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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

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

Plaintiffs,

Case No. 04-6175-AA

PLAINTIFFS' MEMORANDUM OF  
LAW IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT

v.

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

Defendant.

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## I. INTRODUCTION

In its essence, this case is remarkably straightforward. The Governor of Oregon, acting without legislative or constitutional authorization to do so—and in fact unconstitutionally usurping that authority—*created* a new and expanded public policy for Oregon relating to casino gambling, and did so in direct contravention to a blanket Oregon constitutional prohibition against casinos. Numerous state and federal courts have been faced with case after case where the exact issues presented by this case were at issue, and virtually all of those courts have held that the federal Indian Gaming and Regulatory Act only legalizes gaming that is otherwise allowed in a state, and that a governor alone does not have the authority to bind a state to a tribal compact.

Nothing—*nothing*—in any federal law, including the federal Indian Gaming and Regulatory Act (“IGRA”), Pub.L. No. 100-497 (Oct. 17, 1988), 102 Stat. 2467, *as amended, codified at* 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166 *et seq.*, requires a state to violate its own constitution in order to negotiate with tribes concerning gaming. In fact, IGRA is highly deferential to states’ interests concerning tribal gaming, both substantively and procedurally: first, substantively, providing that tribal gaming is only authorized in a state to the extent “such gaming” is otherwise allowed by that state; and, secondly, procedurally, tribal gaming is only legal once a compact is “validly entered into.” This Compact was neither “validly entered into”—the Governor having no constitutional or legislative authority to create Oregon gaming policy in violation of the Oregon Constitution—nor did it authorize gaming “otherwise allowed” in Oregon—the blanket prohibition on casino gambling being unequivocal. For these simple, basic and profound reasons, this Compact must be invalidated.

In entering into the gaming compact that Plaintiffs challenge in this action, the Governor of Oregon violated the Oregon Constitution in two fundamental ways. First, he violated the Constitution’s unconditional prohibition of casinos in the State, which the voters explicitly added

into the Constitution only 20 years ago. This clearly expressed public policy against casino gambling has been acknowledged by the Oregon Supreme Court and is also reflected in State law: *e.g.*, the State Lottery Commission’s administrative rules. *See discussion, infra* at 12–14. The Governor acted in direct contravention of this fundamental public policy by executing a compact that authorized the Tribes to operate a casino.

Second, the Governor’s entering into the Compact transgressed the limits of his organic authority by encroaching upon legislative functions in violation of the Constitution’s separation of powers mandate. Because the Governor is an executive officer, he may not exercise any legislative function except if expressly granted to him by the Oregon Constitution or state statutes. A careful examination of State law establishes that no such source of authority delegates to the Governor the power to enter into a compact such as the one challenged in this action.

The Compact is invalid not only under State law, but also under IGRA. IGRA expressly provides that casino gambling of the type authorized by the Compact would only be authorized 1) if it is located on tribal lands within a State that otherwise permits such gaming and 2) if it is conducted pursuant to a compact “validly entered into” by the State. *See discussion, infra* at 22–29.

As noted above, neither of these requirements are satisfied here. The Oregon Constitution’s prohibition on casinos could not demonstrate any more clearly that State public policy abhors casino gambling, and again nothing in IGRA requires the states to violate their laws or constitutions when it comes to making tribal gaming compacts. Thus, it cannot be maintained that IGRA in and of itself authorizes or requires casino gambling on Indian land in Oregon. Furthermore, because the Governor acted outside his constitutional authority in signing the Compact, it was not validly “entered into” within the meaning of IGRA. For these reasons, Plaintiffs are entitled to summary judgment on their claims for relief.

## II. LEGAL FRAMEWORK

### A. STATE LAW

There are two provisions of the Oregon Constitution that the Governor violated by entering into the Compact. First, the Compact is in direct conflict with Article XV, section 4, paragraph (12) of the Oregon Constitution, which clearly states that “The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.” Or Const. Art. XV, § 4, ¶ 12.

Second, the Compact violates the “Separation of Powers” Clause of the Oregon Constitution, Article III, Section 1, which divides the powers of the State government into three separate branches and forbids any person charged with carrying out official duties in one branch from exercising any function of another unless the Constitution expressly provides otherwise.

Specifically, the clause states that “[t]he powers of the Government shall be divided into three separate departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.” Or Const. Art. III, § 1. The Constitution then goes on in its next four sections to clearly and succinctly define each branch and outline their respective functions and duties. Or Const. Arts. IV-VII. Article IV creates the Legislative branch, in which all legislative powers are vested other than those associated with initiatives and referenda. Or Const. art. IV, § 1. Executive power is vested in the Governor. Or Const. art. V, § 1. Finally, judicial power is vested in the Supreme Court and other courts created by law. Or Const. art. VII, § 1. The Oregon Constitution gives the Governor no independent legislative powers, but instead provides simply that he may “recommend” measures to the legislative branch “as he shall judge to be expedient” and authorizes him to convene emergency sessions of the Legislative Assembly for specific purposes. Or Const. art. V., §§ 11 & 12.

