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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SUSAN DEWBERRY; CAROLE
HOLCOMBE; SUZANNE DANIELSON;
ARNOLD BUCHMAN; DON HEATH; and
DALE SCHAFFNER,

Plaintiffs,

Case No. 04-6175-AA

PLAINTIFFS' REPLY TO THE STATE'S
AND TRIBES' MOTIONS FOR
SUMMARY JUDGMENT

v.

THE HONORABLE THEODORE R.
KULONGOSKI, Governor of the State of
Oregon; OTHER EXECUTIVE OFFICERS of
the State of Oregon; and the
CONFEDERATED TRIBES OF COOS,
UMPQUA, and SUISLAW INDIANS,

Defendant.

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INTRODUCTION: “MORE CASINOS!”

In their summary judgment response briefs, Defendants present a myriad of arguments trying to counter Plaintiffs’ straightforward claims that the Governor violated the State Constitution in entering into the Tribal Compact with the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (“Tribes”), but Defendants’ arguments all founder. Defendants completely ignore the actual text of the Oregon Constitution and fail to acknowledge that it contains both an absolute prohibition on all casino gaming and an explicit separation of powers provision. Defendants also ignore that the Oregon Constitution is manifestly silent as to the putative gubernatorial power to make public policy and new law. In effect, Defendants argue that the Governor did not violate the Oregon Constitution, but never bother to consider the plain meaning of the text.

The Governor and his lawyers should be especially embarrassed at the position they are taking—they who have sworn to protect and uphold the Oregon Constitution as their *first public duty*. That prime duty is higher than advocating for some new public policy that the Governor fancies (more casinos), or for new and “steady” sources of revenue for Tribal and State coffers (more casinos), or some byzantine reading of federal standing law, of IGRA, or of tribal sovereignty and indispensability that would get the Governor the result he seeks (more casinos). His first job is to serve the Oregon Constitution. *He* should be making all the arguments the Plaintiffs here make: why the Oregon Constitution controls in this case, why it means what it says about no casinos in Oregon, and why he has no authority to violate its separation of powers clause. And he *should* instead be arguing why he therefore refused to enter into a compact with the Tribes for (more casinos).

Instead, the Governor attempts to insulate the gambling activities the Compact purports to

authorize—which are indisputably casino gambling, in its purest form—from the unequivocally expressed constitutional prohibition by hiding behind the Compact itself. This is purely circular reasoning. This Court cannot allow an illegal Compact to serve as its own shield. Moreover, far from trumping Oregon’s plainly stated ban on casino gaming, as the state also claims, the Indian Gaming Regulatory Act (“IGRA”) explicitly honors the forum state’s public policy. Defendants also wholly ignore that this record unmistakably shows Plaintiffs vindicate quintessentially “public rights” by their claims to ensure that the Governor abides by the Oregon Constitution. Indeed, the State’s interests in vigorously defending the Compact in this litigation—as can be easily discerned from the briefing here—do not diverge in any meaningful way from those of the Tribes, and thus the Tribes cannot by invoking sovereign immunity block this important public policy case.

Therefore, as explained in more detail below, Defendants have said nothing in their response to undermine Plaintiffs’ principal arguments in this case, which, briefly recapitulated, are as follows. In signing without legislative authorization the gaming compact authorizing the Tribes to operate a casino, the Governor violated the State Constitution’s explicit prohibition of casinos. *See* Or. Const. Art. XV § 4(12). Furthermore, because the Oregon Legislature has never authorized the Governor to create new gaming law— particularly in a manner that directly contradicts Oregon’s unequivocally expressed public policy that categorically prohibits all casino gaming in the State—the Compact was unconstitutionally entered into by the Governor under the separation of powers clause. *See* Or Const Art. III § 1. Consequently, both the means and the ends of the Compact are unconstitutional, and the Court should therefore grant summary judgment in favor of Plaintiffs, and tell the Governor and the Tribes that, absent legislative authorization, there will be no more casinos.

I. PLAINTIFFS HAVE ALLEGED STANDING

The State, as has been its practice, seeks to dodge the crux of this case with procedural smoke screens. It often does so in cases such as this, choosing from a variety of such tools its lawyers keep ever so sharp in their box: mootness, standing, ripeness, the Eleventh Amendment, justiciability. Here, they pull out their favorite wrench—standing. To ward off Plaintiffs’ standing contentions, the State focuses on the cases of Sears v. Hull, 961 P2d 1013 (Ariz 1998), Baird v. Norton, 266 F3d 408 (6th Cir 2001); Willis v. Fordice, 850 F. Supp. 523 (D.Miss 1994), *aff’d* 55 F3d 633 (5th Cir 1995), and Langley v. Edwards, 872 F. Supp. 1531 (W.D.La. 1995), *aff’d* 77 F3d 479 (5th Cir 1996), yet never inquires into the logic of these cases’ analyses. The allegations of standing in Sears, Baird, Willis, and Langley each vary greatly from this case. Thus the standing determinations in each of those cases—as discussed immediately below—are inapposite because of that variance.

The parties seemingly agree that the standard found in Friends of the Earth, Inc. v. Laidlaw Environmental Svcs. (“FOE”), 528 U.S. 167(2000), controls the inquiry into Plaintiffs’ standing. *See* FOE, 528 U.S. at , 180-81 (outlining standing requirements of a particularized and actual injury in fact, fairly traceable to the challenged action, and redressable by the court). *See also* Warth v. Seldin, 422 U.S. 490, 501 (1975) (plaintiff must allege a distinct and palpable injury). Indeed, it is unarguable that “generalized harm that is shared *alike* by all or a large class of citizens generally is not sufficient to confer standing.” Sears, 961 P2d at 1017 (emphasis added), *citing* Warth, 422 U.S. at 499. Yet, Defendants take the position that because the above four cases are based on similar legal claims, that their standing holdings under the FOE test are directly applicable and controlling on the present litigation. This is simply not so.

Beginning with Sears, the plaintiffs in that case were found to have alleged only generalized harm that was not particularized enough to grant them standing. Sears, 961 P2d at 1017. The Sears plaintiffs had alleged:

[T]hat they live in northeast Phoenix, two miles from the Scottsdale city limits, and that the proposed gaming, *the nearest location of which would be 3.2 miles from their children's school*, will “expose their children to conduct contrary to the values . . . which they wish to instill in their children.” They further allege that such gaming will result in “urban crowding, traffic and stresses which will detract from the quality of their immediate community.” Finally, the Sears allege that the immediate community surrounding the proposed casino locations *near Scottsdale* will suffer economic loss as a result of compulsive gamblers' attendant criminal activity and inability to remain gainfully employed or to provide family support.

Id. at 1017–18 (emphasis added). Crudely put, the plaintiffs in Sears were complaining of a casino in the next town over.

In Baird, the plaintiffs were two Michigan State legislators who alleged that the procedural irregularities in the approval of a gaming compact deprived them of the procedural protections of the Michigan Constitution, as well as nullified their votes as legislators. Baird, 266 F3.d at 410–11. The court held that the general procedural requirements of the Michigan Constitution did not give the legislators any greater protection against improper procedure than any other citizen. Id. at 411. Furthermore, these two legislators by themselves could not have cast the deciding votes, and only a group of legislators of sufficient number to change the outcome of the vote have standing to challenge vote nullification. Id. at 411–12. Thus, the Baird plaintiffs did not have standing to challenge the nullification of their vote.

The remaining two cases, Willis and Langley involved what the Langley court described as “dissident tribal members” who opposed their respective tribes going into the casino business. *See*

Langley, 872 F. Supp. at 1533. *See also Willis*, 850 F. Supp. at 528. Neither Langley or Willis raised any allegations of personal harm of any kind as a result of their respective Tribes' casino ventures. The Langley plaintiffs' allegations are not set out in that opinion, but the Willis complaint alleged for standing that plaintiff would be:

detrimentally and adversely affected by the presence of a casino within the boundaries of his traditional tribal homeland, to-wit; said casino will cause material and irreparable damages by permanently altering Mr. Willis' immediate community in a manner hostile to his traditional and religious beliefs. Mr. Willis also owns an Indian novelty shop, the Casino will bring other businesses into the area of Mr. Willis' business and adversely affect the same. The crime increases in the area will also threaten Mr. Willis' business which is located on the Choctaw reservation in Philadelphia, MS where the Casino will be constructed.

Willis, 850 F. Supp. at 528. Without alleging and significant and direct harm to himself, Willis did not have standing to object to the casino at issue in that case.

