

STATEMENT OF THE CASE

1. NATURE OF ACTION; RELIEF SOUGHT

This case concerns the legality of the Three Rivers Casino in Florence, and it challenges the Governor for purporting to give Oregon's authorization for such a casino in the face of the clear constitutional prohibition against casinos in Article XV. This specific appeal is about joining correct parties to a Petition for Mandamus. While questions of proper parties are often considered of somewhat technical and perhaps limited import, the ability of these Plaintiffs to obtain any relief whatsoever hinges on the determination of proper parties. Properly viewed, the question is whether any citizen of Oregon can bring suit in mandamus against a government official when the official unlawfully contracts with an entity that holds sovereign immunity. Under the trial court's view of necessary parties in this case, no citizen would ever have the right to seek judicial review of a Governor's contract with an Indian Tribe that has sovereign immunity. Simply, this Court must state whether the government actor—in this case, the Governor—is the only actual, necessary *defendant* in mandamus actions involving a tribal contract, in this case a casino compact.

This is an appeal from a Lane County Circuit Court judgment dismissing Plaintiffs-Relators' petition for an alternative writ of mandamus. Plaintiffs-Relators respectfully request this Court reverse the dismissal and issue the alternative writ of mandamus to compel the Governor either to abide by both the constitutional limits to his executive powers and the explicit constitutional prohibition on casinos by withdrawing Oregon's approval of the Three Rivers Casino, or justify to the trial court on remand why he should not.

2. NATURE OF THE ORDER

The circuit court dismissed Plaintiffs-Relators' petition for an alternative writ of mandamus on the basis of its conclusion that "there is an alternative plain, speedy, and adequate remedy available to Plaintiffs-Relators and that the Confederated Tribes are a necessary party." *Order Granting Motion to Dismiss Writ of Mandamus*, January 23, 2004, at 4("Order"), ER-2.

3. STATUTORY BASES FOR APPELLATE JURISDICTION

Plaintiffs-Relators have a right to appeal the circuit court's judgment "refusing to allow a mandamus" pursuant to ORS 34.240. Appellate jurisdiction is proper based on ORS 19.270(1).

4. DATES OF JUDGMENT AND APPEAL

On February 10, 2004, the trial court entered the Judgment dismissing Plaintiffs-Relators' petition for an alternative writ of mandamus. Plaintiffs-Relators filed their Notice of Appeal on March 5, 2004. Because the trial court had held that Plaintiffs-Relators only proper remedy was a declaratory judgment action, on August 24, 2004, Plaintiffs-Relators filed a motion to hold this appeal in abeyance while they pursued such a declaratory action in circuit court, which action was then removed to the U.S. District Court for the District of Oregon. The federal district court granted Defendants' summary judgment and dismissed the declaratory judgment action on December 21, 2005, and Plaintiffs-Relators filed a motion to reactive this appeal on April 12, 2006. This appeal is timely filed.

5. QUESTIONS PRESENTED ON APPEAL

A. Does ORS 34.130(3) require the circuit court to issue an alternative writ of mandamus upon receiving Plaintiffs-Relators' petition?

B. Did the trial court err by ruling that a declaratory judgment action was a plain, speedy, and adequate remedy for Plaintiffs-Relators? If not, given that the United States District Court has now held that Plaintiffs have no plain, speedy, and adequate remedy at law, should the writ issue?

C. Did the trial court err by ruling that the general rule regarding parties contained in ORCP 29 trumped the specific rules contained in ORS 34.130?

D. Did the trial court err by applying the "necessary party" test contained in the declaratory judgment act (ORS 28.110) rather than the factors laid out in ORCP 29A?

6. CONCISE SUMMARY OF THE ARGUMENTS

A. ORS 34.130(3) makes clear that issuing an alternative writ of mandamus is not discretionary but occurs immediately upon receiving a petition for the writ. Furthermore, any motion to dismiss must be directed towards the writ after it has been issued, not the petition. The trial court erred as a matter of law by not immediately issuing the alternative writ of mandamus.

B. A declaratory judgment action could not possibly provide Plaintiffs-Relators with a plain, speedy, and adequate remedy because — as the United States District Court found — the Tribes would be a necessary party since they have interests which would be affected by a declaration that the Governor did not have authority to enter into the compact. Because the Tribes have sovereign immunity, any such declaratory judgement action would have to be dismissed, which is what ultimately occurred in federal court. The trial court erred as a matter

of law by ruling that a declaratory judgment action provided Plaintiffs-Relators with a plain, speedy, and adequate remedy. In any event, given the District Court's holding, it is now clear that Plaintiffs have no plain, speedy and adequate remedy at law.

C. Because the mandamus statute (ORS 34.105-34.240) provides detailed and comprehensive rules regarding parties in special mandamus actions, the conflicting general rule contained in ORCP 29 is inapplicable. Correcting this error will make clear that the only *Defendant* in this case is the Governor; the Tribes might or might not decide to intervene and become "adverse parties," but their participation, or not, will not prevent this mandamus case from going forward. Thus, the trial court's error was crucial. Furthermore, even if the mandamus statute and ORCP 29 did not conflict, the more specific provisions contained in the statute still take precedence over the related, more general ORCP 29. The trial court erred as a matter of law by ruling that the general rule contained in ORCP 29 trumped the specific rules regarding parties contained in the mandamus statute.

D. Assuming *arguendo* that ORCP 29 applies to mandamus actions in the same manner it applies to ordinary actions, the trial court still erred because it applied the "necessary party test" contained in the declaratory judgment action (ORS 28.110) rather than the factors which comprise the test found in ORCP 29A. The trial court err as a matter of law by using the wrong "necessary party" test. As with argument "C" above, correcting this error will make plain that the only proper Defendant in this case is the Governor.

7. CONCISE SUMMARY OF FACTS (AND PROCEDURAL HISTORY)

On January 8, 2003, then-Governor of Oregon John Kitzhaber signed a gaming compact with the Confederated Tribes of Coos, Umpqua, and Siuslaw Indians ("the Tribes") that

ostensibly allows the Tribes to establish and operate a casino just outside the city limits of Florence, Oregon. *See* Appendix 1–2. Plaintiffs-Relators, as concerned citizens of Florence who stood to be injured by the Tribes’ casino, formed the nonprofit organization, People Against a Casino Town (PACT), and challenged the Governor’s actions by filing a petition for a writ of mandamus with the Oregon Supreme Court on September 15, 2003. The petition alleged that, in signing the compact, the Governor:¹ 1) violated Article XV, section 4(12) of the Oregon Constitution, which provides that “[t]he Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon”; and 2) violated the separation of powers doctrine of the Oregon Constitution by acting outside his executive role and assuming a legislative role when he unilaterally bound the state of Oregon to the compact with no constitutionally delegated authority to do so. On November 28, 2003, the Oregon Supreme Court denied the petition without comment.

On December 10, 2003, Plaintiffs-Relators filed a second petition for an alternative writ of mandamus in Lane County Circuit Court—the subject of this appeal. On January 23, 2004, the circuit court dismissed the petition itself, not issuing even the alternative writ, finding that Plaintiffs-Relators had “an alternative plain, speedy, and adequate remedy” through a declaratory judgment action. *Order* at 4 ER-2. In addition, applying the necessary party rule contained in the declaratory judgment statute,² the circuit court further found that the Tribes were a necessary party and must be joined. *Id.*

¹ Governor Kulongoski was sworn in as governor on January 13, 2003, shortly after execution of the compact.

² ORS 28.110 provides in part that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

On March 9, 2004, after the circuit court's ruling, Plaintiffs-Relators re-filed their action as a declaratory judgment action and named the Tribes as a defendant. In their complaint, Plaintiffs-Relators sought a declaration that the Oregon Constitution prohibits the casino purportedly authorized by the compact, that the Governor had no authority to enter into the compact, and that the State's participation in the compact is unconstitutional. On June 7, 2004, state defendants removed the declaratory judgment action to federal district court. On December 21, 2005, the federal district court granted the state defendants' and Tribes' motions for summary judgment on the basis of its ruling that it lacked jurisdiction over the dispute, which it predicated on a conclusion that Plaintiffs-Relators lacked standing to bring the declaratory judgment action and alternatively, and on its finding that Plaintiffs-Relators' declaratory judgment claims should be dismissed due to the Tribes' sovereign immunity. *Dewberry v. Kulongoski*, 406 F Supp 2d 1136, 1157 (D Or 2005). Notwithstanding its determination on standing and that it lacked jurisdiction, the court went on to offer apparently advisory findings on the merits, that for a number of reasons the Governor had not violated the Oregon Constitution.