## B. FEDERAL LAW

In 1988, Congress enacted the Indian Gaming Regulatory Act (“IGRA”) to establish a federal regulatory framework for gaming activities on Indian lands, to the extent such activities would otherwise be consistent with State law and policy. Pub.L. No. 100-497 (Oct. 17, 1988), 102 Stat. 2467, as amended, codified at 25 U.S.C. § 2701 et seq. and 18 U.S.C. § 1166 et seq. IGRA was designed to recognize and appropriately balance the legitimate interests of tribal governments, state governments, and the federal government. It seeks to serve the dual goals of providing “a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments” as well as ensuring that gaming on Indian lands is shielded from “organized crime and other corrupting influences.” 25 U.S.C. § 2702(1) & (2). *See* Indian Affairs Comm., Indian Gaming Regulatory Act, S.Rep. No.100-446, at 1-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-73.

IGRA establishes three classes of gaming. Class I includes social games for prizes of minimal value and traditional forms of Indian gaming. 25 U.S.C. § 2703(6). Class II includes bingo, similar games, and certain card games. *Id.* at § 2703(7)(A). Class III comprises all games not in classes I or II. *See id.* at § 2703(7)(B).

A tribe may engage in Class III gaming only if (1) the tribe has authorized the Class III gaming by a tribal ordinance or resolution; (2) the Class III gaming is conducted in conformity with a tribal-state compact entered into by the Indian tribe and the state that is in effect; and (3), of greatest relevance to this case, the Class III gaming will be “located in a State that permits such gaming for any purpose by any person, organization, or entity.” *See* 25 U.S.C. § 2710 (d)(1). Moreover, Section 23 of IGRA provides that, “for purposes of Federal law, ***all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply*** in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.” 18 U.S.C. § 1166(a) (emphasis added). Subsection (c) of the same section recognizes an exception to that rule for class III gaming conducted under a compact entered into between an

Indian tribe and a State.

### C. FACTUAL BACKGROUND

In 1998, the Confederated Tribes of Coos, Umpqua, and Siuslaw Indians (“the Tribes”), a federally recognized group of Indian tribes headquartered in Coos Bay, Oregon, sought to establish a casino on a parcel of land known as the Hatch Tract, located just outside the city limits of Florence, Oregon. *See Oregon v. Norton*, 271 F. Supp. 2d 1270, 1272–74 (D. Or 2003) (explaining uncontested facts in this case); *Dewberry v. Kulongloski*, Oregon District Court Case No. 04-6175-AA *Opinion and Order on Motion for Remand*, dated November 17, 2004 at 3–6 (same).<sup>1</sup> After litigation against the State of Oregon to establish whether the Hatch tract fell within the “restored lands” exception to IGRA, the Tribes obtained recognition of the Hatch tract as tribal land, and the Secretary of the Interior took the land in trust for the Tribes. *See Confederated Tribes of Coos v. Babbitt*, 116 F. Supp. 2d 155, 164 (D.D.C. 2000).

In 2002, then-Governor of Oregon John Kitzhaber negotiated and signed a gaming compact under IGRA (“the Compact”) that would allow Class III gaming on the Hatch Tract, and this Court approved the Hatch tract as “restored land” suitable for Indian gaming under IGRA. *Oregon v. Norton*, 271 F. Supp. 2d at 1270. *See also Dewberry v. Kulongloski, Opinion and Order* at 3–6.

The Plaintiffs bringing suit have alleged a variety of impacts, both current and prospective, economic and social that are attributable directly to the casino. *See Concise Statement of Facts and Affidavits, submitted with this motion*. These impacts are concrete, substantive detriments ranging from higher taxes to greater pollution to increased traffic dangers, to the reduction in property values and loss in quality of life.

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<sup>1</sup> Because this Court has dealt extensively with the facts of this case on several prior occasions, Plaintiffs present only an outline of the factual history and procedural history of this case.

#### **D. PROCEDURAL HISTORY**

On September 15, 2003, Plaintiffs first challenged the Compact by filing a petition for a writ of mandamus with the Oregon Supreme Court; the Oregon Supreme Court denied the petition. See Dewberry v. Kulongloski, *Opinion and Order* at 5. Plaintiffs filed a second petition for writ of mandamus in Lane County Circuit Court, and the court dismissed that petition on the basis that the Tribes were necessary parties and that a declaratory relief claim was available. Id. at 5–6.

Plaintiffs then filed this third action in the Lane County Circuit Court in March of 2004. The Tribes moved to dismiss plaintiffs’ Complaint on grounds of sovereign immunity and Plaintiffs claimed that immunity had been abrogated by IGRA. Defendant Kulongoski timely removed this matter to this Court pursuant to 28 U.S.C. Sections 1441 and 1446. In November of 2004, this Court denied Plaintiffs’ motion to remand. On May 9, 2005, plaintiffs filed with the Court a motion to certify questions to the Oregon Supreme Court, which has not yet been decided. This summary judgment motion comes pursuant to an agreed-upon summary judgment briefing schedule.

#### **E. STANDARD OF REVIEW**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the initial responsibility of

identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party makes such a showing, then the burden shifts to the nonmoving party to go beyond the pleadings and establish the existence of specific facts that show there is a genuine issue for trial. Id. at 324.