Contrast the allegations in the above cases with the allegations advanced by Plaintiffs—and supported by affidavits—in this case. Although set out in detail in Plaintiffs' Response, a brief summation of a few of the concrete and individualized harms alleged by Plaintiffs here include:

1. Plaintiff Schaffner — **current** and imminent future increases in traffic **in his neighborhood** as a result of the proposed casino
2. Plaintiff Danielson — particular, significant, and imminent impacts to her safety and property values as a result of the casino approved in the compact because her residence is located on a street uniquely impacted by undisputed casino traffic increases
3. Plaintiff Heath — a **current** decrease in property value and substantially likely further lowering of those values

See generally Schaffer Aff.; Danielson Aff.; Heath Aff. *See also* Dewberry Aff.; Holcombe Aff.

Unlike the plaintiffs in Sears, Plaintiffs in this case are not merely alleging community “quality of life” and

moral/values-based objections, though these Plaintiffs certainly do raise such concerns. Rather, Plaintiffs here also allege concrete, particularized harm *in addition* to those aesthetic objections.¹ Defendants' arguments present a false dichotomy regarding the nature of Plaintiffs' allegations of harm; simply because certain harms are felt by the community at large does not preclude Plaintiffs from alleging a more particularized and unique form of such harms. Indeed, the fact that the casino has begun limited operation has brought to fruition many of Plaintiffs' concerns regarding the operation of the casino, and these harms were not as readily quantifiable in cases such as Sears where the impacts of the casino had yet to be felt. So too, the cases of Baird, Willis, and Langley involve wholly different fact patterns from the instant case. In plain terms, this is simply a different case from those cases cited by Defendants.

Because of the current operation of the casino, and the irreversible nature and increase of those impacts once fully constructed, the harms flowing to Plaintiffs from the casino in this case are much more similar to the harms found to create standing for citizens and the advocacy association in Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc. (CANN), 501 U.S. 252(1991). The fact that an increase in airport traffic would effect a significant portion of citizens in the flight path of Washington DC's National (now Reagan National) Airport did not transform the

¹ In the environmental context, aesthetic and recreational harms are sufficient to confer standing based on the "injury in fact" prong of Laidlaw. See Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 859–61 (9th Cir 2005). Because this case is based in part on the casino's impact in relation to light and atmospheric pollution, this standard is at the least persuasive. See Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1149 (9th Cir.2000) ("an individual can establish 'injury in fact' by showing . . . that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded").

particularized harm felt by two representative individuals into a “generalized harm that is shared alike by all or a large class of citizens[.]” Sears, 961 P.2d at 1017. *See* CANN, 501 U.S. at 264–65 (“If we accept that the master plan’s provisions will result in increased noise, pollution, and danger of accidents, this ‘personal injury’ to respondents is ‘fairly traceable’ to the Board of Review’s veto power”).²

Defendants are mistaken to assert that where a challenged action presents extensive harms to a community, not even those most significantly effected are able to bring suit. Because Plaintiffs have alleged unique injuries to themselves above and beyond the general impacts to the public at large, Plaintiffs have standing to bring this suit.

II. IGRA APPLIES STATE LAW TO DETERMINE WHETHER CLASS III GAMING ACTIVITIES ARE PERMISSIBLE ON INDIAN LAND.

Throughout this case, the Defendants have argued that IGRA preempts Oregon law—requiring the Governor to violate the Oregon Constitution. *See* State Response at 8 (“IGRA completely preempts the field of Indian gambling, and it is IGRA, not state law, that authorizes or prohibits Indian gambling on tribal lands.”). The “preemption argument” is a red herring, however, because regardless of whether this Court concludes that federal law or state law controls, the result is the same: IGRA expressly defers to state public policy as embodied in state law to determine whether a state may permit class III gaming. In essence, through 25 U.S.C. § 2710(d)(1)(B), a state’s public policy becomes cloaked with the authority of IGRA and, by operation of federal law, that state’s public policy

² *Cf. Pele Defense Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1216 (Haw. 1994) (plaintiffs alleging “diminished property values, deterioration of air quality, odor nuisance, and possible physical injury resulting from the permitted operations” clearly confer standing).

and any prohibitions have the full force and effect of federal law. Remarkably—and unlike many other federal statutes—because IGRA incorporates and gives effect to state law and public policy to determine which class III games an Indian tribe may conduct, IGRA’s application varies from state to state. For example, in Mississippi, IGRA allows tribal casinos to operate because Mississippi law only regulates the location of casinos. *See generally Willis*, 850 F. Supp. 523. Utah, however, has no casinos at all—and therefore no tribal casinos, either. As in Utah, IGRA disallows tribal casinos in Oregon because Oregon law prohibits *all* casinos.

The State Defendants concede that state law ultimately governs by stating that “a federal court is required to determine *whether a state permits class III gaming* . . . in order to determine whether a tribe may lawfully engage in class III gaming in that state. . . .” State Response at 8 (emphasis added). Therefore, regardless of the manner in which the Court approaches its analysis—“IGRA preempts” or “Oregon law controls”—the result is the same. Because Oregon law prohibits casinos, IGRA does not allow tribal casinos in Oregon.

This interplay between IGRA and state law has been upheld by virtually every single case cited by Plaintiffs *and* Defendants. *See, e.g., Rumsey Indian Rancheria of Wintun Indian v. Wilson*, 64 F.3d 1251, 1258 (9th Cir.), *cert. denied*, 1521 U.S. 1118 (1997) (“IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming”). Also, when Congress enacted IGRA, it made the following finding, “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.*” 25 U.S.C. § 2701(5)

(emphasis added.)

State Defendants’ preemption argument is premised upon the conclusion that IGRA conflicts with Oregon’s gaming laws. However, nothing in Oregon law conflicts with IGRA. In fact, Oregon’s prohibition of casinos is fully consistent with IGRA. Nothing in IGRA prevents a state from prohibiting certain gaming activities; IGRA looks to state law and public policy in defining prohibitions concerning gambling activities. IGRA only prevents a state from imposing state *regulations* upon permitted class III gaming. Clearly, Congress intended IGRA to preempt the field of gaming activities on Indian land. *See* S. Rep. No. 100-446 at 6 (1988), *reprinted* in 1988 U.S.C.C.A.N. at 3076. However, Congress never intended the scope of that preemption to be so overly broad that clear and outright state prohibitions would be supplanted. Rather, Congress specifically intended that state prohibitions be left intact and enforced through IGRA. *See* 25 U.S.C. § 2701(5) (Indian tribes may only conduct gaming “*within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.*”)

Moreover, implicit in and necessary to the State’s arguments is an extraordinarily broad and sweeping operation of federal preemption—an odd argument for a *state* to be making.³ Yet the U.S.

³ The State’s position in this case—that federal law trumps state public policy even where the federal statute at issue defers to state public policy as in IGRA—represents a significant divergence from the position the State concurrently advocates before the United States Supreme Court in Gonzalez v. Oregon, U.S. Supreme Court No. 04-623, *cert granted* ___ U.S. ___, 125 S.Ct. 1299, 161 L.Ed.2d 104 (2005). *See Brief for Respondent State of Oregon*, 2005 WL 1687168 *20–*51, *48 (“The Court should reject this unprecedented attempt by an agency official to resolve a disputed issue of social and medical policy that is reserved to the States and should reemphasize the vital role State sovereignty plays in our federal system and the need for Congress to speak clearly when it intends to interfere with that role. Oregon understandably seeks to protect its sovereignty by ensuring that federal agents observe the limits of the power Congress intended to give them and that Congress observes the limits of its defined powers.”). Not surprisingly, the State is reluctant to hear the “clear speaking” of

Supreme Court recently reaffirmed the principle that overly broad applications of federal preemption statutes are disfavored. Bates v. Dow Agrosiences LLC, 125 S.Ct. 1788 (2005) (involving the preemptive scope of the Federal Insecticide, Fungicide, and Rodenticide Act). The Court held that it has “a duty to accept the reading that disfavors preemption. ‘[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.’ In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention ‘clear and manifest.’” Id. at 1801, *citing* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655(1995), *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *See also* Medtronic, Inc. v. Lohr, 518 U.S. at 485 (1996).

Thus, particularly in light of the Supreme Court’s recent direction on preemption in Bates, and far from manifesting a clear intention that IGRA was designed to supplant state prohibitions, Congress actually designed IGRA to ratify and enforce such state prohibitions. The statute authorizes a decentralized scheme that preserves a broad role for state public policy decisions. According to IGRA and the U.S. Supreme Court’s limited view of preemption, then, Oregon’s prohibition of casinos and casino gambling clearly applies to the activities of the Tribes.

