

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE ex rel SUSAN
DEWBERRY, CAROL
HOLCOMBE, SUZANNE
DANIELSON, and ARNOLD
BUCHMAN,

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 THE COOS, LOWER UMPQUA
AND SIUSLAW INDIANS,

Intervenor-Respondent.

Lane County Circuit
Court No. 160323044

CA A146366

RESPONDENTS' JOINT ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Lane County
Honorable KARSTEN H. RASMUSSEN, Judge

Continued...

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RESPONDENTS' JOINT ANSWERING BRIEF

STATEMENT OF THE CASE

Respondents Governor of the State of Oregon and other Executive Officers of the State of Oregon (“the State”), and Intervenor-Respondent the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians (“Confederated Tribes”) (collectively “Respondents”) accept Relators’-Appellants’ (“Relators”) Statement of the Case as adequate for review, except as noted below.

Proceedings Below

Relators’ discussion of the proceedings below, and in particular their characterization of the circuit court’s order (ER 36-64), is both argumentative and incomplete.¹ The circuit court concluded that the Governor had both constitutional and statutory authority under Oregon law to sign the class III tribal-state gaming compact at issue in this case on behalf of the State (“Compact”).² The circuit court also concluded that the requirements under the

¹ The circuit court’s order is incorporated by reference in the General Judgment, July 13, 2010 at 2. (ER-65).

² The Amended Tribal-State Compact for Regulation of Class III Gaming Between the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians and the State of Oregon was executed by the Respondents on January 3, 2003, and approved by the Secretary of the Interior on March 7, 2003, pursuant to 25 USC § 2710(d)(8)(A). *See* 68 Fed Reg 11123. For the

Footnote continued...

Indian Gaming Regulatory Act, 25 USC §§ 2701-2721 (“IGRA”), for a valid compact had been met. Finally, the circuit court held that the Oregon constitutional restriction on casinos, Or Const, Art XV, § 4(10),³ which provides “[t]he Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon”, is a time, place and manner regulation preempted by IGRA and therefore does not apply on Indian lands.⁴ (ER-54-55, 61).

Relators also fail to inform the court in their brief that the precise issues in this case have previously been addressed in a federal court decision, *Dewberry v. Kulongoski*, 406 F Supp 2d 1136 (D Or 2005). In addition to concluding that the Relators did not have standing to bring their declaratory judgment action, the federal court found that the Governor was authorized under federal and state law to enter the Compact. *Id.* at 1150-57. Although the circuit court did not accord the federal district court decision preclusive effect, the court stated: “[T]his court finds the federal court’s analysis of the merits persuasive * * * and, frankly, instructive * * *.” (ER-52).

(...continued)

court’s convenience, the Table of Contents of the Compact is reproduced at SER 1-2 .

³ The text of Article XV, section 4, of the Oregon Constitution was amended in 2010. Prior to 2010, the casino provision appeared at section 4(12).

⁴ The term “Indian lands” is defined at 25 USC § 2703(4).

Questions Presented

1. Did the Governor lawfully enter the Compact under ORS 190.110 or the Oregon Constitution or both?
2. Even if the Governor lacked authority to enter the Compact, would Relators be entitled to the specific relief they seek in a mandamus proceeding, including “withdrawal” of the Governor’s signature from the Compact?

Summary of Argument

For eight years, the State and the Confederated Tribes have been parties to a Compact relating to gaming on the Tribes’ land. Relators’ challenge to the validity of the Compact is based on the erroneous premise that the Oregon Constitution’s ban on legislative approval of casinos in the State of Oregon precluded the Governor from complying with federal law requiring that the State negotiate in good faith with the Confederated Tribes for gaming on Indian lands. As the circuit court and the federal district court have both concluded, the Governor acted appropriately under statutory authority to enter into agreements with Indian tribes in circumstances such as these, where inaction by the State would have violated the Confederated Tribes’ federal right to good faith negotiations for a gaming compact.

Although Relators present the case as involving only questions of state law, the issues presented actually involve a combination of state and federal law. The Compact at issue in this case is an agreement entered between the

state and the Confederated Tribes under IGRA, a comprehensive federal statutory scheme for the regulation of gaming on Indian lands that preempts the application of state gaming laws. Any analysis of the challenge to the Compact must be founded on an examination and understanding of that federal statute. Indeed, the state statute pursuant to which the Governor entered the Compact – ORS 190.110 – itself references federal law, in that it authorizes agreements with Indian tribes “to ensure that the state * * * does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe * * * held or granted under any federal * * * statute * * *.” ORS 190.110(3).

Fundamental principles of federal Indian law provide the general framework for regulation of all activities on Indian lands, including gaming. Under federal law, Oregon does not have jurisdiction to prohibit casinos on Indian lands. Congress has plenary authority over Indian tribes, while states have authority over tribes only to the extent allowed by Congress. In the field of Indian gaming, Congress exercised its plenary authority over Indian tribes when it enacted IGRA in 1988.

Under IGRA, Congress provided states with a role that they otherwise would not have had with respect to “class III” (casino-style) gaming, which is the subject of the Compact. Indian tribes may engage in class III gaming activities if authorized by a class III gaming compact with the state.

States are required to negotiate with tribes in good faith for a compact covering all gaming activities that are permitted in a state “for any purpose by any person, organization, or entity * * *.” 25 USC § 2710(d)(1)(B). A state is only entitled to refuse to negotiate a compact if the state prohibits all forms of class III gaming, as does Utah. The Ninth Circuit has construed 25 USC § 2710(d)(1)(B) to be game-specific, meaning that a tribe has a right to include in its compact any specific *game* that is permitted in a state. In this case, the permitted scope of games under the Compact is lawful under IGRA because all of the permitted games are played in Oregon for some purpose by some person.

The role provided to states by IGRA, however, does not allow states to apply all state gaming regulations to tribes. As a matter of federal law, state restrictions relating to the time, place and manner of gaming do not apply to Indian tribes, unless agreed to in a compact. Therefore, if a game is authorized under state law, even in a highly regulated form (for example, if it is permitted with regulations regarding wager limits or restrictions on the venue or hours of play), the tribe has a right to good faith negotiations for a compact including that game, regardless of the state law restrictions that would otherwise apply.

Relators do not contend that any particular game authorized in the Compact is unlawful. Instead, they argue that the Governor was without authority to enter the Compact because of the provisions in Article XV, section 4(10), of the Oregon Constitution banning legislative approval of casinos and

requiring the legislature to prohibit casinos in Oregon. Relators' argument fails to recognize that section 4(10) is a restriction relating to the time, place and manner of gaming. As the Supreme Court explained in *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 318 Or 551, 871 P2d 106 (1994), Article XV's casino provision regulates the *kind of establishment* in which gambling can lawfully take place, rather than the kinds of *games* that may lawfully be played. With respect to Indian lands, such state venue regulations are preempted by IGRA.

While IGRA governs the kinds of gaming that can take place on Indian lands, Respondents agree with Relators that state law governs the procedure by which a state may enter an IGRA compact. As noted above, the Oregon legislature authorized the Governor to enter compacts pursuant to ORS 190.110(3), which authorizes the Governor to enter into agreements with tribes to ensure that the state does not infringe on the exercise of a tribe's right under a federal statute. ORS 190.110 authorized the Governor to enter the Compact because the Confederated Tribes have a right under federal statute, IGRA, to negotiate a compact.

Contrary to Relators' argument, ORS 190.110 permitted the Governor's action even though the text does not specifically mention IGRA or gaming compacts. ORS 190.110 authorizes the Governor to enter agreements in a broad range of circumstances without attempting to predict specific

circumstances that might fall within its scope. The state's obligations under IGRA plainly fall within scope of ORS 190.110, thereby authorizing the Governor to act. Further, the Governor was authorized to act despite the Oregon Constitution's casino provision because that venue regulation applies only where the state has jurisdiction to regulate gaming.

Moreover, the Governor was authorized to act pursuant to the Oregon Constitution, which provides that the Governor "shall take care that the Laws be faithfully executed" and that he "shall transact all necessary business with the officers of government * * *." Or Const, Art V, §§ 10, 13. Because IGRA required the State to negotiate a compact with the Confederated Tribes, doing so constituted "necessary business" and faithful execution of the laws. Finally, the Governor's action carried out his oath to uphold the United States Constitution, as required under Article XV, section 3, of the Oregon Constitution, adhering to the Supremacy Clause by complying with IGRA.

