

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

STATE ex rel SUSAN DEWBERRY,)	
CAROLE HOLCOMBE, SUZANNE)	Lane County Circuit Court
DANIELSON, and ARNOLD)	Case No. 16-03-23044
BUCHMAN,)	
)	Case No. A146366
Relators-Appellants,)	
)	
v.)	
)	
THE HONORABLE JOHN)	
KITZHABER, Governor of the State)	
of Oregon; and other EXECUTIVE)	
OFFICERS in the State of Oregon,)	
)	
Defendants-)	
Respondents,)	
)	
and)	
)	
THE CONFEDERATED TRIBES OF)	
COOS, LOWER UMPQUA, and)	
SIUSLAW INDIANS,)	
)	
Intervenor-Defendants-)	
Respondents.)	

RELATORS-APPELLANTS' REPLY BRIEF

Appeal of Order Granting Summary Judgment
Issued by the Hon. Karsten H. Rasmussen, July 13, 2010

(counsel on reverse)

Kelly W.G. Clark, OSB #831723
Kristian S. Roggendorf, OSB #013990
O'DONNELL CLARK & CREW LLP
1650 NW Naito, Suite 302
Portland, OR 97209
Telephone Number: 503.306.0224

*Of Attorneys for Relators
Appellants*

Sharon A Rudnick, OSB #830835
HARRANG LONG GARY
RUDNICK PC
360 E 10th Ave Ste 300
Eugene, OR 97440
Telephone Number: 541.485.0220

*Of Attorneys for Intervenors
Defendants-Respondents Tribes*

Bruce R. Greene, *pro hac vice*
Colorado Bar No. 7248
LAW OFFICES OF BRUCE R.
GREENE AND ASSOCIATES
1500 Tamarack Avenue
Boulder, CO 80304

*Of Attorneys for Intervenors
Defendants-Respondents Tribes*

Stephanie Striffler, OSB #824053
Senior Assistant Attorney General
DEPARTMENT OF JUSTICE
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
Telephone Number: 503.378.4402

*Of Attorneys for State
Defendants Respondents*

Craig J Dorsay, OSB #790315
DORSAY & EASTON LLP
1 SW Columbia St Ste 440
Portland OR 97258

*Of Attorneys for Amici Curiae
Tribes*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii–iv
INTRODUCTION.....	1
ARGUMENT IN REPLY.....	2
I. IGRA DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT OREGON’S CONSTITUTIONAL BAN ON “AUTHORIZING” CASINOS.....	2
A. FEDERAL PREEMPTION IS A LIMITED DOCTRINE AND APPLIES ONLY AS FAR AS CONGRESS REQUIRES.....	3
B. IGRA’S EXPRESS PREEMPTION IS LIMITED TO STATE LAWS THAT DIRECTLY REGULATE GAMBLING ACTIVITIES. THE SIGNING OF AN AGREEMENT IS NOT A GAMBLING ACTIVITY.....	5
C. IMPLIED PREEMPTION UNDER IGRA DOES NOT EXTEND TO OREGON’S CONSTITUTIONAL CASINO BAN.....	10
II. DEFENDANTS’ “IMPROPER RELIEF” ARGUMENT IS UNPRESERVED, AND FAILS IN ANY EVENT.....	13
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS.....	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

FEDERAL STATUTES

18 USC § 1162.	7
18 USC § 1166.	7
Indian Regulatory Gaming Act (IGRA), 25 USC §§ 2701–2721.....	1
25 USC § 2710.	6, 7, 8
25 USC § 2701.	6, 13

FEDERAL LEGISLATIVE HISTORY

S Rep No 100-446, 100th Cong, 2d Sess 6 (1988), <i>reprinted in</i> 1988 USCCAN 3071.	2, 8
---	------

OREGON CONSTITUTION AND STATUTES

Or Const Art III, § 1	14
Or Const Art V, § 10.....	14
Or Const Art XV, § 4(10).	<i>passim</i>
<i>Former</i> Or Const Art XV, § 4(12).	1
ORS 190.110.....	15
Ballot Measure 76 (2010).	1

