



## **Indian Gambling and HB 1308** **A Bad Bet and a Dangerous Precedent for Texas**

By: Chavez

H.B. No. 1308

### A BILL TO BE ENTITLED AN ACT

relating to certain gaming activity conducted by an Indian tribe or tribal organization.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 47.09(a), Penal Code, is amended to read as follows:

(a) It is a **defense to prosecution** under this chapter that the conduct: ...

**"Any defenses stated in Texas Penal Code § 47.09 and all of its provisions are as a matter of law inapplicable and unavailable to the Defendants (Tigua) in this civil case under the undisputed facts of this case....The Court further notes this is a civil case. The State in seeking injunctive relief is not required to meet criminal law standards or to negate the exceptions or defenses referred to in the Penal Code."**

***State of Texas v. Ysleta del Sur Pueblo, 220 F. Supp.2d 668 (W. Dist. TX 2001)***

### **NO LEGALIZING EFFECT**

HB 1308 **does not improve** the legal standing of gambling by the Texas tribes bound by the Restoration Act. The bill only provides a defense to criminal charges. The state has **never used criminal charges** to shut down illegal Native-American casinos. The state has the right to sue the tribe in federal court and seek injunctive relief. This is how the casinos were closed in the past and **HB 1308 cannot prevent the state from closing any casino opened by the Tigua or Alabama-Coushatta.**

- The gambling activity the tribes seek to conduct is not just an illegal violation of the penal code that this bill amends; it is **UNCONSTITUTIONAL** according to the Texas Constitution. A statute passed by a simple legislative majority cannot trump the state constitution. While it may preclude criminal penalties the state may still seek to have any operating casino shut down in federal civil court.
- A defense to prosecution does not make an activity legal; it merely serves as a **"get out of jail free" card** for offenders. Is this a good legal precedent to set?
- This bill is nothing more than a **strategy to expand gambling by a simple majority vote** in the legislature rather than the two-thirds majority needed for a constitutional amendment.
- This bill would give the tribes a **false sense of legitimacy**, would result in the opening of illegal casinos and more **costly litigation** on the part of the state in federal court.

### **EXTREME CONSEQUENCES**

HB 1308 **sets a dangerous precedent.** HB 1308 gives a defense to prosecution only to a certain closed class of people, Native American tribes. **The bill would open a legal loophole to Native-American tribes that are 1) named in the list referenced in the bill, 2) which have historic, recognized land ties to Texas and 3) are not bound by the Restoration Act.** The list of tribes referenced in the bill includes **over 300 tribes** from across the country, several of whom have entered into agreements with state agencies acknowledging **"historic property" in Texas.** There are currently letters of intent to petition for recognition on file with the BIA from **10 tribes seeking recognition in Texas.**

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## **HB 1308 is CONSTITUTIONALLY SUSPECT**

HB 1308 **may violate the US CONSTITUTION.** The following is from a December 8, 2004 Attorney General opinion (GA-0278) – “Any legislation singling out such groups of Indians for special treatment would raise issues under the Equal Protection Clause of the United States Constitution. States... may enact legislation according special treatment to Indian tribes **only when authorized to do so by Congress.**”

## **Federal law would still prohibit gambling by tribes**

Above and beyond the federal Restoration Act, any gambling conducted on the reservations would be a violation of two other federal statutes

- The Johnson Act, 15 U.S.C. § 1175, prohibits the possession or use of “any gambling device ... within Indian country.”
- 18 U.S.C. § 1166(a) punishes gambling in Indian country in derogation of state law.

## **HB 1308 cannot relieve the tribes of violation of federal law and resulting prosecution.**

## **TIGUA OPERATE ILLEGAL EIGHT-LINER CASINO - STATE SEEKS ENFORCEMENT IN FEDERAL COURT**

HB 1308 would interrupt ongoing federal litigation by the state. On March 14, 2008 The Attorney General filed an enforcement action against the Tiguas in federal court for conducting illegal gambling operations. Despite the failure of HB 10 last session, the Tigua began operating illegal “eight-liners” that pay gamblers on Visa cards which can be converted into cash contrary to state law. In accordance with the Restoration Act, the AG seeks enforcement in federal court of the court’s September 2001 ruling that state law controls gambling on the reservation.

## **NOT ABOUT BINGO OR PARITY WITH TRIBES GOVERNED BY THE INDIAN GAMING REGULATION ACT**

These “eight-liner” machines would be designated as **Class III under IGRA.** The tribe has already attempted to conduct gambling operations above and beyond what IS authorized currently in Texas under IGRA.