Federal law required the state to negotiate with the Confederated Tribes in good faith for a gaming compact, and state law designated the Governor as the state official authorized to carry out those negotiations. Relators' challenge to the Compact is based on a state constitutional provision that is preempted by IGRA. The circuit court correctly rejected Relators' arguments, and that decision should be affirmed.

ANSWER TO FIRST AND SECOND ASSIGNMENTS OF ERROR

The circuit court correctly concluded that the Oregon Constitution and ORS 190.110 authorize the Governor to enter the Compact.

Standard of Review

Respondents agree that the Assignments of Error present questions of law reviewed for errors of law.

Preservation of Error

Respondents agree that Relators raised their arguments below.⁵

COMBINED ARGUMENT

I. Introduction

The Compact is one of a series of tribal-state gaming compacts that the Governors of Oregon have negotiated with Oregon’s federally-recognized

⁵ Relators refer to the Tenth Amendment to the U.S. Constitution twice in their brief, although they do not argue that the Tenth Amendment is violated by IGRA. They say “if IGRA mandated the Governor’s participation in a federal negotiation process, it would violate the Tenth Amendment.” (App Br 34, 38-39). Relators made a similarly cursory statement below in their Reply Brief at 9: “The Tenth Amendment likewise prohibits the commandeering of state officials to administer and enforce a regulatory program.” These bald statements, without more, do not constitute affirmative argument and do not warrant review by this court. *Miles v. City of Florence*, 190 Or App 500, 505 n 2, 79 P3d 382 (2003); *OTECC v. Co-Gen*, 168 Or App 466, 488, 7 P3d 594 (2000), *rev den*, 332 Or 137 (2001) (we “decline to go in search of a substantive argument” where party “sets forth no meaningful analysis”).

Indian tribes beginning in 1992, relying, at least in part, on ORS 190.110.⁶ The most recently-constructed gaming facility operates pursuant to the Compact at issue in this case.⁷

The fundamental issue before the court is the lawfulness of gaming on Indian lands. Relators rely on state law, particularly Article XV, section 4(10), of the Oregon Constitution, which prohibits the Oregon legislature from authorizing casinos, to argue that the Compact is not lawful. However, the state does not have jurisdiction to enforce state gambling regulations such as Article

⁶ In 1990, the Attorney General issued an opinion that ORS 190.110 authorizes the Governor, on behalf of the State, to negotiate and enter into tribal-state gaming compacts with Indian tribes. 1990 Ore AG LEXIS 19, 36-37 (1990).

Compacts were approved by the Secretary of the Interior as follows: Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians: 60 Fed Reg 9258 (1995); Coquille Indian Tribe: 60 Fed Reg 9258 (1995); Cow Creek Band of Umpqua Tribe of Indians: 57 Fed Reg 56736 (1992); Confederated Tribes of the Grande-Ronde Community: 59 Fed Reg 31500 (1994); Klamath Tribes: 60 Fed Reg 10472 (1995); Confederated Tribes of the Siletz Indians: 60 Fed Reg 15194 (1995); Confederated Tribes of the Umatilla Indian Reservation: 59 Fed Reg 7628 (1994); Confederated Tribes of the Warm Springs Reservation: 60 Fed Reg 13568 (1995). Over the years, those compacts have been amended various times, but the amendments are not relevant to this dispute.

⁷ The Confederated Tribes originally entered into a gaming compact with the State in 1994, but ultimately concluded that the Indian lands available for a gaming facility were unsuitable. *See Oregon v. Norton*, 271 F Supp 2d 1270 (D Or 2003). Gaming under the 2003 Compact takes place at the Three Rivers Casino & Hotel, on a parcel of Indian lands known as the Hatch Tract, located adjacent to Florence, Oregon.

XV, section 4(10), on Indian lands; tribes have the right to game on Indian lands pursuant to *federal* law.

IGRA implicates state law in two different ways — substantively and procedurally. Substantively, IGRA authorizes class III gaming, but only pursuant to a tribal-state gaming compact. Under IGRA, state gaming law shapes the contours of the federal authorization: if a state permits a class III game to be played within the state “for any purpose by any person * * *”, 25 USC § 2710(d)(1)(B), the state is required under IGRA to negotiate with a tribe for the inclusion of that game in a class III gaming compact. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F3d 1250 (9th Cir 1994) (IGRA analysis is game specific). The way the state regulates and controls the play of those games where the state has jurisdiction is irrelevant to whether the state is required to negotiate for the game.

Procedurally, state law governs how a state enters a compact. The Oregon legislature, in enacting ORS 190.110, authorized the Governor to enter agreements with Indian tribes to ensure that the state does not infringe on their federal rights; one of those rights is the right to a gaming compact pursuant to IGRA.

In short, as the circuit court correctly concluded, and as the federal district court concluded in *Dewberry v. Kulongoski*, IGRA reflects a comprehensive scheme for the regulation of gaming on Indian lands, and

preempts state gambling laws that might otherwise apply.⁸ IGRA looks to state law only to determine the *types of games* that a tribe may offer on Indian land; other state time, place and manner regulations, including Oregon’s casino restriction, are preempted. By referencing federal law in ORS 190.110, the Oregon legislature gave the Governor the authority to fulfill the state’s obligation under IGRA. That is exactly what the Governor did here, when he exercised that authority to enter the Compact with the Confederated Tribes. As Respondents explain below, for those reasons, this Court should affirm the judgment of the circuit court.

II. The gaming authorized by the Compact is lawful on Indian lands.

A. Federal law determines which gaming activities are lawful on Indian lands.

Federal Indian law provides the framework for understanding IGRA and the role Congress created for states in regulating gaming activities on Indian lands. Courts have recognized that Congress has “plenary and exclusive authority over Indian affairs.” *United States v. Lara*, 541 US 193, 200, 124 S Ct 1628, 158 L Ed 2d 420 (2004); *see also Cotton Petroleum Corp. v. New Mexico*, 490 US 163, 192, 109 S Ct 1698, 104 L Ed 2d 209 (1989); *Washington*

⁸ The federal district court decision in *Dewberry v. Kulongoski* provides a carefully reasoned and persuasive discussion of IGRA and the relationship between state and federal law. Though that decision is not binding on this court, the decision addresses precisely the issues presented here, and this court should affirm the circuit court on the same grounds.

v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 US 463, 470, 99 S Ct 740, 58 L Ed 2d 740 (1979). Indian lands generally remain free of state authority and jurisdiction in the absence of express congressional delegation. “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Rice v. Olson*, 324 US 786, 789, 65 S Ct 989, 89 L Ed 1367 (1945) (citations omitted); *see also* Felix S. Cohen, *Handbook of Federal Indian Law*, § 6.01[2], pp. 501-06 (2005 ed.). The proposition that state law generally does not apply to Indian affairs within Indian country was first recognized by the Supreme Court in *Worcester v. Georgia*, 31 US 515, 561-62, 8 L Ed 483 (1832), which held that an Indian tribe “is a distinct community, occupying its own territory * * *.” The Supreme Court repeatedly has affirmed the *Worcester* decision. *E.g. Montana v. Blackfeet Tribe of Indians*, 471 US 759, 105 S Ct 2399, 85 L Ed 2d 753 (1985); *United States v. Mazurie*, 419 US 544, 95 S Ct 710, 42 L Ed 2d 706 (1975); *McClanahan v. Arizona State Tax Comm’n*, 411 US 164, 93 S Ct 1257, 36 L Ed 2d 129 (1973).

Only Congress, pursuant to the Indian Commerce Clause, is empowered to grant states jurisdiction over Indian gaming.⁹ As Congress recognized in passing IGRA:

⁹ The Indian Commerce Clause provides that: “The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” US Const, Art I, § 8, cl. 3.

It is a long and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands.

S Rep No 446, 100th Cong, 2d Sess at 5 (1988), *reprinted in* 1988 USCCAN 3071, 3075; *see also California v. Cabazon Band of Mission Indians*, 480 US 202, 207, 107 S Ct 1083, 94 L Ed 2d 244 (1987); *Dewberry*, 406 F Supp 2d at 1150 (“[G]aming on Indian lands is governed by federal rather than state law. * * *. Thus, Oregon law applies to the [Confederated] Tribes’ gaming activities on the Hatch Tract only to the extent that IGRA or other federal law renders it applicable.”)

