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10 **IN THE UNITED STATES DISTRICT COURT**

11 **FOR THE DISTRICT OF OREGON**

12 **SUSAN DEWBERRY; CAROLE**  
13 **HOLCOMBE; SUZANNE DANIELSON;**  
14 **ARNOLD BUCHMAN; DON HEATH; and**  
15 **DALE SCHAFFNER,**

16 **Plaintiffs,**

17 **v.**

18 **THE HONORABLE THEODORE R.**  
19 **KULONGOSKI, Governor of the State of**  
20 **Oregon; OTHER EXECUTIVE OFFICERS**  
21 **of the State of Oregon; and the**  
22 **CONFEDERATED TRIBES OF COOS,**  
23 **UMPQUA, and SUISLAW INDIANS,**

24 **Defendant.**

Case No. 04-6175-AA

**PLAINTIFFS' REPLY ON MOTION TO**  
**CERTIFY QUESTIONS TO THE**  
**OREGON SUPREME COURT**

25 **INTRODUCTION**

26 Both Defendants attempt to use inapposite standards and misdirection to convince this Court not to certify proper questions of state law to the Oregon Supreme Court that may prove determinative of this case. By way of inapposite standards, both Defendants attempt to advance the "discretionary factors" of Western Helicopter Services, Inc. v. Rogerson Aircraft Corp., 311 Or. 361, 811 P.2d 627 (1991), as criteria for this Court to consider, when the Western Helicopter

1 discretionary criteria are specifically factors that only the Oregon Supreme Court takes into  
2 account. 311 Or at 366 (“Assuming, however, that the five statutory prerequisites to accepting  
3 certification are present, the question then becomes: Should *this court*, in the exercise of *its*  
4 *discretion*, accept certification? We turn to an examination of the factors that *we* will consider in  
5 making that decision.”) (emphasis added). Additionally in this vein, by pondering  
6 unmaterialized procedural hurdles, the Defendants attempt to substitute a more rigorous standard  
7 of the “determinative of the cause” criterion than the standard adopted in Western Helicopter.

8 By way of misdirection, both Defendants continue to characterize this case in a light  
9 alien to the claims advanced herein by creatively applying the Western Helicopter standard of  
10 whether the case presents questions of Oregon law, and whether those questions are  
11 determinative of the case. Indeed, this suit is at best only tangentially about Indian Tribes and  
12 casinos. The gravamen of this case lies with the Oregon Governor’s usurpation of authority to  
13 bind the State to a public policy course not set by the Legislature. As a suit so intricately  
14 involved with questions of state law, the logically proper forum for this case is in fact an Oregon  
15 court. That the Defendants have managed to get this case in a federal court is a testament to their  
16 desire to avoid a resolution of the Governor authority issue, not an indication of the underlying  
17 legal nature of this dispute. Also, the Defendants’ insistence that these questions in essence  
18 “must” be determinative of the case runs directly afoul of Western Helicopter’s interpretation of  
19 that very criterion.

## 20 21 **REPLY**

### 22 **I. DEFENDANTS’ ARGUMENTS CONCERNING THE WESTERN HELICOPTER** 23 **DISCRETIONARY STANDARDS ARE INAPPOSITE TO *THIS COURT*’S EVALUATION OF** 24 **WHETHER TO CERTIFY THE QUESTIONS TO THE OREGON SUPREME COURT.**

25 Defendants arguments against certification, aside from being legally flawed, are being  
26 made to the wrong tribunal. Under Western Helicopter and ORS 28.200, the criteria to be  
considered by the certifying court are as follows: “(1) The certification must come from a

1 designated court; (2) the question must be one of law; (3) the applicable law must be Oregon  
2 law; (4) the question must be one that may be determinative of the cause; and (5) it must appear  
3 to the certifying court that there is no controlling precedent in the decisions of [the Oregon  
4 Supreme Court] or the Oregon Court of Appeals.” Western Helicopter Services, 311 Or at 364  
5 (formatting added). Defendants have made only the barest of challenges to Plaintiffs meeting  
6 these five criteria.<sup>1</sup>

7 However, by hewing to the Western Helicopter discretionary factor analysis instead, both  
8 Defendants prod this Court to abandon notions of comity and respect for jurisdictional  
9 independence, and instead ask this Court to supplant the Oregon Supreme Court’s ability to  
10 make its own discretionary decisions with this Court’s opinion of what the Oregon Supreme  
11 Court *might* do. To bolster this already shaky request, Defendants also overemphasize certain  
12 aspects of the Oregon Supreme Court’s discretionary analysis, such as weighing the procedural  
13 posture of this case far in excess of what the Western Helicopter standard would suggest.

14 Indeed, under Western Helicopter, the Oregon Supreme Court stated, “We would *prefer*  
15 that a case certified by a federal district court have progressed at least to the entry of a pretrial  
16 order before certification is sought (*although a motion to dismiss*, for example, might precede  
17 entry of a pretrial order and *could raise issues appropriate for certification*).” Western  
18 Helicopter, 311 Or at 370 (emphasis added). The Oregon Supreme Court’s preference for a fully  
19 developed case is just that, a preference, and as a discretionary factor not even part of *this*  
20 *Court’s* analysis to certify.

21 Given the claims raised by Plaintiffs in this case, there is little wonder that the  
22 Defendants would seek to avoid the straightforward five-step test and focus on the factors that  
23 the Oregon Supreme Court alone decides. Asking a federal District Court to rule in the first  
24 instance on fundamental separation of powers question under the Oregon Constitution is a novel  
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26 <sup>1</sup> Defendant Tribes claim that Plaintiffs fail all five of the statutory criteria, but neglect to mention how this Court is not a “designated court” under ORS 28.200.