In addition, special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Elec., 809 F.2d at 630-31. An inference as to a material fact may be drawn in favor of the non-moving party, however, only if it is “‘rational’ or ‘reasonable’ and otherwise permissible under the governing substantive law.” Id. at 631. Moreover, disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id. at 630.

### III. ARGUMENT

#### A. **BECAUSE THE OREGON CONSTITUTION EXPRESSLY PROHIBITS CASINOS, THE GOVERNOR VIOLATED THE OREGON CONSTITUTION BY ENTERING INTO THE COMPACT**

The planned casino authorized under the Compact is expressly forbidden by the Oregon Constitution, and is therefore indisputably contrary to Oregon public policy. Article XV, section 4(12) of the Oregon Constitution simply could not be any more clear. Article XV, Section 4(12) provides, in clear and unambiguous terms, that “[t]he Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.” The history of this provision is important in fully understanding Oregon’s policy regarding casinos.

As originally adopted in 1857, the Oregon Constitution contained only a single reference to gambling, in Article XV, section 4, which provided that “[l]otteries, and the sale of Lottery tickets, for any purpose whatever, are prohibited, and the Legislative Assembly shall prevent the same by penal laws.” Or Const Art XV § 4, *quoted in* Ecumenical Ministries v. Oregon State

Lottery Comm., 318 Or 551, 554, 849 P2d 532 (1994). In 1976, Oregon voters adopted an amendment excepting charitable, fraternal, and religious organizations from this prohibition of lotteries. 318 Or at 554. Then in 1984, Article XV, Section 4 was amended through the initiative process to create the State Lottery. 318 Or at 554. At the same time, and in the same initiative, the Oregon voters also added the provision prohibiting casinos. Id. at 555. Undoubtedly, the voters' intention behind this prohibition was to make clear that, although they were willing to accept the establishment of a state-run lottery, it was the public policy of the State that casinos were fundamentally different. To this effect, the People enshrined a blanket prohibition on the siting or operation of casinos into the Constitution.<sup>2</sup> *See id.* at 562.

Indeed, the Oregon Supreme Court recognized the distinction between lottery and casino gaming in Ecumenical Ministries, noting that by adopting the prohibition against casinos, "the voters intended to distinguish between the authorized State Lottery and particular types of game procedures...on the one hand, and the general category of gambling establishments known as 'casinos,' on the other . . . the voters intended to prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling." Id. at 561 & 562. The Ecumenical Ministries plaintiffs argued that state statutes allowing businesses to operate up to five video lottery terminals amounted to authorization of "casinos" in violation of the Oregon Constitution. The Oregon Supreme Court disagreed, concluding that the presence of five video lottery game terminals in a business does not necessarily mean "that gambling is the dominant use or dominant purpose, or both, of the establishment." Id. at 564. The clear import of Ecumenical Ministries, then, is that, if an establishment's "dominant use or purpose" is gambling, it is a "casino" prohibited by the Oregon Constitution.

In response to Ecumenical Ministries, the State Lottery Commission codified this

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<sup>2</sup> The tribes concede that the Oregon Constitution establishes state public policy. The compact states, "WHEREAS, the public policy of the State is reflected in the Constitution, statutes and administrative rules of the State." Compact at p. 3.

definition of “casino” by adopting OAR 177-040-0060, which states “[i]t shall be the policy of the Oregon State Lottery to not contract with any establishment whose dominant use or dominant purpose, or both, is for the sale of lottery games.” OAR 177-040-0060(1). In other words, it is the public policy of Oregon that the State not enter into contracts with casinos. *See Oregon Restaurant Services, Inc., v. Oregon State Lottery*, 199 Or App 545, 112 P3d 398 (2005) (restaurants are not entitled to judicial review of letters from the State to restaurants declaring that amount of money generated from sale of lottery products ran afoul of the “dominant use or purpose” rule.).<sup>3</sup>

The Compact at issue in this case purports to authorize the Tribes to construct and operate a “casino” as that term is used in the Oregon Constitution and defined by the Oregon Supreme Court. Indeed, the Compact allows the Tribes to engage in video lottery games, keno, blackjack, craps, roulette, pai-gow poker, Caribbean stud poker, let-it-ride, mini-baccarat, big 6 wheel, and off-track pari-mutuel wagering on animal racing. Compact at 9–10. It also allows the operation of 850 video lottery games and 25 tables of class III games, all concentrated at a single site whose sole purpose on an ongoing basis is clearly casino gambling. It is the type of establishment expressly prohibited by the Oregon constitutional provision inserted by Oregon voters via initiative just two decades ago.