CASES

<i>Alessi v. Raybestos–Manhattan, Inc.</i> , 451 US 504 (1981)	3–4
<i>AT&T Communications v. City of Eugene</i> , 177 Or App 379 (2001)	5
<i>Barona Band of Mission Indians v. Yee</i> , 528 F3d 1184 (9th Cir 2008)	10
<i>Brewer v. Dep't of Fish & Wildlife</i> , 167 Or App 173 (2000)	13
<i>Cabazon Band of Mission Indians v. Wilson</i> , 37 F3d 430 (9th Cir 1994)	4
<i>California v. Cabazon Band of Mission Indians</i> , 480 US 202 (1987)	8
<i>Confederated Tribes of Siletz Indians v. Oregon</i> , 143 F3d 481 (9th Cir 1998)	8–9. 10
<i>County of Madera v. Picayune Rancheria of Chukchansi Indians</i> , 467 F Supp2d 993 (ED Cal 2006)	9
<i>Dairyland Greyhound Park, Inc. v. Doyle</i> , 2003 WL 24124290 (Wis Cir Ct, Feb. 11, 2003)	6, 9
<i>Derenco, Inc. v. Benj. Franklin Fed. S&L Ass'n</i> , 281 Or 533 (1978)	11
<i>Fred Meyer Stores v. Godfrey</i> , 218 Or App 496 (2008)	13-14
<i>Gaming Corp. of Am. v. Dorsey & Whitney</i> , 88 F3d 536 (8th Cir 1996)	6
<i>Ginsberg v. Northwest, Inc.</i> , 653 F3d 1033 (9th Cir 2011)	3
<i>Gonzales v. Raich</i> , 545 US 1 (2005)	3
<i>In re Indian Gaming Related Cases</i> , 331 F3d 1094 (9th Cir 2003)	4
<i>Jefferson v. Commissioner of Revenue</i> , 631 NW2d 391 (Minn 2001)	10

<i>Lipscomb v. State By & Through State Bd. of Higher Educ.</i> , 305 Or 472 (1988)	14, 15
<i>Medtronic, Inc. v. Lohr</i> , 518 US 470 (1996)	4
<i>Montalvo v. Spirit Airlines</i> , 508 F3d 464 (9th Cir 2007)	3
<i>Parks v. Board of County Com'rs of Tillamook County</i> , 11 Or App 177 (1972)	2, 15
<i>Rincon Band of Luiseno Mission Indians v. Schwarzenegger</i> , 602 F3d 1019 (9th Cir 2010)	4
<i>Saratoga County Chamber of Commerce Inc. v. Pataki</i> , 275 AD2d 145 (NY App Div 2000)	9, 12
<i>Seminole Tribe v. Florida</i> , 517 US 44 (1996)	12
<i>State ex rel. Oregon State Bldg. & Const. Trades Council v. BOLI</i> , 61 Or App 22 (1982)	14
<i>State ex rel. Stephan v. Finney</i> , 836 P2d 1169 (Kan 1992)	12
<i>White Mountain Apache Tribe v. Bracker</i> , 448 US 136 (1980)	2
<i>Williams v. Babbitt</i> , 115 F3d 657 (9th Cir 1997)	4
<i>Willis v. Winters</i> , 350 Or 299 (2011)	3, 10

INTRODUCTION

Oregon’s constitutional ban¹ on the Governor signing a casino compact does not directly control any particular gambling activity. Therefore, Oregon’s constitutional casino ban is not overridden by any preemption created by the federal Indian Regulatory Gaming Act (IGRA), 25 USC §§ 2701–2721. As Relators anticipated in the Opening Brief, the argument from Defendants Governor Kitzhaber and other Officials (“the Governor”) and Intervenor-Defendants Confederated Tribes of Coos, Umpqua, and Siuslaw Indians (“the Tribes”) (collectively “Defendants”), assumes IGRA preemption on the very issue that IGRA in fact leaves in the hands of state law—*how* a casino compact gets signed. Additionally, IGRA does not preempt state law on gambling until *after* a compact is in place, so it cannot preempt Oregon’s constitutional ban on government officials assisting with the establishment of casinos in the first instance. Therefore, the Governor had no authority to sign the Compact, and he must undo his improper action.

