with the last amended Ordinance approved by the National Indian Gaming Commission on October 19, 1993. The Council again amends this Ordinance this 18th day of March, 2014, as follows.

Section 1. Title.

This Ordinance shall be known as the Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance, or the Gaming Ordinance.

Section 2. Findings.

The Council finds that:

1. The Ysleta del Sur Pueblo has the exclusive authority to operate, license, and regulate Class II Gaming activities on its Tribal Lands under the Indian Gaming Regulatory Act; and

2. It is essential to the health, safety and general welfare of the Ysleta del Sur Pueblo and the visitors to its Tribal Lands that standards and regulations be promulgated to govern the conduct of Class II gaming activities on Tribal Lands.

Section 3. Purpose.

The purposes of this Gaming Ordinance, as amended, are to:

1. Provide standards and regulations governing the conduct of Class II gaming activities on Tribal Lands;

2. Promote tribal economic development;

3. Enhance employment opportunities for tribal members;

4. Strengthen the economy of the Ysleta del Sur Pueblo; and,

5. Generate revenue for use in improving the health, education and general welfare of members of the Ysleta del Sur Pueblo.

I. General Provisions

Section 4. Definitions.

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. "Bingo Occasion" shall mean a single session or gathering at which a series of successive bingo games are played.

3. "Class I Gaming" means social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

4. "Class II Gaming" means all forms of gaming which are defined as Class II Gaming in the Indian Gaming Regulatory Act, P.L. 100-497, 25 U.S.C § 2703 (7)(A) ("IGRA") and by the regulations promulgated by the National Indian Gaming Commission at 25 C.F.R. § 502.3.

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

6. "Electronic, computer or other technological aid" shall mean any machine or device such as telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games and which: (i) assist a player or the playing of a game; (ii) is not an electronic or electromechanical facsimile; and, (iii) is operated according to applicable Federal Communications law. Such machines or devices broaden the participation levels in a common game, facilitate communication between and among gaming sites, or allow a player to play a game with or against other players rather that with or against a machine.

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. "Game Card" and "Bingo Game Card" means a regular or special Bingo card.

9. "Games Similar to Bingo" means any game in the same location as bingo constituting a variant on the game of bingo, provided that the game is not house banked, and permits players to compete against each other for a common prize or prizes.

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

11. "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.

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

13. "Gaming Services" means the providing of any goods or services to the Pueblo directly in connection with the operation of Class II gaming in a Gaming Facility, including equipment, maintenance, or security services for the Gaming Facility.

14. "Indian" shall mean an individual as defined by 25 U.S.C § 2201(2) of an Indian tribe as defined by the Nation Indian Gaming Commission Regulations at 25 C.F.R. 502.13.

15. "Instant Bingo" means a game of chance whereby the player purchases a card and removes paper slips, which act as concealing flaps, revealing numbers or symbols or numbers and letters, and on the reverse side of the card are printed the winning combination such that the player need only compare the sides to determine if and what they may have won.

16. "Key Employee" means:

a. A person who performs one or more of the following functions:

(1) Bingo Caller;
(2) Counting Room Supervisor;
(3) Bingo Chief of Security;
(4) Custodian of gaming supplies or cash;
(5) Floor Manager;
(6) Pit Boss;
(7) Dealer;
(8) Approver of credit; or
(9) Custodian of equipment including persons with access to cash and accounting records;

b. If not otherwise included, any other person whose total cash compensation is in excess of $50,000 per year; or,

c. If not otherwise included, the four most highly compensated persons in the Gaming Operation.

d. Any other person designated by the Pueblo as a Key Employee.

17. "Lotto" means a game of chance with cards bearing numbers or other designations, in rows of 9, in which the player holding the card covers such numbers or designations when objects similarly numbered or designated are drawn or otherwise randomly determined, in which the game is won by the first player to cover a pre-designated arrangement on the card.

18. "Net Revenues" means the gross gaming revenues from the Pueblo Gaming Operation, less (a) amounts paid out as, or paid for, prizes; and (b) total gaming-related Operating Expenses, excluding management fees.

19. "Management Contract" means a management contract within the meaning of 25 U.S.C. § 2711.

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

21. "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.

22. "Operating Expenses" means expenses of the Enterprise, necessary for the operation of the Enterprise and which include, but are not necessarily limited to, the following:

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

b. Materials and supplies for the Enterprise;

c. Utilities;

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

e. Interest on installment contract purchases by the Enterprise;

f. Insurance and bonding;

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

h. Professional fees;

i. Security costs;

j. Reasonable and necessary travel expenses for employees of the Pueblo, the Enterprise 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 Enterprise;

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.

23. "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 Indian Lands. The Pueblo, Tribal Council, or the Regulatory Commission is not within the definition of person.

24. "Player" or "Patron" means any person who is a customer or guest of the Gaming Enterprise participating in Class II gaming activity.

25. "Principal" means with respect to any enterprise: (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 for the enterprise constituting more than ten percent of the total financing of the enterprise; and, (vi) any person or entity set forth and described in 25 CFR § 537.1.