**B. THE GOVERNOR OF OREGON ACTED OUTSIDE HIS AUTHORITY WHEN HE SIGNED THE COMPACT ON BEHALF OF THE STATE.**

It is basic to limited constitutional government that an executive such as the Governor has only such authority as that expressly granted to him by the Oregon Constitution and statutes that are consistent with the Constitution. As noted above, the Oregon Constitution clearly separates the powers of State government into three separate branches: legislative, executive, and

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<sup>3</sup> Again, the tribes concede that administrative rules of the state reflect public policy. The compact states, “WHEREAS, the public policy of the State is reflected in the Constitution, statutes and administrative rules of the State.” Compact at pg. 3.

judicial. This separation of powers reflects a principle that is fundamental in the structure of the federal government and the government of all fifty states. The doctrine of separation of powers is based on the idea that the accumulation of too much power in one governmental entity presents a threat to liberty. See Gregory v. Ashcroft, 501 U.S. 452, 459 (1991). James Madison earliest expressed this sentiment more than two hundred years ago when he wrote: “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether heredity, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” 1 Alexander Hamilton, James Madison & John Jay, THE FEDERALIST, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, No. XLVII, at 329 (1901 ed.). A more contemporary exposition of the well-established jurisprudence in this area explains the implications of the doctrine as follows:

Since the governor is a mere executive officer, his general authority is narrowly limited by the constitution of the state, and he may not exercise any legislative function except that granted to him expressly by the terms of the constitution. Hence, a contract entered into with a third person by the governor upon his assumption of authority, which contract is within the province of the legislative department only, will not bind the state; the governor’s act is purely ultra vires.

38 Am. Jur. 2d, Governor § 4, pp. 934–35.

In entering into the Compact challenged in this case, the Governor was not “executing” existing Oregon law. Rather, he was acting in a legislative capacity: unilaterally deciding to expand casino gambling by binding the state of Oregon to a Compact permitting the operation of a casino. Neither the Oregon Legislature nor the Oregon voters have ever authorized the Governor to negotiate compacts under IGRA, to create new gaming policy as he sees fit, or to enter into this type of compact with the Tribes.

The language of the constitutional prohibition of casinos is further evidence that the act of authorizing a casino, *if at all*, would be a legislative function. By enacting the words “[t]he **Legislative Assembly** has no power to authorize . . . [casino] operation in the State of Oregon[,]”<sup>4</sup>

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<sup>4</sup> Or Const. art. XV, § 4, ¶ 12.

the voters of Oregon correctly understood that such authorization would be a legislative function and must come from the Oregon Legislature. Certainly, a constitutional limitation on the power of the Legislature makes little sense if the Governor can unilaterally override that limitation. Oregonians (who at least know their civics) could not have anticipated that their Governor would act *ultra vires* and assume this purely legislative role.

This result—that the Governor had no power to create gaming policy on his own and in clear violation of the Constitution’s prohibition against casino gaming—is not only compelled by the clear language and intent of the Oregon Constitution, it is also consistent with the rulings of court after court that on similar facts and constitutions have held that governors lack the authority to sign tribal gaming compacts on behalf of their state.

For example, in Pueblo of Santa Ana, v. Kelly, 104 F.3d 1546, 1557, 1559 (10th Cir 1997), the Tenth Circuit held that *state law* determines the procedure by which a state may validly enter into a compact: because the New Mexico governor lacked legislative authority to bind the state to a gaming compact, the compact was never “validly entered into” and thus did not comply with IGRA. 104 F.3d at 1557. The court stated that because IGRA is silent regarding the procedure for determining whether a state and tribe entered into a valid compact, Congress intended that *state law* apply to this determination. 104 F 3d. at 1558, *citing* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 493 & n.39 (1979) (holding that section 6 of Pub.L. 280 (now codified at 25 U.S.C. 1324), which authorized “the people of any State to amend, where necessary, their State constitution or existing statutes” to effect the transfer of civil and criminal jurisdiction over Indian lands to the state, *required the application of state law* to the procedural amendment requirement.).

In reaching this determination, the Tenth Circuit discussed State ex. rel. Clark v. Johnson, 904 P2d 11, 24 (N.M. 1995), which, in turn, had held that the New Mexico Governor lacked the authority to sign compacts on behalf of the state. In Clark, the court observed, “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.” Id. at 23. *See also* Seminole Tribe v. Florida, 517 U.S. 44, 75 n.17 (1996) (the duty to negotiate imposed by IGRA “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 P2d 1169 (1992).

The United States Supreme Court in Seminole cited State ex rel. Stephan v. Finney because that case provided sound rationale for why a Governor may not sign a compact on behalf of a State. In Finney, the Kansas Attorney General brought a mandamus action challenging the Kansas Governor’s authority to enter into a binding tribal-state casino compact with the Kickapoo Nation. The court examined various state statutes which authorized the Governor to transact business on behalf of the state, but found that such statutes only allowed the Governor to engage in day-to-day transactions under previously legislated law or public policy. Id. at 572–73. Since signing the compact constituted enactment of law and the creation of public policy, rather than the implementation of established law or public policy, the court held that these state statutes did not authorize the Governor to bind the state to a compact.<sup>5</sup> State ex rel. Stephan v. Finney, 836 P2d at 1169.