Before IGRA, there was uncertainty regarding the extent to which existing federal or state laws applied to gaming on Indian lands.¹⁰ Several states tried to assert jurisdiction under Public Law 83-280 (“PL 280”), a 1954 statute that granted six states, including Oregon and California, broad criminal jurisdiction over offenses committed by or against Indians within all Indian lands, but no general civil regulatory authority over Indian tribes.¹¹ *Bryan v.*

¹⁰ See, e.g., *United States v. Bay Mills Indian Community*, 692 F Supp 777 (WD Mich 1988); *vac’d*, 727 F Supp 1110 (WD Mich 1989); and *United States v. Dakota*, 796 F2d 186 (6th Cir 1986).

¹¹ Codified in part at 18 USC § 1162 and 28 USC § 1360.

Itasca County, 426 US 373, 96 S Ct 2102, 48 L Ed 2d 710 (1976); *Sycuan Band of Mission Indians v. Roache*, 54 F3d 535, 539 (9th Cir 1994); *see also State v. Jim*, 178 Or App 553, 37 P3d 241 (2002) (discussing application of PL 280 in Oregon); *see also generally* Cohen at § 6.04[3][a], p. 544. The question whether states could assert criminal jurisdiction over Indian gaming under PL 280 culminated in the United States Supreme Court’s decision in *Cabazon*.

B. The *Cabazon* decision established the framework for gaming permitted on Indian lands under IGRA.

Cabazon determined, as a matter of federal law, the extent to which state gambling laws applied on Indian lands. As explained below, the *Cabazon* Court’s analysis considered whether a state’s gambling laws were “criminal/prohibitory” or “civil/regulatory” in nature. That analysis is significant here because IGRA reflects that distinction. *See* S Rep No 446, 100th Cong, 2d Sess at 6 (1988), *reprinted in* 1988 USCCAN at 3075-76. *Cabazon* thus provides context for IGRA’s focus on the *type of games* allowed under state law, rather than on other kinds of state regulations, including bet limits, hours of operation, or venue restrictions (such as Or Const, Art XV, § 4(10)).

In *Cabazon*, California unsuccessfully argued that Congress had expressly consented to state jurisdiction over tribal gaming by passing PL 280. 480 US at 206. The *Cabazon* Court observed that Indian tribes retain

“attributes of sovereignty over both their members and their territory,” and that “tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States[.]” *Id.* at 207 (citations omitted). However, the Court also noted that, if authorized by Congress, state laws would be applicable to Indian lands. *Id.* In determining that Congress had not applied California gaming law to Indian lands under PL 280, the Court stated:

[I]f 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 law 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 shorthand test is whether the conduct at issue violates the State’s public policy.

Id. at 209.

Because California permitted “a substantial amount of gambling activity * * * and actually promote[d] gambling through its state lottery,” the Court concluded that California “regulate[d] rather than prohibit[ed] gambling in general and bingo in particular.” *Id.* at 211. Accordingly, California’s laws were “civil/regulatory” and did not apply on Indian lands.

The Court also applied a balancing test between federal, state and tribal interests. The Court concluded that state gaming laws were preempted by the operation of federal laws and policies and tribal interests that promoted tribal self-sufficiency and economic development. *Id.* at 221-22.

C. Through IGRA, Congress enacted a comprehensive scheme for the regulation of gaming on Indian lands that preempts the application of state gambling laws.

In response to *Cabazon*, Congress enacted IGRA to provide a statutory framework for regulating gaming on Indian lands. *See* S Rep No 446, 100th Cong, 2d Sess at 6 (1988), *reprinted in* 1988 USCCAN 3075. IGRA was “intended to expressly preempt the field in the governance of gaming activities on Indian lands[.]”. *Id.*, *reprinted in* 1988 USCCAN at 3076; *Dewberry*, 406 F Supp 2d at 1152 (“It is well-established that IGRA, as a matter of federal law, preempts state regulation which ‘interferes or is incompatible with federal or tribal interests.’”) (citations omitted).

Relators attempt to avoid the impact of federal preemption here, but they misunderstand IGRA and the role of federal preemption in the context of Indian tribes. The preemption decisions cited by Relators are inapposite.¹² The U.S. Supreme Court has made it clear that traditional preemption rules are “unhelpful” in the context of Indian tribes. *White Mountain Apache Tribe v. Bracker*, 448 US 136, 143, 100 S Ct 2578, 65 L Ed 2d 665 (1980) (“The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that

¹² Relators cite these cases in the context of contending that “IGRA does not preempt state law on signing compacts” (App Br 33), a contention with which Respondents do not disagree; see Section III below.

have emerged in other areas of the law.”). Rather, “federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.” S Rep No 446, 100th Cong, 2d Sess at 5-6 (1988), *reprinted in* 1988 USCCAN at 3076. Congress has expressly defined those roles in IGRA. Further, there is no question but that IGRA was *intended* to preempt the application of state gaming laws; accordingly there is no need to engage in any analysis to determine whether that intent is implied.

IGRA separates types of gaming into three classes—class I, II and III—each subject to a different manner of regulation. Class I gaming, which is regulated solely by tribes, consists of “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.” 25 USC § 2703(6); 25 USC § 2710(a)(1); 25 CFR § 502.2. Class II gaming includes bingo, lotto and certain types of card games—specifically excluding house-banked card games. 25 USC §§ 2703(7)(A), (B); 25 CFR § 502.3. Class II activity is regulated by tribes and the National Indian Gaming Commission (“NIGC”), a federal commission created under IGRA. 25 USC § 2704. Neither class I nor class II gaming is at issue in this litigation.

Class III gaming includes all forms of gaming that are not class I or II, such as house-banked card games, casino-style games such as roulette, craps,

and keno, slot machines, electronic or electromechanical facsimiles of games of chance, sports betting, pari-mutuel wagering, jai-alai and lotteries. 25 USC § 2703(8); 25 CFR § 502.4. Class III games are lawful on Indian lands if: 1) located in a state that otherwise permits such gaming for any purpose by any person, 2) conducted in conformity with a tribal-state compact, and 3) authorized by a tribal ordinance or resolution approved by the NIGC's Chair. 25 USC § 2710(d)(1).

Key to class III gaming under IGRA is the tribal-state compact, which was designed as a way to reconcile tribal and state interests concerning such gaming. *See* S Rep No 446, 100th Cong, 2d Sess at 6 (1988), *reprinted in* 1988 USCCAN at 3075-76. Congress noted “the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply,” and “balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands.” *Id.*; *reprinted in* 1988 USCCAN at 3083. Under such compacts, states and Indian tribes develop joint regulatory schemes. *See* Cohen at § 12.05[1], p. 872. “In IGRA, Congress * * * imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA permitting the tribes to engage in lawful class III gaming activities.” *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F3d 1019,

1030 (9th Cir 2010), *cert den sub nom Brown v. Rincon Band of Luiseno Mission Indians of the Rincon Reservation*, ___ US ___, 131 S Ct 3055, ___ L Ed 2d ___ (2011).

D. IGRA requires the state to negotiate a compact for games that are lawful “for any purpose by any person.”

IGRA thus imposes compacting obligations on both tribes and states. If a tribe seeks to conduct class III gaming, it must first negotiate a compact with the state regarding the scope and regulation of the class III gaming activities. 25 USC § 2710(d)(1)(C).¹³ Likewise, states must negotiate compacts in good faith with tribes for class III gaming if the state permits such gaming activity “for any purpose by any person, organization, or entity * * *.” 25 USC §§ 2710(d)(1)(B), (d)(3)(A). Tribes may enforce that obligation by suing states in federal court for the failure to negotiate in good faith. 25 USC §§ 2710(d)(7)(A) and (B). If the court finds that the state failed to negotiate in good faith, the court can issue an order requiring the state and the tribe to conclude the compact.¹⁴ 25 USC § 2710(d)(7)(B)(iii). Thus, under federal law,

¹³ The provisions that may be included in a class III gaming compact are set forth in 25 USC § 2710(d)(3)(C)(i)-(vii).

¹⁴ The Ninth Circuit recently found that California acted in bad faith in its negotiations with an Indian Band in southern California and ordered the parties to reach a compact or submit last best offers of compact to a mediator, pursuant to 25 USC § 2710(d)(7). *Rincon*, 602 F3d at 1042; *see also United States v. Spokane Tribe of Indians*, 139 F3d 1297 (9th Cir 1998) (declining to

Footnote continued...

the Confederated Tribes had a right to good faith compact negotiations with the State of Oregon, and, concomitantly, the state was obligated to negotiate in good faith for a compact.

E. The state was required to negotiate for the gaming authorized under the Compact because all of the games are permitted under Oregon law.