///

///

///

¹ *Former* Article XV, Section 4(12) was renumbered to Article XV, Section 4(10). *See* Measure 76 (2010).

ARGUMENT IN REPLY

This reply brief raises two arguments. First, federal preemption is narrowly applied out of respect for our federal structure, and IGRA express preemption only extends to laws that attempt to directly regulate gaming activities. The constitutional ban on Oregon officials assisting with the establishment of casinos does not directly regulate any gambling on Indian land. Further, IGRA relies on state law to determine who signs compacts, so preemption cannot be implied.

Second, Relators' requested relief is proper because "officials have an implied legal duty to undo any actions they have taken in violation" of the law. *Parks v. Board of County Com'rs of Tillamook County*, 11 Or App 177, 206 (1972). The trial court should be reversed.

I. IGRA DOES NOT EXPRESSLY OR IMPLIEDLY PREEMPT OREGON'S CONSTITUTIONAL BAN ON "AUTHORIZING" CASINOS.

Defendants argue that "traditional preemption rules" are "unhelpful" in the Indian gambling context under *White Mountain Apache Tribe v. Bracker*, 448 US 136, 143 (1980), and cite to the Senate Report on IGRA, providing that IGRA "expressly preempt[s] the field in the governance of gambling activities on Indian lands." S Rep No 100-446, 100th Cong, 2d Sess 6 (1988), *reprinted*

in 1988 USCCAN 3071, 3076. Yet while exhaustively discussing IGRA’s history and scope, Defendants elide over the contours of IGRA preemption—the very crux of this case. This section first discusses general preemption under IGRA, and then shows that neither express nor implied preemption are applicable to the Constitution’s casino ban.

A. FEDERAL PREEMPTION IS A LIMITED DOCTRINE AND APPLIES ONLY AS FAR AS CONGRESS REQUIRES.

Federal “[p]reemption may be either express or implied[.]” *Ginsberg v. Northwest, Inc.*, 653 F3d 1033, 1035–36 (9th Cir 2011). Express preemption is obvious from the language in the statute; implied preemption only occurs when the government occupies the entire field on a given issue, or where compliance with both sets of law is either “physically impossible” or state law “stands as an obstacle” to Congressional goals. *Willis v. Winters*, 350 Or 299, 307–08 (2011) (citations and internal quotation marks omitted).²

“Preemption provisions are narrowly and strictly construed.” *Montalvo*

² Notably in *Willis*, the court rejected the idea that the federal Gun Control Act preempted Oregon’s grant of concealed handgun licenses to medical marijuana card holders, despite extensive federal control over drugs and guns, and even though it is a federal crime to purchase or possess firearms while illegally using drugs. *Willis*, 350 Or at 311–12. See *Gonzales v. Raich*, 545 US 1, 26–28 (2005) (state law cannot legalize use of marijuana).

v. Spirit Airlines, 508 F3d 464, 474 (9th Cir 2007) (citation omitted).

Preemption analysis “must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.” *Alessi v.*

Raybestos–Manhattan, Inc., 451 US 504, 522 (1981). “States are independent sovereigns in our federal system, [so the courts] have long presumed that Congress does not cavalierly pre-empt [state laws.]” *See Medtronic, Inc. v. Lohr*, 518 US 470, 485 (1996) (internal quotation marks omitted).

Even under IGRA, the concerns of federalism still hold. *In re Indian Gaming Related Cases*, 331 F3d 1094, 1096 (9th Cir 2003) (“IGRA is an example of ‘cooperative federalism’ ... [that] seeks to balance the competing sovereign interests”) (citation omitted). While “courts must apply standards different from those applied in other areas of federal preemption,” *see Cabazon Band of Mission Indians v. Wilson*, 37 F3d 430, 433 (9th Cir 1994), the concerns over State sovereignty remain an integral part of IGRA.

Typically, “ambiguities in federal law are resolved in favor of tribal independence.” *Cabazon*, 37 F3d at 434. *But see Williams v. Babbitt*, 115 F3d 657, 663 n5 (9th Cir 1997) (construing law in favor of tribal interests is “a mere guideline and not a substantive law”). Nonetheless, where there is a conflict between tribal rights and federalism, “it is far from clear that [federalism]

should be shoved aside in favor of [tribal sovereignty].” *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F3d 1019, 1062 n9 (9th Cir 2010) (Bybee, J., dissenting). This Court should harmonize IGRA’s grant of gambling rights to Tribes with IGRA’s recognition of state sovereignty in the compact process.