26. "Primary Management Officials" or "PMO" means:

a. The person having management responsibility for a management contract;

b. Any person who has authority to:

i. hire and fire employees; or

ii. set up working policy for the Gaming Enterprise, or

c. The chief financial officer or other person who has financial management responsibility.

27. "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 activity.

28. "Pueblo" or "Tribe" means the Ysleta del Sur Pueblo 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, (all as set forth in the Ysleta del Sur Pueblo Restoration Act, Public Law 100-89, 25 USC 1300g), and its authorized officials, agents and representatives.

29. "Pueblo Gaming Facility" or "Gaming Facility" means any location in which Class II gaming as authorized by this Gaming Ordinance is conducted on the Pueblo's Tribal Lands.

30. "Pueblo Gaming Enterprise" or "Enterprise" means an economic entity authorized to conduct Class II Gaming Operations and related activities on the Pueblo's Reservation pursuant to this Gaming Ordinance. A Gaming Enterprise may be operated by the Ysleta del Sur Pueblo directly or by a Person under a Management Contract.

31. "Pueblo Lands" or "Tribal Lands" means all lands within the limits of the Ysleta del Sur Pueblo Reservation; and any lands title to which is either held in trust by the United States for the benefit of the Ysleta del Sur Pueblo or individual Ysleta del Sur Pueblo tribal member subject to restriction by the United States against alienation and over which the Pueblo exercises governmental power.

32. "Pueblo Tribal Member" means an individual who is recognized as a member of the Ysleta del Sur Pueblo as determined by the Pueblo.

33. "Pull Tabs" means factory covered tickets which are purchased and opened by players or patrons revealing a predetermined winning arrangement.

34. "Punch Board" means a small board that has many holes, each filled with a rolled up printed slip to be punched out upon payment of player fee, in an effort to obtain a slip that entitles the player to a designated prize.

35. "Regular Bingo Card" means a bingo card or bingo paper issued to a player upon payment of admission fee which affords a player the opportunity to participate in all regular bingo games played at a bingo occasion.

36. "Regulations" means Rules and Regulations promulgated from time to time by the Regulatory Commission pursuant to the Gaming Regulatory Act, and Tribal Regulations, and this Gaming Ordinance, as amended, as the case may be.

37. "Reservation" means Ysleta del Sur Pueblo lands:

a. held by the Pueblo on August 18, 1987;

b. held in trust by the State or by the Texas Indian Commission for the benefit of the Pueblo on such date;

c. held in trust for the benefit of the Pueblo by the Secretary under 25 USC 1300g- 4(g)(2); and,

d. subsequent to such date, acquired and held in trust by the Secretary for the benefit of the Pueblo.

38. "Secretary" means the Secretary of the Department of the Interior.

39. "Special Bingo Card" means a disposable, specially marked bingo card or bingo paper which affords a player the opportunity to participate in a special bingo game for special prizes.

40. "Special Bingo Game" means any bingo game which is not a regular bingo game and which is played with special bingo cards or bingo paper for special prizes.

41. "State" means the State of Texas.

42. "Ysleta del Sur Pueblo Regulatory Commission" or "Regulatory Commission" means such agency of the Pueblo as the Pueblo may from time to time designate as the single Tribal agency responsible for regulatory oversight of entertainment and gaming activities conducted by the Gaming Enterprise.

43. "Tip Jars" means a game of chance, wherein a person upon payment of a fee, is permitted to reach into, or tip a jar containing printed slips, and extract one slip in an effort to obtain a slip that entitles the player to a designated prize.

44. "Tribal Building Inspector" means the person appointed as Tribal Building Inspector, his qualified agent or if none, such other person as the Council designates or appoints, to perform the duties of a building inspector, including but not limited to, enforcement of applicable building, safety and health codes.

45. "Tribal Council" or "Council" means the Pueblo's governing body as recognized by the Texas Indian Commission on August 18, 1987, and such tribal council's successors. The Tribal Council of the Pueblo consists of the Cacique, the Governor, the Lieutenant Governor, and five Council members, who possess plenary power over the people, land and property within the exterior boundaries of the Pueblo.

46. "Tribal Court" means the Ysleta del Sur Pueblo Tribal Court.

Section 5. Class II Gaming Authorization and Regulation.

Operation of Class II gaming is authorized on Indian lands and shall be subject to the provisions of this Gaming Ordinance. All Class II gaming shall be regulated by the Pueblo through the Ysleta Del Sur Pueblo Regulatory Commission, and shall only be operated consistent with the provisions of this Gaming Ordinance.

Section 6. Exclusive Ownership by Pueblo.

Class II gaming shall be owned and operated exclusively by the Pueblo, which shall have the sole proprietary interest in and responsibility for the conduct of any Gaming Operation.

Section 7. Use of Revenue from Class II Gaming Activities.