1 approach to notions of comity. Defendant Kulongoski claims that there are no issues to certify,  
2 as nothing is in contention yet. Plaintiffs wish this were true. The Oregon Supreme Court  
3 discretionary factor of “contested issues,” in addition to being another factor solely examined by  
4 the Oregon Supreme Court, simply means that “the questions certified appear truly to be  
5 contested . . . [as] there is no suggestion in [ORS 28.200] that the legislative authorization  
6 extends to the issuance of advisory opinions.” Western Helicopter, 311 Or at 370. If Defendant  
7 Kulongoski wishes to concede that he did not have authority to sign the compact, certification  
8 would be inappropriate. Otherwise, the question of the Oregon Governor’s authority is one for  
9 the Oregon Supreme Court to answer.

10 The Defendants attempt to introduce the Western Helicopter discretionary factors into  
11 this Court’s certification analysis is inconsistent with ORS 28.200 as well as Western Helicopter  
12 itself, and Defendants’ invitation to this Court to assume the role of the Oregon Supreme Court  
13 should be firmly rejected.

14  
15 **II. PLAINTIFFS’ CERTIFIED QUESTIONS MEET THE WESTERN HELICOPTER STATUTORY**  
16 **CERTIFICATION STANDARDS OF “QUESTIONS OF OREGON LAW” AND “POTENTIALLY**  
17 **DETERMINATIVE OF THE CASE”**

18 Apart from the Tribes’ bare, unsupported contention that “Plaintiffs have failed to satisfy  
19 *all five mandatory criteria* for certification,” *see* Tribes’ Response at 7, the only statutory  
20 criteria with which Defendants actually take issue are the requirements that the questions be ones  
21 of Oregon law and that they be determinative of the case. In alleging that the questions posed by  
22 Plaintiffs fail to meet these criteria, Defendants mistake both the standards surrounding these  
23 criteria, and the bases of Plaintiffs’ claims.

24 The Tribes deny that the questions posed by Plaintiffs are ones of Oregon law, but do so  
25 on the basis of the procedural vehicle by which they are tied to the suit. While this Court has  
26 found that IGRA may be pivotal to the Tribes’ involvement in the case, it is only pivotal as to  
“jurisdiction over the Tribes[,]” *Opinion and Order* at 12, not to the resolution of the underlying

1 claims. The Plaintiffs' claims ask two things: (1) can the Oregon Governor unilaterally sign a  
2 binding agreement without statutory or constitutional authority; and (2) can the Governor permit  
3 a form of gambling in Oregon that the Oregon Constitution expressly forbids? Irrespective of  
4 the parties involved and the procedural vehicles by which they are party to this suit, those basic  
5 questions are questions of Oregon law. Those are the questions Plaintiffs seek this Court to  
6 certify to the Oregon Supreme Court.

7 Defendant Kulongoski readily admits that at least so formulated, the Plaintiffs' first  
8 question is one of Oregon law. *See Defendant Kulongoski's Response* at 9 (“at fist blush,  
9 plaintiffs' first question appears to state questions of Oregon constitutional and/or statutory  
10 law.”). Defendant Kulongoski dismisses this with speculation as to arguments purportedly to be  
11 raised in summary judgment, without any clue as to what those summary judgment arguments  
12 might entail. Aside from this mystical deflection, one assumes that Defendant Kulongoski,  
13 unlike the Tribes, admits that Plaintiffs' first question is one of Oregon law.

14 Defendant Kulongoski objects to Plaintiffs' second question as a “mixed question of  
15 federal and state law” on the grounds that IGRA authorizes class III gaming. But IGRA only  
16 authorizes class III gaming in states that permits such gaming activity. 25 U.S.C. § 2710(d)(1).  
17 The question to the Oregon Supreme Court is whether Oregon is a state that permits such  
18 “gaming activity.” This is not a question that in any way involves an interpretation of, or inquiry  
19 into, IGRA. Once the Oregon Supreme Court determines whether Oregon allows casinos under  
20 the Oregon Constitution, then it is for this Court to decide if IGRA permits the type of compact  
21 purportedly entered into by Defendant Kulongoski's predecessor.

22 The final objection by Defendants is that these questions will not be determinative of the  
23 case largely, as Defendants see it, because other issues *might also* be determinative of the case.  
24 This is not the analysis required under Western Helicopter. The “determinative of the case”  
25 criterion is as follows:

26 The fourth requirement, *viz.*, that the question must be one whose answer *may*  
determine the cause, means that our decision must, in one or more of the forms it

1 could take, *have the potential to determine at least one claim in the case*. That  
2 interpretation accords both with the text of the statute and with the majority rule.

3  
4 FN4. *We reject the extraordinary interpretation* given to a similar  
5 statute by the Wyoming Supreme Court, which requires that its  
6 decision—whatever its form—must be determinative of the claim,  
7 *i.e.*, that all that can be left for the certifying court to do is to enter  
8 judgment pursuant to the answer to the certified question. Matter of  
9 Certified Question From U.S. Dist. Ct., Etc., 549 P.2d 1310  
10 (Wyo.1976).

11 Western Helicopter, 311 Or at 365 (emphasis added). As explained in Plaintiffs’ opening  
12 memorandum on this motion, these two questions are independently sufficient to resolve the case  
13 in favor of the Plaintiffs and taken together sufficient to resolve the case for the Defendants.  
14 These questions meet the “determinative of the case” criterion found in ORS 28.200 and Western  
15 Helicopter.

#### 16 CONCLUSION

17 For the foregoing reasons, the questions posed by Plaintiffs should be certified to the  
18 Oregon Supreme Court.

19 DATED this \_\_\_\_\_ day of June, 2005.

20 O’DONNELL & CLARK LLP

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