B. IGRA’S EXPRESS PREEMPTION IS LIMITED TO STATE LAWS THAT DIRECTLY REGULATE GAMBLING ACTIVITIES. THE SIGNING OF AN AGREEMENT IS NOT A GAMBLING ACTIVITY.

IGRA does not expressly preempt Oregon’s constitutional casino ban. As applied in this case, the ban here does not deal with “*governance* of gambling activities on Indian lands” at all—the ban prohibits the Legislature from “authorizing” casinos, and properly assumes that such fundamental policy choices are made in the Legislature, not by the Executive.

This Court has said, “[e]xpress preemption by federal statute is essentially a matter of statutory construction; our task is to determine whether Congress intended to preempt the *type* of state or local law at issue ... [by] examin[ing] its text and structure and, if necessary, its legislative history.” *AT&T Communications v. City of Eugene*, 177 Or App 379, 402 (2001) (emphasis added). Defendants argue that *all* state laws that touch upon Indian

gaming are preempted by IGRA because of Congress' express intention. That argument is not supported by IGRA's text, structure or legislative history.

The text of IGRA grants "Indian tribes ... the exclusive right to regulate gaming activity on Indian Lands if the gaming activity is . . . within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" to everyone. 25 USC § 2701(5). IGRA requires "negotiations for ... a Tribal-State compact governing the conduct of gaming activities[,] and requires that a "State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 USC § 2710(d)(3). But nothing in the text of IGRA mentions, let alone overrides, fundamental state law on who negotiates or signs a compact.³ In fact, all parties and the trial court recognize that IGRA leaves negotiation and signing of a compact to state law. Thus, IGRA's text does not expressly preempt Oregon's constitutional casino ban in the context of the Governor signing compacts.

Structurally, IGRA does not expressly preempt Oregon's constitutional

³ IGRA also creates a jurisdictional "complete preemption," allowing federal court jurisdiction over state law claims based on tribal gaming. *Compare Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F3d 536, 543–49 (8th Cir 1996) (complete preemption where law firm was sued over representation of both tribe and management company operating casinos), *with Dairyland Greyhound Park, Inc. v. Doyle*, 2003 WL 24124290 (Wis Cir Ct, Feb. 11, 2003) (no jurisdictional preemption when challenging "constitutionality of the Governor's powers with respect to entering [IGRA] compacts").

casino ban with respect to the Governor's authority. Absent IGRA, federal criminal statutes recognize the validity of state gambling-specific laws on tribal land. *See* 18 USC § 1166(a) ("all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions ..., shall apply in Indian country"). *See also* 18 USC § 1162(a) (state criminal laws extend to Indian territory). Tribal gambling is exempted from the state's criminal laws only where conducted under a valid IGRA compact. 18 USC § 1166(c)(2). State gambling laws are not structurally preempted from the outset, as Defendants suggest.

Rather, IGRA's preemption of state gambling law is triggered *only after* a compact is in place—assuming a valid compact. IGRA provides that Class III gambling "shall be lawful on Indian lands *only if*" it is: (1) authorized by Tribal resolution; (2) "located in a State that permits such gaming for any purpose by any person;" *and* (3) "conducted *in conformance with a Tribal-State compact*["]." 25 USC § 2710(d)(1) (emphasis added). Temporally, before any gambling can occur, there must be a compact. Otherwise, all state gambling laws remain in effect. *See* 18 USC § 1166. Defendants do not even try to argue that gambling could occur without a compact. If IGRA cannot preempt gambling laws before a compact is in place, then it cannot preempt a

state constitution's ban on government participation in allowing casinos to be established: a law related to compact formation necessarily applies before the compact exists.

