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

STATE OF TEXAS, Plaintiff, v. YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, the TRIBAL COUNCIL, TRIBAL GOVERNOR CARLOS HISA, or his SUCCESSOR, Defendants.	§ § § § § § § § §	Civil Action No. 3:99-CV-00320-KC

PLAINTIFF TEXAS' RESPONSE TO PUEBLO DEFENDANTS' MOTION TO DISMISS OR TO MODIFY THE INJUNCTION

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TO THE HONORABLE KATHLEEN CARDONE:

STATEMENT OF THE ISSUES

1. Does the savings clause in in § 103 of the Restoration Act cause the remedies provision in § 107 of the Restoration Act to survive the adoption of IGRA without any conflict between those laws? How can the Pueblo Defendants argue around other states with settlement acts that also contain savings clauses which the courts have held to not conflict with IGRA?[1]

2. Does the savings clause in § 103 of the Restoration Act preclude application of any *Chevron*-gap interpretation by the Deputy Solicitor for Indian Affairs in the DOI since Congress has spoken directly (without ambiguity) to the issue of the remedies provided in § 107 of the Restoration Act surviving IGRA?

3. Does the Deputy Solicitor for Indian Affairs in the DOI have any authority to act without the Secretary of DOI formally approving or disapproving her Letter Opinion in Ex. A? Has the Secretary at DOI issued any formal rule, regulations, or taken any action to support NIGC jurisdiction over the Pueblo Defendants?

4. Has Congress delegated any authority to NIGC or the Deputy Solicitor for Indian Affairs in the DOI to read, interpret, and make judicial declarations on repeal of a law that neither administers?[2] If DOI does make a decision to affirm the Deputy Solicitor for Indian Affairs' Ex. A opinion letter, does DOI have any delegated Congressional authority to make legal interpretations of repeal of statutes?

5. Should this Court apply the principles of construction from Indian canon law, legal presumptions favoring Indian Tribes, or the general authority statutes to decide if § 107 of the Restoration Act survives IGRA when there is no showing of ambiguity or conflict expressed in Congress' intent that both Restoration Act and IGRA both govern different tribes?

6. Does this NIGC opinion asserting repeal of § 107 of the Restoration Act conflict with Fifth Circuit precedent directly on point in *Ysleta del Sur Pueblo v. Tex.*, 36 F.3d 1325 (5th Cir. 1994, writ denied 514 U.S. 1016, 115 S.Ct. 1358 (1995))? Is that entitled to stare decisis affirmation by this Court?

7. Should Texas be required to join the NIGC to this litigation pursuant to Rule 19, Fed.R.Civ.P. despite the fact that NIGC lacks jurisdiction to administer the Restoration Act Tribes?

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[1] *See Commonwealth of Mass. & Aquinnah/Gay Head Cmnty. Assoc. v. Wampanoag Tribe of Gay Head,* 2015 WL 7185436, (D. Mass., Nov. 13, 2015); and *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784 (1st Cir. 1996).

[2] *See e.g. Gila River Indian Cmty. v. U.S.*, 729 F.3d 1139 (9th Cir. 2013) where the Office of Solicitor's memorandum opinion was expressly *rejected* by the (DOI) Secretary, who "parted ways" with that Solicitor's memorandum contained in the Field Solicitor's Report, *Id*. at 1147-1148.

8. Should Texas be required to join the Alabama-Coushatta Tribe to this litigation pursuant to Rule 19, Fed.R.Civ.P. without any evidence that the Alabama-Coushatta Tribe is currently violating the Restoration Act?

I. INTRODUCTION

The National Indian Gaming Commission and the Deputy Solicitor for Indian Affairs in the Department of the Interior ("DOI") now opine, without any confirmation by DOI, that the adoption of the Indian Gaming Regulatory Act impliedly repealed § 107 remedies provision of the Restoration Act. The Pueblo Defendants once again embrace that theory to seek dismissal of this litigation, or alternatively, modification of this Court's permanent injunction, despite the fact that the Pueblo Defendants themselves have raised this same legal issue multiple times in the past twenty years, all without success. Three times the federal Fifth Circuit Court of Appeals rejected it,[3] as did the National Indian Gaming Commission itself[4] just five years ago. No explanation has been offered today for the abrupt reversal in legal position by the NIGC.