III. THE TRIBES ARE NOT NECESSARY AND INDISPENSABLE PARTIES BECAUSE THE STATE CAN ADEQUATELY REPRESENT THEIR INTEREST.

Congress in IGRA that a State’s public policy sets the limits of IGRA’s reach.

State Defendants argue that the Ninth Circuit has held that, “compacting tribes are necessary and indispensable parties, with sovereign immunity to suit, in actions that challenge the validity of their gaming compacts.” State Response at 8 *citing to American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002).⁴ This statement is a mischaracterization and substantial oversimplification of the holding in American Greyhound. The Ninth Circuit did not in that case—and indeed has never—set forth such a categorical rule regarding the necessity and indispensability of Indian tribes in gaming cases. Instead, in determining whether an Indian tribe is indispensable, the Ninth Circuit “continue[s] to follow the four-factor process even with immune tribes” and such determinations are “fact-specific” to each case. American Greyhound, 305 F.3d at 1025; Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

In this case, the Tribes are not necessary because the State Defendants can adequately represent the Tribes’ interests. “As a practical matter, an absent party’s ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by

⁴ In passing, Defendant Tribes suggests that “the Tribes are a necessary party [under] the law of the case[.]” Tribes’ Response at 6, *citing Arizona v. California*, 460 U.S. 605, 618 (1983). However, the “law of the case” analysis “posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*.” Id. (emphasis added). This Court’s Opinion and Order of November 17, 2004 mentioned the ruling of the state court in a prior case involving these parties. Opinion at 10. However, that was a prior case and this Court did not find it necessary to address the nature of the Tribes’ status in this present case. Because the determination of the Tribes’ status as necessary did not occur in this case, the “law of the case” doctrine cannot apply. Furthermore, “the doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.” Agostini v. Felton, 521 U.S. 203, 236 (1997) (citations and internal quotation marks omitted). Because these Plaintiffs have had their various cases repeatedly dismissed on hypertechnical, procedural grounds quite apart from the merits of the underlying action, it would be a manifest injustice to hold that the Tribes are indispensable simply based only on a circuit court decision in a prior, legally separate action.

existing parties to the suit.” Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999); see also Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153 (9th Cir. 1998).

In Daley, the Ninth Circuit ruled that Indian tribes were not necessary parties to an action challenging fishing allocations promulgated by the Secretary of Commerce. 173 F.3d at 1158. The court recognized that the Tribes had an interest in the subject of the actions and that the Tribes would lose their rights to harvest fish if appellants were successful. Id. at 1167. The court also noted that even though it was possible for a conflict to arise in the future regarding the parties’ interests, no such conflict existed presently in the case. Id. at 1168. Therefore, because no direct conflict of interest existed between the federal Defendants and the Tribes, the court held that the federal defendant could adequately represent the Tribes’ interests in the proceedings.

In Southwest Center for Biological Diversity, an environmental organization (Southwest) brought an action against the Secretary of the Interior alleging that the government’s plan to begin using the newly completed Additional Active Conservation Capacity (AACC) behind the Roosevelt Dam violated the Endangered Species Act and the National Environmental Polity Act. Id. 150 F.3d at 1152. The district court dismissed Southwest’s action for failure to join an Indian community which had rights under a 1988 agreement to store water in the AACC. Id. at 1154. The Ninth Circuit reversed the district court’s ruling that the Indian community was necessary and indispensable because “as a practical matter, the Community’s ability to protect its interest would not be impaired by its absence from the suit because its interest will be represented adequately by the existing parties to Southwest’s suit”—the federal government and *cities*. Id. at 1153. The court stated:

The presence of the cities of Phoenix, Chandler, Scottsdale, Mesa, and Tempe as parties

to Southwest's suit further ensures that the Community will be represented adequately. The cities have made substantial financial contributions to the construction of the AACC, and are dependent on the additional storage space it will provide to meet the future water needs of their residents. Thus, the cities share the Community's strong interest in Defeating Southwest's suit and ensuring the AACC is available for use as soon as possible. Although they assert they do not adequately represent the Community, they offer nothing to show that their interests in the AACC or the arguments they would make differ at all from those of the Community. The cities' storage rights derive from a source other than the 1988 settlement agreement, and the cities disagree with the Community's interpretation of that agreement, but *those differences have no bearing on the cities' ability to represent the Community on the merits of the litigation*. Neither the settlement agreement nor the source of the parties' storage rights is at issue in Southwest's suit. The cities, like the United States, may not share the Community's interest in protecting its sovereignty, but they have not explained how the Community's sovereignty would be implicated in the adjudication of the merits of Southwest's suit.

Id. at 1154-55 (emphasis added).

Similarly, in the case at bar, the interests of the State and of the Tribes are fully aligned.

Although the state does not have a trust responsibility to the Tribes, neither did the cities in Southwest Center for Biological Diversity whom the Ninth Circuit stated could adequately represent an Indian community. No court has ever held a trust obligation is *required* for a party to adequately represent an Indian tribe. Rather, the inquiry focuses on whether a conflict of interest exists between the Tribe and the potential representative, and the existence of a trust responsibility is only one element that has been examined in undertaking that inquiry. Indeed, “[e]ven the United States, which [has] a trust responsibility, is not an adequate representative of Indian tribes if the litigation presents it with conflicts of interests.” Id. 305 F.3d at 1023 n.5. In American Greyhound, the court noted that the Arizona Governor could not adequately represent the interests of the absent tribes because “the State and the tribes have often been adversaries in disputes over gaming” and “the Governor’s and the tribes’ interests under the compacts are potentially adverse.” Id. This statement shows that the Ninth Circuit

would allow a state to represent an absent Indian tribe if the state's and the tribe's interests are aligned, such as in the present case.

So too, the sovereign immunity of the Tribes in this case is, contrary to Defendants' adamant assertions, not as simple as Defendants' arguments would suggest. The abrogation of sovereign immunity is a matter strictly construed, *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), but Plaintiffs can find no cases answering the question of whether sovereign immunity, once abrogated in a particular context, is abrogated in all actions brought in that context. *See* Plaintiffs' Response at 14–17. There is little argument that IGRA abrogates the sovereign immunity of an Indian tribe with IGRA Section 2710, at least in relation to “any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact[.]” 25 U.S.C. § 2710(d)(7)(A)(ii). The question facing this Court is: where there is an abdication on the part of State officials to bring such a suit, can such a suit be brought under a state law cause of action and will Section 2710 still abrogate the immunity of the Tribes?

Plaintiffs, by proceeding in what amounts to a private attorney general capacity, are seeking to determine the propriety of Oregon's governor entering into Indian gaming compacts without specific statutory authority, and in clear violation of the Oregon Constitution's ban on casino gaming. *See* Or Const Art XV § 4(12). If the abrogation of sovereign immunity extends to all such cases, then the Tribes are properly in this suit and subject to this Court's jurisdiction. Plaintiffs are not by this attempting to suggest that there is a “private right of action” under IGRA, but rather that the waiver of sovereign immunity contained in IGRA applies in similar cases such as this where Plaintiffs seek to enjoin an improperly entered-into compact.

Yet even if this Court finds that the Tribes are immune from suit and cannot be joined, they are not indispensable. First, for the reasons enumerated above, the Tribes are not prejudiced by their absence from this action because the state can adequately represent their interests. Second, there clearly is an adequate remedy without the Tribes. In State Ex Rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995), which presented a very similar factual scenario, the New Mexico Supreme Court held that affected Indian tribes were not indispensable parties. The court held,

Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the compact.

Id. Likewise, in the present case, the requested relief principally entails interpretation of Oregon law and the Tribes are not "indispensable" to the resolution of the applicable inquiries. See also Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001) (Indian tribe was not necessary and indispensable party in action challenging tribe's gaming); Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001) (same); Artichoke Joe's v. Norton, 216 F.Supp,2d 1084, (E.D.Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003) (same).