The Governor complied with federal law by negotiating the Compact, which authorizes games permitted under Oregon law. IGRA looks to state law to determine the permitted scope of games that the state must negotiate for inclusion in a compact. If a state permits such gaming activities “for any purpose by any person, organization, or entity * * *”, 25 USC § 2710(d)(1)(B), then *as a matter of federal law*, the class III games that the state permits are lawful on Indian lands, provided they are authorized by a tribal ordinance and carried out pursuant to a tribal-state compact.

IGRA’s provision regarding authorized scope of gaming reflects *Cabazon’s* “civil/regulatory” versus “criminal/prohibitory” analysis. Under IGRA, the only way a state may completely prohibit gaming on Indian lands is to prohibit *all* persons within the state from playing a particular game for *any* purpose. If a state chooses to completely prohibit gaming, then—and only

(...continued)

enjoin uncompact class III gaming where the tribe claimed that the state had failed to negotiate in good faith.)

then—are tribes prohibited from gaming in that state. In the words of IGRA, gaming in Utah is not permitted for any purpose by any person. However, most states, like Oregon, permit some form of gaming by some persons, and thus must negotiate for those forms of gaming on Indian lands.

The Ninth Circuit has adopted a “game-specific” approach to the question of whether gaming activities are permitted “for any purpose by any person * * *”, 25 USC § 2710(d)(1)(B), “meaning that courts must determine whether applicable state law permits a specific type of game rather than a broad category of gaming.” *Rumsey*, 64 F3d at 1257-58,¹⁵ *Coeur d’Alene Tribe v. Idaho*, 842 F Supp 1268, 1278 (D Idaho 1994), *aff’d*, 51 F3d 876 (9th Cir 1995); *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F3d 273, 278-79 (8th Cir 1993); *Dewberry*, 406 F Supp 2d at 1151. In other words, if the state entirely prohibits a particular game, the state is not required to negotiate with a tribe to permit that game, even if the state permits other games in the same classification. *See Rumsey*, 64 F3d at 1258; *Coeur d’Alene Tribe*, 842 F Supp at 1279-80. Conversely, “if a state allows a gaming activity ‘for any purpose by any person, organization, or entity,’ then it also must allow Indian tribes to

¹⁵ Although the *Rumsey* decision does not bind this court, it does control whether the Secretary of the Interior would (and did) approve the Compact.

engage in that same activity. 25 USC § 2710(d)(1)(B).” *Rumsey*, 64 F3d at 1258.

Dalton v. Pataki, 5 NY3d 243, 835 NE2d 1180 (2005), illustrates the application of the game-specific standard. There, plaintiffs asserted that the state constitution completely prohibited *commercial* gaming, and thus contended that tribal-state compacts could not authorize casino-style gaming. The court rejected those arguments, focusing instead on which specific games were permitted under New York law. The court held that casino-style gaming was permitted because New York allows a lottery, racing, and gaming for charitable purposes:

* * * IGRA does not allow the state to consider the purpose behind the gaming. The language of the statute is clear that class III gaming will be permitted when “located in a State that permits such gaming for *any* purpose by *any* person, organization, or entity” (25 USC § 2710 (d)(1)(B) (emphasis added)). This language is intentionally broad and includes the limited gaming permitted by the New York State Constitution under the supervision and authority of the New York State Racing and Wagering Board (*see* General Municipal Law art 9-A; 9 NYCRR 5600.1 et seq.). Through IGRA, Congress has preempted the states in this area. Since New York allows some forms of class III gaming—for charitable purposes—such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact (*see* 25 USC § 2710 (d)(1)).

835 NE2d at 1189 (emphasis in original); *see also Mashantucket Pequot Tribe v. Connecticut*, 913 F2d 1024 (2d Cir 1990) (Connecticut obligated to negotiate with tribe for a wide variety of casino-style games, notwithstanding that those

games were only played by charitable entities under rules restricting wagers, prizes and frequency of occurrence, because those games were permitted for any purpose by any person, within the meaning of IGRA).

Similarly, because Oregon permits almost all forms of gaming, even if only for charitable purposes, the Compact lawfully authorizes a wide range of games, including casino-style games. *Dewberry*, 406 F Supp 2d at 1150-51. Although gaming in Oregon is highly regulated, Oregon law authorizes many gaming activities that are classified as class III under IGRA. 25 USC § 2703(8); 25 CFR § 502.4. For example, since 1933, Oregon has allowed pari-mutuel betting on horse and greyhound races, both on and off-track. ORS 462.010; ORS 462.020; ORS 462.700-462.740. Similarly, Oregon's "Happy Canyon" statute, passed in 1971, allows charitable, religious, and fraternal organizations to engage in a broad range of games to raise funds, including games in which wagers are placed on "contests of chance." ORS 167.117(7). Contests of chance include bingo, lotto or raffle games, or "Monte Carlo" events such as blackjack, roulette, craps, and other common casino-style games. ORS 167.117(7)(d); ORS 167.118. In addition, since 1974, Oregon has permitted counties or cities to authorize the playing of "social games" (such as poker and blackjack) in places of public accommodation. ORS 167.121. In 1984, Oregon voters created a state-sponsored lottery by amending the Oregon

Constitution. Or Const, Art XV, § 4.¹⁶ Thus, all the games in the Compact are permitted for some purpose by some person in Oregon and the state was required to negotiate to include them in the Compact.

F. Oregon Constitution, Article XV, section 4(10), does not apply on Indian lands under IGRA because it is a time, place and manner regulation.

Relators do not identify any specific game that they contend the Compact unlawfully authorizes; they do not claim that the games listed in the Compact are not among the numerous class III games that are already being conducted in the state by nonprofit organizations and others. Rather, they contend that the Compact is unlawful under Article XV, section 4(10), of the Oregon Constitution. But IGRA focuses only on whether state law permits or prohibits specific *games* and does not import into gaming compacts other associated state regulations, such as the venue restriction in Article XV, section 4(10), of the Oregon Constitution.

1. Even if state law imposes strict regulations on the time, place and manner of gaming activities, the state may not prohibit or even regulate such gaming on Indian lands.

As discussed above, before IGRA, *Cabazon* held that when a state allows gaming, albeit in a regulated form, state laws regulating such gaming do not apply on Indian lands within the state. 480 US at 209-10. Even if a state only

¹⁶ That initiative also amended the Constitution to prohibit the legislature from authorizing casinos.

allows a limited amount of gaming subject to strict regulations on time, manner and place, the state may not prohibit or even regulate gaming on Indian lands within the state. *Id.* at 221. The Court’s distinction between prohibiting and permitting-subject-to-regulation (referred to in *Cabazon* as “criminal/prohibitory” and “civil/regulatory”) is reflected in IGRA.

In interpreting IGRA, courts have repeatedly upheld the principle that state time, place and manner regulations do not apply on Indian lands. For instance, in *Willis v. Fordice*, the court rejected an argument that state laws limiting the permissible *location* or *venue* of gambling apply on Indian lands. There, the plaintiff contended that “neither *Cabazon* nor IGRA would allow gaming on the Indian lands at issue in this case” because “Mississippi only allows legalized gaming along the Mississippi River and the Gulf Coast.” *Willis v. Fordice*, 850 F Supp 523, 531 (SD Miss 1994), *aff’d*, 55 F3d 633 (5th Cir 1995). Therefore, the plaintiff claimed that tribes could only engage in gaming if their gaming operation was located along the Mississippi River or on the Gulf Coast. *Id.* The court rejected that argument, stating that the plaintiff “misreads the holding in *Cabazon* and the statutory framework of the IGRA.” *Id.* The court held:

[T]he Choctaw Indian tribe in the State of Mississippi is not bound by the requirement that gaming be located on navigable waters, as [plaintiff] asserts. Because Mississippi allows such gaming as a matter of public policy, it may not prohibit Class III gaming

by the Choctaw Indian tribe on tribal lands. The tribe is only bound by the provisions contained in the Compact between the tribe and the State, not all of the regulations contained in the Mississippi Gaming Control Act.

Id. at 532 (citations omitted).

Likewise, in *Mashantucket Pequot*, the state had indicated that it would negotiate a compact with the tribe that included “Las Vegas” style gaming, but only subject to specified conditions and limitations under state law as to the size of wagers, the character of prizes and the frequency of operations. The Second Circuit held that state laws restricting the time, place and manner of how a particular game must be played do not apply to tribal-state gaming compacts. Because the state allowed nonprofits to engage in casino-type gaming, albeit in a highly regulated form, the state was required to negotiate a compact for casino games on Indian lands under § 2710(d)(1)(B) of IGRA, but without the state regulatory restrictions:

[T]he legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, *even if conducted in a manner inconsistent with state law*, if the state merely regulated, as opposed to completely barred, that particular gaming activity.