Nevertheless, the Pueblo Defendants now ask this Court to find a repeal of § 107 of the Restoration Act and apply IGRA to them instead. To obtain that result, they ask this Court to ignore Congress' expressed intent to the contrary contained in the savings clause of § 103(a) by applying a *Chevron*-gap interpretation by NIGC and Deputy Solicitor without having to show any ambiguity in the two laws at issue, or showing any delegation of authority to construe the Restoration Act. To avoid those defects, they want this Court to apply Indian canon law and other presumptions which have been rejected in other federal circuits as recently as last month.[5] No additional parties need be joined and Court should deny the motions in all respects.

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[3] *See Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325; *Texas v. Ysleta del Sur Pueblo*, 69 F. App'x. 659 (5th Cir. 2003) (unpublished), cert. denied, 540 U.S. 985 (2003); and *Texas v. Ysleta del Sur Pueblo*, 431 F. App'x 326, 328 (5th Cir. 2011).

[4] *See* Memorandum Opinion in *Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36 (D.C. 2010) at p. 38 where NGIC wrote a letter denying the Tribe's request for IGRA application, and held that "In this letter, NIGC relied on a Fifth Circuit decision, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) cert. den. 514 U.S. 1016 (1995) in concluding that plaintiff's activities are governed by the Restoration Act and not IGRA . . . (b)ecause IGRA does not govern plaintiff, NIGC explained that the Pueblo was not under NIGC jurisdiction." *Id.*"

[5] *See* Footnote 1, *supra.*

II. ARGUMENT

A. Congress unambiguously provided that § 107 of the Restoration Act would survive the adoption of IGRA and any subsequent legislation by creation of a savings provision in § 103 of the Restoration Act.

To support their theory of repeal of § 107[6] the Restoration Act, the Pueblo Defendants employ nothing more than two letters. No pleadings were filed in this Court by anyone alleging that § 107 of the Restoration Act was impliedly repealed by the adoption of IGRA, and no federal agencies have intervened in this lawsuit seeking a judicial finding that § 107 of the Restoration Act was repealed or that they have jurisdiction over this issue of gambling by the Pueblo Defendants. Moreover, the Department of Interior, which has administrative authority for the Restoration Act, has taken no position formally on its Deputy Solicitor's letter, Ex. A, E.C.F. 523-1 and DOI's position is currently unknown[7] on this issue. The motions to dismiss or modify injunction filed by the Pueblo Defendants, E.C.F. 531, are therefore procedurally flawed since none of their legal opinions advanced concerning the alleged repeal of a federal law is self-executing.

Left to employ only the two letters, the Pueblo Defendants present the first letter from the National Indian Gaming Commission ("NIGC") and it asserts, without any legal support of authority to regulate under the Restoration Act,8 new jurisdiction of the NIGC over the Pueblo Defendants, a Restoration Act Tribe.

The second letter, an un-dated legal opinion from the former Deputy Solicitor for Indian Affairs at the United States Department of Interior ("DOI") is found in Ex. A, E.C.F. 523-1.

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[6] The Pueblo Defendants at p.5 of E.C.F. 531 assert waiver of their sovereign immunity is effected by § 107 of the Restoration Act, and argue its repeal by the IGRA now permits immunity from this litigation.

[7] In *Gila River*, the DOI's Office of Solicitor's memorandum opinion was expressly rejected by the (DOI) Secretary, who "parted ways" with that Solicitor's memorandum contained in the Field Solicitor's Report, *Id*. at 729 F.3d at 1147-1148.

[8] The NIGC only has authority to regulate under IGRA, *see* 25 U.S.C.A. § 2706(b).

At pp. 11-12 of the Ex. A letter, the Deputy Solicitor acknowledges that IGRA did not expressly repeal § 107 of the Restoration Act, so to find an implied repeal, the Solicitor asks this Court to ignore both the Fifth Circuit's 1994 analysis and decision and ignore the legislative history of IGRA found in the 1988 Senate Report. The Senate Report acknowledged that, contrary to the Solicitor's interpretation advanced today, at the time of IGRA adoption, Congress excepted from IGRA coverage "any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute . . ." *see* FN. 92 at p. 11 Ex. A letter. The Solicitor quibbles with the language of "grant" of authority and chooses to ignore this legislative history altogether. Oddly, the Solicitor missed entirely the fact that Congress passed both the Restoration Act and IGRA within one year of each other, and could have easily remembered to expressly repeal the Restoration Act, if they had such a legislative intent. That did not occur.