Legislative history provides that IGRA “expressly preempt[s] the field in the *governance of gambling activities* on Indian lands ... [and] courts should not balance competing Federal, State, and tribal interests to determine *the extent to which various gaming activities are allowed.*” S Rep No 100-446, 1988 USCCAN at 3076 (emphasis added). Congress has performed that balancing here, and codified that only regulatory laws on specific games are preempted (unless agreed to in the compact).⁴ 25 USC § 2710(d). *See California v. Cabazon Band of Mission Indians*, 480 US 202, 209 (1987). But in this situation, the Constitution prohibits a signature, not a game of chance.

A state constitutional ban on its officers *actively authorizing* casinos is not a specific regulation on gambling activities, and therefore cannot be preempted along with laws that “govern[] gambling activities.” *See Confederated Tribes of Siletz Indians v. Oregon*, 143 F3d 481, 486 n7 (9th Cir

⁴ Relators maintain that the constitutional casino ban is a prohibitory law, and as such, is not expressly preempted. However, this Court need not reach that issue. Even assuming Section 4(10) is merely a “venue restriction” as Defendants would have it, the central legal issue in this case is the Governor’s authority to *sign compacts*.

1998) (rejecting Senate Report as basis for IGRA preemption of Oregon public records law because public records law “has no effect on the *determination of which gaming activities are allowed.*”) (emphasis added) (citation and internal quotation marks omitted). In fact, IGRA’s express preemption applies only to state laws that directly control tribal gaming activity, even if the law in question has a negative impact on tribal gaming. *Id.* at 487 (upholding application of public records law even though “the Records Laws could have a detrimental effect on the Siletz Tribe”); *County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F Supp2d 993, 1002 (ED Cal 2006) (county’s nuisance claim against tribe’s casino addition was not preempted by IGRA, citing *Siletz Indians*). These holdings are logically indistinguishable from Oregon’s constitutional policy forbidding state assistance in creating casinos.

Defendants properly concede that (1) IGRA does not mandate a *governor’s* participation in negotiations, and (2) IGRA provides no independent authority for a governor to sign a compact. Joint Response Brief at 6, 10, 16 n2. *See also Saratoga County Chamber of Commerce Inc. v. Pataki*, 275 AD2d 145, 157 (NY App Div 2000) (“IGRA says nothing specific about how [to] determine whether a state and tribe have entered into a valid

compact”) (citation and internal quotation marks omitted). *Cf. Dairyland Greyhound Park*, 2003 WL 24124290 *4 (“a governor’s authority to enter into a Tribal-State compact is a matter of State law,” citing USDOJ opinion). Axiomatically, there can be no “express preemption” of state law where IGRA fails to address the issue. *Cf. Jefferson v. Commissioner of Revenue*, 631 NW2d 391, 396–97 (Minn 2001) (IGRA “does not *expressly* preempt state taxation of ... tribal members”) (emphasis in original). Like Oregon’s public records law in *Siletz Indians* or the state taxation in *Jefferson*, IGRA nowhere *expressly* preempts Oregon’s constitutional prohibition on a *state executive* assisting in the establishment of a casino.

C. IMPLIED PREEMPTION UNDER IGRA DOES NOT EXTEND TO OREGON’S CONSTITUTIONAL CASINO BAN.

Implied preemption only occurs where Congress has occupied the field, or where state law directly conflicts with federal law. *See Willis*, 350 Or at 307–08. IGRA does not completely occupy the field, and does not directly conflict with Oregon’s ban on state officials helping to create casinos. Thus, the constitutional casino ban does not trigger “implied preemption.”

First, precedent shows that Congress has not so completely occupied the field of Indian gaming that *all* laws touching on the issue of Indian gaming are

wholly preempted. *Eg, Barona Band of Mission Indians v. Yee*, 528 F3d 1184, 1193 (9th Cir 2008) (“IGRA’s comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on ... equipment”). *See also Siletz Indians*, 143 F3d at 485 (9th Cir 1998) (“Where the Compact is silent ... neither IGRA ... nor any other federal law prevents” compliance with the Oregon public records act).

Furthermore, occupation of an entire field of law is a drastic legislative act:

If ... Congress has occupied a field, the states are precluded from enacting ***any laws*** covering the subject matter, ***even if they are consistent*** with the federal law ***or are complementary*** to it.