913 F2d at 1029 (emphasis added), quoting *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F2d 358, 365 (8th Cir 1990). If the state’s approach were correct, the court continued, the heart of IGRA’s regulation of class III gaming

“would thus become a dead letter.” There would be nothing to negotiate between sovereigns, since all state laws and regulations covering Las Vegas Night gaming would have to be included within the compact, something Congress did not contemplate. *Id.* at 1030-31; *Dewberry*, 406 F Supp 2d at 1152 (“Consequently, if a state permits gaming activity ‘for any purpose by any person,’ IGRA authorizes such gaming activity on Indian lands *without the restrictions imposed by state law on off-reservation gaming*”) (emphasis added; citations omitted); *see also Northern Arapaho Tribe v. Wyoming*, 389 F3d 1308 (10th Cir 2004); *Ysleta del Sur Pueblo v. Texas*, 852 F Supp 587 (WD Tex 1993), *rev’d on other grounds*, 36 F3d 1325 (5th Cir 1994); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F Supp 480 (WD Wis 1991).

2. The Oregon Constitution’s casino clause is a venue regulation.

Like the plaintiffs in *Dalton*, *Willis*, and *Mashantucket Pequot*, who each contended that state law gaming regulations should apply on Indian lands under a gaming compact, Relators argue that if the Oregon Constitution prohibits casinos on non-Indian lands, that regulatory restriction also applies on Indian lands. Relators misunderstand the meaning and function of Article XV, section 4(10). As explained below, the Oregon Supreme Court has interpreted the casino clause as regulating the location – or kind of establishment – where

gaming takes place, rather than as a regulation on the types of games that may be played. Thus, just as the state regulations in *Dalton*, *Willis* and *Mashantucket Pequot* did not apply to the tribes in those states, Article XV, section 4(10), does not apply to tribes in Oregon.

In *Ecumenical Ministries*, the plaintiffs contended that certain lottery statutes violated the casino clause because they created “state-sponsored video poker” that had “the effect of creating casino gambling in the State of Oregon.” 318 Or at 556. The Oregon Supreme Court disagreed, thus explaining how the legislature had the authority to authorize a wide range of casino-style gaming in Oregon without running afoul of the casino clause.

As the court explained, “the voters intended to distinguish between the authorized State Lottery and particular types of game procedures (expressly including game procedures utilizing computer terminals), on the one hand, and the general category of gambling establishments known as ‘casinos,’ on the other.” *Id.* at 561. Considered together, the court said, the text and context of the constitutional casino provision demonstrate that in

prohibiting the operation of “casinos,” the voters intended to prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling. The voters did not intend, in adopting Article XV, section 4(7) [now section 4(10)], to prohibit the use of lottery games using computer terminals, with the exception of those that dispense coins or currency directly to players.

Id. at 562. Having construed the relevant language in that manner, the court determined that the challenged statutes did not violate the constitutional casino restriction. That was true, because “[t]he use of video lottery game terminals does not, *per se*, make a place a casino.” *Id.* at 564.

Accordingly, Article XV, section 4(10), does not prohibit any particular *game*. Rather, the clause prohibits authorizing “*establishments* whose dominant use or dominant purpose, or both, is for gambling.” 318 Or at 564 (emphasis added). Like the riverboat provision in *Willis*, the clause regulates the location or venue where gaming takes place. As a “place” restriction, it does not apply to gaming activities on Indian lands. As in *Willis*, Oregon does not have jurisdiction to impose on tribes the venue restrictions that apply to others under state law. *See also Knox v. Idaho*, 148 Ida 324, 223 P3d 266, 278 n. 7 (2009) (“Under IGRA, a state can permit Class III gambling on an Indian reservation that is not permitted in other parts of the state.”), citing *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F3d 712 (9th Cir 2003)). As the federal court held in *Dewberry*:

Nowhere in the *Rumsey* decision does the Ninth Circuit suggest that the ‘method’ of the gaming matters in determining whether a particular class III game is permitted by state law. * * * [B]ecause Oregon allows various persons and organizations to conduct class III games for various purposes, the State must negotiate with tribes to permit those games on Indian lands free from state restrictions – such as the prohibition against casinos – that would otherwise

apply. *Where class III gaming takes place is simply irrelevant to the inquiry under IGRA.*

406 F Supp 2d at 1152 (emphasis added).

Relators rely on *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21 Cal 4th 585, 981 P2d 990 (1999) (“*HERE*”), but that case does not help them. The case concerned California’s similarly worded constitutional provision that “The Legislature has no power to authorize * * * casinos of the type currently operating in Nevada and New Jersey.” 981 P2d at 994, quoting Cal Const, Art IV, § 19, subd. (e). But the similarity between Oregon and California’s provisions ends with the first few words. The California Supreme Court found that the provision was intended to refer to facilities offering certain prohibited gaming activities, such as house-banked table games and slot machines. Because Oregon’s casino provision does not prohibit such specific gaming activities, *HERE* does not apply. *See Dewberry*, 406 F Supp 2d at 1153 (“In contrast to *Hotel Employees*, plaintiffs identify no Oregon provision that prohibits the class III games authorized under the [Confederated] Tribes’ Compact.”).

In sum, because Article XV, section 4(10), is a venue restriction, it is preempted by federal law on Indian lands.

III. State law authorizes the Governor to enter tribal-state gaming compacts.

While federal law governs the kind of gaming authorized on Indian lands, Oregon law governs the manner in which the state enters tribal-state gaming compacts. *E.g. Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, 798 NE2d 1047, 1060 (2003) (state law governs “which state actors are competent to negotiate and agree to gaming compacts * * *”); *Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 (10th Cir 1997) (“Congress intended that state law determine the procedure for executing valid gaming compacts.”)

Oregon law provides two sources for the Governor’s authority to enter into gaming compacts: statutory authority for agreements with tribes, and more general constitutional authority. First, ORS 190.110 authorizes the Governor to enter into agreements with tribes to ensure that the State does not interfere with or infringe on the exercise of tribal rights under federal law. Second, the Oregon Constitution provides that the Governor “shall take care that the Laws be faithfully executed”, Art V, § 10, that he “shall transact all necessary business with the officers of government * * *”, Art V, § 13, and that he take an oath of office to “support the Constitution of the United States, and of this State * * *”, Art XV, § 3.

A. The legislature authorized the Governor to enter the compact under ORS 190.110.

The Governor entered the Compact pursuant to ORS 190.110, which authorizes state agencies to enter agreements with tribes. ORS 190.110 provides, in relevant part:

(1) In performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, a unit of local government or a state agency of this state may cooperate for any lawful purpose, by agreement or otherwise, with * * * an American Indian tribe.
* * *

(2) The power conferred by subsection (1) of this section to enter into an agreement with an American Indian tribe * * * extends to any unit of local government or state agency that is not otherwise expressly authorized to enter into an agreement with an American Indian tribe * * *.

Further, in section 3, the legislature specifically authorized the Governor to enter agreements with Indian tribes to protect tribal rights under federal law:

(3) With regard to an American Indian tribe, the power described in subsections (1) and (2) of this section includes the power of the Governor or the designee of the Governor to enter into agreements to ensure that the state * * * does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe * * * held or granted under any federal * * * statute * * *.

The legislature provided that the provisions of ORS 190.110 “shall be liberally construed.” ORS 190.007.

The text and context of ORS 190.110 demonstrate that gaming compacts fall squarely within its scope. ORS 190.110 is but one part of a chapter generally addressing “cooperation of governmental units.”

ORS 190.110 grants state agencies and units of local governments the power to cooperate with other governmental units for any lawful purpose.

Subsection 3 extends the power to the Governor or his designee “to ensure that the state * * * does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe * * *.” As discussed above, Oregon tribes have a federal right under IGRA to good faith negotiations for a compact, upon request. 25 USC § 2710(d)(3)(A).

Tribal gaming compacts thus constitute agreements ensuring that the state does not infringe on that federal right, and, accordingly, ORS 190.110 by its terms confers upon the Governor authority to enter into gaming compacts with the tribes.

Relators contend that ORS 190.110 does not apply for two reasons. First, Relators argue that ORS 190.110 predated IGRA and does not specifically identify IGRA or gaming compacts. (App Br 21-27). Second, Relators argue that ORS 190.110 does not apply because the Governor is entitled to refuse to comply with IGRA’s good-faith negotiation obligation, and thus there is no “federal right” at issue. (App Br 27-30). As explained below, Relators’ reading of both state and federal law is far too restrictive.