Beginning at p.14 of the Ex. A letter from the Solicitor, she asserts authority to interpret repeal of the Restoration Act in reliance on both the district court opinion in *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796 (D. R.I. 1993) and the First Circuit opinion on appeal, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) at p. 19 of Ex. A letter. That reliance is misplaced here for two reasons, first, the Settlement Act in Rhode Island did not specifically place the Narragansett tribe under Rhode Island state law or give Rhode Island the limited right to bring an injunction action in federal court to enforce its law (as does § 107 of the Restoration Act here), but rather granted the State broader general civil and criminal authority (which was held to not be exclusive to the State of Rhode Island, *id*. 19 F.3d at 701).

Thus the *Narragansett* court found "the two laws do not collide head-on" but went on to find a repeal of the more general Settlement Act for precisely the opposite reason advanced by

the Solicitor today—that IGRA related specifically to gambling and hence, was the more specific statute compared to the more general Settlement Act that did not specifically mention gambling in an exclusive sense, *id.*, 19 F.3d at 704-705.

Two years later, the same First Circuit court that decided *Narragansett* found to the contrary, that the tribe's Settlement Act was "specific" in controlling tribal activities and IGRA was a "general" statute—when there was a savings provision that harmonizes both statutes, *see Passamaquoddy Tribe v. State of Maine*,[9] 75 F.3d 784, 791 (1st Cir. 1996). That *Passamaquoddy Tribe* opinion went further to say that the IGRA was not "exclusive of other potentially applicable legislation." *Id.* 75 F.3d at 792.

As a result, the second reason the *Narragansett* cases are inapposite is that the Settlement Act in Rhode Island, unlike § 103(a) of the Texas Restoration Act, did not contain a savings provision.10 In *Passamaquoddy Tribe*, the federal Settlement Act contained a savings provision similar to § 103(a) of the Restoration Act in Texas that provided in section 16(b) thereof that laws adopted after the effective date of the Settlement 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." *Id*. 75 F.3d at 787 (emphasis in original).

With that savings provision, *Passamaquoddy Tribe* rejected the *Narragansett Indian Tribe* analysis, and found "Where, as here, Congress enacts a statute of general applicability (*e.g.*, the Gaming Act) with full knowledge that a preexisting statute (*e.g.*, the Settlement Act) contains a savings clause warning pointedly that a specific reference or a similarly clear

[9] This *Passamaquoddy Tribe* opinion is cited by the Deputy Solicitor at p.9 of her Ex. A letter, in FN 79.
[10] Here, the Deputy Solicitor was unaware of the savings provision, "The Restoration Act neither expressly anticipates and provides for the possibility that subsequent legislation might render certain sections of it obsolete, not does it expressly insulate its provisions from subsequently enacted contrary legislation." E.C.F. 523-1, p. 9 of Ex. A.

expression of legislative intent will be required to alter the status quo, the only reasonable conclusion that can be drawn from the later Congress's decision to omit any such expression from the text of the new statute is that Congress did not desire to bring about such an alteration. *See Narragansett Indian Tribe*, 19 F.3d at 704 n. 21 (observing that when an "enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging" any other presumption)." *Passamaquoddy Tribe* at 75 F.3d at 789.

Moreover, the First Circuit *Passamaquoddy Tribe* opinion also addresses the implied repeal argument raised by the Solicitor at p. 19 of Ex. A letter when, in reliance on the Fifth Circuit opinion in *Ysleta Del Sur Pueblo v. Tex.*, 36 F.3d 1325, the court found "Here, in contradistinction to the situation that obtained in (*Narragansett Indian Tribe*), section 16(b) satisfactorily harmonizes the Settlement Act and the Gaming Act, and prevents any incoherence. The Settlement Act governs the State's relationship with the Tribe and will continue to do so without dilution unless and until Congress, by later enactment, makes a new law touching upon the same subject matter in one or more particulars specifically applicable within Maine. As the Gaming Act does not meet this benchmark, the Settlement Act remains inviolate and precludes the operation of the Gaming Act in Maine. *See Ysleta*, 36 F.3d at 1335."