ASSIGNMENTS OF ERROR

I. FIRST ASSIGNMENT OF ERROR

The trial court erred by not issuing the alternative writ of mandamus upon receipt of Plaintiffs-Relators' petition for alternative writ of mandamus.

A. PRESERVATION OF ERROR

"Plaintiffs-Relators respectfully petition the Court . . . to issue its Alternative Writ to the Defendants[.]"

“[D]efendants move to dismiss plaintiffs’ petition for an alternative writ of mandamus[.]”

Defendants’ Motion to Dismiss at 1, ER-11

“Defendants-Adverse Parties’ Motion to Dismiss is granted.”

Order Granting Motion to Dismiss Writ of Mandamus at 4, ER-2

B. STANDARD OF REVIEW

In reviewing a judgment refusing to grant a writ of mandamus, the appellate court is “bound by the trial court’s factual findings if supported by the evidence in the record . . . and [it] review[s] for errors of law.” *Curry v. Thompson*, 156 Or App, 537, 541, 967 P2d 544 (1998), citing *Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d 272 (1973); *Haas v. Hathaway*, 144 Or App 478, 480, 928 P2d 331 (1996). Plaintiffs-Relators’ first assignment of error does not involve factual findings; therefore, this Court should review for errors of law and need not give any deference to the trial court’s legal conclusions.

C. ARGUMENT: ISSUANCE OF AN ALTERNATIVE WRIT IS NONDISCRETIONARY

The trial court appeared to be unsure from the beginning as to the proper procedure to be followed in mandamus proceedings. For example, in trying to determine whether it should issue the writ, during oral argument the court asked for counsels’ “thoughts procedurally on how [the court] should proceed today.” TR at 2, ER-3. In addition, although the court recognized that the mandamus statute “requires the Court to issue a writ,” it never did so. *Id.* Moreover, the trial court treated the oral argument as “the return of the writ” even though the writ had never been issued. *Id.* The trial court ultimately dismissed Plaintiffs-Relators’ petition without ever issuing the writ as required by law.

The mandamus statute clearly lays out the procedure for issuing alternative writs of mandamus and such issuance occurs upon receipt of the petition. *See* ORS 34.130; *See also* 2 OREGON CIVIL PLEADING AND PRACTICE § 34.12A (Oregon CLE 1994) (“In circuit court . . . an alternative writ issues automatically once the petition has been filed.”). ORS 34.130 states that after the relator files the petition for a writ of mandamus with the court and serves a copy on the defendant and adverse parties “the writ *shall* be allowed by the court or judge thereof *on the petition.*” ORS 34.130(3)(emphasis added). At this point in the mandamus proceeding, the petition passes out of the case and is superseded by the alternative writ, which is the first “pleading” in the case and acts as the complaint. *See Venn v. Reid*, 207 Or 617, 298 P2d 990 (1956) (“It is well recognized in [Oregon] that a petition for mandamus is no part of the pleadings. An alternative writ of mandamus is tantamount to a complaint in other actions.”).

The mandamus statute further states that alternative writs shall command that the defendant perform the act required or return the writ at a specified time and place and show cause “why the defendant has not done so.” ORS 34.150(2)(b). On the return date of the alternative writ, the defendant “may show cause by motion to dismiss or answer to the writ, in the same manner as an answer to a complaint in an action.” ORS 34.170. If the defendant’s answer to the writ contains new issues, the plaintiff may reply to those new issues. ORS 34.180. The pleadings mentioned in ORS 34.170 and 34.180—the alternative writ, motion to dismiss the alternative writ, answer to the writ, and plaintiff’s reply—are the only pleadings allowed in a mandamus proceeding and “none other are allowed.” ORS 34.190. Therefore, the trial court erred in treating defendants’ motion as a motion to dismiss the *petition*, since such a pleading is not allowed or even recognized in a mandamus proceeding. “A motion to dismiss an alternative writ is similar in form and purpose to a motion under ORCP 21 A. . . .Because the

alternative writ is the ‘complaint’ in mandamus, a defendant’s answer should be *directed to the writ, not to the petition.*” 2 OREGON CIVIL PLEADING AND PRACTICE §§ 34.14 & 34.15(emphasis added).

The trial court cited *Dinsdale v. Young*, 72 Or App 778, 697 P.2d 200 (1985), for the proposition that “it is appropriate for the Court to rule first on the Motion to Dismiss before ruling on the Petition for Alternative Writ of Mandamus.” Order at 2, ER-1. In point of fact, however, *Dinsdale* does not stand for that proposition, nor does it involve the issue for which it was cited.³ Procedurally, the court should have issued the alternative writ of mandamus first, as required by ORS 34.130(3), and then considered the defendant’s motion as a motion to dismiss the *alternative writ* on the return date.

This error is not merely technical, but affects the procedural rights of the parties in any mandamus proceeding, since the issuance and return of the writ impacts whether adverse parties may intervene in the mandamus proceeding as a matter or right. Before the return date of the alternative writ, any adverse party may intervene in the proceeding *as a matter of right*. ORS 34.130(4)(a). After the return date, adverse parties may intervene *only at the discretion of the court*. *Id.* Because the trial court never issued the writ, it was consequently never returned, which means the time period for adverse parties to intervene as of right has never closed. The trial court failed to understand the specific statutorily imposed procedure unique to mandamus proceedings and this misunderstanding had significant impacts. The Plaintiffs-Relators have a

³ The companion opinion to *Dinsdale v. Young*, 72 Or App 778 (in this footnote, *Dinsdale I*), was *Dinsdale v. Young*, 72 Or App 642, 697 P.2d 196 (1985) (in this footnote, *Dinsdale II*). That case noted that the action had been dismissed, without any mention of whether the writ had been issued. *Dinsdale II*, 72 Or App at 644 n1 (“Petitioner’s separate appeal from the dismissal of the mandamus action is the subject of our opinion in [*Dinsdale I*].” The petition discussed in *Dinsdale II*, was not a mandamus petition, but rather a petition for review of an agency rule (then-OAR 690-10-050(2)(e)).

statutory right to issuance of the alternative writ of mandamus for which they have petitioned and to its return, which closes the time for adverse parties to intervene as of right.

Plaintiffs-Relators request this Court order the issuance of the writ and remand the writ for hearing. If the Tribes wish to intervene, and thereby waive their sovereign immunity, they may petition the trial court for permissive intervention on remand.

II. SECOND ASSIGNMENT OF ERROR

The trial court erred by ruling that Plaintiffs-Relators had an alternative plain, speedy, and adequate remedy through a declaratory judgment action.

A. PRESERVATION OF ERROR

“[D]efendants move to dismiss plaintiffs’ petition for an alternative writ of mandamus[.]”

Defendants’ Motion to Dismiss at 1, ER-11

“Plaintiffs cannot obtain a plain, speedy and adequate remedy in the ordinary course of the law[.]”

Plaintiffs-Relator’s Memorandum in Opposition at 4, ER-5

“[T]here is an alternative plain, speedy, and adequate remedy available to Plaintiffs-Relators. . . Defendants-Adverse Parties’ Motion to Dismiss is granted.”

Order Granting Motion to Dismiss Writ of Mandamus at 4, ER-2

B. STANDARD OF REVIEW

In reviewing a judgment refusing to grant a writ of mandamus, the appellate court is “bound by the trial court’s factual findings if supported by the evidence in the record . . . and [it] review[s] for errors of law.” *Curry v. Thompson*, 156 Or App, 537, 541, 967 P2d 544 (1998), citing *Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d 272 (1973); *Haas v. Hathaway*, 144

Or App 478, 480, 928 P2d 331 (1996). Plaintiffs-Relators' second assignment of error does not involve factual findings; therefore, this Court should review for errors of law and need not give any deference to the trial court's legal conclusions.

C. ARGUMENT: PLAINTIFFS HAD, AND HAVE, NO PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW

The trial court dismissed Plaintiffs-Relators' petition for an alternative writ of mandamus because it found that they had a plain, speedy and adequate remedy through a declaratory judgment action. Order at 4, ER-2. This finding also was in error because the court had already found that the Tribes were a necessary party to a declaratory judgment action and that they enjoined sovereign immunity, which would, of course, require dismissal of the case. *Id.* at 3, ER-2.