1. Net revenues from Class II Gaming activities shall be used by the Pueblo to:

    a. donate to charitable organizations;

    b. fund tribal government operations or programs;

    c. provide for the general welfare of the Tribe or Tribal members;

d. promote tribal economic development;

e. fund operations of local tribal government agencies; and/or

f. other lawful purposes.

g. 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).

Section 8. Gaming Facilities.

1. To ensure that the environment and the public safety and welfare are adequately protected, each Gaming Facility shall be constructed and maintained in compliance with the minimum standards of any applicable Building Code adopted by the Pueblo.

2. Each Gaming Facility shall be subject to inspection to insure compliance, annually or on such basis as the Tribal Building Inspector, or if none, Tribal Council, determines necessary and appropriate.

3. The Pueblo shall construct, maintain and operate each Gaming Facility in a manner that adequately protects the environment and the public's health and safety.

Section 9. Persons Under the Age of Twenty-One (21), Employees Prohibited.

1. No person under the age of twenty-one (21) years shall be permitted to play any Class II game.

2. No person who is employed at a Gaming Facility may play any game conducted therein while on duty, except in the course of employment, on behalf of the employer, in which event employee status shall be clearly identifiable to the patron players.

Section 10. 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 Pueblo Gaming Enterprise shall be retained 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 Enterprise.

b. Any prize won by a person under the age of twenty-one (21) shall be forfeited as a violation of Section 9 of this Gaming Ordinance. Any such prize shall be awarded to the Enterprise, and the approximate consideration paid by such person shall be refunded to such person.

II. Administration

Section 11. Ysleta del Sur Pueblo Regulatory Commission.

1. Establishment and Composition.

a. Pursuant to Article 62 of the Tribal Ordinance TO-001-10 as amended by Tribal Resolution TC-023-10, the Ysleta del Sur Pueblo Regulatory Commission, shall provide for the orderly development, administration and regulation of Pueblo entertainment and gaming activities conducted by the Gaming Enterprise. For the purposes of this section, and only this section, "Commission" means the "Regulatory Commission" as defined in this Ordinance.

b. The Regulatory Commission shall consist of three members, shall be appointed in accordance with Article 62 of the Tribal Ordinance TO-001-10 as amended by Tribal Resolution TC-023-10, and shall include a Chairperson, Vice-Chairperson and Secretary/Treasurer.

2. Qualifications and Appointment.

a. Commissioners shall be appointed by the Governor subject to the approval of the Tribal Council, and may be a person other than a tribal member. All Commissioners as minimum qualifications shall:

(1) Possess a bachelor's degree in business administration, management, marketing, accounting, law or other relevant field or high school diploma with at least four years' experience in a high regulated industry in the field of business management, compliance or regulation;

(2) Be at least 21 years of age;

(3) Possess a basic knowledge and understanding of entertainment and gaming activities authorized on the Reservation;

(4) Have the ability to interpret regulations and conduct administrative hearings; and

(5) Have the ability to observe restrictions concerning conflicts of interest and confidentiality.

b. No individual who has been convicted of, pled guilty to or pled no contest to a felony or a gambling-related offense or any crime of moral turpitude may serve as a Commissioner.

c. No member of the Tribal Council may be a member of the Commission either during a Tribal Council member's term or for a period of one year thereafter.

d. All Commissioners shall be appointed for indefinite terms, during which they must maintain eligibility.

e. In the event of a vacancy on the Commission, the Governor may appoint any other qualified person to fill the vacancy, provided that any proposed appointee shall be subject to the qualification requirements for Commissioners.

3. Powers and Duties.

a. The Commission shall administer the provisions of the Gaming Ordinance and shall have, pursuant to Tribal Ordinance TO-001-10 and Tribal Resolution TC-023-10, the power to:

(1) Promulgate regulations governing the licensing, conduct and operation of Pueblo entertainment and gaming activities as are consistent with the purposes of the Gaming Ordinance, including establishing minimum internal control standards for Class II gaming activities;

(2) Investigate violations of this Gaming Ordinance governing the licensure, operation or conduct of Pueblo entertainment and gaming activities; the regulations promulgated by the Commission; any minimum internal control standards, and any condition, term or restriction of a license issued by the Commission;

(3) Conduct, or cause to be conducted, background investigations and criminal records checks on all applicants and licensees;

(4) Process all license applications, determine the suitability of all applicants, issue and deny licenses;

(5) Levy fines and to limit, condition, suspend, restrict or revoke any license which the Commission has issued, either upon complaint or upon its own motion, and to enforce this Gaming Ordinance and the regulations promulgated by the Commission;

(6) Obtain all information from applicants, licensees and other persons which the Commission deems necessary for the regulation of Pueblo entertainment and gaming activities;

(7) Issue subpoenas for the appearance or production of persons, records and things in connection with applications before the Commission or in connection with disciplinary or contested cases under consideration by the Commission;

(8) Investigate and conduct hearings upon complaints charging violations of this Gaming Ordinance or the Commission regulations, or any condition, term or restriction of a license issued by the Commission, and to impose appropriate penalties and fines, including injunctive relief;