As referenced at pp. 14 and 16 of Ex. A letter from the Deputy Solicitor, DOI issued a 2013 opinion letter for the Wampanoag Tribe of Gay Head, with similar conclusions as they make in Ex. A letter and when that decision was placed in litigation, the trial court which applied the reasoning of *Passamaquoddy Tribe* case and the 1994 Fifth Circuit opinion in *Ysleta* to find no implied repeal of a settlement act by IGRA. In *Commonwealth of Mass.* that dealt with a savings clause in the Massachusetts Settlement Act (to "prohibit or regulate the conduct of bingo or any other game of chance" at *Commonwealth of Mass.* at 2015 WL 7185436 *16) and in

reliance on both *Passamaquoddy Tribe* and *Ysleta* held that If IGRA and the Massachusetts Settlement Act are "capable of co-existence," the Court must "regard each as effective" unless there is explicit Congressional guidance otherwise . . . . The two statutes are not merely capable of co-existence; rather, both can be given full effect. IGRA permits tribes to engage in class II gaming on their land unless it is specifically prohibited by federal law. 25 U.S.C.A. § 2710(b)(1). When Congress passed IGRA, the Settlement Act was an existing federal law that specifically prohibited gaming on the Settlement Lands. 25 U.S.C.A. § 1771g. The statutes are "capable of co-existence" because the Settlement Act's parenthetical triggers IGRA's exemption. Therefore, the Court can, and must, "regard each as effective." *Commonwealth of Mass*. at 2015 WL 7185436 *16).

Congress twice spoke to this issue already. First, when Congress adopted § 107 of the Restoration Act to apply to the Pueblo Defendants, *see* §§ 101(1) and 102 of the Restoration Act, Congress specifically established what law would apply to gambling on the Pueblo Defendants' Indian lands by expressly saying so in § 107 of the Restoration Act, and to show their intent included a reference to Tribal Resolution No. T.C.-02-86 and stated that § 107 "was enacted in accordance with the tribe's request." *Ysleta* at 36 F.3d at 1335.

Second, to establish legislative intent of this issue in the future, Congress added a specific savings provision in Section 103(a) (25 U.S.C.A. § 1300g-2) that provides that ". . . all laws and rules of law of the United States of general application to Indians . . . or Indian reservations which are not inconsistent with any specific provisions contained in this subchapter shall apply to the members of the tribe, and the reservation." This was an expression of Congressional intent of what law to apply to the Pueblo Defendants. Otherwise, this Section 103(a) conflict of laws provision would have been unnecessary.

No federal agency interpretation can contradict Congressional intent. *See Whitman v. Am. Trucking Assocs., Inc*., 531 U.S. 457, 121 S.Ct. 903, 916, 149 L.Ed.2d 1 (2001), which applied the *Chevron*[11] doctrine to hold the agency's regulation "contradicts what in our view is quite clear. We therefore hold the implementation policy unlawful." *Id*. To reach that conclusion, the *Whitman* court established that in ". . . a delegation challenge, the constitutional question is whether the statute has delegated legislative power to an agency . . . when Congress confers decision-making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which a person or body authorized to (act) is directed to conform.'" *Id.* 531 U.S. at 472.

Otherwise if the Deputy Solicitor and NIGC could assert that their trust responsibility to Indian tribes gives them authority to refashion or declare implied repeal of Congressional statues, such as § 107 of the Restoration Act, those assertions would amount to an invalid delegation of legislative authority.[12] Here, they cannot be used to justify the regulatory "rewriting" of other statutes to expand the power of the NIGC, where Congress has in the Restoration Act omitted any power to the NGIC, and limited the Secretary's power. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statutes' primary objective must be the law. *Rodriguez v. U.S*., 480 U.S. 522, 525-526, 107 S.Ct. 1391, 1393 (1987).

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[11] *Chevron USA, Inc., v. Nat'l Res. Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984).