Plaintiffs-Relators argued that this jurisdictional obstacle clearly made a declaratory judgment action inadequate as a remedy at law. Specifically, Plaintiffs-Relators argued that, if the trial court dismissed the mandamus action and required them to refile a declaratory judgment action, it "will have forced Plaintiffs into a procedural cul-de-sac." *Plaintiffs' Memorandum in Opposition of Defendant's Motion to Dismiss* at 5, ER-6. Plaintiffs were correct: indeed, that scenario is exactly what occurred.

After the trial court's dismissal of Plaintiffs-Relators' mandamus action, Plaintiffs-Relators refiled their action as a declaratory judgment action and named the Tribes as defendants as instructed by the trial court. The Tribes immediately moved to dismiss the complaint on grounds of sovereign immunity and the State Defendants removed the matter to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. On December 21, 2005, the federal district court dismissed Plaintiffs-Relators' declaratory judgment action ruling that the Tribes were an

indispensable party to the action and that they had not waived their sovereign immunity. *Dewberry v. Kulongoski*, 406 F Supp 2d at 1157.

The trial court’s erroneous ruling that a declaratory judgment action provided Plaintiffs-Relators with a “plain, speedy, and adequate remedy” forced the Plaintiffs-Relators to endure complicated, costly, and lengthy litigation which was ultimately—and foreseeably—unsuccessful. As the futile declaratory judgment litigation that Plaintiff-Relators pursued showed, that legal remedy clearly was not plain, speedy, or adequate, and the trial court erred as a matter of law in ruling to the contrary.

III. THIRD ASSIGNMENT OF ERROR

The trial court erred by ruling that ORCP 29 applies to mandamus actions.

A. PRESERVATION OF ERROR

“[D]efendants move to dismiss plaintiffs’ petition for an alternative writ of mandamus[.]”

Defendants’ Motion to Dismiss at 1, ER-11

“Plaintiffs seek relief against the Governor, not the tribes . . . [and n]othing in mandamus requires joinder of affected third parties[.]”

Plaintiffs-Relator’s Memorandum in Opposition at 6, ER-6

“[T]he Confederated Tribes are a necessary party Defendants-Adverse Parties’ Motion to Dismiss is granted.”

Order Granting Motion to Dismiss Writ of Mandamus at 4, ER-2

B. STANDARD OF REVIEW

In reviewing a judgment refusing to grant a writ of mandamus, the appellate court is “bound by the trial court’s factual findings if supported by the evidence in the record . . . and [it]

review[s] for errors of law.” *Curry v. Thompson*, 156 Or App, 537, 541, 967 P2d 544 (1998), citing *Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d 272 (1973), *Haas v. Hathaway*, 144 Or App 478, 480, 928 P2d 331 (1996). Plaintiffs-Relators’ third assignment of error does not involve factual findings; therefore, this Court should review for errors of law and need not give any deference to the trial court’s legal conclusions.

C. ARGUMENT: ORCP 29 DOES NOT APPLY TO MANDAMUS ACTIONS AND THE GOVERNOR IS THE ONLY DEFENDANT IN THIS CASE

The trial court failed to apply the specific mandamus procedure set forth in the statute and also failed to apprehend the proper application of the Rules of Civil Procedure to the mandamus procedure—specifically as it relates to third parties. Mandamus is a unique, extraordinary remedial process “the detailed requirements of which differ from the pleading and practice prescribed for ordinary actions.” *Buell v. County Court of Jefferson Co.*, 175 Or 402, 152 P2d 578 (1944). Because mandamus is a special proceeding with a specific and comprehensive set of rules set out in ORS 34.105– 34.240, some of the general rules of procedure that apply to ordinary actions do not apply, or are applied differently, in mandamus actions. The general rule regarding necessary and indispensable parties, ORCP 29, is one of those rules that is usually inapplicable in a mandamus action.

The trial court’s ruling is not completely clear on this point, but it appears to hold that ORCP 29 applies to Plaintiffs-Relators’ *mandamus* action and that the Tribes would be a necessary party to that action. The trial court states, “For the reasons set forth by Defendants-Adverse Parties in oral argument, I conclude that the Oregon Rules of Civil Procedure do apply to mandamus actions. The Court concludes that pursuant to both ORS 28.110 and ORCP 29A the Confederated Tribes are a necessary party.” Order at 2, ER-1. This ruling is confusing

because the trial court appears to use the “necessary party” tests in ORS 28.110 and ORCP 29 interchangeably; the test for whether a party is necessary to a declaratory judgment action, however, is different from the general test contained in ORCP 29A. Essentially, then, there are two errors embedded in this finding; that is, the trial court erred by supplanting ORCP 29A with the necessary party test contained in ORS 28.110 (applicable to declaratory judgment actions), and then erred again when it misapplied the latter standard to Plaintiffs-Relators’ mandamus action. Thus, the trial court erred as a matter of law when it applied ORCP 29A to this mandamus action and further erred when it applied that rule in a manner that required Plaintiffs-Relators to join all parties who are necessary under ORS 28.110 to the mandamus action.

1. MANDAMUS IS A SPECIAL ACTION WHICH SERVES A UNIQUE, EXTRAORDINARY FUNCTION AND IS TREATED DIFFERENTLY THAN AN ORDINARY ACTION.

The special remedy of mandamus originated as a common-law writ used by medieval English kings to command an official to perform his official duties. *See* 2 OREGON CIVIL PLEADING AND PRACTICE, §34.1. This important tool to compel the performance of official duties was made a special statutory remedy by the Oregon Territorial Legislature in 1851. *Id.* In 1862, the Oregon Legislature enacted the civil code of procedure and carefully preserved the distinctions between actions at law, suits in equity, and special proceedings. *In re Vinton*, 65 Or 422, 426 132 P. 1165 (1913). Because the “detailed requirements of [special proceedings] differ from the pleading and practice prescribed for ordinary actions,” the code of 1862 provided for such special actions in a separate chapter. Oregon Laws 1862, chapter 7, page 146 et seq; *Buell*, 152 P2d at 581; *Venn v. Reid*, 207 Or at 631. Mandamus actions were among the proceedings originally classified as “special” and this distinction continues today. *See* ORS § 34.105—34.240, (Special Actions, Writ of Mandamus). Although mandamus is termed a legal remedy,

it “is in fact a special proceeding, the requirements of which differ from the pleading and practice prescribed for ordinary actions.” *Venn*, 298 P2d at 997 (citing *Buell*, 175 Or 402). *See also Mattila v. Mason*, 287 Or 235, 598 P2d 675,678 (1979); 2 OREGON CIVIL PLEADING AND PRACTICE, §34.17 (“Mandamus is a ‘special proceeding’ neither legal nor equitable”).

Writs of mandamus are governed by a detailed and comprehensive set of rules set out at ORS 34.105– 34.240 and the core statutory language remains virtually unchanged from its first codification in 1862:

A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; . . . The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.

ORS § 34.110.

The primary purpose or function of a writ of mandamus is to enforce an established right, and to enforce a corresponding imperative duty created or imposed by law.” *Venn*, 298 P2d at 994 (citing 55 C.J.S. Mandamus, § 51, at p. 85.) The only duty that can be imposed by the law is on government officials. Mandamus is thus a unique, extraordinary remedy where citizens can require government officials to comply with the duties of their offices under the law. As this Court stated in *Parks v. Board of County Commissioners of Tillamook County*, 11 Or App 177, 501 P2d 85, 98 (1972), “when a public official has acted in a way that violates some statute, rule, or ordinance, he has an implied legal duty to correct his error, and mandamus is an appropriate remedy to compel him to do so.”

Because mandamus is a special action, certain general rules that apply to ordinary actions do not apply to mandamus actions. For example, in determining that the ordinary statute of limitation does not apply to mandamus, the Oregon Supreme Court stated:

Some of the provisions relating to actions at law, it is true, are specifically made applicable to special proceedings Yet nowhere in the code, so far as we have been able to discover, is there any provision placing mandamus and other special proceedings within the operation of the statute of limitation, applicable to ordinary actions. . . . In a number of jurisdictions, however, it has been held that statutes of limitation do apply to mandamus. Such decisions are generally based on codes of civil procedure which abolish the distinction between actions at law and suits in equity and classify all civil proceedings as “actions”, or codes which especially make statutes of limitation applicable to special proceedings.

Buell, 152 P2d at 581. This decision makes clear that rules relating to ordinary actions must specifically be made applicable to mandamus proceedings by the Legislature or they will be deemed inapplicable. This proposition is supported by ORCP 1A, which states in part, “These rules govern procedure and practice in all circuit courts of this state. . . for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin *except where a different procedure is specified by statute or rule.*” (emphasis added).