(9) Conduct hearings at the request of an applicant or licensee who petitions for review of an adverse ruling;

(10) Inspect and examine, with or without notice, all Pueblo entertainment and gaming operations and all premises wherein entertainment and gaming activity devices or equipment are located, and to seize, remove and impound, pursuant to a Commission order, from such premises any equipment, devices, supplies, books or records for the purpose of examination or inspection as necessary to enforce the provisions of this Gaming Ordinance and the Commission regulations;

(11) Review, inspect, examine and copy all papers, books and records of the Pueblo Gaming Enterprise related to the enforcement of any provision of this Gaming Ordinance, the Commission regulations and any condition, term or restriction of a license issued by the Commission, and to impound or remove, pursuant to a Commission order, all such papers, books and records when deemed necessary for their preservation, inspection and examination;

(12) Establish minimum internal controls for the Pueblo Gaming Enterprise and to audit each operation's compliance with said standards;

(13) Establish and collect license fees and fees for performing background investigations on applicants for licenses and on other persons for whom the Commission requires a background investigation;

(14) Ensure that an annual independent audit of the Pueblo's Gaming Enterprise is conducted and presented to the Tribal Council;

(15) Propose an annual budget for Commission operations to the Tribal Council;

(16) Participate on behalf of or in conjunction with the Pueblo in litigation brought pursuant to the Restoration Act; and

(17) Exercise such other incidental powers as may be necessary to ensure the safe and orderly regulation of the Pueblo's Gaming Enterprise.

b. Before seizing, removing or impounding any devices, equipment, books, records or any other property of the Pueblo Gaming Enterprise, the Commission shall issue a pre-hearing order based upon a specific factual finding that any person has failed to comply with this Gaming Ordinance or any Commission regulation or minimum internal control standard. The Commission shall afford the person subject to the order, an opportunity for a hearing with the Commission no later than 30 days after issuance of the order.

c. The Commission shall not negotiate or execute any capital equipment purchase, contract, lease, deed, mortgage or other instrument in the name of or on behalf of the Pueblo without prior authorization of the Tribal Council, except that it is authorized to execute purchase orders and similar documents necessary for day to day operation of the Commission. The Commission shall not enter into loans on its behalf or on behalf of the Pueblo and no evidence of indebtedness shall be issued in the name of the Commission or Pueblo unless authorized by the Tribal Council. All checks, drafts, purchase orders, or other orders for payment of money from the Commission must be executed pursuant to any Pueblo procurement policies for the Commission as established by the Tribal Council.

Section 12. Licensing.

1. Authority to License.

The Regulatory Commission 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. Types of Licenses to be Issued.

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

a. Enterprise Management License

b. Key Employment License

c. General Employee License

d. Other Licenses necessary and appropriate.

3. License Fees: Application Fees and Continuing Yearly Fees.

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

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

4. 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 Enterprise operation located on the Pueblo's Tribal Lands.

5. 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 Regulatory Commission 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; and,

(c) In all other respects is qualified to be licensed or found suitable consistent with the declared policy of the Gaming Enterprise.

(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 Regulatory Commission or the Commission 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 person shall be employed in a Pueblo Gaming Enterprise 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 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 the Gaming Ordinance, and, has been made the subject of a background investigation conducted by the Pueblo, its agents, or designee pursuant to the requirements of this Gaming Ordinance.

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

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

Every person employed at a Gaming Facility operated on Tribal Lands shall wear an identification card issued by the Regulatory Commission 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 Pueblo seal or signature, and a date of expiration.

7. License Suspension and Revocation.

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

(1) The Regulatory Commission reserves the right to suspend or revoke a gaming licensed to a gaming employee.

(2) Any Key Employee or Primary Management Official gaming license issued by the Regulatory Commission shall be suspended, without prior notice, if the Commission, after notification by the Regulatory Commission 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 Commission, the Regulatory Commission 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 under this Ordinance.

8. 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 the suspension and/ or revocation notice for Key Employees or Primary Management Official licenses shall be sent to the Commission through the appropriate Regional office.

9. Revocation Hearing.

a. After a revocation hearing, the Pueblo shall decide to revoke or to reinstate a gaming license. The Pueblo shall notify the Commission of its decision regarding the

revocation or reinstatement of a Key Employee or Primary Management Official license within forty-five (45) days of receiving notification from the Commission pursuant to Section 13(k)-(l) of this Ordinance.

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 Regulatory Commission 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 their own cost, and the Regulatory Commission may be represented by legal counsel at the revocation hearing. The licensee and the Regulatory Commission may present witnesses and witnesses and evidence 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 Regulatory Commission and Commission.

Section 13. Background Investigation of Gaming Employees.

1. Background Investigations Prior to Employment.

a. The Pueblo, 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 Pueblo a written release authorizing the Pueblo 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).