1. Legislative history confirms that gaming compacts are the kind of tribal agreement covered by ORS 190.110(3) even though the statute predates IGRA.

True enough, ORS 190.110 could not have specified *IGRA* gaming compacts, because it was enacted before IGRA. But as explained above, the broad scope of ORS 190.110 clearly encompasses gaming compacts, even though ORS 190.110 does not specifically mention gaming compacts (or any other specific kind of agreement, for that matter). In addition, the legislative history confirms that tribal gaming compacts are indeed the kind of agreement that ORS 190.110 contemplates. *See State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (discussing use of legislative history in statutory interpretation). As the following discussion of the legislative history demonstrates, the 1985 legislature foresaw the need to authorize the state and tribes to enter a wide range of cooperative agreements without having to seek specific legislative approval in every instance. Further, tribal gaming was a specific example presented to legislators as a potential agreement topic that ORS 190.110 was needed to cover.

Legislators considering SB 159, which amended ORS 190.110, envisioned that, under its provisions, the Governor would be able to enter into a variety of agreements to resolve potential disputes about a wide range of federal tribal rights. Those rights included, for example, the Indian Child Welfare Act, a federal law governing state procedures regarding custody of Indian children.

Leroy Wilder, attorney for the Confederated Tribes of Siletz Indians, explained that the bill would make clear that state agencies were authorized under state law to comply with such federal laws:

* * *. The Indian Child Welfare Act, which is a piece of federal legislation, authorizes tribes to enter into agreements with states to handle * * * the disposition of * * * cases involving Indian children, which otherwise are governed by a special federal statute. We've had difficulty entering into an agreement * * * with the state on that, because there's some doubt as to whether the agreement would be binding on the state. And the tribes' fear, is [that] if we enter into an agreement for a disposition of a case, and then we decide later on, or somebody decides that they don't really like what we've agreed to do, they will say, "Well, this agreement is not binding on the state." So we would like some means of * * * suggesting or being able to point to the state law and say you do have the authority, and the agreement is binding.

Mr. Wilder also explained that the bill would authorize a range of cooperative agreements that would avoid conflict and would be difficult to enumerate in advance:

* * * I anticipated the question why do you want this bill? It's difficult to come up here with a laundry list of reasons for the bill because * * * when you need it, it's too late. I mean you've got the confrontation present. If you have the ability to sit down and discuss it and agree and bind each other then * * * we don't have to develop our laundry list. * * *

Hearing on SB 159, Senate Government Operations and Elections Committee
(April 1, 1985), Tape 58, Side A at 128.

Not only did SB 159 address a need for a range of agreements, but legislators also considered tribal gaming in particular among the federal-rights-based subjects about which the Governor and Indian tribes might reach such agreements. In response to a question whether the statute would authorize the Governor to “set aside what the legislature had decided,” Wilder replied, using tribal gaming as an example. He explained that federal law provided Indian tribes certain rights not subject to regulation by the Oregon Legislature, rights that created the risk of confrontation with the state:

* * * [I]f you’re going to allow bingo you cannot legislate how an Indian tribe is going to conduct bingo within this state. The only way you can regulate bingo on an Indian reservation is to say you can’t have bingo in the State of Oregon period. Then, Indian tribes can’t have bingo either. But if you say there can be bingo games in the State of Oregon, you can’t legislate how an Indian tribe conducts that. So, an Indian tribe has the authority in this state to bring in the world’s biggest bingo game and run it, and the State of Oregon can sit back and do nothing about it, but the Governor could sit down * * * with the tribe under this bill and say, “Let’s talk about this, and let’s come to some reasonable disposition of this problem.” And that’s where we’re hoping to be able to do. * * *

Id. at 128.

As with the Indian Child Welfare Act referred to in the legislative testimony, IGRA is a federal law addressing state government activities with tribes. The Oregon legislature enacted ORS 190.110 to ensure that state

government had authority to act consistently with federal law in such situations. That is exactly the function the statute performs in the case of IGRA: it ensures that the governor and state officers have the authority to act consistently with federal law regarding tribal gaming. That IGRA had not yet become law when SB 159 passed does not change that conclusion. The legislature envisioned that ORS 190.110 could implicate a variety of federal rights.

Relators also assert that “the idea of Indians having a federal right to allow gaming on their lands did not arise until the 1987 *Cabazon* decision and the passage of IGRA in 1988.” (App Br 24). Relators are wrong. Indeed, as the legislative testimony regarding SB 159 indicates, when SB 159 was adopted, the tribal right under federal law to engage in gaming on Indian lands was the subject of significant public debate, both in Congress and the courts. *See generally* Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 43 Ariz St L J 99, 108-69 (Spring 2010) (detailing tribal gaming litigation and Congressional proposals in the 1980’s).

In the courts, the debate about whether states had jurisdiction to impose gaming laws on Indian lands culminated in the 1987 decision in *Cabazon*. However, long before that decision, predecessor rulings had already worked their way through the courts, reaching substantially the same result as did the ultimate Supreme Court decision. *See e.g., Seminole Tribe of Florida v. Butterworth*, 658 F2d 310 (5th Cir 1981); *Barona Group of the Capitan Grande*

Band of Mission Indians v. Duffy, 694 F2d 1185 (9th Cir 1982). Other litigation during that time addressed a variety of tribal gaming. *E.g. Langley v. Ryder*, 778 F2d 1092 (5th Cir 1985) (finding that federal law preempted state criminal jurisdiction over tribal gaming, including blackjack, roulette, and slot machines); *United States v. Dakota*, 666 F. Supp 989 (WD Mich 1985) (finding state jurisdiction over commercial casino gambling). *Cabazon* itself was argued in the Ninth Circuit in October, 1985, and thus that litigation was in full swing when the 1985 Oregon legislature adopted SB 159. *Cabazon Band of Mission Indians v. County of Riverside*, 783 F2d 900 (9th Cir 1986); *see also* Ducheneaux at 150 (discussing history of *Cabazon*). Such cases were likely the basis for Mr. Wilder’s legislative testimony regarding tribal rights to conduct bingo if lawful in Oregon. Indeed, that 1985 testimony states the rule that was ultimately adopted by the United States Supreme Court two years later in *Cabazon*.¹⁷

¹⁷ Relators contend that in 1985, “Public Law 280 * * * allowed Oregon specifically to regulate gambling * * * on Tribal lands.” (App Br 23). This statement is wrong. Because Oregon’s gambling laws are civil and regulatory in nature, they would not have applied on Indian lands in 1985, just as they do not apply today. *See Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F2d 1185 (9th Cir 1982); *Seminole Tribe of Florida v. Butterworth*, 658 F2d 310 (5th Cir 1981). The holding in those earlier cases was adopted by the Supreme Court in *Cabazon*.

In the meantime, Congress debated several Indian gaming bills, starting in the 98th Congressional Session in 1983 and 1984. S Rep No 446, 100th Cong, 2d Sess 6 (1988), *reprinted in* 1988 USCCAN 3071. In the 99th Congress (1985-1986), five bills were introduced in the House. *Id.* Representative Morris Udall introduced HR 1920, which became the focus of attention and the subject of three House Interior Committee hearings. *Id.* Thus Relators are simply wrong to state that the idea of a federal right to game on Indian lands “had not arisen” when ORS 190.110 was amended, or that the statute’s legislative history is “bereft of any indication” of the holding that was to come in *Cabazon*. (App Br 23).

Not only does the 1985 legislative history demonstrate that ORS 190.110 was intended to have a scope broad enough to encompass tribal gaming agreements, but also the legislature has since rejected proposals to take a more active role in gaming compacts. Since the enactment of SB 159, the Oregon legislature has considered and rejected bills that would have instituted a legislative role in the negotiation and execution of state-tribal compacts. In 1997, Senate Bill 881 would have required the Governor to consult with the legislature before and during gaming negotiations with Indian tribes and to submit proposed compacts to the legislature for review. SB 881(1997). After testimony that such amendments would create an undue burden on tribes and the State, no further action on Senate Bill 881 was taken. Hearings on SB 881,

Senate Committee on Trade and Economic Development (March 25 and April 3, 1997).

Further, in 2001, a proposed Joint Resolution would have referred a constitutional amendment to the voters to require legislative approval of proposed tribal-state gaming compacts. SJR 29 (2001). After referral to the Senate Committee on Business, Labor, and Economic Development, no further action was taken on the resolution. *Id.*

The text, context and legislative history thus establish the legislature's intent to authorize the Governor to enter into a broad range of agreements with Indian tribes without specific legislative approval, that such authority encompasses the execution of gaming compacts, and even that legislators were specifically aware that there was a potential need for tribal gaming agreements. Moreover, subsequent legislatures have declined to disturb the current process.