The legal requirement of standing is another example of a general rule that does not have the same applicability to mandamus actions. It is well-settled in Oregon that, in a mandamus action,

[w]hen the question is one of public right and the object of the writ is to enforce the performance of a public duty, the relator need not show that he has any legal or special interest in the result, where he shows he is a citizen of the county or district and is interested in the execution of the laws.

Putnam v. Norblad, 134 Or 433, 436-438, 293 P. 940 (1930). This special standing rule allows citizens to proceed in mandamus to enforce the performance of official duties without satisfying the jurisdictional hurdle of standing which applies to ordinary actions. *See also Hunt v. Ketell*, 253 P2d 372, 275 (Utah 1953) (the purpose of mandamus is to compel legal duties, and rules applicable to replevin actions do not apply).

This is of special note in this case, given the Federal District Court’s finding that Plaintiffs did not have standing to bring a declaratory action. *Dewberry v. Kulongoski*, 406 F.

Supp 2d at 1144–45. The application of certain general rules of procedure are clearly inapplicable to mandamus actions because their use would alter and frustrate the fundamental purpose of mandamus, which is to provide a unique method of compelling officials to perform their legal duties.

2. THE MANDAMUS STATUTE PROVIDES A DETAILED AND COMPREHENSIVE SET OF RULES REGARDING PARTIES AND THOSE RULES TAKE PRECEDENCE OVER THE CONFLICTING GENERAL “NECESSARY PARTY” RULE CONTAINED IN ORCP 29.

The rules of procedure and practice applicable to mandamus actions are specifically provided for by statute at ORS 34.105— 34.240. A careful review of this statute shows that its detailed and comprehensive provisions establish specific rules for every aspect of the mandamus proceeding: everything from defining “defendant,” to explaining what constitutes sufficient service, to stating what pleadings are allowed in a mandamus action. Because the mandamus statute contains a comprehensive set of rules, ordinary rules of procedure do not apply unless the statute specifically provides otherwise, which it does in several places. For example, ORS 34.130(2) states that “[s]ervice of the petition on the defendant and adverse parties is sufficient if it complies with ORCP 9B.”⁴ Likewise, ORS 34.140 (1) provides that “[service of the writ] is sufficient if it complies with ORCP 9.” If the Legislature intended for all of the ORCPs to apply to mandamus, the foregoing provisions would be superfluous and without meaning. However, the Legislature made it clear that this was *not* its intention when it enacted ORCP 1A, which states that the ORCPs apply “except where a different procedure is specified by statute or rule.”

Clearly, the Legislature intended that statutes could specify “different procedure[s]” for

⁴ ORCP 9 is the general rule regarding service of pleadings and other papers.

certain actions and that the general rules contained in the Oregon Rules of Civil Procedure would not apply to those actions. ORCP 1A. The mandamus statute is certainly one of those instances because it provides a complete and exclusive set of rules that specifically apply to mandamus actions. The fact that the statute invokes the general rules in certain areas is additional evidence that such rules do not otherwise apply.

In addition to the examples cited above, several provisions of the mandamus statute specifically state that the procedure and practice shall be “in the same manner as in an action” or words to similar effect. *See* ORS 34.170, 34.190, 34.210, 34.240. The references to “an action” refer to an ordinary action and these are plainly the only areas where the Legislature specifically intended for the general rules to apply to a mandamus proceeding. *See State v. Pelham*, 136 Or App 336, 342, 901 P2d 972 (1995)(“[P]etition for a writ of mandamus . . . is an altogether different remedy than an appeal, and one that is not controlled by ORS chapter 138 or the Oregon Rules of Civil Procedure.”); *see also* 2 OREGON CIVIL PLEADING AND PRACTICE 34.17 (“The Oregon Rules of Civil Procedure apply only to supplement the procedural rules of the mandamus statutes”), *citing* ORCP 1A. The mandamus provisions pertaining to parties make no reference to the general rules, and therefore, ORCP 29 does not and should not apply to or supplement mandamus procedure. Rather, the mandamus statutes provide specific, detailed, and complete guidance regarding the appropriate parties to a mandamus action. The relevant provisions include the following:

“Adverse party” means a beneficially interested party to a judicial or administrative proceeding from which a mandamus proceeding arises, whose interests are adverse to the relator. * * * * *

“Defendant” means the court, corporation, boards, officer or person against whom relief is sought in a mandamus proceeding. * * * * *

“Relator” means the beneficially interested party on whose relation a mandamus

proceeding is brought.

ORS 34.105.

These provisions make clear that there are only three categories of parties to a mandamus action: 1) the party who brings the action (“relator”); 2) the governmental official who has a legal duty to perform an act (“defendant”); and 3) parties whose interests are adverse to the relator (“adverse parties”). The mandamus statute also makes clear that a writ of mandamus can *only* be issued to a defendant “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station.” ORS 34.110. Simply put, if a party does not have a legal duty to perform an official duty, the court has no authority to issue a writ to that party and they are not a proper “defendant.” This is illustrated in the case of *McLeod v. Scott*, 21 Or 94, 26 P 1061 (1891), where an applicant was wrongfully denied a liquor license and brought a mandamus action. The applicant addressed the writ to the county court which issued the licenses and to the clerk of that court. In dismissing the writ against the clerk, the Oregon Supreme Court noted:

The reason for sending the writ to the clerk does not appear to us, because it does not seem that he refused to perform any duty which the law specially enjoined. If he should refuse to issue the license after the same is authorized by the court, then, no doubt, compliance with such order might be compelled by means of this writ; but until such refusal or failure it is not perceived that he is in default. As to the county clerk, therefore, no sufficient cause is shown for the issuance of the writ to him.

Id., 21 Or at 102. As such, in mandamus cases, the only proper defendants are those parties who have an official, legal duty to perform an act.

However, in an effort to allow the rights and interests of other parties to be considered in deciding mandamus cases, the Legislature provided the following limited intervention provision:

[A]t any time in the course of a mandamus action until the return date of the alternative writ, any adverse party may intervene in the mandamus proceeding as matter of right. At any time subsequent to the return date of the alternative writ, the court in its discretion may allow an adverse party to intervene.

ORS 34.130(4)(a). Applying these provisions to the mandamus case at hand, the Tribes cannot be joined as a “defendant” because they have no duty compelled upon them by law. Rather, the proper status for the Tribes would theoretically be as an adverse party, voluntarily intervened, since they have interests adverse to Plaintiffs-Relators. As such they have a procedural right to intervene should they choose to do so at the proper time. However, if they did they would not be “defendants”; and, if not, their decision not to participate in a mandamus proceeding does not provide grounds for its dismissal. This is the crucial difference between this mandamus action and the declaratory relief case dismissed at summary judgment by the US District Court.

Because the mandamus statute “occupies the field” regarding parties, the general party provision contained in ORCP 29 simply does not apply. It is well-settled that when a general statute and a specific statute both purport to control an area of law, the specific statute takes precedence over the general statute related to the same subject. *Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 309, 865 P2d 356 (1994). Here, the mandamus provisions relating to parties conflict with ORCP 29 because, under the mandamus statute, a case may only proceed against a party who has a legal duty resulting from an office, trust or station. Indeed, a writ of mandamus cannot issue *against* a party who does not have a legal duty to carry out a certain act. ORS 34.110; *McLeod*, 21 Or at 102. Therefore, pursuant to the mandamus statute, the Tribes *cannot be made a defendant*. In contract, under ORCP 29B,⁵ a court has the authority

⁵ ORCP 29A provides factors to be considered in determining whether a party is “necessary” to an action and should be joined. When a “necessary” party cannot be joined, ORCP 29B provides factors to be considered in determining whether the case should be dismissed, the absent party thus being considered “indispensable.”

to declare the Tribes to be an indispensable defendant, which—given their sovereign immunity—would result in the dismissal of the case, as happened in the federal case. Therefore, if ORCP 29B were to apply, a court could determine that the Tribes *must be made a defendant*. Because the mandamus statute (specifically ORS 34.105, 34.110, and 34.130(4)(a)) and ORCP 29 address the same area of law and would lead to inconsistent results with respect to proper parties in a mandamus proceeding, the specific mandamus statute must take precedence over the general rule of procedure.