See also, Subsection (m)(2) of this section and Part V, § 22(b) of this Ordinance.

d. The Regulatory Commission shall be responsible for the performance of such background investigations. The information shall be provided in writing to meet the requirements of 25 CFR § 556.4 and § 537.1 as to background investigations. In conducting a background investigation, the Pueblo 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 and 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 Regulatory Commission shall maintain a complete application file containing the information listed under § 13(d)(1)-(17).

g. Before issuing a license to a Key Employee or Primary Management Official, the Regulatory Commission 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 Enterprise, the Regulatory Commission shall forward a completed application for employment to the Commission.

i. Within sixty (60) days after a Key Employee or Primary Management Official begins work for the Gaming Enterprise, the Regulatory Commission shall submit a notice of results of the applicant's background investigation conducted and a copy of the eligibility determination to the Commission. 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 Commission provides the Regulatory Commission with a statement itemizing objections to the issuance of a license to a Key Employee or to a Primary Management Official for whom the Regulatory Commission has provided an application and notice of results, the Regulatory Commission shall reconsider the application, taking into account the objections itemized by the Commission. The Regulatory Commission shall make the final decision whether to issue a license to such applicant.

k. The Regulatory Commission may employ and 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 Regulatory Commission may also employ and license a Primary Management Official or Key Employee, on a probationary basis, after the Regulatory Commission has submitted a notice of results to the Commission, but before receiving the Commission's statement of objections, provided that notice and the licensee's right to a hearing are provided to the licensee, or The Regulatory Commission shall notify the Commission within thirty (30) days after a license is issued to a Primary Management Official or Key Employee. Additionally, the Regulatory Commission shall comply with the Tribal employment preference ordinance in effect.

l. If the Regulatory Commission issues a Primary Management Official or Key Employee a gaming license, before receiving the Commission's statement of objections, notice and hearing shall be provided to the licensee pursuant to Section 12(7)-(9) of this Gaming Ordinance.

m. The Regulatory Commission shall not employ 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 plead nolo contendere to any felony within the previous ten (10) years or has ever been convicted of or has ever plead nolo contendere to any gaming offense;

(b) has knowingly and 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 Regulatory Commission does not license a Primary Management Official or Key Employee applicant, the Regulatory Commission shall notify the Commission and shall forward copies of its eligibility determination and notice of results to the Commission for inclusion in the Indian Gaming individuals Record System.

o. The Regulatory Commission shall retain for inspection by the Commission 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.

p. In the event of any dispute as to Subsection (d) above, the parties shall meet and in good faith attempt to resolve the differences. Until the matter is resolved the applicant shall not be employed as a gaming employee by the Pueblo.

2. Background Investigation of Gaming Employee During Employment.

a. The Pueblo shall retain the right to conduct such additional background investigations of any Primary Management Official, Key Employees, 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 13 (1)(a)-(d) above shall be immediately suspended and shall be dismissed, after notice to the employee and hearing pursuant to Section 12(7)-(9) of this Gaming Ordinance.

3. Background Investigation of any Principal.

a. The Pueblo shall retain the right to conduct background investigations of any Principal of an entity which provides management services to the Pueblo or the Enterprise.

4. License Locations.

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

Section 14. Management Contracts.

The Pueblo may enter into a management contract for the Enterprise 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, 2711).

III. Class II Games Generally

Section 15. Class II Games Permitted.

1. The Pueblo 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. A Gaming Facility shall conduct regular Bingo games, special Bingo games and such other Class II games as are permitted by the Regulatory Commission pursuant to the requirements of applicable law.

3. A schedule of the Class II games to be conducted must be conspicuously posted at each entrance to the Gaming Facility each week in which games will be conducted at least twenty-four (24) hours prior to the start of the first game scheduled. The schedule must include a statement of the fee to play and the prizes offered for each game.

Section 16. Bingo Game Cards.

The Regulatory Commission shall approve the game cards to be used for each Bingo game conducted.

Section 17. Player Limitation.

The number of persons permitted to play any Class II game shall be determined by the Regulatory Commission, except that:

1. The number of people permitted in the Bingo Gaming Facility or in any room in the Facility shall not exceed the limitation of the number permissible under the applicable fire, building or other safety codes or standards.

2. The number of people permitted to play any Bingo game shall not exceed the number of chairs available in the room(s) in which the game is being played.

Section 18. Entry Prohibited.

No person may enter any room in which a Bingo game is being played unless the person is a player, except Gaming Facility employees and persons present by authority of the Regulatory Commission, for purposes of inspection or regulatory duties.

Section 19. 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 Regulatory Commission.

Section 20. Patron Disputes

The Regulatory Commission shall promulgate regulations and procedures governing patron disputes over the play or operation of any Class II game, including any refusal to pay to a patron any alleged winnings, currency or other thing of value.

IV. Records and Audits

Section 21. Records Maintenance.

1. Each Gaming Facility administered by the Regulatory Commission 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. facility in house investigations of any kind;

    f. incidents and accidents;

    g. actions by the Regulatory Commission against players or Gaming Facility visitors; and,

    h. actions by Regulatory Commission against or in reprimand of employees.

Section 22. Independent Audits.