Additionally, in equity and good conscience, this Court should allow this action to proceed because there is no readily available alternate forum for this action. Such was the conclusion of the Court of Appeals of New York in Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047,1057 (N.Y. 2003), where Plaintiffs opposed to casino gambling challenged the Governor's authority to negotiate and sign tribal gaming compacts. The court ruled that the tribes were not

indispensable parties to the litigation and, thus, the action could proceed without them. Specifically, the court stated:

Not only will these Plaintiffs be stripped of any remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. *The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances. . . . While sovereign immunity prevents the Tribe from being forced to participate . . . , it does not require everyone else to forego the resolution of all disputes that could affect the Tribe. . . .* While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the tribe's voluntary absence to deprive these Plaintiffs (and in turn any member of the public) of their day in court. . . . While in other cases sovereign immunity might support dismissal, here the factors weigh toward allowing judicial review of this constitutional question.

Id. at 1058-59 (emphasis added). Similar to Saratoga, the present case presents fundamental constitutional issues that have never been addressed by any Oregon court and the litigation should therefore be allowed to proceed. Dismissal based upon a finding that the Tribes are “indispensable” would allow the Governor to act unchecked and in a manner that expressly violates the State Constitution, and then prevent those actions from being subjected to judicial review and accountability. The specific facts of this case weigh heavily in favor of allowing the case to proceed even without the presence of the Tribes as parties.

IV. BECAUSE PLAINTIFFS SEEK TO VINDICATE PUBLIC RIGHTS, THIS CASE SHOULD BE ALLOWED TO PROCEED UNDER THE PUBLIC RIGHTS EXCEPTION EVEN IF THE COURT FINDS THE TRIBES INDISPENSABLE.

The U.S. Supreme Court has recognized a “public rights exception” to dismissal of an action based on the absence of an otherwise necessary and indispensable party in National Licorice Co. v.

National Labor Relations Board, 309 U.S. 305 (1940). In that case, the Court declared that, “[i]n a proceeding . . . narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.” Id. at 363. Applying that principle, the Court ruled that the action to vindicate a public right of restraining the unlawful actions of the Defendant and setting aside contracts into which it had illegally entered was appropriate “even though the restraint prevented his performance of [] contracts” with non-parties to the case. Id. at 366. The Court went on to examine application of the principle in other contexts, explaining, for example, that antitrust injunctions often affect non-parties by preventing the offending company from meeting contractual obligations to others not before the court. Id. at 365. The Court concluded its analysis of case law in this area by noting that “[i]n every case the third persons were left free to assert such legal rights as they might have acquired under their contracts. But in all, the public right was vindicated by restraining the unlawful actions of the Defendant even though the restraint prevented his performance of the contracts.” Id. at 366.

In interpreting National Licorice, the Ninth Circuit has also recognized that many courts since that case “have also refused to require the joinder of all parties affected by public rights litigation—even when those affected parties have property interests at stake—because of the tight constraints traditional joinder rules would place on litigation against the government.” Conner v. Burford, 848 C.2d 1441, 1459 (9th Cir. 1988), *citing* Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919, 927-29 (11th Cir.1982 (Section 8 landlords not joined in action by tenants challenging lease termination procedure); Swomley v. Watt, 526 F.Supp. 1271, 1273 (D.D.C.1981) (owners of use permit for federal lands not joined in Establishment Clause challenge to issuance of permit); National Resources

Defense Council v. Berklund, 458 F.Supp. 925, 933 (D.D.C.1978) (refusal to join applicants for preference right coal leases in NEPA challenge to lease sale), *aff'd*, 609 F.2d 553 (D.C.Cir.1980); National Resources Defense Council v. Tennessee Valley Authority, 340 F.Supp. 400, 407-08 (S.D.N.Y. 1971) (refusal to join coal producers in action challenging TVA's coal purchases under NEPA); National Wildlife Federation v. Burford, 676 F.Supp. 271 (D.D.C. 1985) (mineral leaseholders not joined in challenge to lifting of protective restrictions on federal land); Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420 (2nd Cir.1975) (promoted officers not deemed indispensable in case involving constitutional challenge to test used to determine promotions that ultimately resulted in invalidation of the challenged test and enjoined Defendant from making appointments on the basis of the test's results). These cases demonstrate plainly that the public rights exception has been repeatedly relied upon in a variety of cases even in the absence of a party whose contractual rights may be affected by the litigation.⁵

The public rights exception clearly applies in this case because Plaintiffs are seeking to vindicate the indisputably public right of ensuring that the Governor upholds and acts consistently with the laws and Constitution of the State of Oregon. They are also acting to protect the rights of their community to not be subjected to the effects of a casino gambling establishment that is expressly forbidden by that Constitution. The Tribes allege that Plaintiffs' concerns are "self-interested" and that their affidavits

⁵ Moreover, it is not clear that the Tribes necessarily stand to suffer the permanent loss of all of their rights under the Compact in any event, as the Court could fashion its remedial order consistent with the approach taken by the Ninth Circuit in Conner v. Burford, 848 F.2d at 1461, and thereby enjoin the Governor from permitting any activity to occur pursuant to the Compact until the constitutional infirmities identified by Plaintiffs' claims in this case have been remedied. In addition, nothing in Plaintiffs' action seeks to forbid the Tribes from engaging in non-casino gaming activities that are consistent with IGRA and the Oregon Constitution.

“reveal the true nature of their objections.” Tribes’ Response at 8. However, the Plaintiffs discuss individualized harms in their affidavits in order to establish their standing in this case, not to establish that public rights are at stake. Moreover, the Tribes contradict themselves on this point and effectively concede that more than simply private interests are at stake in the resolution of Plaintiffs’ claims in their arguments on standing in which they allege that Plaintiffs do not have standing because their harms are “of a generalized grievance common to the entire community.” Tribes’ Response at 10.

In addition, that matters of public importance are involved in this action is conclusively established by a plethora of case law to which Plaintiffs have already cited. *See, e.g., Hotel Employees v. Davis*, 981 P.2d 990, 995 (Cal. 1999) (issue regarding validity of state law which authorized casino gambling was of “great public importance and must be resolved promptly”); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1176 (Kan. 1992) (whether governor had authority to enter into tribal gaming compact was matter of “great statewide concern”); *State ex rel. Clark v. Johnson*, 904 P.2d at 18 (“the issues presented are of great public interest and importance”) (citations omitted). The issues presented in these cases are virtually identical to the ones at issue in this case, lending further weight to the proposition that Plaintiffs are seeking to vindicate a public right.

This case is distinguishable from *American Greyhound*, where the court declined to invoke the public rights exception. In that case, racetrack owners and operators brought an action to enjoin the Governor of Arizona from entering into gaming compacts with Indian tribes. The court stated that, rather than vindicating a public right, Plaintiffs’ interests were of a private nature. “[T]heir interest is in freeing themselves from the competition of Indian gaming, not in establishing for all the principle of separation of powers. . . . The Plaintiffs sought this injunction to avoid competitive harm to their own

operations. . . . [T]he rights in issue between the Plaintiffs in this case, and the Tribes and the state are more private than public.” American Greyhound, 305 F.3d at 1026.

Unlike the Plaintiffs in American Greyhound, Plaintiffs in the current case are not owners or operators of gaming facilities or any other kind of business that competes with the Tribes’ casino. Indeed, Plaintiffs are not seeking to free themselves from the competition of Indian gaming or serve any other pecuniary interests of their own. Rather, they are seeking to vindicate the inherently public right and interest of all Oregon citizens in ensuring that their Governor acts in conformity with the laws of the State.

These important public issues have never been addressed by a court in Oregon and a dismissal of this case would “sound[] the death knell for any judicial review of executive decisionmaking.” Conner v. Burford, 848 F.2d 1441, 1460 (9th Cir.1988). As reflected by the parties’ briefs filed in this case, other courts in many other states have reached the merits in similar cases. Plaintiffs are likewise entitled to their day in court for the purpose of having the important public rights their claims implicate resolved in the present proceeding.

V. 18 U.S.C. §1166 EXTENDS OREGON’S CONSTITUTIONAL PROHIBITION OF CASINOS TO INDIAN LANDS IN OREGON.

Section 23 of IGRA provides that, “for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country* in the same manner and to the same extent as such laws apply elsewhere in the State.” 18 U.S.C. § 1166(a) (emphasis added). Subsection (c)(2) recognizes an exception to that rule for class III gaming

conducted under a compact “which is in effect” between an Indian tribe and a state. Contrary to state Defendants’ allegation that Plaintiffs “simply ignore”⁶ this exception, Plaintiffs *do* recognize the exception contained in subsection (c). *See* Plaintiffs’ Summary Judgment Memo at 9-10. However, this exception to the application of state gambling laws to Indian lands does not apply here because the Compact was never validly entered into. *See* Hotel Employees v. Davis, 981 P.2d 990, 1008 (1999) (18 U.S.C. § 1166(c) did not exempt tribal gaming from state law because the compact was not validly entered into).