2. IGRA's procedural remedies for refusal to negotiate do not negate IGRA's affirmative obligation to negotiate or render ORS 190.110 inapplicable to tribal gaming compacts.

The second reason that Relators contend that ORS 190.110 does not apply to tribal gaming compacts is that, according to Relators, the Governor is entitled under IGRA to refuse to negotiate compacts. Therefore, Relators claim, compacts are not necessary to avoid "interference" or "infringement" of tribal federal rights within the meaning of ORS 190.110(3). (App Br 25 - 27).

For that reason, Relators also argue ORS 190.110 does not authorize the Governor to enter gaming compacts because there is no “duty imposed” under ORS 190.110(1), which authorizes a state agency to enter agreements with tribes in “performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it * * *.” Relators are wrong under both state and federal law.

First, Relators are wrong that the statute requires that there be a “duty imposed” on the Governor at all. Relators quote text from subsection (1) of the statute, but the power to enter compacts conferred on the Governor by that statute is set forth in subsection (3).

Second, Relators attempt to avoid the import of IGRA by suggesting that the Governor can simply ignore IGRA’s requirement to negotiate. (App Br 26). Relators rely on the fact that IGRA provides remedies if the compact is not concluded, ultimately including the potential imposition by the Secretary of the Interior of procedures for the conduct of class III gaming on the Indian lands.

25 USC §§ 2710(d)(7)(A)(i), 2710(d)(7)(B)(vii).¹⁸ According to Relators,

¹⁸ The United States Supreme Court found that IGRA does not abrogate state Eleventh Amendment immunity from suit in federal court. *Seminole Tribe of Florida v. Florida*, 517 US 44, 116 S Ct 1114, 134 L Ed 2d 252 (1996). However, the Secretary of the Interior has promulgated regulations for procedures applicable when states do not waive Eleventh Amendment immunity in such suits. *See Class III Gaming Procedures*, 25 CFR Part 291. One Court of Appeals has found these regulations invalid. *Texas v. United*

Footnote continued...

IGRA thus merely provides a “procedure,” not a “mandate,” because the Governor could refuse to negotiate and instead can allow a compact to be imposed on the state pursuant to procedures adopted by the Secretary under IGRA. (App Br 36 n 12).

While federal law may provide a consequence if a state fails to engage in good faith compact negotiations, it is a remarkable reading of IGRA to suggest that the requirement to negotiate is a “procedure, not a mandate.” Federal law *expressly* requires the State to negotiate. (“Upon receiving such a request [to negotiate a compact] the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact.” 25 USC § 2710(d)(3)(A) (emphasis added).) That IGRA provides a remedy for a state’s refusal to negotiate in good faith does not prevent ORS 190.110 from applying. A refusal to negotiate would still constitute “interfering with” or “infringing” on the exercise of a right granted under federal statute, within the meaning of ORS 190.110.

Moreover, the legislature would not have intended to abide by Relators’ suggestion that the State should be subjected to an externally imposed compact. A federally imposed compact can hardly be said to further state interests better than allowing the Governor to negotiate a compact. The bulk of the provisions

(...continued)

States, 497 F3d 491 (5th Cir 2007), *cert den sub nom, Kickapoo Traditional Tribe v. Texas*, 555 US 811 (2008).

in the Compact address the monitoring role the Oregon State Police performs in regulation of the gaming facility, along with regulatory provisions such as standards for licensing of vendors and employees. The Compact also includes provisions regarding transportation and environmental standards. As contemplated by IGRA, the compact contains a provision concerning how state criminal laws will apply at the casino. (TCF (OJIN) 69, Ex. 1, p. 14). *See also Dalton*, 835 NE2d at 1189 (“[T]hrough the compacting process, IGRA confers a benefit on the state by allowing it to negotiate and to have some input into how class III gaming will be conducted.”); *Willis*, 850 F Supp at 530 (“By following the procedures of the IGRA, the State was able to have some input into the manner in which gaming on Indian lands will be conducted in Mississippi.”)

B. The Governor had constitutional authority to enter the Compact.

1. The Governor has a constitutional duty and authority to follow federal law.

In addition to the statutory authority in ORS 190.110, the Oregon Constitution provides authority to enter tribal-state gaming compacts. The Oregon Constitution states that the Governor “shall transact all necessary business with the officers of government * * *.” Art V, § 13. Oregon’s Constitution also imposes a mandatory duty on the Governor to “take care that the Laws be faithfully executed.” Art V, § 10. And the Oregon Constitution

requires the Governor to take an oath of office to “support *the Constitution of the United States*, and of this State * * *.” Art XV, § 3 (emphasis added).

Because IGRA is the law of the land, the Governor has a duty to execute it.

Although the Oregon legislature could have specifically provided for a different compacting or approval process, it has not chosen to do so. Absent state legislation providing for a different compacting procedure, the negotiation and execution of tribal gaming compacts is “necessary business” that the Governor is duty-bound to transact. *See Willis*, 850 F Supp at 532-33 (where state statute provided that “governor shall transact all the business of the state * * * with the United States Government or with any other state or territory, except in cases otherwise specially provided by law”, governor had authority, without more, to negotiate and sign gaming compact binding on state); *Langley v. Edwards*, 872 F Supp 1531 (WD La 1995) (governor could bind state to terms of tribal gaming compact). *See also Dewberry*, 406 F Supp at 1154 (“[T]he execution of gaming contracts is ‘necessary business’ to support the Governor’s authority to do so under Art V, § 13 of the Oregon Constitution.”)¹⁹

¹⁹ The “necessary business clause” cases in other states are not uniform, admittedly, and the Florida Supreme Court has interpreted that state’s “necessary business clause” not to include tribal gaming compacts. *House of Representatives v. Crist*, 999 So 2d 601, 613-15 (Fla 2008). Significantly, however, in *Crist*, the compact authorized new types of games that were not otherwise permitted under state law. *Id.* (“We express no opinion on whether the ‘necessary business’ clause may ever grant the governor authority to bind

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Relators’ suggestion that the state’s interpretation of the “necessary business” clause conflicts with Article XV, section 4, of the Oregon Constitution fails. As explained above, federal law preempts Article XV, section 4, with respect to Indian lands. The Governor’s duty to take care that “the Laws” be faithfully executed includes federal law that preempts provisions of state law. Indeed, it is Article XV that also requires the Governor to take an oath of office to “support *the Constitution of the United States*, and of this State * * *.” Or Const, Art XV, § 3 (emphasis added). The United States Constitution includes the Supremacy Clause. As discussed above, IGRA imposes an affirmative duty to negotiate.

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the State to an IGRA compact. We do conclude, however, that the clause does not authorize the governor to execute compacts contrary to the expressed public policy of the state or to create exceptions to the law.”) The more persuasive concurrence in *Crist*, however, differed regarding the clause, concluding that, in the absence of legislative action:

“I * * * conclude that, if the Compact had not granted and authorized certain types of Class III gaming that are specifically prohibited by state law, the Governor would have been authorized – pursuant to the necessary-business clause – to enter into a compact on behalf of the State without * * * legislative authorization * * *.”

Id. at 616.

2. The Governor's execution of the Compact does not violate separation of powers principles.

Throughout their brief Relators allude to the doctrine of separation of powers, and repeatedly suggest that the Governor has improperly set state gambling policy by entering the Compact. (App Br 13-21, 25). The Compact does not violate separation of powers principles. Unlike the circumstances presented in some other states, where the Governor has entered a compact entirely without any legislative authority at all to do so, or has unilaterally authorized games prohibited by that state's legislature, here both the Governor and legislature have properly engaged in their respective constitutional roles.

Oregon courts have taken a functional approach to separation of powers issues.²⁰ The Oregon Supreme Court has observed that “separation is not always complete, and the roles that governmental actors are asked to play not infrequently interact in material ways.” *Rooney v. Kulongoski*, 322 Or 15, 28, 902 P2d 1143 (1995) (citations omitted). Thus, the court has cautioned that a violation of separation of powers may be found only if the problem is clear. *Id.*,

²⁰ Oregon's separation of powers provision is set forth in Article III, section 1, of the Oregon Constitution:

The powers of the Government shall be divided into three separate [sic] 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.

citing *State ex rel. Emerald PUD v. Joseph*, 292 Or 357, 361, 640 P2d 1011 (1982). See also *MacPherson v. Department of Administrative Services*, 340 Or 117, 134, 130 P3d 308 (2006); accord, *Smejkal v. Department of Land Conservation and Development*, 239 Or App 553, 562, 246 P3d 1140 (2010) (a violation of separation of powers may be found only if the problem is clear, citing *Rooney*).