The Finney court then discussed whether the Governor had any authority independent of a statute to sign the compact. Although the Kansas Constitution did not contain an express provision establishing the doctrine of separation of powers, the court determined that the structure of the three-branch system of government inherently included such a principle. This

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<sup>5</sup> Plaintiffs anticipate that defendants in this case may argue that ORS 190.110 authorized the Governor to enter into the Compact. However, like the Kansas statute, ORS 190.110 only authorizes the implementation of existing law. The statute states the Governor may enter into agreements “[i]n performing a duty imposed . . . in exercising a power conferred . . . in administering a policy or program delegated . . . .” Id. Here, there was no existing power delegated to the Governor to authorize a casino. Furthermore, the statute states that any agreements must be for a “lawful purpose.” Since the Oregon Constitution prohibits casinos, the Compact is not for a lawful purpose.

principle was violated when the Governor signed the compact because this act was *legislative* in nature. 836 P2d at 1184 (“The creation of the State Gaming Agency would, in effect, be the creation of a new state agency by the executive branch to perform a new function of Kansas government which was never authorized by the legislature.”). The court concluded that there was no constitutional impediment to the Governor’s authority to negotiate with the tribe as an abstract proposition. However, “in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor has no power to bind the State to the terms thereof.” *Id.* at 1185.

In the present case, the analysis is the same. Indeed, the plaintiffs here have an even stronger claim that the Governor had no authority to engage in a legislative function because the Oregon Constitution, unlike the Kansas Constitution, has an express Separation of Powers Clause and a clear prohibition against casinos. See Or Const. art. III, § 1; Or Const Art XV § 4(12).

While the Finney case was pending in the Kansas Supreme Court, the Secretary of the Interior deferred approval of the Compact until the court resolved the question of the Governor’s authority. The Kickapoo Nation and Kansas Governor, then filed a new suit in the D.C. District Court seeking a declaratory judgment that the Secretary lacked authority to defer approval of the compact. The Tribe and Governor also sought a writ of mandamus directing the Secretary to publish notice of the compact in the *Federal Register*. The District Court granted summary judgment to the Secretary and concluded that the Governor’s *ultra vires* action meant that the State of Kansas never “lawfully entered into” the compact and thus the compact was void. The Court stated, “[B]ecause 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 2710(d)(8)(A) and is invalid”. Kickapoo Tribe of Indians v. Babbitt, 827 F.Supp. 37, 46 (D.D.C. 1993) (emphasis added), *rev’d on other grounds*, 43 F.3d 1491 (D.C.Cir.1995).

A similar result was reached in Narragansett Indian Tribe of Rhode Island v. Rhode

Island, 667 A.2d 280 (R.I.1995). In that case, the Rhode Island Governor signed a tribal-state compact which permitted class III gaming on the Narragansett tribal lands and litigation ensued in the United States District Court for the District of Rhode Island. The issue was in determining the validity of the compact, the District Court certified to the Rhode Island Supreme Court, the following question: “Whether, under Rhode Island Law, the Governor has authority to act on behalf of and to bind the ‘State’ by executing the Tribal-State Compact dated August 29, 1994, between the State of Rhode Island and the Narragansett Indian Tribe.” Id. at 280.

The Rhode Island Supreme Court took the certification and observed that the State Constitution contained a separation of powers concept and that authority over lotteries had always been placed with the State Legislature, beginning with King Charles II’s charter to the Colony of Rhode Island in 1633 to the present day. Therefore, the Court held, “Our response to the question certified is that 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. . . .” Id. at 282. In the current case, plaintiffs have respectfully submitted that the Oregon Supreme Court is also best-positioned to interpret state law and have respectfully requested that this Court certify questions of state law to the Oregon Supreme Court. *See* Motion to Certify. However, regardless of which court ultimately undertakes to settle these important issues, the result reached in Narragansett should also be reached in the present case- that the Governor lacks authority to bind the State of Oregon to a tribal gaming compact.

McCartney v. Attorney Gen., 231 Mich. App. 722, 587 N.W.2d 824 (1998) is yet another illustration of the limitations a Governor has regarding signing tribal gaming compacts. In that case, action was brought against the Michigan Attorney General for disclosure of documents relating to the Governor’s negotiation of a gaming compact with Indian tribes. In holding that the documents were exempt from disclosure, the Court stated that the Governor did not usurp legislative power because he did not attempt to “unilaterally bind” the State Legislature or the State to the Compact. Rather, the Governor negotiated the Compact and subsequently *presented*

the Compact to the Legislature for approval. The Court stated, “[T]he Governor has the ability to enter into compacts with Indian tribes, *subject to the approval of the Legislature.*” 587 N.W.2d at 827 (emphasis added), *appeal denied* 601 N.W.2d 101 (1999). In the current case, the result must be identical: the Governor did act to *usurp* the Legislative power because he never presented the Compact to the Oregon Legislature for approval.

Continuing the drumbeat, the Supreme Court of Wisconsin also had occasion—just last year—to determine the Governor’s authority regarding entering into gaming compacts with Indian tribes. In Panzer v. Doyle, 271 Wis.2d 295, 680 N.W.2d 666 (2004), several state legislators filed an action against the Wisconsin Governor seeking declaratory and injunctive relief after the Governor unilaterally agreed to amendments to an existing tribal compact. Specifically, the plaintiffs argued that the Governor had no authority to allow casino-style games that were prohibited by the Wisconsin Constitution. In a lengthy opinion, the court held that the Governor had acted contrary to public policy and therefore without authority when he agreed unilaterally to the compact amendments. Id. at 670.