[12] DOI used the same tactic to try to enlarge its powers without proper Congressional delegation of legislative authority for another Texas tribe, and the Fifth Circuit reversed that attempt to legislate by fiat. *See Texas v. U.S.*, 497 F.3d 491 (5th Cir. 2007).

Moreover, the issue of what laws to apply to the Pueblo Defendants is a legal and legislative issue made only by Congress pursuant to Art. I, § 1, U.S. Const., and that legislative power may not be constitutionally delegated to another branch of government because this "nondelegation doctrine" is based upon separation of powers. *Touby v. U.S.*, 500 U.S. 160, 164-165, 111 S.Ct. 1752, 1755-1756 (1991). The Article I legislative authority to find implied repeal of federal laws like § 107 of the Restoration Act or to exercise Article III judicial powers to declare sections of laws repealed is far beyond the scope of permissible delegation to the Article II Executive branch DOI. *See Pittston Co. v. U.S.*, 368 F.3d 385 (4th Cir. 2004).

In *Pittston*, the court held that "a nondelegation principle serves both to separate powers as specified in the Constitution . . . and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design, . . . Moreover, because the Constitution's text 'permits no delegation of those powers,' . . . in exercising conferred powers, a Department may authorize a person or body to act on its behalf only by designating 'an intelligible principle to which the person or body authorized to act is directed to conform.'" *Id.* In other words, core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design." *Id.* 368 F.3d at 394. Clearly the legislative power to decide what remedies apply to different Indian Tribes who violate federal law is exclusively in Congress, as shown in § 107 of the Restoration Act and the savings provision in §103(a) of the Restoration Act. *See also Loving v. U.S.*, 517 U.S. 748, 757, 116 S.Ct. 1737 (1996) ". . . it remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another . . . . Congress (is) the branch most capable of responsive and deliberative lawmaking."

Finally, in *Ysleta Del Sur Pueblo v. Tex.*, 36 F.3d at 1336, the Fifth Circuit dealt squarely with this issue and held that "Therefore, we conclude not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Id.*

In reaching their decision, the Fifth Circuit court analyzed the same arguments advanced in the Deputy Solicitor's letter[13] concerning repeal by implication and general/specific laws arguments for repeal of the Restoration Act, but rejected all of them as well.[14] On the general/specific, the Fifth Circuit noted that the Restoration Act "applies to two specifically named Indian tribes located in one particular state, and (IGRA) applies to all tribes nationwide." *Id*. The exact same conclusion was reached in the First Circuit opinion of *Passamaquoddy Tribe*, 75 F.3d at 789.

Moreover, contrary to p. 19 of the DOI letter, the Fifth Circuit did indeed consider that IGRA was adopted "less than one a year after the Restoration Act," but noted in particular that IGRA "explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA." *Ysleta*, at 36 F.3d at 1325.

The cases cited by the Deputy Solicitor also do not support this proposition. *See Narragansett Indian Tribe*, 19 F.3d at 704 n. 21 (observing that when an "enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging" any other presumption). *Id.*, 19 F.3d at 789.

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[13] *See* E.C.F. 523-1, pp 21-25.
[14] *Ysleta*, at 36 F.3d at 1334-1335.

B. *There can be no Chevron-gap interpretation by DOI when Congress has spoken directly to the issue of the remedies provided in § 107 of the Restoration Act surviving IGRA and where DOI's interpretation consists solely of reading judicial opinions without any showing that DOI has special expertise in interpreting case law.*

At p.16 of their Motion to Dismiss and Vacate Injunction, E.C.F. 531, the Pueblo Defendants rely on the *Chevron*[15]doctrine for federal agencies to fill "gaps" in federal laws and here boldly assert that this "Court is required to defer to these two decisions, one by the Department of Interior and the other by the NIGC." The Pueblo Defendants correctly cite to the delegation of administrative authority of these two federal agencies to administer IGRA, and even admit that only the Department of Interior has any authority to administer the Restoration Act.[16] Here, however, we only have a letter from the Deputy Solicitor.