However, the trial court did just the opposite, and applied the general rule in ORCP 29A rather than the specific provisions regarding parties in the mandamus statute.⁶ A proper application of the mandamus statute results in the determination that only the state, specifically the Governor, is a “defendant” who had an official duty imposed by law to abide by the Oregon Constitution. The Tribes cannot be made a defendant in this case — no court has the authority to issue them a writ compelling the performance of an official duty imposed by law because they owe no official duty. As parties whose interests are adverse to Plaintiffs-Relators, the Tribes might qualify as adverse parties who may opt to intervene but, in any event, whose decision to participate in the action or not does not relieve the Governor of his duty to uphold and abide by the Constitution and laws of Oregon.

This view—that the specific rules in the mandamus statute trump the general rules on “parties” — is common and, in this case carries a special irony. *See Tosterud v. Druian*, 325 Or

⁶ Although the trial court stated that the Tribes were necessary “pursuant to both ORS 28.110 and ORCP 29A,” the court only considered the language of ORS 28.110 and did not apply the factors of ORCP 29A to the case. Rather, the court improperly assumed the Tribes were necessary under ORCP 29A simply because they would be necessary in a declaratory judgment action. Even apart from that flaw, the court dismissed the action without ever considering whether the Tribes were indispensable under ORCP 29B.

315, 937 P2d 1015 (1997) (Kulongoski, J., for the court). In that case, a taxpayer filed a petition in Tax Court for an alternative writ of mandamus against the Director of Assessment and Taxation for Multnomah County alleging that the Director failed to place several nonexempt hospitals on the tax rolls. *After* the return date of the alternative writ, the affected hospitals moved to intervene as adverse parties pursuant to ORS 34.130(4). Because the hospitals moved to intervene after the return date, the court could use its discretion in determining whether to allow the intervention and ultimately denied the motion to intervene, issuing a peremptory writ of mandamus to the Director. The hospitals appealed the court's order denying their motion to intervene, arguing that intervention of parties in a mandamus proceeding is governed by both ORS 34.130(4)⁷ and Tax Court Rule (TCR) 33C⁸ and that both laws allowed intervention. The relator argued that TCR 33C trumped the mandamus statute, that the show cause hearing constituted a trial, and that the hospitals failed to timely intervene because their motions were not filed before the show cause hearing.

In determining which provision controlled, the Oregon Supreme Court, with Justice Kulongoski writing for the majority, stated:

We need not decide whether the show cause hearing in this mandamus proceeding constituted a "trial" under TRC 33C because, even assuming that it did, ORS 34.130(4) still would govern this proceeding. The Tax Court is authorized only to promulgate rules that conform "as far as practical to the rules of equity practice and procedure." ORS 305.425(3). Here, relator's interpretation of TRC 33C does not conform with ORS 34.130(4) because, under that interpretation, the Tax Court lacked authority to allow the hospitals to intervene

⁷ ORS 34.130 (4) provides in part, "At any time subsequent to the return date of the alternative writ, the court in its discretion may allow an adverse party to intervene."

⁸ TCR 33C is identical to ORCP 33C and provides, "At any time before trial, any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

due to the untimeliness of the hospitals' motion to intervene. Under ORS 34.130(4), however, the motions to intervene were timely; therefore, the Tax Court had discretion to allow the hospitals to intervene. Relator has presented no explanation for why it would not be practicable in this instance for the rule-as it is interpreted by relator-to conform with ORS 305.425(3), nor are we aware of any. Relator's interpretation of TCR 33C is not well taken.

Even if the statute and the Tax Court's rule could be read not to conflict, a more specific provision takes precedence over a related, more general one. In this case, ORS 34.130(4) is more specific, because it governs intervention in *mandamus proceedings*, whereas TCR 33C governs intervention in any form of *trial*.

Tosterud, 325 Or at 320-21 (emphasis in original)(citations omitted).

Simply put, Justice Kulongoski for the Court reasoned that where a general rule conflicted with the mandamus statute, "ORS 34.130(4) still would govern this proceeding." *Id.* at 320. He further noted that, even if they did not conflict, the mandamus provision still would be given precedence because it is more specific than the general rule and governs "*mandamus proceedings*." *Id.* at n.9 (emphasis in original). In the current case against *Governor* Kulongoski the logic holds the same. The mandamus provisions regarding parties trump the conflicting ORCP 29 because they both address the issue of who are to be considered proper party defendants.⁹ Moreover, even if those two provisions are construed as not conflicting, the mandamus provisions still should be given precedence and ORCP 29 must conform to the mandamus provisions. This would result in the Plaintiffs-Relators proceeding against the Governor as the defendant and the Tribes intervening, if they wish, as an adverse party (but not a defendant) pursuant to ORS 34.130(4), since that is the specific mandamus provision that deals with third parties and their participation in mandamus actions.

⁹ In *State ex rel Lowell v. Eads*, 148 Or App 56, 939 P2d 74 (1997), this Court stated that ORCPs do apply to mandamus actions; that case, however, involved ORCP 70A— regarding judgments— which was consistent with the mandamus provision regarding appealing from judgments— ORS 34.240— and did not frustrate the purpose of the mandamus statute. ORCP 70 has since been repealed. Or Laws 2003, c. 576, § 580, eff. Jan. 1, 2004.

Significantly *Tosterud* went on to hold that the Tax Court did not abuse its discretion in denying the hospitals' motions to intervene. *Id.*, 325 Or at 321. Justice Kulongoski also noted that the hospitals' ultimate objection was that the mandamus proceeding allowed the relator a special vehicle to challenge an official action which would not otherwise be allowed in a regular proceeding. Specifically, the Court observed:

[The hospitals] assert that relator normally would *not* have standing to appeal to the department of Revenue the director's decision to leave the hospitals off the tax rolls. *See* ORS 305.275 (providing that only an aggrieved person whose property is affected by an act or omission of a county assessors may appeal to the Department of Revenue). Therefore, the hospitals do not think it fair that relator can avoid that asserted statutory bar to appeal by initiating this mandamus proceeding, which *does* allow for appeal by a taxpayer to the Department of Revenue.

Tosterud, 325 Or at 322 (italics in original). In response to this objection, Justice Kulongoski simply stated, "Whether or not those arguments are well taken, they fall within the province of the Legislature and not this court." *Id.*

The Court was correct to recognize that mandamus proceedings are intended to allow legal challenges that would be foreclosed by general rules of practice and procedure. Indeed, mandamus proceedings can allow otherwise non-justiciable challenges to official actions to proceed free from many of the jurisdictional requirements applicable to other civil actions. The application of certain general rules of procedure would alter and frustrate the basic statutory purpose for which the specific mandamus procedure was adopted by the Legislature. Specifically, the general rule regarding joinder of parties contained in ORCP 29 should not be applied to this mandamus proceeding because its application conflicts with the mandamus provisions regarding parties, and would strip Plaintiffs-Relators of the important remedy provided by the Legislature through the mandamus statute. Instead, the holding of *Tosterud*, set out so cleanly by Justice Kulongoski, should be applied cleanly in this mandamus against

Governor Kulongoski.

3. EVEN IF ORCP 29 DOES APPLY TO THIS ACTION, IT SHOULD BE APPLIED IN A MANNER THAT DOES NOT FRUSTRATE THE UNIQUE AND SPECIAL PURPOSE OF MANDAMUS.

Assuming *arguendo* that ORCP 29 does apply to mandamus actions, the specific mandamus statute still must take precedence over the general rule and the rule must be applied in a manner that conforms to the statute. *Tosterud*, 325 Or at 321; *Smith v. Multnomah County*, 318 Or 302. As such, in a mandamus proceeding, a third person is necessary and indispensable as a party only if it has a legal duty to perform the act sought by the relator and completion of the act is dependant upon the will of this third party. This was the rule followed in a case directly on point, *State ex rel Clark v. Johnson*, 904 P2d 11 (N.M. 1995),¹⁰ where plaintiffs sought a writ of mandamus to preclude the New Mexico Governor from implementing gaming compacts he had executed with several Indian tribes within the state. The Governor argued that the tribes with whom he entered the compacts were indispensable parties to the proceeding; however, the New Mexico Supreme Court disagreed, relying on the following reasoning:

In a mandamus case, a party is indispensable if the “performance of an act [to be compelled by the writ of mandamus is] dependent on the will of a third party, not before the court. That is not the case here. Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials. 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. at 19. After determining that the tribes were therefore not indispensable to the mandamus

¹⁰ This case was raised and argued before the trial court, but the trial court’s order makes no reference to it.

case, the court held that “the Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts.” *Id.* at 25.¹¹