Because IGRA is silent about how a state validly “enters into” a compact, state law must be applied to determine this issue. In Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit held that state law determines the procedure by which a state may validly enter into a compact and that the “entered into” language imposes an independent requirement that the compact be *validly entered into* by a state before it can go “into effect,” via Secretarial approval, under IGRA. *Id.* at 1553 & 1555. In that case, the Tenth Circuit determined that because the New Mexico Governor lacked the authority to bind the state to a compact, the compacts were never validly “entered into” by the state and, as a result, did not comply with IGRA. *See also* Seminole Tribe, 517 U.S. 44, 47 (1996) (observing that IGRA “provides that an Indian tribe may conduct certain gaming activities

⁶ State Response at 11. Additionally, throughout State Defendants’ Response, they allege that Plaintiffs misconstrue case holdings and cite cases that do not support Plaintiffs’ case. However, Plaintiffs do not misconstrue any cases and urge this Court to carefully examine all such allegations. For example, state Defendants write, “Plaintiffs cite a Michigan case for the proposition that a governor usurps legislative power by entering a compact before it is approved by a legislature. Plaintiffs’ Memorandum at 19, citing McCartney v. Attorney General, 587 N.W.2d 824,826 (Mi. 1998). That case did not so hold.” State Response at 33-34. A review of Plaintiffs’ Memorandum will show that Plaintiffs did not cite this case for the proposition state Defendants allege.

only in conformance with a *valid* compact between the tribe and the State”) (emphasis added); Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1495 (D.C.Cir.1995) (“Clearly, . . . the State of Kansas has an interest in the validity of a compact to which it is a party. . . .”); Narragansett Indian Tribe of Rhode Island v. Rhode Island, 667 A.2d 280 (R.I.1995) (holding that a compact signed by the Rhode Island Governor, who lacked authority under state law to sign the compact “is void in the same sense that any document executed without proper authority is void; namely, it has no legal effect”); State ex. rel. Clark v. Johnson, 904 P.2d 11, 24 (N.M. 1995) (“[w]e conclude that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.”)

In the present case, because the Governor exceeded his executive authority by signing the Compact with the Tribes, the Compact was never validly “in effect” and cannot operate to prevent the application of Oregon law through 18 U.S.C. §1166(a).⁷ State Defendants cite to several cases for the proposition that 18 U.S.C. §1166(a) does not apply state laws to Indian gaming when that gaming is governed by a “valid tribal-state compact.” *See* State Defendants’ Response at 13-14. However, those cases are inapposite because in each the court found that the governor *had* authority to sign the compact and, thus, the resulting compacts were valid. Contrarily, in the present case, the Oregon

⁷ Oregon’s prohibition of casinos applies to the Tribes not only through 18 U.S.C. §1166(a), but also through 27 U.S.C. §2710(d)(1)(B), which states “Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity. . . .”

Governor did not have authority to enter into the Compact on behalf of the State, which renders the Compact invalid and the exception contained in subsection (c)(2) inapplicable.

A. ORS 190.110 DID NOT GIVE THE GOVERNOR AUTHORITY TO ENTER INTO TRIBAL GAMING COMPACTS.

Both parties agree that under Oregon law, this Court should interpret ORS 190.110 by first looking at its text, which is “the best evidence of the legislature’s intent.” *See* State Response at 37, *citing* PGE v. Bureau of Labor and Industry, 859 P.2d 1143, 1146 (1993) (statutory interpretation looks first to plain language of statute, and if unambiguous, the inquiry goes no further). The parties also agree that the text of ORS 190.110 is clear and this clarity “makes an examination of legislative history unnecessary.” State Response at 39.

ORS 190.110 is entitled “Authority of units of local government and state agencies to cooperate; agreements with American Indian tribes; exclusion of conditions for public contracts,” and primarily deals with the authority given to local units of governments to enter into cooperating agreements. This statute does not create new powers for the Governor, but deals with duties and powers that have already been “imposed,” “conferred,” or “delegated” by the Oregon Legislature. ORS 190.110(1). Also, the intergovernmental cooperation allowed by this statute must be for a “lawful purpose.” The Compact is not for a lawful purpose because it directly contradicts Oregon’s constitutional prohibition of casinos.

ORS 190.110(3) gives the Governor authority to make agreements with Indian tribes, but that authority must be exercised within in confines of the “power described in subsections (1) and (2). . . .”

Id. See also State ex rel. State Office for Services to Children and Families v. Klamath Tribe, 11 P.3d 701, 705 (Or. App. 2000) (court rules in favor of children who argued that the power to make agreements with tribes only applies when “ ‘performing a duty imposed upon it or exercising a power conferred upon it,’ it does not permit agencies to ‘create new duties and obligations—in other words, to make law—by agreement with Indian tribes’ ”). Furthermore, such agreements must be ones that ensure that the state does not interfere with an Indian tribe’s rights or privileges. ORS 190.110(3). The Compact clearly is not this type of agreement. Indeed, there is no evidence or even an allegation that the state was “interfering” in any way with the Tribes. The only right arguably involved here was the right to good faith negotiations regarding Class III gaming, and the State was not interfering with that right nor refusing to negotiate. Since the Tribes had no “right” to operate a casino in contravention of the constitutional prohibition, ORS 190.110(3) is inapplicable.

The context of ORS 190.110 is also significant. It is a governmental cooperation statute included among other “miscellaneous” statutes which deal with the fine details of government affairs. Surely, if the Governor were given the authority to bind the State of Oregon to any contract he so chose, as Defendants argue, this would be no “miscellaneous matter.”

The Tribes argue that ORS 190.110 gives the Governor “clear legislative authorization” to enter into the Compact. See Tribes’ Response at 12. However, the fact that the statute does not discuss gaming—in fact, does not even contain the word “games” or “gaming”—is evidence that the Legislature did not intend to give the Governor authority to enter into gaming compacts through this statute. Indeed, the Legislature could not have possibly intended to give the Governor authority to sign gaming compacts pursuant to IGRA because this statute pre-dates IGRA. The state concedes this point:

“Gaming compacts could not have been specified by the terms of the statute, because ORS 190.110(3) was enacted before the United States Supreme Court decided Cabazon or Congress enacted IGRA.” State Summary Judgment Memo at 39.

The Tribes argue that “it has been well-settled for many years that ORS 190.110 authorizes the Governor to enter into gaming compacts” and that this is a “well-accepted and understood interpretation of the statute” Tribes’ Response at 12, 13. However, neither the Tribes nor the state cite to any cases which discuss this “well-accepted” interpretation of the statute. Plaintiffs are aware of only one case which interprets ORS 190.110—State ex rel. State Office for Services to Children and Families v. Klamath Tribe, 11 P.3d 701 (Or. App. 2000)— and it does not support Defendants’ argument. In that case, children in custody of the State Office for Services to Children and Families (SCF) challenged an agreement SCF entered into with the Klamath Tribe which expanded the definition of “Indian children.” The court agreed with the children that ORS 190.110 did not authorize SCF to create new duties and obligations. The court stated:

An administrative body possesses only those powers that the legislature grants and cannot exercise authority that it does not possess. By its terms, ORS 190.110 merely authorized intergovernmental agreements to further the agency’s ability to “perform[] a duty imposed upon it or [to] exercise[] a power conferred upon it. . . .” ***That statute does not authorize an administrative body to enter into agreements in order to carry out duties or powers that otherwise have not been imposed or conferred upon it by the legislature.***

Id. at 706 (citation omitted) (emphasis added).

Defendants’ argument is further undercut by the Oregon Attorney General Opinion which states that ORS 190.110 gives the Governor authority to ***negotiate*** a gaming compact. The opinion does not say that the Governor has the authority to ***sign*** a gaming compact, which is an entirely different type of

authority because it is the signature on behalf of the state which operates to bind the state to the new law contained in the compact. Moreover, this opinion is merely that- an *opinion* of a member of the Executive branch which cannot expand gubernatorial power.

Clearly, the Oregon Legislature did not intend for ORS 190.110 to give the Governor unbridled authority to sign tribal gaming compacts on behalf of the State. It is well-settled that in the absence of an appropriate delegation of legislative power,⁸ governors do not have the inherent power to sign gaming compacts. *See* Plaintiffs’ Summary Judgment Memo at 14-22. As the court observed in Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y. 2d 801, 798 N.E. 2d 1047 (2003), “Unsurprisingly, every state high court to consider the issue has concluded that the state executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA Today we join those states in a commitment to the separation of powers and constitutional government.” Id. at 1060-1061.