## **HISTORY**

### **THREE TEXAS TRIBES**

There are three federally recognized tribes in the State of Texas: the Kickapoo near Eagle Pass, the Alabama-Coushatta near Livingston and the Tigua (Ysleta del Sur Pueblo) in El Paso. The Tigua and the Alabama-Coushatta were federally recognized through the Restoration Act passed by Congress in 1987. By agreement between the two tribes and the Texas delegation in Congress at that time, the Restoration Act specifically prohibits gambling by the two tribes.

The Kickapoo were federally recognized in 1983. Because the Kickapoo’s recognition statute was silent on gambling, they are governed by the more permissive federal Indian Gaming Regulation Act (IGRA).

HB 1308 attempts to allow the Tigua and Alabama-Coushatta to conduct any type of gambling that **may** be permitted by IGRA, **above and beyond what is currently given to the Kickapoo Tribe.**

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## **INDIAN GAMBLING TIMELINE**

- 1986 – Tigua and Alabama-Coushatta Tribes each pass internal resolutions prohibiting gambling in order to gain support for federal recognition
- 1987 – The Restoration Act passes Congress restoring recognition to Tigua and Alabama-Coushatta
- 1993 – Tigua tribe opens casino
- 1994 – Tigua tribe sues state to compel negotiation of a compact for more expansive gambling - Gov. Richards refused to negotiate, state prevails in 5<sup>th</sup> Circuit Court of Appeals
- 1996 – Tigua tribe adds slot machines to casino
- 1996 – Kickapoo open limited class II casino as permitted under IGRA
- 1999 – Attorney General Cornyn sues the Tigua in federal court, wins
- 2001 - Alabama-Coushatta open casino
- 2001 - 5<sup>th</sup> circuit upholds ruling against Tigua after appeal from the tribe
- 2001 – Tigua casino closed
- 2002 - Alabama-Coushatta casino closed
- 2003 – HB 809 filed but failed to pass
- 2005 – HB 1417 Introduced but fails to get committee hearing
- 2007 - HB 10 fails to pass legislature
- 2008 – Tigua tribe operates illegal “eight liner” slot machines that pay out in cash
- 2008 - Attorney General Abbott files an enforcement action in federal court to stop illegal Tigua operation
- 2009 - HB 1308 filed

## **TRIBES PROMISE TO NOT ALLOW GAMBLING – GAIN FEDERAL RECOGNITION**

In 1986 the Tigua and Alabama-Coushatta tribes sought the benefits of federal trust status provided for in the proposed Restoration Act before Congress. In order to satisfy the fears of many members of the Texas delegation regarding gambling, both the tribes ***passed similar resolutions opposing gambling on each of their reservations.***

Each tribal resolution is incorporated by reference into the Restoration Act and reads, in part:

**WHEREAS**, the (Alabama-Coushatta Tribe and Ysleta del Sur Pueblo) has no interest in conducting high stakes bingo or other gambling operations on its Reservation, regardless of whether such activities would be governed by Tribal law, state law or federal law;

**WHEREAS**, the (Alabama-Coushatta Tribe and Ysleta del Sur Pueblo) remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation; and,

**NOW THEREFORE BE IT RESOLVED** that the (Alabama-Coushatta Tribe and Ysleta del Sur Pueblo) respectfully requests its representatives in the United States Senate and House of Representatives to... place language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the state of Texas, shall be prohibited on the Tribe's reservation or on Tribal land.

Alabama-Coushatta Tribal Resolution # 86-07. Passed March 10, 1986.

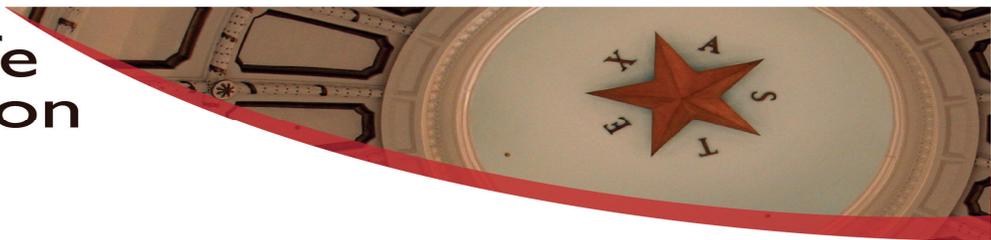
Ysleta del Sur Pueblo Resolution No. T. C. -02-86 approved and certified on March 12, 1986

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## **GAMBLING AND THE RESTORATION ACT**

The Restoration Act limits tribal sovereignty regarding gambling by clearly stating:

“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.” Restoration Act 25 U.S.C. § 737(a) and 25 U.S.C. § 1300g-6(a)

## **TRIBES OPEN ILLEGAL CASINOS**

Contrary to each of their resolutions passed to restore their federal recognition, both tribes governed by the Restoration Act began operating casinos. Both “entertainment center” casinos conducted Las Vegas style games, not bingo-based games.