¹¹ Should this Court decide to examine the merits of the mandamus action, Plaintiffs-Relators would urge this Court join the other states who have been presented with the issue of the governor’s authority to enter into gaming compacts without—California, New York, New Mexico, Arizona, Kansas, Wisconsin, Michigan, Rhode Island—rule that the Governor’s actions were ultra vires and mandate him to withdraw both his signature and the State’s authority for such a compact. These numerous other courts that have held that governors lack the authority to unilaterally sign gaming compacts on behalf of their state. *See Pueblo of Santa Ana, v. Kelly*, 104 F3d 1546, 1557, 1559 (10th Cir 1997) (state law determines the procedure by which a state may validly enter into a gaming compact, and because the New Mexico governor lacked authority to bind the state to a gaming compact, the compact was never validly entered into), *discussing State ex rel Clark v. Johnson*, 904 P.2d at 23 (“While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 n.17 (1996) (the duty to negotiate imposed by federal law “is not of the sort likely to be preformed by an individual state executive officer or even a group of officers”), *citing State ex rel. Stephan v. Finney*, 836 P.2d at 1178–79 (Kansas Attorney General brought a *mandamus* action challenging the Kansas governor’s authority to enter into a binding tribal-state compact based on statutes authorizing the Governor to transact business on behalf of the state; held that such statutes only allowed the Governor to engage in day-to-day transactions under previously established law or public policy, not bind the state to a compact); *Kickapoo Tribe of Indians v. Babbitt*, 827 F.Supp. 37, 46 (D.D.C. 1993), *rev’d on other grds.*, 43 F3d 1491 (D.C.Cir.1995) (preventing entry of Kansas compact in *Federal Register*, “because only the governor—a person without authority—signed the compact, the State did not enter into the compact. Thus, the compact does not comply with [federal law] and is invalid”); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280, 282 (R.I.1995) (“the Governor as Chief Executive lacked both constitutional as well as legislative authority to bind the State of Rhode Island by executing the Tribal-State Compact”); *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E. 2d at 1060-1061 (“we have no difficulty determining that the Governor’s actions were policy-making, and thus legislative in character. . . . *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*”) (emphasis added). *See also McCartney v. Attorney Gen.*, 587 N.W.2d 824 (Mich Ct App 1998) (“the Governor has the ability to enter into compacts with Indian tribes, subject of the approval of the Legislature”).

Compare also Oregon’s prohibition on casinos, Or Const Art XV § 4(12) (“The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.”) with the result in *Hotel Employees v. Davis*, 981 P.2d 990 (Cal. 1990), (voters of California amended their constitution, adding “The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey,”

A few years later, the same court ruled that certain Indian tribes *were* necessary and indispensable parties in another mandamus action against the Governor challenging the legality of legislation authorizing Indian gaming. In *State ex rel. Coll v. Johnson*, 990 P2d 1277 (N.M. 1999), the New Mexico Supreme Court did not apply the indispensable rule for mandamus actions set forth in *Clark*. Rather, it applied the general rule regarding indispensable parties—which is similar to ORCP 29B—and found that the tribes were indispensable. However, the court was careful to point out that it was not retreating from its earlier pronouncement in *Clark* in which it had “articulate[d] an indispensability rule based on the special character of mandamus.” *Coll*, 990 P2d at 1281. Rather, the court concluded that the “mandamus indispensability rule” should not apply because the case *was not properly a mandamus case at all*. The court stated:

Here, citing [*Clark*], Plaintiffs have styled their amended complaint a petition for writ of mandamus and they advance several arguments regarding the grave threats HB 399 allegedly poses to this state’s definition of itself as sovereign. Upon close examination, however, none of Plaintiffs’ arguments provide a proper basis for this Court to order mandamus. [*Clark*] is therefore inapposite. . . . In contrast to the facts in [*Clark*], the Legislature has now passed legislation authorizing gaming compacts with the Tribes and Pueblos.

Coll, 990 P2d at 1281(citations omitted). Essentially, the plaintiffs in *Coll* attempted to take advantage of the special indispensability test for mandamus actions by improperly referring to their challenge as a mandamus case. However, despite the clever use of the mandamus label given by the plaintiffs, the court refused to apply the “mandamus indispensability test” articulated in *Clark* because it was not really a mandamus case. Rather than challenging the Governor’s unauthorized acts— as in *Clark* and as in the present case— the plaintiffs in *Coll*

Cal. Const. Art. IV, § 19(4)), thereby preventing statute authorizing casinos from taking effect).

were actually challenging the legality of the legislation.

Here, as in *Clark*, the plaintiffs are bringing a true mandamus case by challenging the Governor's unconstitutional acts, and an indispensability test similar to that espoused in *Clark* should therefore be used. Under such a test, the Tribes are not indispensable to this mandamus action because Plaintiffs-Relators only seek performance of a duty imposed by law upon the Governor. Plaintiffs-Relators do not seek the performance of any duty imposed upon the Tribes; indeed, no such duty exists. Furthermore, resolution of this case only involves issues of law regarding the Governor's authority under state law to agree on behalf of the State to the establishment of a casino, in apparent contradiction of the Oregon Constitution. Of course, as adverse parties, the Tribes may choose to intervene in this mandamus action to argue in favor of their interests, but they are not defendants, they are not necessary and this action should not be dismissed by virtue of their participation or lack of it. *See also Caldwell v. Nolan*, 522 N.E.2d 175 (Ill Ct App 1988) ("Only those parties who have not performed a duty required by law are necessary parties to a *mandamus* proceeding.")

The use of the *Clark* test is supported by an early Oregon mandamus case which, fittingly, deals with illegal gambling. In *State ex rel Livingston v. Williams*, 45 Or 314, 77 P. 965 (1904), relators brought a mandamus proceeding against several Portland officials, including the mayor, the chief of police, the municipal judge, and members of the executive board of the city. The alternative writ alleged that, although defendants knew that illegal gambling was occurring at several gambling houses, they had entered into an agreement amongst themselves to not perform their respective duties to enforce a municipal ordinance and a state statute which prohibited gambling. The defendants admitted through demurrers that such a conspiracy existed and that they had sought to raise revenue by a "method tantamount to licensing public

gambling.” *Id.*, 45 Or at 333. The court stated, “the scheme alleged to have been adopted was unlawful, and, the agreement entered into [was] void. . . .Mandamus will lie to compel [the chief of police] diligently to prosecute any and all persons . . . guilty of a violation of the provisions of the statue prohibiting gambling.” *Id.*

With particular relevance to the case at bar, the court held that although relators were entitled to have a writ of mandamus issued, it was not necessary to join the mayor and executive board as defendants. The Chief of Police was the target. Although the others were parties to the illegal scheme, they were not “indispensable” to the relief that relator sought. *Id.* The court explained:

[A] writ of mandamus will not lie to compel the execution of vain and useless things, *no necessity existed* for joining a cause of special proceeding against the mayor or the executive board, the discharge of whose duties, if it be assumed they are imperative, *were not an indispensable or successive step* in the procedure to suppress the evil of which relators complain. . . .A mandatory writ, properly framed, alleging the required facts, and addressed to all the officers of the city of Portland who *are indispensable in taking the necessary successive steps required* successfully to prosecute persons for violating the law prohibiting gambling, will, in our opinion tend to suppress the evil.

Id. at 332-333, 334 (emphasis added). Although the mayor and executive board members were part of the illegal agreement to allow prohibited gambling — parties to the contract, as it were — the court found that they were not necessary and indispensable to its issuance of a writ compelling the police chief to carry out the duty to arrest and prosecute persons violating the gambling prohibitions. Because the mayor and executive board members were improperly named in the alternative writ, the court sustained the demurrers but instructed the relator to file an amended petition only against the chief of police. *Id.* at 335. *State ex rel Livingston* therefore stands for the proposition that a writ of mandamus will not lie against a person unless he has a clear legal duty to act, and that the only necessary and indispensable parties to a writ are those

official persons whose legal duty is a necessary and indispensable step in achieving the requested remedy. Applying this rationale to this case, the Tribes are not necessary and indispensable because they have no legal duty to act and their participation is not necessary to ensure that the Governor abides by the Constitution. Indeed, a writ against the Tribes would be a “vain and useless thing” in this instance.

Because ORCP 29B allows courts to consider equitable factors and use their discretion when determining whether a party is indispensable, the rule does not preclude and is not at all inconsistent with the use of a “mandamus indispensability test” similar to the one used in *Clark*. Applying ORCP 29 to a mandamus proceeding, it not only would be appropriate for a court to consider the special purpose of a mandamus action, but such consideration is required. As Professor Frank R. Lacy has stated:

[Rule 29] provides no rules for decision at all but rather a technique for the exercise of discretion. . . . [P]re-Rule cases tended to deal with this problem mechanically; if an absentee had a possible interest, any interest, in the subject matter he had to be joined. The Rule requires a more thoughtful approach. The court must realistically assess the magnitude and likelihood of any prejudice to the absentee or to the present parties if the absentee is left out, and weigh this against the cost of bringing the absentee in, all in the light of the facts of the particular case.