In Arizona, a similar result was reached in American Greyhound v. Hull, 146 F.Supp2d 1012 (D.Ariz. 2001), *rev’d on other grounds*, 305 F.3d 1015. In that case, the Governor of Arizona had entered into gaming compacts with Indian tribes pursuant to a state statute which in fact authorized the Governor to negotiate and enter such compacts. A.R.S. § 5-601 (2001). After seventeen compacts had been executed, racetrack owners and operators brought an action against the Governor of Arizona challenging the constitutionality of this state statute. After an exhaustive examination, the district court held that decisions about what kinds of gaming should be legal in Arizona are *legislative* decisions. Id. at 1029. Since the statute delegated this lawmaking to the Governor without sufficient guidance, the statute was an unlawful delegation of legislative power.

The Court further held that even if the statute had been valid -- in the first instance, the Governor was not authorized to negotiate compacts which allowed casino-type games because

such games were prohibited by state law. *Id.* at 1030. The Court accordingly enjoined the Governor from executing new compacts pursuant to the statute and ordered her to give notice of non-renewal of existing compacts entered pursuant to that statute.<sup>6</sup> Of course, the Oregon Governor is on even more slippery legal footing because there is no state statute that even purports to give the Governor authority to enter into tribal gaming compacts. Furthermore, even if such statute did exist, the Governor could not allow the operation of a casino because, as in Arizona, they are prohibited by the Oregon Constitution.

Finally, the Court of Appeals of New York on the same essential facts also considered these issues in Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E. 2d 1047 (N.Y. 2003). In that case, Governors Cuomo and Pataki signed compacts. A group of legislators, organizations, and individuals opposed to casino gambling challenged the Governors' authority to negotiate and sign these compacts. In a remarkably bold and unequivocal conclusion, the Court said:

[W]e 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.

*Id.* at 1060-1061.<sup>7</sup> In summary, because the Governor had neither statutory nor constitutional authorization to enter into the challenged Compact with the Tribes, he exceeded his executive

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<sup>6</sup> This decision was later vacated and remanded for failure to join the tribes. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). The Ninth Circuit failed to apply the public rights exception to the joinder requirement in large part because the plaintiffs, as racetrack owners, were seeking to free themselves from the competition of Indian gaming. As such, the court considered the controversy a private one rather than one vindicating a larger public interest. *Id.* at 1026. In the present case, plaintiffs have no private dispute with the Tribes and are not owners of gaming facilities in competition with the Tribes. Rather, they are seeking to vindicate a larger public interest.

<sup>7</sup> Because the Mississippi Constitution vests residual powers with the Governor, that state allows its Governor the authority to negotiate and sign compacts. *See Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), *aff'd* without opinion, 55 F.3d 633 (5<sup>th</sup> Cir. 1995). Oregon has no such constitutional provision.

authority and the Compact should be declared null and void. To rule otherwise would be contrary to the doctrine of separation of powers, contrary to the Oregon Constitution, and contrary to the decisions of half a dozen state and federal courts that have confronted this issue to date. Legislatures legislate, Executives execute; the matter of tribal gaming is a legislative question, in concert with the constitutional provisions of separations of powers and gaming. It really is that simple.

**C. THE COMPACT IS ALSO INVALID UNDER IGRA.**

As the Court is aware, plaintiffs assert that the issues presented in this case are purely matters of state law and that the Court—or the Oregon Supreme Court—only needs to interpret Oregon’s Constitution and caselaw to determine that the Governor unconstitutionally exceeded his authority in signing the Compact. Nevertheless, even if the Court determines that it needs or wishes to consider IGRA in resolving plaintiffs’ claims, the same result obtains that the Compact is null and void. This follows principally on the ground that IGRA expressly defers to state law for purposes of the issues before the Court by providing that “Class III gaming activities shall be lawful on Indian lands *only if such activities are . . . located in a State that permits such gaming* for any purpose by any person, organization, or entity . . . .” 25 U.S.C. § 2710(d)(1)(B) (emphasis added). IGRA also unambiguously provides that “for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling*, including but not limited to criminal sanctions . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.” 18 U.S.C. § 1166(a). (Emphasis added.)

IGRA explicitly incorporates state law because Congress plainly intended to accommodate tribal *and* state interests in enacting IGRA:

[T]he Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the *interests of both sovereign entities* are met with respect to the regulation of complex gaming enterprises . . . . The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands . . . . The Committee balanced

these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. . . . In the Committee’s view, ***both State and tribal governments have significant interests in the conduct of class III gaming*** . . . . A State’s governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the ***State’s public policy***, safety, law and other interests . . . .

S.Rep. No. 100-446, at 6, 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076 & 3083 (emphasis added). Additionally, Congress made the following finding when it enacted IGRA, “Indian tribes have the exclusive right to regulate gaming activity on Indian Lands if the gaming activity is not specifically prohibited by Federal law and is conducted ***within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.***” 25 U.S.C. § 2701(5) (emphasis added).

Certainly, Congress could have, if it so desired, enacted legislation legalizing all forms of gambling on all Indian lands in all states, and mandating states to allow casinos *carte blanche*. Congress knows how to order States to comply with federal mandates. That is, however, not the course that Congress chose. Rather, Congress sought to give the states a substantive voice in the process equal to that of Indian tribes. *See* S.Rep. No. 100-446. It did so by permitted class III gaming only if located in a state that “permits such gaming” and conducted pursuant to a compact validly “entered into” by the state. §§ 2710(d)(1)(B) and (C).