The minority view is represented in Willis v. Fordice, 850 F.Supp. 523, and Langley v. Edwards, 77 F.3d 479, which are cited repeatedly by Defendants. To date, Mississippi is the only state which has determined that its Governor has the inherent authority to negotiate and sign gaming compacts. Because a Mississippi statute vests *residual* powers with the Governor, that state allows its Governor to negotiate and sign compacts. Oregon has no such “residual power” statute. These cases

⁸ Even if the legislature had intended to delegate the power to enter into gaming compacts to the Governor, ORS 190.110 would be an improper delegation of legislative authority because it gives no guidance to the Governor concerning what types of compacts or games he could agree to on behalf of the state.

are further differentiated by the significant fact that they did not involve a constitutional prohibition of casinos.

Defendants also compare ORS 190.110 to the statutes involved in New Mexico ex rel. Coll. v. Johnson, 990 P.2d 1277 (N.M. 1999) and Sears v. Hull, 961 P.2d 1013, which *expressly* gave the Governor authority to sign gaming compacts. In Johnson, the New Mexico Legislature had recently passed legislation explicitly authorizing the Governor to enter into gaming compacts with tribes and pueblos. Id. at 1281. The authorizing statute also gave specific guidance to the Governor regarding the length of time compacts were binding and revenue sharing. Id. at 1282, 1283. In Sears, the Arizona Legislature has also passed a statute which expressly authorized the Governor to, on the state's behalf, negotiate and sign "gaming compacts." Id. at 1015. This statute also gave guidance to the Governor regarding how she was to negotiate compacts and provided a "standard form of gaming compact." Id. Defendants' comparison of ORS 190.110 to the statutes in Johnson and Sears is misleading and erroneous because, not only does ORS 190.110 fail to give any guidance to the Governor, it does not even mention "gaming." Thus, the Defendants can not seriously maintain that the Governor had express statutory authorization to enter into the Compact, especially in light of Article XV, Section 4(12). Rather, ORS 190.110 is akin to the "government cooperation" statute in State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995), which authorized public agencies to enter into agreements with other public agencies and Indian tribes, but did not authorize the Governor to enter into gaming compacts. Id. at 25.

B. OR. CONST. ART. V, §13 DID NOT GIVE THE GOVERNOR AUTHORITY TO ENTER INTO THE COMPACT.

The Oregon Constitution states, “[the Governor] shall transact all necessary business with the officers of government. . . .” Or. Const. Art. V, § 13. State Defendants argue that this provision authorizes the Governor to unilaterally enter into gaming compacts because “IGRA is the law of the land” and “negotiating and executing a tribal gaming compact is ‘necessary business.’” State Response at 30 (citing Willis, 850 F.Supp 523; Langley, 872 F.Supp. 1531). However, IGRA does not give Governors the authority to unilaterally sign gaming compacts. As the court in Clark noted, “*We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power.*” Id. at 26 (emphasis added), *citing New York v. United States*, 505 U.S. 144, 176 (1992) (striking down an act of Congress on the ground that principles of federalism will not permit Congress to “commandeer[] the legislative processes of the States” by directly compelling the states to act) (citations omitted).

In a case similar to the one presently before this Court, State ex rel. Stephen v. Finney, the Kansas Governor also contended that she had authority to enter into a tribal gaming compact pursuant to a constitutional provision which stated, “The governor shall transact all the business of the state, civil, and military, with the general government, except in cases otherwise specially provided by law.” Id. at 1178. The court rejected this argument and stated, “[T]he transaction of business connotes the day-to-day operation of government under *previously established law or public policy*. The

implementation of law and policy rather than the enactment of law and the determination of the public policy constitutes the transaction of business between Kansas and the federal government.” Id. (emphasis added). The determination of public policy is not a power that IGRA bestows upon state governors. Likewise, in the present case, the Governor was not merely transacting business by implementing previously enacted law; rather, he was creating law by agreeing to the establishment of a casino and by agreeing to the expenditure of state funds. Simply put, single-handedly enacting new law which directly contradicts Oregon public policy as reflected in the state Constitution does not fall within the parameters of “necessary business” as contemplated by Article V, Section 14 of the Oregon Constitution.

C. LEGISLATIVE SILENCE DID NOT AUTHORIZE THE GOVERNOR TO ENTER INTO THE COMPACT.

Finally, Defendants argue that “legislative silence” is the source of the Governor’s purported authorization to sign gaming compacts on behalf of the state. Tribes’ Response at 13; State Response at 27. Specifically, the Tribes state that “legislative silence in the face of a well-accepted and understood interpretation of [ORS 190.110] constitutes the legislature’s approval of that interpretation.” Tribes’ Response at 13. However, as noted above, ORS 190.110 has never been interpreted as giving the Governor authority to unilaterally sign gaming compacts. Far from being “well-accepted,” Defendants are unable to offer even a single case to support their interpretation of this statute. Plaintiffs are aware of only one case that interprets ORS 190.110, and it clearly supports the Plaintiffs by holding that the statute “does not authorize an administrative body to enter into agreements

in order to carry out duties or powers that otherwise have not been imposed or conferred upon it by the legislature.” State ex rel. State Office for Services to Children and Families v. Klamath Tribe, 11 P.3d at 706.

Furthermore, there has not been silence on the issue of casinos. Oregon voters felt so strongly that they did not want casinos in their state that they amended the Constitution to prevent the legislature from ever authorizing casinos in Oregon. Or. Const. Art. XV, § 4(12). Legislative silence in the face of this explicit prohibition can not constitute authorization of the Governor’s *ultra vires* actions. Moreover, if ORS 190.110 were ever interpreted as giving the Governor authority to sign compacts allowing casinos, then the statute would be unconstitutional as it would violate Article XV, Section 4(12) of the Oregon Constitution. Such a reading is not permissible. See State v. Kitzman, 323 Or. 589, 602, 920 P.2d 134 (1996) (“when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning”); State v. Duggan, 290 Or. 369, 373, 622 P.2d 316 (1981) (courts must construe statutes, if possible, to avoid constitutional difficulties).

State Defendants’ discussion of SB 881⁹ illustrates the absurdity and illegality of the current compacting process in Oregon. See State Response at 27-29. The Governor and the legislature have essentially turned their respective constitutional roles upside down with the Governor having unilateral and unchecked power to create law through signing compacts and the legislature “participate[s] in the implementation of the compacts.” Id. at 29. This arrangement clearly violates the Oregon Constitution

⁹SB 881 would have required the Governor to submit a proposed compact to the legislature before the compact became binding on the State of Oregon. See State Response at 27.

which defines the Governor’s duties as Executive in nature and the Legislature’s to be legislative in nature. *See* Or. Const. Arts. IV, V. The Governor and Legislature have reversed their roles; the Legislature should be legislating and the Governor should be executing the laws enacted. Any variation of this constitutionally mandated process should be expressly and clearly spelled out in an appropriate delegation of legislative authority.

Unsurprisingly, Indian tribes, their attorneys, and the Governor did not support SB 881 and the legislative oversight it would have provided the Governor. Various tribes testified against the bill stating that it would be a “devastating blow” and “create an unnecessary burden to the tribes.” State Response at 28. Frankly, Plaintiffs are mystified at how legislative approval of gaming compacts—which are legislative in nature and properly within the Legislature’s constitutional duties—would impose an unnecessary burden to the tribes and “derail” the compacting process. *See id.* At the hearing on SB 881, Chair Lim asked the Governor’s legal counsel if he thought the legislature should “just stay out of it.” *Id.* at 29. Clearly, the answer to that question is “yes!” The Governor wants unchecked power to agree unilaterally to any gaming compact he chooses without any guidance or approval from the Legislature. While this arrangement may satisfy the Defendants in this case, it does not come close to satisfying the requirements of the Oregon Constitution. *See* Or Const Art III §1

The fact that the Legislature considered adopting a process for the Governor to sign compacts on behalf of the state does not legitimize the current flawed process. Defendants place much reliance on the fact that the Governor has acted erroneously repeatedly; however, the Oregon Supreme Court has noted that a history of extra-constitutional action does not legitimize the error:

Governors, legislators, and other public officials are responsible in the first instance for determining their constitutional duties. . . . In the constitutional relationships between the legislative and executive branches, a longstanding understanding and practice shared by both branches doubtless deserves respectful consideration, though it is not conclusive. Political institutions like any others may adapt to erroneous practices that should not be sustained. . . . Congress and presidents, for instance, had struggled over and lived with the “legislative veto” (the practice of subjecting authorization of executive action to future disapproval by one or both houses of Congress), for a generation before it was held unconstitutional in INS v. Chadha, 462 U.S. 919 (1983).