1. Gaming Activities Conducted by the Pueblo.

The Regulatory Commission 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 Regulatory Commission on its behalf. However, nothing in this Subparagraph shall prohibit the annual audit of tribal gaming activities from being encompassed within the Pueblo'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 Subparagraph (1), above.

3. Annual Audit Report to be Provided to Commission.

The Regulatory Commission shall furnish a copy of each annual gaming audit report to the Commission.

V. Violations

Section 23. 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 Regulatory Commission pursuant to the authority of this Gaming Ordinance;

b. Knowingly make a false statement in an application for employment with a Pueblo Gaming Enterprise on Pueblo 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 Pueblo Gaming Enterprise.

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.

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

2. Any person or licensee who violates any provisions of this Gaming Ordinance or any rule or regulation promulgated by the Regulatory Commission, 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.

3. 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.

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

5. Any person who violates any provision of this Gaming Ordinance or any rule or regulation promulgated by the Regulatory Commission may have their property, equipment, material and supplies used in conducting the unlawful activity seized and impounded by the Regulatory Commission 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 Pueblo may dispose of the seized property.

6. 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 Pueblo 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.

7. The Pueblo shall retain the right to revoke any license of any contractor who engages in conduct not authorized by this Gaming Ordinance or the contractor's agreement with the Pueblo which involves moral turpitude, dishonesty or any act which is punishable as a felony or misdemeanor involving moral turpitude under State or Federal laws.

8. Any non-member of the Pueblo, including non-Indian, who violates a provision of this Ordinance may be excluded from the Tribal Lands within the jurisdiction of the Ysleta del Sur Pueblo.

Section 24. Enforcement.

After any person or entity fails or refuses to pay a final assessment levied pursuant to Section 23 above, the Pueblo may proceed to collect the assessment by initiating a civil action against the person or entity in Tribal Court or in any other court of competent jurisdiction. In such civil action, validity and amount of the assessment shall not be subject to judicial review. The Pueblo 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 25. Severability.

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

Section 26. Amendments.

The Gaming Ordinance may be amended by action of the Tribal Council and documented by Tribal Council Resolution.

Section 27. Effective Date of Ordinance.

This Gaming Ordinance, as amended, shall take effect upon adoption of the Tribal Council and after it has been approved by the Chairman of the Commission.

NOW, THEREFORE, BE IT RESOLVED, that the foregoing amendment to Ordinance No. 00492 is hereby enacted by the Tribal Council of the Ysleta del Sur Pueblo on the 18th day of March, 2014.

By: _____
Authorized Officer

Title: Lt. Governor

ATTEST:

By: _____
Authorized Officer

Title: TC Admin Asst.

Class II Gaming Regulations

Bingo

Section 1. Bingo Cards

1. Bingo Card Inventory.

a. Bingo cards shall be inventoried to ensure that the bingo card inventory can be accounted for at all times and to ensure the integrity of the cards being used.

b. Bingo cards shall be maintained in a secured location, with surveillance coverage adequate to identify persons accessing the secured storage area.

c. When bingo cards are received from the supplier, the cards shall be inspected (without breaking the factory seals, if any) counted, inventoried, and secured.

2. Bingo Card Inventory Records

a. Bingo Card Inventory Records shall be recorded to include the following information:

i. Date received
ii. Shift or session
iii. Time
iv. Location
v. Quantities received, issued, removed and, if applicable, returned
vi. Marked, altered, or otherwise manipulated cards
vii. Name and signature of the authorized gaming employee conducting the inventory
viii. Any variance
ix. Beginning and ending inventory, and
x. Description of inventory transaction being performed

b. Records shall be signed by the issuer and recipient whenever bingo cards are:

i. Removed from storage to the bingo facility and returned to storage from the bingo facility.

ii. Removed from storage and issued to the cage or sellers and returned from the cage or seller to storage.

3. Cancelled Bingo Cards

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a. Bingo Cards removed from inventory that are deemed out of sequence, flawed, or misprinted and not returned to the supplier shall be cancelled to ensure they are not used in any bingo game. Such cards shall be logged as removed from inventory.

4. Bingo cards associated with an investigation shall be retained separately from the cancelled and removed bingo cards.

5. Bingo Card Sales

a. Manual bingo cards sold shall be recorded. The following information shall be documented:

i. Date
ii. Shift or session
iii. Number of bingo cards issued, sold, and returned
iv. Dollar amount of bingo card sales;
v. Name and signature of the gaming employee preparing the record,
vi. Name and signature of a gaming employee who verified the bingo cards returned to inventory and dollar amount of bingo card sale.

b. Bingo card voids will be processed in accordance with the rules of the game and must include:

i. Patron refunds;
ii. Adjustments to bingo card sales and inventory to reflect voids;
iii. Reason for the void;
iv. Authorization for all voids.

Section 2. Bingo Equipment and Draw

1. Access to controlled bingo equipment (e.g. blower, balls in play and back-up balls) shall be restricted to authorized gaming employees.