1. ***OREGON LAW AND PUBLIC POLICY SIMPLY DO NOT PERMIT “SUCH GAMING” AS CASINO GAMING.***

Pursuant to 25 U.S.C. § 2710(d)(1)(B), IGRA does not allow casinos on Indian land in the State of Oregon because, quite simply, Oregon does not “permit[] such gaming.” The Ninth Circuit made clear that this provision of IGRA means what it says in Rumsey Indian Rancheria of Wintun Indians v. Wilson, 99 F.3d 321 (9th Cir. 1996), when Indian tribes filed suit seeking declaration that the State of California was obligated to negotiate regarding proposed gaming activities under IGRA. In reaching its decision, the Ninth Circuit discussed California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which was the precursor to IGRA. In

Cabazon, the Supreme Court explained that there was:

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

Id. at 209 (emphasis added by Ninth Circuit). The Court found that “IGRA does not ***require*** a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.” Id. at 1258.

Other federal courts have made similar holdings. The Eighth and Tenth Circuits, for example, have also held that IGRA does not require a State to violate its own laws to allow tribes to operate gaming that is illegal. In United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998) an Indian tribe filed suit against the State of Nebraska for the State’s alleged failure to negotiate in good faith for a tribal-state compact. The State counterclaimed, alleging that the Tribe was conducting class III gaming in violation of IGRA. The Court recognized that under IGRA an Indian tribe may engage in a gaming activity only if that specific gaming activity is permitted under the laws of the State where the tribal land is located. Id. at 564. The Court held, “Because the video gambling engaged in by the Tribe is not permissible under Nebraska law, this activity is being conducted in violation of the IGRA. . . .” Id.

Previously, the Eighth Circuit had considered similar issues in Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993). There, an Indian tribe brought suit against the State of South Dakota alleging that the State refused to negotiate in good faith. Specifically, the tribe alleged that the State was required to negotiate regarding traditional keno and higher bet limits. The Court not only ruled that the State was not required to negotiate traditional keno, but also that it would be ***illegal*** for the tribe to offer ***traditional*** keno because only ***video*** keno was

permitted in South Dakota. Id. at 279. Also, the Court held that the State need not negotiate regarding bet limits because bet limits were already established by State law. Id. The Court reached these conclusions by recognizing that “[t]he ‘such gaming’ language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.” Id.

Likewise, the Tenth Circuit addressed similar issues in Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179 (10th Cir. 1993). In that case a tribe filed an action seeking declaration that the Johnson Act did not prohibit importation of video lottery terminals (VLTs) onto tribal land in Oklahoma. The Johnson Act prohibits the possession or use of any gambling device within Indian country. 15 U.S.C. § 1175. IGRA provides that the Johnson Act does not apply to gaming conducted under a tribal-state compact that “is entered into . . . by a State *in which gambling devices are legal*. . . .” 12 U.S.C. § 2710(d)(6)(A) (emphasis added) The Court concluded that Oklahoma is not a state “in which gambling devices are legal,” and therefore IGRA does not override State law’s prohibition of the VLTs. In rejecting the tribe’s argument that a compact itself can legalize VLTs, the Court stated, “Congress must have meant that gambling devices be legal [within state law] absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal . . . and that the compact be ‘in effect’ . . . .” Id. at 181.

Finally, in Coeur D’Alene Tribe v. Idaho, 842 F.Supp. 1268, 1282 (D. Idaho 1994), a district court encountered similar issues as in the present case. In that case, Indian tribes brought a declaratory judgment action regarding their rights under IGRA. The tribes desired to engage in casino gaming which the state contended was prohibited under State law and public policy. The Court held “*Cabazon* and IGRA clearly restrict gaming on Indian lands to those type of games permitted by the state and/or those games which do not violate the law and public policy of the state.” Id. at 1282. The tribes were thus not allowed to conduct casino gaming “when the laws and public policy of Idaho [were] so clearly against such gaming.” Id. at 1283.

A similar constitutional prohibition in California's Constitution provides instructive guidance to the current case. The same year Oregon voters enacted the constitutional prohibition of casinos, California voters also enacted a blanket prohibition of casinos. In 1984, the people of California amended their Constitution by adding section 19(e), which states: "The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e). Then, in 1998, California voters approved an initiative *statute*, Proposition 5, which purported to authorize various forms of gaming in tribal casinos. In Hotel Employees and Restaurant Employees International Union v. Davis, 981 P2d 990, 994 (Cal. 1999), the California Supreme Court held that "[b]ecause Proposition 5, a purely *statutory* measure, did not amend section 19(e) or any other part of the Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail, we conclude Proposition 5's authorization of casino gambling is invalid and inoperative." 981 P2d at 994 (emphasis added).

In reaching this conclusion, the Court analyzed the provisions of IGRA and found that it simply does not exempt gambling on Indian lands from state regulatory laws, "Indeed, section 23 of IGRA provides that 'for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.'" *Id.* at 1008. Because the State constitution prohibited casinos, the Court ruled that specific gambling activities were banned "when conducted in a casino setting." *Id.* at 1009.