There are two problems with this argument by the Pueblo Defendants. First, the Pueblo Defendants fail to identify any "gap" to fill in the administration of the Restoration Act. Instead, they conflate the authority to administer different federal acts (Restoration Act and IGRA) and now assert that the regulation of the Pueblo Defendants gambling activities "should be handled by the NGIC . . ." without citation to legal authority in support of that conclusion. Moreover, they omit entirely any discussion of the very important provisions of conflict of laws provision in Section 103 of the Restoration Act.

Second, the NGIC and the Deputy Solicitor for DOI lack any administrative authority to regulate the Pueblo Defendants under the Restoration Act, and likewise was not delegated any legislative authority by Congress to decide on the issue of repeal of federal laws. Here, the Pueblo Defendants argue that NGIC acceptance of video bingo ordinances under IGRA somehow gives them additional authority to opine on conflict of law. *Passamaquoddy Tribe*

[15] *Chevron,* 467 U.S. at 837.
[16] *See* Pueblo Motions, E.C.F. 531, pp.16-17, and reference to DOI letter at 9, footnote 79.

rejected that argument and held "we cannot take it upon ourselves to assume, without any evidence, that Congress intended to entrust the Commission with reconciling the Gaming Act and other statutes in the legislative firmament." *Passamaquoddy Tribe*, 75 F.3d at 794.

For support, the Deputy Solicitor next asserts in E.C.F. 523-1 Ex. A p. 1 that DOI has "expertise in the field of Indian affairs" and cites *Cherokee Nation of Okla. v. U.S.*, 73 Fed. Cl. 467, 479, n.7 (2006) which related to interpretation of an ambiguous phrase in 25 U.S.C.A. § 1779e(a) of approval required by the tribe for paying attorneys' fees. The court in *Cherokee Nation* actually denied any *Chevron* deference to DOI and found at p. 480, FN 7:

> However, the Court is not convinced that (the DOI) interpretation is owed deference under *Chevron* because *Chevron* deference is warranted 'only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.' *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 914–915, 163 L.Ed.2d 748 (2006) . . . There is no evidence that Congress delegated any authority to the Secretary (DOI) to make any rules whatsoever in carrying out the Settlement Act, nor has the Secretary issued any such rules or undertaken any adjudicatory role in carrying out the duties imposed on it by the statute. While the Secretary certainly has vast expertise in interpreting Indian statutes generally, the Secretary interprets its role in paying attorneys' fees is a 'purely ministerial act.'

Likewise, starting at p. 9 of E.C.F. 523-1, Ex. A, DOI cites three cases in footnote 79 for its authority to "choose a different construction" than the 1994 opinion from the Fifth Circuit Court of Appeals. First, DOI cites *Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 983, 125 S.Ct. 2688 (2005). *Brand X* concerned the determination by the FCC of the "proper regulatory classification under the Communications Act of broadband cable Internet service" by finding broadband was an "information service" rather than a "telecommunications service" the FCC determined no registration was necessary under the Act. The court addressed *Chevron* deference and found the FCC interpretation was proper because it first determined the statute was ambiguous, and then determined that "The *Chevron* framework governs our review of the Commission's construction. Congress has delegated to the Commission the authority to

"execute and enforce" the Communications Act, § 151, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, § 201(b); . . . These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction." *Id*. 545 U.S. at 980-981.

Here, the Pueblo Defendants and the Deputy Solicitor offer no similar showing that Congress delegated to DOI the right to issue legal interpretations that the Restoration Act was repealed, and DOI has not issued any published rules or regulations making any such interpretation that § 107 of the Restoration Act was impliedly repealed as an agency rule.

The DOI reliance on *Passamaquoddy Tribe* is equally misplaced because in *Passamaquoddy Tribe*, the court held that Congress did not delegate to the NIGC any authority to engage in "reconciling the Gaming Act and other statutes" especially where NIGC ". . . does not administer the Settlement Act." Also, ". . . we note that deference is inappropriate when an agency's conclusion rests predominantly upon its reading of judicial decisions . . . In this instance, the Commission's jurisdictional analysis depends almost exclusively on decrypting and applying *Marcello* and *Narragansett Indian Tribe*. As courts, not agencies, have special expertise in interpreting case law, we are loath to defer to a determination that amounts to little more than the Commission's understanding of judicial precedents." *Passamaquoddy Tribe*, 75 F.3d at 794.