2. All new bingo equipment, including new bingo balls, as well as those in use, shall be inspected by two employees before the start of the first Bingo Occasion. At least one of the verifying gaming employees shall be a supervisory gaming employee or independent of the bingo games department.

3. Where the selection is made through an electronic aid, certification in accordance with 25 CFR 547.14 is acceptable for verifying the randomness of the draw and satisfies the requirements of paragraph (d)(1) of this section.

4. The Pueblo Gaming Operation, with the Regulatory Commission approval, shall establish procedures to ensure the correct calling of numbers selected in the bingo game.

5. Each ball drawn shall be shown to a camera immediately before it is called so that it is individually displayed to all patrons.

6. At the end of each Bingo game, an authorized gaming employee shall place all numbered balls back into the selection device prior to calling the next game.

7. For all games offering a prize payout of $1,200 or more, as the objects are drawn, the identity of the objects shall be immediately recorded and maintained for a minimum of 24 hours.

Section 3. Verification and Payout Procedures

1. An employee who sells bingo cards:

a. Shall not be the sole verifier of bingo cards for prize payouts;

b. Is permitted to announce the serial numbers of winning paper.

2. When a Bingo is called, at least two employees shall verify the authenticity of each card, objects drawn and previously designated arrangement were valid for the game in play.

a. A computerized card verifying system may be used to verify the payout

3. Payout

a. A payout form shall be issued to every winner. The payout form shall be verified by at least two gaming employees, signed by a bingo floor employee and the main bank cashier.

b. Manual prize payouts over $1,000 must require one of the two signatures and verification to be a supervisory or management employee.

c. Total payouts shall be computed and recorded by shift or bingo occasion.

4. Payout Records

a. Payout records, including manual payout records, shall include the following information:

i. Date and time
ii. Amount of the payout
iii. Bingo card serial number, or player interface identifier
iv. Game name or number
v. Description of pattern covered (cover-all, four corners, etc.)
vi. Signature of all, and at least two, employees involved in the transaction.

5. Cash and Cash Equivalent

a. All funds used to operate the bingo department shall be counted by at least gaming employees independently and reconciled to the recorded amounts at the end of each shift or bingo occasion.

b. Unverified transfers of cash of cash equivalents are prohibited.

c. Procedures must be implemented to control cash or cash equivalents based on the amount of the transaction. These procedures must include documentation by shift or bingo session of the following:

i. Inventory, including any increases or decreases;
ii. Transfers;
iii. Exchanges, including acknowledging signatures or initials; and
iv. Resulting variances.

d. Any change to control of accountability, exchange, or transfer requires that the cash or cash equivalents be counted and recorded independently by at least two agents and reconciled to the recorded amount.

6. Display of Rules

a. All game rules and disclaimers shall be made readily available to the player upon request.

Section 4. Electronic Bingo Equipment

The Regulatory Commission shall establish controls and procedures, in accordance with 25 CFR Part 543 and 25 CFR Part 547 for the use of technological aids and electronic bingo games.

1. Controls and Procedures

a. The controls and procedures established and implemented shall ensure the following:

i. Shipping and receiving of all software and hardware components are received and verified by an authorized employee.
ii. Access to gaming system components is limited to authorized employees.
iii. Records related to installed game servers and player interfaces shall maintain the following records:

1. Date installed
2. Date made available for play
3. Supplier
4. Software version
5. Serial number
6. Game title
7. Location number
8. Seal number
9. Initial meter reading

b. Procedures must be implemented to investigate, document and resolve malfunctions.

2. Software Verification and Testing

a. System software verifications shall be verified in accordance with the regulations established by the Regulatory Commission and in accordance with 25 CFR 547.

b. Any software verification shall be verified by an authorized employee independent of the bingo operation.

c. All testing shall be completed during the installation proceeding to verify that the player interface has been properly installed.

Class II Card Games

Section 1. Non-Banking Class II Card Game

1. Playing Cards

a. New and used playing cards shall be maintained in a locked and secured location, with appropriate surveillance coverage, and accessible only to authorized gaming employees.

b. Used playing cards that are not to be re-used shall be properly cancelled and removed from service to prevent re-use, pursuant to approval by the Regulatory Commission.

c. Playing cards associated with an investigation shall be retained intact, sealed in a container, identified by table, time and date, and signed by a supervisory gaming employee and forwarded to the Regulatory Commission.

2. Inventory of Card Room

a. Two or more gaming employees—one of whom shall be a supervisory gaming employee—shall independently count the table inventory at the opening and closing of the table and record the following information:

i. Date;
ii. Shift;
iii. Table number;
iv. Amount by denomination;
v. Amount in total; and
vi. Signatures of each gaming employee.

3. Card Game Rules

a. The rules shall be posted or made available for patron review at the gaming facility, including rules governing contests, prize payouts, fees, the rake collected, and the placing of antes.