The Ysleta del Sur Pueblo of the Tigua tribe opened the Speaking Rock Casino and Entertainment Center in 1993. The Alabama-Coushatta tribe opened their “Entertainment Center” casino operation in November of 2001.

## **FEDERAL COURT RULINGS PROHIBIT GAMBLING AND CLOSE CASINOS**

In 1994 the US 5<sup>th</sup> Circuit Court of appeals ruled that the Restoration Act and not IGRA controls gambling operations by the Tigua tribe. That means that state gambling laws function as surrogate federal law and can prevent gambling on the reservations pursuant to the Restoration Act. The court also held that tribe does not have a right to sue the state in an attempt to force the state into compact negotiations allowing them to gamble.

*Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d. 1325 (5<sup>th</sup> Cir 1994) (Ysleta I)

In 1999 Texas Attorney General John Cornyn sued the Tigua to stop the tribe from operating the casino. In September of 2001 the 5<sup>th</sup> Circuit let stand an injunction shutting down the Speaking Rock Casino. The court held that the effect of the Restoration Act is to treat the Tribe as any other citizen of Texas. **What a citizen of Texas can do, the Tribe can do. But what a citizen of Texas cannot do, the Tribe cannot do.** Furthermore, through the Restoration Act congress **empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction.** According to the district court opinion upheld by the 5<sup>th</sup> Circuit U.S. Court of Appeals, **“the Tribe waived any parallel sovereign status claim that it might have regarding gaming when it made its ‘compact’ with the State in order to obtain federal trust status.”**

*State of Texas v. Ysleta del Sur Pueblo*, 220 F. Supp.2d 668 (W. Dist. TX 2001)(Ysleta II)

In June of 2002 a federal district court held that the above rulings apply to the Alabama-Coushatta tribe as well as the Tigua and issued an injunction closing their “Entertainment Center.”

*Alabama-Coushatta Tribes of Texas v. State of Texas*, 208 F.Supp. 2d 670 (E. Dist. TX 2002)

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## **HB 1308 - AN END-AROUND THE RESTORATION ACT AND TEXAS LAW**

- HB 1308 attempts to **circumvent the Restoration Act's** specific prohibition against gambling by the two tribes. By their own Resolutions and Agreement with the US Congress, they forfeited their right to gamble until and unless Texas decides to allow casino gambling for all.
- HB 1308 attempts to **negate years of costly litigation** conducted by the state to stop the illegal casinos. Without amending the Texas constitution's prohibition against illegal gambling, **HB 1308's statutory "defense to prosecution" authorizes nothing.**
- HB 1308 **does not change Texas gambling laws** that prohibit casino gambling.
- **Only a Constitutional Amendment can make casinos legal** in Texas.
- HB 1308 allows certain groups of people conduct illegal activity without prosecution – a suspect and horrible precedent!
- HB 1308 specific language allows **ANY TYPE** of gambling that **MAY** be permitted under IGRA. IGRA permits casino gambling.
- HB 1308 gives a defense to prosecution for the two tribes to conduct gambling operations **above and beyond what the Kickapoo tribe is allowed.**
- HB 1308 means **full-blown casinos, NOT BINGO Games.**

## **REQUIREMENTS OF AND PROBLEMS WITH IGRA**

- HB 1308 does not mandate that the tribes enter into a compact with the state as is required under the federal law that governs the Kickapoo Tribe.
- HB 1308 does not apply all the **requirements** of IGRA to the tribes, including labor, local governments and environmental regulations.
- Casinos opened in Texas as a result of the passage of HB 1308 will be **totally unregulated.**
- Any revenue sharing agreements with IGRA tribes are **unenforceable!** States may not tax tribes operating under IGRA leading to loss of revenue and tax-free profits for tribes.
- States with IGRA gambling have experienced many schemes to expand gambling in their state including tribes move in from other states and establish casinos in populous areas that have little or nothing to do with the tribe's ancestral range.
- States with gambling tribes have seen an explosion in the number of casinos regardless of the state's desire to limit gambling. California went from zero to 58 Native American casinos in less than two decades.

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