Lipscomb v. State Bd. of Higher Educ., 305 Or 472, 478-79, 753 P.2d 939

(1988) (citations omitted). Therefore, in the current case, the Governor’s *ultra vires* actions are not redeemed by their reoccurrence.

VI. THE COMPACT GAMES VIOLATE IGRA BECAUSE “SUCH GAMING” IS NOT PERMITTED IN OREGON.

The parties agree that to properly apply IGRA, this Court must first determine what class III games Oregon permits. *See* State Response at 17. The parties disagree, however, on how this Court should go about deciding which class III games Oregon permits. Defendants invite this Court to put blinders on and view the statutory charitable exception in isolation from Oregon’s constitutional prohibition regarding casinos. In essence, Defendants want this court to look at the exception but not the rule, which would thereby allow the exception to swallow the rule - the constitutional prohibition of casinos and casino gaming. This court should decline the invitation to view Oregon law so narrowly. Indeed, the U.S. Supreme Court would not allow such an approach. *See California v. Cabazon Band of Mission Indians*, 480 U.S. at 209 (“The short-hand test is whether the conduct at issue violates the States’ public policy.”) The conduct at issue here is casino gaming, and it clearly violates Oregon’s public policy against casinos as reflected in the Constitution.

Incredibly, state Defendants urge this Court to look only at laws which “permit” games and to ignore laws which “prohibit” games. *See* State Response at 18-19. However, to determine what is permitted, this Court must look at Oregon’s entire body of law—including prohibitions—regarding casino gambling. Surely Defendants would agree that gaming activities that are “prohibited” are by definition not “permitted” and that such information is vital for this Court to gain an accurate understanding of Oregon gaming law.

Ironically, State Defendants accuse Plaintiffs of adopting a narrow approach to the determination of what gaming is permissible in Oregon. State Defendants write, “Contrary to Plaintiffs’ argument, the ‘short-hand test’ referred to by the Cabazon Court is *not* to simply determine whether the intent of a single statute is ‘to prohibit certain conduct,’ and if so, to conclude that the conduct at issue ‘violated the state’s public policy.’ . . . while Plaintiffs argue that Oregon has a general public policy against gambling, Plaintiffs ignore the entire body of Oregon gambling law.” State Response at 16. First, Plaintiffs have never argued that Oregon has a general public policy against gambling.¹⁰ We only argue that Oregon has a public policy against the type of class III gaming involved in this case—casino gambling. Second, Plaintiffs do not ask this Court to look at the Oregon Constitution in isolation of Oregon statutory law. Rather, Plaintiffs urge this Court to consider the corpus of Oregon gaming law and, specifically, Oregon’s law regarding *casino* gambling.

In determining whether tribal casinos are permissible in Oregon, California v. Cabazon Band of Mission Indians, 480 U.S. 202, and Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d

¹⁰ Plaintiffs recognize that Oregon permits and regulates certain class III gaming in non-casinos, such as video lottery games, video poker, and pari-mutuel wagering.

1250 (9th Cir. 1994), *cert. denied*, 1521 U.S. 1118 (1997), offer roadmaps for this Court to follow.

In Cabazon, California sought to impose a statute which regulated bingo, a class II game, upon an Indian tribe. In determining whether the regulatory statute could be imposed upon the tribe, the Supreme Court explained that there was:

a distinction between state “criminal/prohibitory” laws and state “civil/regulatory” laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280’s grant of criminal jurisdiction, but if the state laws generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The short-hand test is whether the conduct at issue violates the State’s public policy.

Id. at 209. The Supreme Court concluded that California “regulates rather than prohibits gambling in general and bingo in particular.” Id. at 212. Because California only regulated bingo, but did not prohibit it, the regulation could not be applied to the tribe.¹¹ Id.

In Cabazon, the U.S. Supreme Court first examined California gaming law with a wide focus, then zoomed in to examine the state laws regarding the particular game of bingo. Thus, the Court had a two-part inquiry: 1) Does California regulate or prohibit gaming in general; and 2) Does California regulate or prohibit bingo in particular. Applying Cabazon to the present case, this Court should conclude that Oregon regulates gaming in general, but prohibits casinos in particular. Pursuant to the rule stated in Cabazon, Oregon’s prohibition on casinos is applicable to the Tribes.

¹¹ State Defendants allege, “If Plaintiffs were correct, the *Cabazon* Court would have concluded that the bingo statute was prohibitory, and thus enforceable on Indian land, since it was a penal statute intended to prohibit certain conduct.” State Response at 16. However, Plaintiffs do not espouse a test which differs from Cabazon’s. Plaintiffs agree with and urge this Court to follow the test used in Cabazon, which would result in the conclusion that Oregon’s prohibition of casinos is applicable to the Tribes because its “intent . . . is generally to prohibit certain conduct.” Id. at 209.

Indeed, the Ninth Circuit also looks to particular games when determining whether those games are permitted under 2710(d)(1)(B) of IGRA. In Rumsey, the court stated, “IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.” Id. at 1258. State Defendants agree that the Ninth Circuit follows the “game specific” approach. State Summary Judgement Memo at 29 n.13.

Regarding class III games, Rumsey adopts a rule that is less stringent than the “criminal/regulatory” test espoused in Cabazon, which dealt with class II gaming. Rumsey, 64 F.3d at 1257. According to Rumsey, a state may refuse to negotiate over a class III activity if a state “does not allow” that activity; it is not required that the activity rise to the level of violating the state’s public policy. Id. at 1257, 1259. The court stated,

Congress envisioned different roles for Class II and Class III gaming. It intended that tribes have “maximum flexibility to utilize [Class II] games such as bingo and lotto for tribal economic development,” and indicated that Class II gaming would be conducted largely free of state regulatory laws. Congress was less ebullient about tribes’ use of Class III gaming, however, and indicated that Class III gaming would be more subject to state regulatory schemes.

Id. at 1259 (citations omitted). In the current case, both tests are satisfied to allow the state prohibition of casinos to apply to the Tribes. Not only does Oregon law not allow casinos, but casinos also violate Oregon’s public policy. Therefore, according to the rules adopted by both the U.S. Supreme Court and the Ninth Circuit, casinos are not “permitted” in Oregon for purposes of IGRA.

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A. THE CHARITABLE EXCEPTION CONTAINED IN ORS 167.118 DOES NOT AUTHORIZE THE TRIBES TO OPERATE A CASINO.

Defendants urge this Court to interpret ORS 167.118¹² in a manner that would allow tribal casinos. If this Court agrees with Defendants’ interpretation, then ORS 167.118 must be declared unconstitutional because it would directly conflict with Or. Const. Art. XV, § 4, ¶ 12, which states, “The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.” A very similar factual scenario occurred in Hotel Employees v. Davis, 981 P.2d 990 (Cal. 1999), where the voters of California had also amended their Constitution by adding section 19(e), which stated: “The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.” Cal. Const. Art. IV, § 19(4). Twelve years after the California Constitution was amended to prohibit casinos, California voters approved an initiative statute, Proposition 5, which purported to authorize various forms of gaming in tribal casinos. “[T]o authorize such gaming facilities, however, would be to authorize casinos of the type expressly prohibited by . . . section 19(e).” Hotel Employees, 981 F.2d at 994. Therefore, the California Supreme Court held, “Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the Constitution, and because in a conflict between statutory and constitutional law the Constitution

¹² ORS 167.118 allows charitable, fraternal, and religious organizations to conduct “Monte Carlo events” to raise money.

must prevail, we conclude Proposition 5's authorization of casino gambling is invalid and inoperative.”

Id. Therefore, regarding the case at hand, to interpret ORS 167.118 as authorizing the casino contemplated by the Compact, would be to authorize casinos of the type expressly prohibited by Or. Const. Art. XV, § 4, ¶ 12. Because in a conflict between a statute and constitutional law the Constitution must prevail, ORS 167.118 must be declared unconstitutional if it is interpreted as state Defendants suggest. For the same reason, if this Court concludes that ORS 190.110 provides express authorization for the Governor to enter into compacts allowing casinos, ORS 190.110 would also be unconstitutional.