Section 2. Card Game Promotions

1. Promotional Progressive Pot and Pools

a. All funds contributed by players into progressive pots and pools shall be returned when won in accordance with posted rules with no commission or administrative fee withheld.

b. Rules governing promotional pools shall be conspicuously posted and shall designate:

i. The conditions for participating in promotional progressive pots and/or pools card game;
ii. The amount of funds to be contributed from each pot;
iii. What type of hand it takes to win the pool;
iv. How the promotional funds will be paid out;
v. How/when the contributed funds are added to the pools; and
vi. Amount/percentage of funds allocated to primary and secondary pools, if applicable.

c. Promotional pool contributions shall not be placed in or near the rake circle, in the drop box, or commingled with gaming revenue from card games or any other game.

d. The amount of the prize shall be conspicuously displayed.

e. Individual payouts for card game promotional progressive pots and/or pools that are $600 or more must be documented at the time of the payout to include the following:

i. Patron's name;
ii. Date of payout;
iii. Dollar amount of payout and/or nature and dollar value of any non-cash payout;
iv. The signature of the agent completing the transaction;
v. Name of the contest/tournament.

f. At least once a day, the posted pool amount shall be updated to reflect the current pool amount.

g. At least once a day, gaming employees independent of the card room shall reconcile the increases to the posted pool amount to the cash previously counted or received by the cage.

h. All decreases to the pool shall be properly documented, including a reason for the decrease.

i. Promotional funds removed from the card game shall be placed in a locked container.

i. Gaming employees authorized to transport the locked container shall not have access to the contents keys.
ii. The contents key shall be maintained by a key employee independent of the card room.
iii. At least once a day, the locked container shall be removed by at least two gaming employees, one of whom is independent of the card games department, and transported directly to the cage, vault or other secure room to be counted, recorded, and verified, prior to accepting the funds into cage accountability.

Section 3. Variances

1. The Gaming Enterprise shall establish, as approved by the Regulatory Commission, the threshold level at which a variance must be reviewed and must document the review.

Ysleta del Sur Pueblo

Section 1. Patron Dispute Procedures

All disputes with patrons including customers, players and any visitor to the Gaming Facility shall be handled according to these internal control procedures.

1. Any dispute, disagreement, or other patron grievance that involves the payment of any winnings, currency or other thing of value and is between the patron and the gaming employees or staff, shall be resolved by two or more persons and the gaming enterprise shall notify the Commissioner Chairperson or a Gaming Investigator in writing within twenty-four (24) hours of a dispute.

2. The gaming employee shall document the dispute and notify their immediate supervisor of the dispute regardless if the dispute was resolved or not. A copy of the dispute, whether resolved or not, shall also be given to the Gaming Facility General Manager.

3. The gaming employee handling the dispute or the employee authorized to make a decision regarding any dispute shall advise the patron of the right to take the dispute to a higher ranking gaming employee.

4. If the gaming employee and the supervisor cannot resolve the dispute, a report shall be made detailing the patron's name, address, the date, the nature of the dispute or the disposition of the dispute and shall provide copies to the Commissioner Chairperson or the Gaming Investigator. The Commissioner Chairperson or the Gaming Investigator, with the assistance of the Regulatory Commission staff, shall conduct whatever investigation is necessary and determine how to resolve the dispute.

5. The Commissioner Chairperson shall notify the Gaming Enterprise and the patron in writing of the Commissioner Chairperson's decision regarding the dispute within fifteen (15) days after the date the Executive Director or Gaming Investigator was notified of the dispute.

6. Any patron aggrieved by the decision of the Commissioner Chairperson may file a petition for a hearing before the Regulatory Commission within thirty (30) days after the date of the Commissioner Chairperson's decision. If timely filed, the patron's grievance shall be subject to the hearing procedures promulgated by the Regulatory Commission.

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7. All records of the dispute shall be kept on file for a minimum of two years at the gaming facility and shall be open for inspection by an authorized employee or by the Regulatory Commission.

Ysleta del Sur Pueblo
Tribal Attorney
119 S. Old Pueblo Rd. Ysleta del Sur Pueblo, Texas 79907 Ph. (915) 859-7913 Fax (915) 859-2988

June 2, 2014

National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, D.C. 20005
Attn: Jonodev Osceola Chaudhuri, Chairman

Dear Chairman Chaudhuri:

As general legal counsel for the Ysleta del Sur Pueblo, I am writing to confirm that the Tribal Council of the Ysleta del Sur Pueblo is the authorized traditional governing body of the Pueblo, exercising all inherent governmental power, fiscal authority, and tribal sovereignty as recognized in Sections 101 and 104 of the Act of August 18, 1987. Pursuant to that authority, the Tribal Council is duly empowered to enact tribal law, including resolutions and ordinances. On March 18, 2014, the Ysleta del Sur Pueblo Tribal Council formally adopted Tribal Resolution TC-021-14, Class II Tribal Gaming Ordinance.

This letter further confirms our opinion that Tribal Resolution TC-021-14 was duly enacted pursuant to the authority of the Tribal Council of the Ysleta del Sur Pueblo.

Please feel free to contact me should you have any questions or need additional information.

Sincerely,

Ronald L. Jackson, General Counsel
Ysleta del Sur Pueblo