Finally, the DOI letter at p. 9 cites in FN 79 the *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) which is inapposite because the only question decided there was authority of the Secretary (DOI) to issue a regulation "establishing a game code regulating hunting on the reservation." *Id.* 808 F.2d at 743. The Deputy Solicitor cited it for the reference to

the general authority statutes reference at p. 9, however, the court was "reluctant to hold that sections 2 and 9[17] by themselves could support the regulations" and therefore had to look for language from the 1868 Treaty with the tribes to determine what authority the DOI might have to adopt interim hunting restrictions. Although DOI claims here it can ". . . choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit" FN. 79, p. 9 Ex. A, DOI did not issued any regulations nor publish rules concerning repeal of any provisions of the Restoration Act. The Fifth circuit has also denied DOI authority under these statutes.[18]

Pueblo Defendants do not explain in their motions why there are conflicting NIGC opinions separated by a five-year span of time[19] nor why decisions on this exact question of law were not resolved by stare decisis over twenty years ago[20] and has remained settled law.

Here, there is no gap for DOI or NGIC to fill created by either IGRA or the Restoration Act. For that reason, the Pueblo Defendants' Motions at pp. 16-17, E.C.F. 531 omit any reference to delegated authority to find other federal laws impliedly repealed, or to increase the jurisdiction of the NIGC over a non-IGRA tribe.

In fact, the *Chevron* doctrine actually forbids this type of action by federal agencies of the Executive Branch of Government. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is

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[17] *See* the general delegation statutes of 25 U.S.C.A. §§ 2 and 9.
[18] *Texas v. U.S.*, 497 F.3d at 509-510 held that the general authority statutes, 25 U.S.C. §§ 2, 9 could not be used to issue gap-regulations and held that ". . . sections 2 and 9 do not grant Interior a general power to make rules governing Indian conduct.' . . . Instead, the authority Congress there delegated to the Secretary only allows prescription of regulations that implement 'specific laws, id., and that are consistent with other relevant federal legislation."
[19] *See Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d at 38.
[20] *Ysleta,* 36 F.3d at 1332-1336.

clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[21] If, however, the court determines Congress has not directly addressed the precise question at issue, then the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's answer is based on a permissible construction of the statute*."* *Chevron,* 467 U.S. at 842-843.

To get to a decision point on the creation of a gap, *Chevron* offered "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Id*.

Here, there is no gap. The only issues presented are legal issues for this Court. Congress delegated no power or authority to either federal agency to interpret laws or invalidate portions of federal law.

[21] *See Texas v. U.S.*, 497 F.3d at 501.

C. *Without any showing of ambiguity in Congress' intent that § 107 of the Restoration Act survives IGRA, there is no need to apply the principles of construction from Indian canon law, legal presumptions favoring Indian Tribes, or the general authority statutes.*

The Deputy Solicitor letter acknowledges the *Chevron* analysis at p. 10, E.C.F. 523-1, but to avoid its obvious legal shortcomings to reach the desired conclusion the Deputy Solicitor wants to add two new standards, *i.e*. the Indian canon of construction law, and the principle that "statutes passed for the benefit of Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians."

To support that analysis, at p. 10 of the Deputy Solicitor's Ex. A letter, she cites both *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 96 S.Ct. 2102 (1976) and *Cherokee Nation of Okla. v. U.S.*, 73 Fed. Cl. 467 (2006). *Cherokee Nation* discussed above related to payment of attorneys' fees and the court held no *Chevron* deference to DOI was necessary.

Bryan is not relevant here because it only decides the question of applying Indian canon law to an ambiguous portion of Public Law 280 that the states were claiming abolished Indian tax immunities. *Bryan*, at 426 U.S. at 391-392. In *Chickasaw Nation v. U.S.*, 534 U.S. 84, 95, 122 S.Ct. 528, 535 (2001), the Supreme Court found that "Nonetheless, these canons do not determine how to read this statute. For one thing, canons are not mandatory rules. They are guides that 'need not be conclusive.'. . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force. In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." In *Chickasaw Nation*, the Supreme Court rejected "the canon that assumes Congress intends its statutes to benefit tribes" because, as here with the savings clause in the Restoration Act, Congress had spoken clearly and no presumptions were needed. *Id*.