Lacy, *Indispensable Parties Under ORCP 29*, 63 Or L. Rev. 317, 320, 321 (1983).

A test similar to the one used in *Clark* and *Livingston* would preserve the basic statutory purpose for which the mandamus procedure was originally adopted by the Legislature, i.e., to “compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station.” ORS 34.110. Applying ORCP 29 to a mandamus proceeding, were it to apply at all, without considering the special character and purpose of mandamus, would allow the general rule to take away what the specific statute explicitly authorizes: an important tool that ordinary citizens can use to require their Governor to abide by the explicit commands of the

Oregon Constitution.

IV. FOURTH ASSIGNMENT OF ERROR

The trial court erred by applying the necessary party test contained in ORS 28.110 rather than the factors laid out in ORCP 29A.

A. PRESERVATION OF ERROR

“[D]efendants move to dismiss plaintiffs’ petition for an alternative writ of mandamus[.]”

Defendants’ Motion to Dismiss at 1, ER-11

“Plaintiffs seek relief against the Governor, not the tribes . . . [and n]othing in mandamus requires joinder of affected third parties[.]”

Plaintiffs-Relator’s Memorandum in Opposition at 6, ER-6

“[T]he Confederated Tribes are a necessary party Defendants-Adverse Parties’ Motion to Dismiss is granted.”

Order Granting Motion to Dismiss Writ of Mandamus at 4, ER-2

B. STANDARD OF REVIEW

In reviewing a judgment refusing to grant a writ of mandamus, the appellate court is “bound by the trial court’s factual findings if supported by the evidence in the record . . . and [it] review[s] for errors of law.” *Curry v. Thompson*, 156 Or App, 537, 541, 967 P2d 544 (1998), citing *Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d 272 (1973), *Haas v. Hathaway*, 144 Or App 478, 480, 928 P2d 331 (1996). Plaintiffs-Relators’ fourth assignment of error does not involve factual findings; therefore, this Court should review for errors of law and need not give any deference to the trial court’s legal conclusions.

C. ARGUMENT: THE TRIBES ARE NOT NECESSARY UNDER ORCP 29

Assuming *arguendo* that ORCP 29 applies to mandamus actions in the same manner it applies to ordinary actions—without any consideration given to the special character of mandamus—the trial court nonetheless *still* erred in finding that the Tribes are necessary under ORCP 29A. First, the trial court erred because it did not use the test provided in that rule. Rather, it applied the necessary test contained in ORS 28.110, which pertains to declaratory judgment actions, and that analysis is different from ORCP 29A. *Wright v. Hazen Investments, Inc.*, 293 Or 259, 648 P2d 360 (1982).

Specifically, in performing its analysis, the trial court stated:

The Court concludes that pursuant to both ORS 28.110 and ORCP 29A the Confederated Tribes are a necessary party. The Confederated Tribes (sic) interests would most certainly be affected if the compact were found to be invalid. *See O.S.E.A. v. Holman*, 4 Or App 320, 323, 478 P2d 657 (1971). ORCP 29A requires that the Confederated Tribes must be joined in this action.

Order at 3, ER-2. In its cursory analysis, the trial court only considered whether the Tribes had “any interest which would be affected” pursuant to ORS 28.110 and, finding that they did, assumed they were also necessary under ORCP 29A. That rule, however, lays out a much different test and lists specific inquiries to be considered, such as: 1) is complete relief possible among the existing parties, and 2) does the absent party have an interest which either stands to be impaired by disposition of the action in the party’s absence or will subject an existing party to the risk of inconsistent rulings. ORCP 29A. The trial court made no reference to the factors laid out in ORCP 29A, nor did it make any attempt to apply such factors to the facts of this case. Furthermore, the case cited by the trial court—*O.S.E.A.*—only pertains to ORS 28.110 and does not even refer to ORCP 29. The trial court erred because it did not properly apply the ORCP 29 analysis before determining that the Tribes were necessary and that the case should be dismissed

in their absence. *See Steers v. Rescue 3, Inc.*, 146 Or App 746, 749-751, 934 P2d 532 (1997).

Secondly, even under the factors contained in ORCP 29, the Tribes are not necessary and indispensable. With respect to the first condition in ORCP 29A, complete relief is available in this action without the Tribes. That is, Plaintiffs-Relators seek a writ requiring the Governor to abide by the provisions in the Oregon Constitution that establish separation of powers and prohibit casinos in the State. This duty to abide by the Oregon Constitution is directed solely at the official state defendants. Plaintiffs-Relators seek no relief whatsoever against the Tribes and this Court may provide the requested mandamus remedy without the Tribes' participation.

As to the second factor in ORCP 29A, Plaintiffs-Relators recognize that the Tribes have an interest in the compact and that this interest would be affected by the relief Plaintiffs-Relators seek. Nevertheless, the Tribes are not "necessary" because an existing party, the State, can adequately represent the Tribes' interest. "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 existing parties to the suit." *Washington v. Daley*, 173 F3d 1158, 1167 (9th Cir 1999).¹² *See also Southwest Center for Biological Diversity v. Babbitt*, 150 F3d 1152,

¹² Because ORCP 29 is virtually identical to Federal Rule of Civil Procedure 19, cases construing FRCP 19 are relevant to the Court's analysis. *See Steers*, 146 Or App at 749. Yet, nothing short of a United States Supreme Court or Oregon Supreme Court opinion is binding on this Court, even in interpretations of federal law. *Joyce v. Multnomah County*, 114 Or App 244, 248, 835 P2d 127 (1992) ("the Ninth Circuit's interpretations of federal law are not binding on us")

Notwithstanding this similarity between the state and federal rules in this regard, the federal district court's finding that the Tribes were necessary and indispensable parties to the declaratory judgment action would not give rise to issue or claim preclusion in this mandamus action even if this Court were to conclude that ORCP 29 should apply in this action in the same manner as in a declaratory judgment proceeding. This follows because the federal district court determined that it lacked jurisdiction to entertain the declaratory judgment action in the first instance on the basis of its finding that Plaintiffs-Relators lacked standing to pursue their claims in such an action and, once it made this finding, its authority to address any other issue was at

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 F3d 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 Policy Act. 150 F3d 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.

an end. The District Court's opinion is thus largely *dicta*. Indeed, this Court has held that, once a court determines that it lacks jurisdiction, it cannot proceed to decide any other issue and "[a]ny decision that it made on another issue would not be essential to its judgment and thus would not give rise to issue preclusion." *Black v. Arizala*, 182 Or App 16, 30 n6, 48 P3d 843 (2002). The U.S. Supreme Court recently reaffirmed that the same principle has long been established in the federal courts as well, ruling that once a court finds that a plaintiff lacks standing, the only proper procedure for it to follow is to dismiss the action forthwith. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998) (citing to and quoting its well-known 19th Century precedent, *Ex Parte McCardle*, 7 Wall. 506, 514, 19 L Ed 264 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). For the same reasons, the district court's findings on the merits of the constitutionality of the Governor's actions challenged in this proceeding do not give rise to issue preclusion either.

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." *Id.* at 1153.

Similarly, in the case at bar, the interests of the State and of the Tribes are fully aligned. Indeed, a comparison of the Tribes' and the State's summary judgment briefs filed in the federal declaratory judgment action revealed virtually identical arguments in support of their motions. Moreover, although the State does not have a trust responsibility to the Tribes, neither did the cities who were parties in *Southwest Center for Biological Diversity* whom the Ninth Circuit stated could adequately represent an Indian community. Here, the State obviously shares the Tribes' strong interest in defeating Plaintiffs-Relators' claims and ensuring that the Governor's authority to enter into the compact is upheld. For all of these reasons, the State would be an effective and amply adequate representative of the Tribes' interests in this litigation.