Derenco, Inc. v. Benj. Franklin Fed. S&L Ass’n, 281 Or 533, 541–42 (1978) (emphasis added). Two undisputed facts force the conclusion that Congress has not occupied the field to preempt all state laws that even touch upon Indian gaming. First, IGRA completely defers to state law on the negotiation process. By leaving compact negotiation in the hands of state law, IGRA obviously does not occupy the field in a manner preventing “even ... complementary” state laws. *See Derenco*, 281 Or at 542. Second, IGRA allows state law to control what games are permitted under an IGRA compact, so state laws that are “consistent with” federal law remain. *Id.* at 541. The continuing and deliberate

application of such state laws here necessarily destroys any “occupy the field” preemption argument.

Next, “direct conflict” implied preemption cannot apply in this case because there is no physical impossibility in complying with both sets of laws, and respecting state policy cannot run afoul of the purposes of IGRA.

Defendants point out that IGRA requires states to “negotiate in good faith” regarding an IGRA compact. That is true. But while there is a duty for *a State* to negotiate, there is no specific state officer designated for negotiation under IGRA. *See Saratoga County Chamber of Commerce*, 798 NE2d at 1060.

Indeed, the United States Supreme Court rejected the notion that a state’s governor was uniquely responsible for negotiating tribal-state compacts.

Seminole Tribe v. Florida, 517 US 44, 75 n17 (1996) (negotiating a compact “is not [a duty] of the sort likely to be performed by an individual state executive officer or even a group of officers.”) (citation omitted). Thus, the **Governor** has no specific duty to fulfil under IGRA, and it is not physically impossible to comply with both federal and Oregon law by refusing to allow the Executive Branch to approve a compact in violation of Oregon’s Constitution. *Cf State ex rel. Stephan v. Finney*, 836 P2d 1169 (Kan 1992) (Kansas governor cannot constitutionally enter into compact).

Nor is the constitutional inability of the Governor to sign a compact in “direct conflict” with IGRA’s purposes. IGRA balances the interests of two sovereign entities. While the State must negotiate with the Tribes, it is plain that it does not have to violate its own public policy to promote tribal gaming. *See* 25 USC § 2701(5) (gaming allowed if state does not “prohibit such gaming activity”). Therefore, IGRA does not impliedly preempt the constitutional ban on State assistance in the establishment of casinos.

II. DEFENDANTS’ “IMPROPER RELIEF” ARGUMENT IS UNPRESERVED, AND FAILS IN ANY EVENT.

Only now, after eight years and on the second appeal of this case, do Defendants raise the issue of “improper relief.” Because Relators could have developed discovery on this issue (*eg*, has the State ever withdrawn its approval of an improperly adopted contract, and if so, how?), this argument cannot be raised for the first time here. *Brewer v. Dep’t of Fish & Wildlife*, 167 Or App 173, 181 (2000) (“this court ... may generally affirm ... the trial court on [alternative] grounds [not raised below] ... provided that there [was] evidence in the record to support the alternative ground, but not if the parties were not allowed to develop the factual record”) (citations and internal quotation marks omitted). *See Fred Meyer Stores v. Godfrey*, 218 Or App 496,

502 (2008) (approving of Workers' Compensation Board's ruling on employer's failure to preserve defense, even though employer was respondent on appeal). Defendants' argument has not been preserved.

In any event, Relators' requested relief is proper. Defendants cite *State ex rel. Oregon State Bldg. & Const. Trades Council v. BOLI*, 61 Or App 22, 26 (1982), for the uncontroversial proposition that mandamus cannot lie to control the exercise of discretion. However, in that case, relators sought mandamus in part against Indian Tribes for prevailing wage violations. *Id.* This Court held that the prevailing wage laws imposed no affirmative legal duty on Tribes simply because they took a government loan. *Id.* Further, government officials had no mandatory duty to declare the loan in default for failure to pay prevailing wage, because declaring default was discretionary under the loan contract. *Id.* at 27. Relator's case here does not involve the enforcement of such a discretionary right.