Likewise, when Oregon voters amended the Oregon Constitution to prohibit casinos, they sought to prohibit a certain type of gaming activity – "casino gaming" – which the Oregon Supreme Court defined as an establishment whose dominant use and purpose is gambling. *See Ecumenical Ministries*, 318 Or at 562 ("the voters intended to prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling.") The Compact at issue in this case would allow a gambling establishment with literally hundreds of

class III games being conducted simultaneously on a regular basis. This is clearly the type of gaming activity prohibited by the Oregon Constitution and Oregon public policy. Pursuant to Rumsey and the other above-mentioned cases, 25 U.S.C. § 2710(d)(1)(B) simply does not allow the operation of a casino on Indian land in Oregon because Oregon law does not permit “such gaming.” According to Cabazon, Oregon’s constitutional prohibition of casinos applies to Indian lands because the intent of this prohibition is, of course, to *prohibit* certain conduct. Furthermore, applying Cabazon’s “short-hand test,” the prohibition applies to Indian land because such casino gaming violates the state’s clear public policy. Cabazon, 480 U.S. at 209.

**2. THE COMPACT WAS NOT VALIDLY “ENTERED INTO” WITHIN THE MEANING OF IGRA.**

IGRA requires compacts to be validly “entered into” under applicable state law and “in effect” pursuant to Secretarial approval and notice before a casino is lawful. Section 2710(d)(1)(C) permits class III gaming “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.” The statute also states:

The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal State compact that –

- (A) is entered into under paragraph (3) by a State in which gambling devices are legal, and
- (B) is in effect.

§ 2710(d)(6). Both the provisions in A & B above separate the “entered into” requirement from the “in effect” requirement. IGRA unambiguously provides that a compact goes into “effect” when it is approved by the Secretary and notice is published in the Federal Register. § 2710(d)(3)(B). It does not, however, specifically define what is meant for a tribe and state to “enter[] into” a compact -- nor does it specify or direct who within, or how, a state government can or must sign a compact. IGRA leaves those questions to State law.

As discussed above for a different proposition, in Pueblo of Santa Ana, the Tenth Circuit

held that state law determines the procedure by which a state may validly enter into a compact and that the “entered into” language imposes an independent State law requirement that the compact be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA. Pueblo of Santa Ana, 104 F.3d at 1553 & 1555. The Tenth Circuit in Pueblo of Santa Ana determined that because the New Mexico Governor lacked the authority to bind the state to a compact, the compacts were therefore never validly “entered into” by the state and, as a result, did not comply with IGRA. *See also* Seminole Tribe, 517 U.S. at 47 (observing that IGRA “provides that an Indian tribe may conduct certain gaming activities only in conformance with a *valid* compact between the tribe and the State”) (emphasis added); *accord*, Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1495 (D.C.Cir.1995)

Other courts have determined that compacts entered into without binding authority are void and without effect, regardless of the Secretary’s putative approval of the compact. *See* Kickapoo Tribe of Indians v. Babbitt, 827 F.Supp.37, 46 (D.D.C. 1993)(“[B]ecause 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 2710(d)(8)(A) and is invalid”), *vacated on other grds.*, 43 F.3d 1491 (D.C.Cir. 1995); *accord*, Narragansett Indian Tribe of Rhode Island v. Rhode Island, 667 A.2d 280 (R.I.1995) (holding that a compact signed by the Rhode Island Governor, who lacked authority under state law to sign the compact “is void in the same sense that any document executed without proper authority is void; namely, it has no legal effect”); *accord*, Hotel Employees, 981 P2d at 1009 (“ . . . IGRA legalizes only gaming conducted pursuant to a compact validly entered into by both the state and the tribe.”); *accord*, State ex. rel. Clark v. Johnson, 904 P2d 11, 24 (N.M. 1995) (“[w]e conclude that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.”)

In the present case, because Oregon’s Governor exceeded his executive authority by

signing the Compact with the Tribes without legislative authorization, the Compact was never validly “entered into” and has no legal effect. It does not satisfy the requirements of Sections 2710(d)(1)(C) and (d)(1)(6) and must be considered null and void under the terms of IGRA. To rule otherwise would bind the State of Oregon to a Compact into which it never “validly entered” under State law.

### III. CONCLUSION

By entering into the challenged Compact, the Governor violated Oregon’s constitutional prohibition of casinos in the State of Oregon. The Governor also violated Oregon’s constitutional doctrine of separation of powers when he exceeded his executive role without authority and performed the legislation function of binding the State of Oregon to a gaming compact. Because the Governor acted contrary to state law, the Compact should be declared to be without legal effect.

The Compact is invalid under federal law for virtually the same reasons it is null and void under state law. IGRA applies state law to determine whether certain gaming is permitted within a state and whether the compact was validly entered into between the tribe and the state. Since Oregon law prohibits casinos and the Governor had no authority to bind the State of Oregon to a gaming compact, the resulting compact is not effective under IGRA.

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For the foregoing reasons, Plaintiffs respectfully submit that the Court should grant their

motion for summary judgment, deny the summary judgment motion of Defendants, and set aside the challenged Compact.

DATED this \_\_\_\_\_ day of July, 2005.

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