Additionally, proceeding without joining the Tribes would not subject the existing parties to a substantial risk of incurring inconsistent obligations. *See* ORCP 29A(2)(b). The Ninth Circuit stated in *Southwest Center for Biological Diversity* that "this provision of Rule 19 is implicated only when a non-party's *absence* produces a substantial risk of inconsistent obligations." *Id.* at 1155 (emphasis in original.) By way of explanation, the district court in that case had ruled that the Indian community was necessary because, if Southwest prevailed, "litigation to determine the Community's rights under the contested 1988 settlement agreement would probably follow." *Id.* The Ninth Circuit stated that the district court's conclusion was "mistaken" because:

[t]he "inconsistent obligations" the district court concluded could result if Southwest's suit were allowed to proceed arise not from the Community's

absence from the suit, but rather from the ambiguity in the 1988 settlement agreement. Litigation to resolve the ambiguity in the settlement agreement following the issuance of an injunction would be just as likely if the Community were a party to Southwest's suit.

Id. Similarly, in the instant case, any subsequent litigation concerning the Tribes' rights under the compact would be just as likely even if the Tribes were a party to this litigation. Therefore, under the Ninth Circuit's test, the Tribes are not necessary because their *absence* does not produce a substantial risk of inconsistent obligations.

Assuming *arguendo* this Court determines that the Tribes are "necessary" and cannot be joined, then it must be determined whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party thus being regarded as indispensable." ORCP 29B. The inquiry is a practical one and fact-specific, and is designed to avoid the harsh results that might otherwise arise from a rigid application. *Makah Indian Tribe v. Verity*, 910 F2d 555, 558 (9th Cir 1990). The moving party has the burden of persuasion in arguing for dismissal. *Id.*

There are four criteria that must be applied to determine whether the Tribes are indispensable within the meaning of ORCP 29B: 1) whether potential prejudice exists for the absent nonparty; 2) whether relief can be shaped to avoid (or substantially lessen) the prejudice; 3) whether the judgment rendered in the party's absence will be adequate; and 4) whether there is an alternate forum. *See Chehalis v. Lujan*, 928 F2d 1496, 1499 (9th Cir 1991).

Regarding the first two of these factors, as discussed above, Plaintiffs-Relators recognize that the Tribes have an interest in the Governor's duty to abide by the constitutional prohibition of casinos. Again, however, the Tribes are not prejudiced by their absence from this action because the State can adequately represent their interests for the reasons enumerated above.

The third criterion informing the indispensability inquiry weighs heavily in favor of

Plaintiffs-Relators as mandamus clearly provides for an adequate remedy without the Tribes. In this action, Plaintiffs-Relators seek to compel the Governor to uphold his legal duty to abide by the laws and Constitution of this state; Plaintiffs-Relators do not seek the performance of any duty by the Tribes. *See Clark*, 904 P2d at 19 (“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”). Therefore, in the case *sub judice*, the requested mandamus relief only involves the Governor’s duty to abide by the Oregon Constitution and the Tribes are not “indispensable” to the performance of that duty.

Finally, the fourth factor also weighs heavily in favor of Plaintiffs-Relators because there is no readily available alternate forum for this action. As this Court is aware, Plaintiffs-Relators originally sought a writ of mandamus from the Oregon Supreme Court, which was denied. Subsequently, Plaintiffs-Relators filed a second petition for writ of mandamus in Lane County Circuit Court, which is the subject of this appeal. Following and in reliance on the trial court’s finding that Plaintiffs-Relators could obtain adequate relief in the form of a declaratory judgment action and that the Tribes were necessary to that action, Plaintiffs-Relators filed a third action—a declaratory judgment action—which was ultimately removed to federal court and dismissed. If this Court were to now uphold the trial court’s dismissal of the present action, based on a finding that Plaintiffs-Relators had an adequate alternate declaratory judgment remedy that subsequent events have proven to be without merit, Plaintiffs-Relators would have the “doors of justice” shut in their faces for a fourth time and they would have no other forum to pursue this action. Such a result would not only be unjust, it would also be unjustifiable given the vitally important questions that Plaintiffs-Relators have brought forward for resolution regarding the Governor’s duty to uphold the Oregon Constitution. As in *Clark*, this case presents issues of

“constitutional and fundamental importance.” *Id.* at 18. “In equity and good conscience,” then, the Court should enable this mandamus action to proceed.

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). In that case, plaintiffs opposed to casino gambling challenged the New York 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 1154-55. Similar to *Saratoga*, the present case presents fundamental constitutional issues that need to be addressed by this Court. Dismissal based upon a finding that the Tribes are “indispensable” would allow the Governor to act in a manner that expressly violates the State Constitution and then prevent those actions from undergoing mandamus review. This result would undermine the citizens’ confidence in their ability to go to court for mandamus relief when they believe that their elected representatives have exceeded the bounds of their enumerated authority and violated a clear constitutional mandate.

Other courts have also held that an Indian tribe’s absence due to sovereign immunity should not result in the dismissal of gaming cases. In *Artichoke Joe’s v. Norton*, 216 F.Supp. 2d

1084 (E D Cal 2002) *aff'd* 353 F3d 712 (9th Cir 2003), card clubs and charities that were prohibited under state law from offering casino-style gaming brought an action against state and federal defendants challenging the validity of compacts between California and Indian tribes. In its amicus curiae brief, Indian tribes argued the complaint must be dismissed because the plaintiffs failed to join California's 61 Indian tribes. The court ruled that the tribes were not necessary because the other defendants could adequately represent the tribes's interests and the tribes were unable to carry their burden of demonstrating that an actual conflict in the pending litigation would prevent adequate representation. *Id.* at 1119.

Similarly, in *Sac and Fox Nation of Missouri v. Norton*, 240 F3d 1250 (10th Cir 2001), the State of Kansas and three Indian tribes filed suit against the Secretary of the Interior to prevent her from taking a tract of land into trust on behalf of the Wyandotte Tribe for gaming purposes. The federal district court dismissed the action for failure to join the Wyandotte Tribe as a necessary and indispensable party, however, the Tenth Circuit reversed and concluded that the Tribe was not a necessary party. The Tenth Circuit reached an identical result in *Kansas v. United States*, 249 F3d 1213 (10th Cir 2001). In that case, the State of Kansas brought an action against the National Indian Gaming Commission and numerous other government officials seeking declaratory and injunctive relief from the Commission's decision that a tract of land in Kansas under lease to the Miami Tribe of Oklahoma constituted "Indian lands." The Miami Tribe intervened as defendant for purposes of challenging the subject matter jurisdiction, however, the court held that the Tribe was not a necessary and indispensable party. *See also Dairyland Greyhound Park v. McCallum*, 655 N.W.2d 474 (Wis Ct App 2002) ("There can be little question that the citizens of Wisconsin have a considerable interest in ensuring that state officials act in accordance with the . . . state constitution. . . . We conclude that, in equity and

good conscience, this action, like those we have cited in California and New York, must be allowed to proceed in the absence of the tribes, notwithstanding the potential prejudice to their interests.”)

In sum, as Plaintiffs-Relators explained above, the issue of whether to dismiss an action for nonjoinder of a necessary party is a practical and fact-specific inquiry, and is designed to avoid the harsh results of dismissal if at all possible. The specific facts of this case weigh heavily in favor of allowing it to proceed even without the presence of the Tribes as parties. First, the Tribes are not necessary to this litigation because the State of Oregon can adequately represent the Tribes’ interests. Furthermore, in equity and good conscience, the action should not be dismissed because Plaintiffs-Relators have already twice been denied access to the state courts in their efforts to compel the Governor to uphold the Oregon Constitution. For Plaintiffs-Relators to be subjected to the same fate now would therefore be patently unfair and allow such issues to continue to escape review, and would further risk completely immunizing the Governor from any effective check on his ability to act outside the most unmistakably clear limits on his authority laid out in the State’s fundamental legal charter.

CONCLUSION

Upon being sworn into office, the Governor took an oath to uphold and defend the Oregon Constitution, which prohibits casinos and separates the powers of state government. However, far from complying with this oath, the Governor has acted directly contrary to the Constitution by unilaterally creating new law which allows for the operation of a casino. A writ of mandamus is an appropriate vehicle, and, indeed, the only vehicle, for Plaintiffs-Relators to challenge this unconstitutional action and compel the Governor to perform his official duties to

abide by the Constitution of Oregon. It would be an incorrect interpretation of law, and unwise, to apply the general rules of civil procedure to the specific mandamus statute in a manner that nullifies the mandamus statute and gives the Governor unbridled and unchecked authority when contracting with entities outside the jurisdiction of this Court. Accordingly, Plaintiffs-Relators respectfully request that this Court reverse the trial court, issue the alternative writ of mandamus, and compel the Governor to abide by the Oregon Constitution, or show cause why he should not.

RESPECTFULLY SUBMITTED this _____ day of June, 2006.

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