The holding in Hotel Employees is very instructive because, like Oregon, California also had a statute which was at odds¹³ with a constitutional prohibition of casinos. State Defendants' only rebuttal to Hotel Employees is the unsubstantiated claim that it was wrongly decided. State Response at 23. State Defendants attempt to analogize the current case to ones where, in the absence of a constitutional prohibition, courts ruled that a charitable exception statute authorized tribal casinos. *See* State Response at 24. However, all of these cases—Northern Arapaho Tribe v. Wyoming, 389 F.3d 1308 (10th Cir. 2004); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 1990)¹⁴; Ysleta del Sur Pueblo v. Texas, 852 F.Supp. 587 (W.D. Tex. 1993); Dalton v. Pataki, 2005 N.Y.

¹³ On its face, ORS 167.118 does not conflict with the Constitution, but it does as interpreted by state Defendants.

¹⁴ In Rumsey, the Ninth Circuit discussed Mashantucket Pequot Tribe v. Connecticut in a footnote. The court stated that “Because Connecticut allowed charities to operate games of chance, it had to negotiate with the tribe over these games.” Id. 99 F.3d at 1259-60 n.5. However, in Mashantucket, Connecticut did not have a constitutional prohibition and public policy against casinos, which makes this case inapposite from the current case..

LEXIS 1059 (N.Y. May 3, 2005)—are completely inapt because they did not involve *constitutional* bans on casinos. Plaintiffs recognize that in the absence of a constitutional prohibition of casinos, a charitable exception would have the effect of allowing tribal casinos. However, if a state has a constitutional ban on casinos, as Oregon does, that constitutional provision trumps a conflicting statute. See Hotel Employees 981 P.2d 990. A state’s constitution sets the state’s public policy, which in turn is used to determine whether certain gaming is permissible under IGRA. See Cabazon, 480 U.S. at 209 (“*The short-hand test is whether the conduct at issue violates the State’s public policy.*”) (emphasis added by Ninth Circuit in Rumsey, 99 F.3d at 1257). This fundamental difference makes the cases relied upon by State Defendants inapposite to the case presently before this Court. In sum, a comprehensive review of Oregon law should lead this Court to the conclusion that the statutory charity exception does not eviscerate the constitutional provision and public policy that expressly prohibits casinos.

B. THE CONSTITUTION’S PROHIBITION OF CASINOS IS ALSO A PROHIBITION OF CASINO GAMBLING.

Plaintiffs recognize that some of the class III games the Tribes want to offer in their casino are permitted in Oregon as long as they are not played in a “casino.” A “casino” is defined by the Oregon Supreme Court to mean an establishment whose dominant use or dominant purpose, or both, is for gambling. Ecumenical Ministries v. State Lottery Comm’n, 318 Or 551, 562, 871 P.2d 106, 112 (1994). In Ecumenical Ministries, the court found that the presence of five video lottery games in one place does not violate the constitutional prohibition of casinos because it “does not, in all circumstances,

demonstrate that gambling is the dominant use or dominant purpose, or both, of the establishment.” Id. 871 P.2d at 113. However, “[i]t may be that some establishments in which video lottery game terminals are located *are* casinos . . . notwithstanding the limited number of terminals” Id. (emphasis added). The result of Ecumenical Ministries is that if an establishment’s dominant use or purpose is for gambling, then that establishment and its gambling activities are illegal. For example, video lottery games may be played in a restaurant as long as that restaurant’s dominant use and purpose is not for gambling. If, however, that restaurant was used primarily for gambling, then the “restaurant” would actually be a “casino” and those gambling activities would not be legal.

Ecumenical Ministries makes it clear that the Oregon Supreme Court distinguishes between games played in a casino from games played in a non-casino. See Id. at 112 (“the voters intended to distinguish between the authorized State Lottery and particular types of game procedures . . . on the one hand, and the general category of gambling establishments known as ‘casinos,’ on the other”). Therefore, in Oregon, certain class III games may be played in a non-casino - such as in Ecumenical Ministries- but the Oregon Constitution prohibits all games in a casino. The Oregon Supreme Court views these two types of games differently. “Non-casino class III games” are legal; “casino class III games” are prohibited. Regardless of whether Defendants agree with this distinction between “casino class III games” and “non-casino class III games,” that is the law in Oregon as a result of the constitutional prohibition of casinos and Ecumenical Ministries.

State Defendants argue the prohibition of casinos “does not prohibit any particular types of games, but only a certain kind of establishment. . . .” State Response at 20. However, by prohibiting casinos, the voters of Oregon were not simply outlawing a type of building or physical structure. This

narrow reading of the prohibition is unreasonable and is not supported by Ecumenical Ministries. Rather, the voters of Oregon were prohibiting the activity that takes place inside casinos—namely, casino gambling. Defendants’ interpretation—that the voters intended to prohibit casinos but not the gaming activities that occur inside casinos—is illogical and renders the constitutional prohibition meaningless. Indeed, one must look at the specific gaming activities taking place at an establishment to determine whether that establishment is in fact a casino. Therefore, for the constitutional prohibition to have any effect, the ban on casinos is also a ban on the specific games that make the place a casino.

State Defendants attempt to bolster their argument that the constitutional prohibition does not ban specific games by pointing to the fact that the prohibition does not expressly list the banned games. However, such specificity is unnecessary given that the provision prohibits casinos and casino gambling in its entirety. State Defendants seem to suggest that the provision should read, “The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon. Also, the Legislative Assembly shall prohibit video lottery games from being played in casinos. And the Legislative Assembly shall prohibit blackjack from being played in casinos. . . .” Clearly, this type of specificity would be ludicrous because, by prohibiting casinos, the voters intended that *all* games be prohibited from being played inside a casino. In fact, specifying particular games would actually undercut the complete prohibition and make it appear that the prohibition is actually a regulation and only applies to the listed games. By not listing any exceptions and not listing the particular games that are prohibited, the voters send a clear message that casinos are completely prohibited and, therefore, *all* games are prohibited from being played inside casinos.

State Defendants' argument was considered and rejected in Hotel Employees, where the Defendants argued that under IGRA states may not regulate except to prohibit specific games, and because the constitutional prohibition¹⁵ was not a prohibition on particular games, but on conducting them in a casino, IGRA preempts its application to tribal gaming. The California Supreme Court rejected this argument because it incorrectly characterized the prohibition as not banning specific games. The court stated, “[The prohibition] *does*, in substantial part, prohibit specific gambling activities, including slot machines, banked card games and other banking games, when conducted in a casino setting. Id. at 1008-1009. Likewise, in the present case, specific games are prohibited when played inside an establishment whose dominant use or purpose is for gambling. Because the Ninth Circuit looks to particular class III games when determining whether tribes may operate those games pursuant to IGRA, Oregon’s prohibition of these games applies to the Tribes.

Furthermore, this prohibition of casinos and casino gambling is not merely a regulation; it is a complete prohibition with no exceptions. State Defendants cite Willis v. Fordice, 850 F.Supp. 523, to support their assertion that Oregon’s constitutional prohibition of casinos is regulation and, therefore, cannot be applied to the Tribes. State Response at 25. In Willis, a Mississippi statute only allows casinos on cruise vessels that are in the waters “which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi,” or if the vessel is “on the Mississippi River or navigable waters within any county bordering on the Mississippi River. . . .” Id. at 531, n.9. The court in Willis concluded that Indian tribes were not bound by the requirement that casinos must be

¹⁵ The prohibition stated, “The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.”

located on navigable waters. Id. at 532. Willis is clearly different from the case as hand because Mississippi only regulated the *location* of casinos; it did not have a blanket prohibition of casinos. On the contrary, Oregon does not merely regulate the time, place, and manner of casinos; it strictly prohibits the operation of *any and all* casinos. Plaintiffs are not attempting to impose the gambling regulations set forth at ORS 167.108 *et seq.* (Gambling Offenses), but rather the blanket prohibition on *casinos* set forth in the Constitution. IGRA acts to strip away state regulation associated with permitted but regulated gaming activities, not to insulate Indian tribes from outright prohibitions in state law. *See Cabazon*, 480 U.S. at 208. Therefore, under the tests the U.S. Supreme Court and the Ninth Circuit established in Cabazon and Rumsey, respectively, Oregon's prohibition on casinos applies to Indian lands.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment and deny the state Defendants' and the Tribes' motions for summary judgment.

DATED this _____ day of September, 2005.

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