To address when to apply these presumptions, the *Passamaquoddy Tribe* case cited at p. 9 of Ex. A letter in FN. 79 held that contrary to the Deputy Solicitor's position today, the use of Indian canon and other presumptions never arise because "If ambiguity does not loom, the occasion for preferential interpretation never arises. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587–88, 97 S.Ct. 1363–64 (1977); *Narragansett Indian Tribe,* 19 F.3d at 691. When, as now, Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning, without any judicial embroidery. So it is here: since there is no statutory ambiguity, the principle of preferential construction is not triggered." *Passamaquoddy Tribe*, 75 F.3d at 793. The court in *Commonwealth of Mass.* at 2015 WL 7185436 *17 likewise held that Indian canon law and presumptions did not apply since both the settlement act and IGRA were not ambiguous.

Even if there were an ambiguity and no savings clause existed in § 103(a) of the Restoration Act, applying the Indian canon law starting at p. 15 the Deputy Solicitor's letter postulates that ". . . . 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."

However, that argument is not helpful because under § 107 of the Restoration Act, Texas is not seeking, nor has Congress granted, "jurisdiction over the land." The actual wording of § 107 of the Restoration Act only gives Texas authority to bring injunctive actions in this Court for violations by "the tribe, or by any member of the tribe, on the reservation or lands of the tribe." Texas has no authority over the tribal land, and needs none to seek injunctive relief in this Court, since Congress provided that remedy in § 107 of the Restoration Act. For this reason, the

DOI letters discussion at p. 17 and cases in FN 132 are inapposite to this legal determination. Tribal immunity plays no role for this equitable relief, *see Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Another problem with that analysis is that the regulatory authority of Texas question imposed by Indian canon law advanced by the Deputy Solicitor omits entirely the able analysis of the application of § 107 of the Restoration Act through the contempt procedure of federal courts found in *Texas v. Ysleta del Sur Pueblo*, 431 F. App'x at 330-331 when the Fifth Circuit rejected these broad generalizations of ceding control of Indian lands to Texas, and instead focused on the remedial provision of § 107 of the Restoration Act. The Fifth Circuit found that in the context of remedial sanctions imposed against the Pueblo Defendants in a contempt order, Plaintiff Texas could be granted a right to inspect not land, but gambling "records," and held that ". . . the Tribe, not the State, controls the duration of the inspection regime, as it may either cease to operate the machines in question or file evidence of compliance in the district court . . . . As Texas can neither issue sanctions nor control the duration of the inspections, the contempt order does not grant the State regulatory or enforcement power over the "Tribe." *Id.* The DOI Ex. A letter at pp. 17-18 ignores entirely the application of discovery rules in a contempt proceeding, which is the only relevant context for analysis and therefore is easily sidetracked from valid conclusions.

Moreover, the discussion at pp. 16-17 of the Ex. A letter from the Deputy Solicitor of the application of Public Law 280 definitions of regulate/prohibit has been rejected by the Fifth Circuit which held in *Ysleta del Sur Pueblo v. Tex.*, 36 F.3d at 333-1334 that the *Cabazon* dichotomy does not apply to Restoration Act Tribes like the Pueblo Defendants because as the Fifth Circuit noted, "Furthermore, as a means of enforcing those laws and regulations, Congress

provided in § 107(a) that "(a)ny 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 . . . . Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a civil penalty? We this conclude that Congress did not enact the Restoration act with an eye towards Cabazon Band." *Id.* (emphasis in original).

D. Neither the NIGC nor the Alabama-Coushatta Tribe are necessary parties under Rule 19, Fed.R.Civ.P. because the NIGC lacks regulatory authority under the Restoration Act and there is no evidence that the Alabama-Coushatta Tribe is currently violating the federalized Texas gambling laws as provided in the Restoration Act . . . .

Since this litigation was filed to enjoin and hold accountable the Pueblo Defendants for their continued violation of federal law embodied in the Restoration Act, there is no need to join as parties to this litigation any third-party federal agencies that lack authority to administer the gambling provisions of the Restoration Act, nor add any third-party tribes which, unlike the Pueblo Defendants here, are not currently violating federal law.

III. CONCLUSION

All Pueblo Defendants' motions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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