Rather, the Governor here is under a specific legal duty to execute the laws of this State, and he has no power to establish contrary constitutional policy. *See* Or Const Art V, § 10; Art III, § 1. *See also Lipscomb v. State Bd. of Higher Educ.*, 305 Or 472, 474–75 (1988) (Governor's expansive interpretation of veto power violated authority of Legislature to set

policy in legislation). Oregon’s Constitution unequivocally states that the Legislature “has no power to authorize” the establishment of casinos. Or Const Art XV, § 4(10). ORS 190.110 therefore cannot “authorize” the Governor to enter into a compact that allows a casino. Where the Governor exceeds his constitutional authority, that action must be declared a nullity. *See Lipscomb*, 305 Or at 478, 487 (“Compliance with constitutional processes is the predicate for any government action,” and nullifying improper vetoes).

Likewise, “[o]fficials have an implied legal duty to undo any actions they have taken in violation” of the law. *Parks*, 11 Or App at 206 (in mandamus action, county officials had “a duty to cancel the building permits ... issued in violation of the zoning ordinance”). *See Lipscomb*, 305 Or at 474 (when Governor unlawfully engaged in line-item vetoes, agencies required “to stop further contributions, and to ***return those already made***”) (emphasis added). The Governor must undo what he has unconstitutionally done. Withdrawing his unlawful signature from the Compact, ceasing all State activities under the Compact, and forbidding any future state support of the Compact are the only logical remedial actions that the Governor can take to fix his *ultra vires* act.

///

///

CONCLUSION

Limits on the Governor's signature do not directly regulate gambling on Tribal land, and are not preempted by IGRA. Also, IGRA does not preempt gambling laws until a compact is in place, and thus cannot preempt a state constitution's limitation on the formation of casino compacts. For the foregoing reasons and those provided in the Opening Brief, Relators pray this Court reverse the decision of the trial court and order summary judgment entered in favor of Relators.

RESPECTFULLY SUBMITTED this 1st day of February, 2012.

O'DONNELL CLARK & CREW LLP

/s/ *Kristian Roggendorf*

Kelly Clark, OSB #831723

kellyc@oandc.com

Kristian Roggendorf, OSB #013990

ksr@oandc.com

Of Attorneys for Relators

(503) 306-0224

**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS**

BRIEF LENGTH

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b)(ii), and (2) the word count of this brief (as described in ORAP 5.05(2)(a), from “Introduction” to the final word in the Conclusion, inclusive of footnotes and headers, but exclusive of the cover, table of contents, table of authorities, certificates and signature block), comes to 3,294 words as determined by the Word Count feature of WordPerfect X3.

TYPE FACE

I certify that the size of the type in this brief is not smaller than 14 point, Times New Roman font, for both the text of the brief and the footnotes, as required by ORAP 5.50(4)(f).

RESPECTFULLY SUBMITTED this 1st day of February, 2012.

O'DONNELL CLARK & CREW LLP

/s/ *Kristian Roggendorf*

Kelly Clark, OSB #831723

kellyc@oandc.com

Kristian Roggendorf, OSB #013990

ksr@oandc.com

Of Attorneys for Relators

(503) 306-0224

CERTIFICATE OF SERVICE

I certify that on February 1, 2012, I served a true copy of this RELATORS-
APPELLANTS' REPLY BRIEF on:

Stephanie Striffler,
Senior Assistant Attorney General
Department of Justice
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201

Sharon A Rudnick
Harrang Long Gary Rudnick PC
360 E 10th Ave Ste 300
PO Box 11620
Eugene OR 97440

*Of Attorneys for Defendants-
Respondents*

*Of Attorneys for Intervenor-Defendants-
Respondents*

Craig J Dorsay
Dorsay & Easton LLP
1 SW Columbia St Ste 440
Portland OR 97258

Of Attorneys for Amici Curiae Tribes

by electronic filing with the eCourt system. I further certify that I served a paper copy
of this motion on:

Bruce R. Greene, Colorado Bar No. 7248
Law Offices of Bruce R. Greene and Associates
1500 Tamarack Avenue
Boulder, CO 80304

Of Attorneys for Intervenor-Defendants

by regular first-class US Mail, deposited in Portland, OR, on February 1st, 2012.

DATED this 1st day of February, 2012.

O'DONNELL CLARK & CREW LLP

/s/ *Kristian Roggendorf*

Kelly Clark, OSB #831723
Kristian Roggendorf, OSB #013990
Of Attorneys for Appellants