Relators appear to suggest that the legislature has improperly delegated its authority to the executive branch of government. (App Br 13). However, the Oregon Supreme Court long ago “rejected the shibboleth that all legislative delegations of authority must be tested by the verbal adequacy of the standards stated for its exercise.” See *Anderson v. Peden*, 284 Or 313, 325, 587 P2d 59 (1978) (upholding local government’s delegation of administrative discretion to its board of commissioners) (citations omitted). Rather, the issue is “whether the lawmakers’ political responsibility for choosing at least the general direction of public policy among competing alternatives has been abdicated without guidance to administrative officials.” *Id.* Thus, a law that broadly delegates legislative authority “is not unconstitutional merely because the terms of the legislative directive are general and vague.” *Id.* “[T]he important consideration is not whether the statute delegating the power expresses standards, but whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the administrative

action.” *Warren v. Marion County*, 222 Or 307, 314, 353 P2d 257 (1960); *see also State v. Davilla*, 234 Or App 637, 646, 230 P3d 22 (2010) (prohibition on delegation of legislative powers is not absolute).

It is not difficult to see that the Governor’s exercise of authority and the legislature’s delegation was lawful. First, as discussed above, federal law significantly narrows the “competing alternatives” from which the legislature may choose. The terms of IGRA represent Congress’s limited delegation of power to states with respect to tribal gaming. Considered in the context of IGRA’s requirements, the primary policy choices to be made by the state are two-fold: first, whether and to what extent to allow class III gaming for anyone in the state; and second, whether to avail itself of the opportunity to negotiate a gaming compact with the Tribes. Those decisions have been made by the legislature, not unilaterally by the Governor.

The Oregon legislature has made those decisions in two ways. First, the legislature has enacted ORS 190.110, reflecting the legislature’s decision to cooperate with tribes.²¹ Second, as discussed next, the Oregon legislature has

²¹ The same policy is reflected in other statutes, including ORS 182.164(1)(c) and (d), which require, respectively, state agencies to “develop and implement a policy * * * [that] promotes communication between the state agency and tribes” and “[p]romotes positive government-to-government relations between the state and tribes.” Similarly, ORS 182.164(3) requires state agencies to “make a reasonable effort to cooperate with tribes in

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enacted gambling laws and continued to allow class III gaming in certain forms and for certain persons, even in the face of congressional enactment of IGRA.

Relators repeatedly assert that the Governor has “set state gambling policy.” (App Br 13-18, 25). But other than the fact that the gaming authorized in the Compact may take place in a casino venue, Relators have identified no specific policy choice reflected in the Compact that they claim is unauthorized under state law or exceeds the Governor’s prerogative. Relators ignore that gaming policy on Indian lands is determined by federal law. But further, to the extent that federal law references state law, as does IGRA, it is the people of Oregon who have made the applicable state gambling policy. It is the people of Oregon, acting through the legislature and the initiative process, who have determined which games are lawful or prohibited in Oregon, who have authorized “Happy Canyon” gaming and the Oregon Lottery. Had Oregon prohibited gambling entirely, as has Utah, or prohibited some forms of gaming as have many other states, that gambling policy would necessarily be reflected in any gaming compact required under IGRA.²² Therefore the people have set

(...continued)

the development and implementation of programs of the state agency that affect tribes, including the use of agreements authorized by ORS 190.110.”

²² The Compact provides for automatic amendment in the event of a change in state gambling law. (TCF (OJIN) 69, Ex. 1, p. 54).

state policy by determining what games to prohibit. Otherwise state law is preempted and federal law determines gaming policy on Indian lands. Thus the Governor has not unilaterally made gambling policy. Permitting the Governor to negotiate compacts with tribes has not resulted in an unlawful concentration of power in that office.

C. In the context of federal law, ORS 190.110 can properly be harmonized with Article XV, section 4.

Relators make various arguments to the effect that it is not possible to rely on ORS 190.110 as authority for the Governor to enter a compact because then ORS 190.110 would violate the constitutional casino restriction (App Br 27-29). Relying on *Wieber v. FedEx Ground Package Sys., Inc.*, 231 Or App 469, 490, 220 P3d 68 (2009), Relators assert that, “any federal source of law – even when flowing directly from the United States Constitution – does not salvage a state statute that is unconstitutional under the Oregon Constitution.” (App Br 28). But ORS 190.110 is not unconstitutional. Rather it reflects the legislative choice to comply with federal law with respect to Indian tribes.

Moreover, *Wieber* does not support Relators’ argument. The issue in *Wieber* was the authority of an appeals court to review a jury award for punitive damages. The Oregon Constitution, Article VII, section 3, limits a reviewing court’s jurisdiction to determining whether there is any evidence in the record to support an award of punitive damages. Notwithstanding that state

constitutional limitation, a reviewing court is also required to determine whether, as a matter of federal constitutional due process, the punitive damages award is excessive. Thus, *Wieber* merely harmonizes the state constitutional limitation on appropriate review of jury awards of punitive damages with the federal constitutional standard of due process. Similarly here, Respondents are harmonizing the state constitutional restriction on casinos with a federal statute governing gaming on Indian lands. There is no tension between the two.

Article XV, section 4(10), of the Oregon Constitution restricts the Legislature from authorizing casinos on lands subject to state jurisdiction, while IGRA governs gaming on Indian lands.²³ ORS 190.110 authorizes the Governor to recognize that distinction.

Relators also rely on *Li v. Oregon*, 338 Or 376, 110 P3d 91 (2005), to contend that “the Compact represents an *ultra vires* act by the Governor, and is thus void *ab initio*.” (App Br 30-32). However, that case is inapposite. In *Li*, a County Board of Commissioners ordered its records management division to issue marriage licenses to same sex couples. The Oregon Supreme Court concluded that the power to regulate marriage rested exclusively with the state

²³ Relators state that “ORS 31.730 – allowing the court to examine the amount of punitive damages – was unconstitutional despite being a partial codification of federal due process requirements.” (App Br 29). Relators have misstated the holding of the case. The Court of Appeals did not rule that ORS 31.730 is unconstitutional.

legislature, and not with local units of government. *Li*, 338 Or at 392. Since the legislature had previously defined marriage as a union between opposite sex couples, the local unit of government lacked authority to issue same sex marriage licenses or to opine about the constitutionality of the state's marriage laws. The Court said that "the constitutional duty [to uphold the state and federal constitutions does not create] a general license for any governmental official to go forth and remedy any constitutional wrong that the official perceived." *Id.* at 395. Here, unlike in *Li*, the legislature has spoken and specifically delegated authority to the Governor or his designee to enter into agreements with Indian tribes to ensure that their federally granted rights are protected.

D. Relators misapply cases from other states.

Relators cite several cases from other states, apparently for the proposition that "the state executive lacks the power unilaterally to negotiate and execute tribal gaming compacts." (App Br 11 n 3, citing *Saratoga County*, 798 NE2d at 1060-61; App Br 31-32). The cases cited by Relators are distinguishable on both the facts and the law. In other states, where courts have found compacts invalid, they have done so for reasons that do not apply here: either because there was no legislative authority whatsoever for compacts, or because the compacts authorized new games that state law prohibited.

In most of the cases that Relators cite, courts have reached their conclusion under a particular state law, based on the principle that a state governor had no power, *absent legislative authority*, to enter into a gaming compact. However, under the same principle, other courts have held compacts valid that have been entered into by a governor who *did have* legislative authority to negotiate and execute contracts, as here. *See, e.g., Willis*, 850 F Supp at 532-33 (where state statute provided that “governor shall transact all the business of the state * * * with the United States Government or with any other state or territory, except in cases otherwise specially provided by law,” governor had authority to enter into compacts); *Taxpayers of Michigan Against Casinos v. Michigan*, 478 Mich 99, 732 NW2d 487, 493 (2007) (governor had authority to negotiate and agree to compact amendments on behalf of the state where legislature had approved amendatory provision by resolution); *cf. Sears v. Hull*, 192 Ariz 65, 961 P2d 1013, 1020 (1998) (no constitutional separation of powers issue when legislature authorizes governor to enter into compacts).

Indeed, most of the cases Relators cite involve complete legislative silence regarding a governor’s authority to enter a gaming compact with an Indian tribe. *See generally Panzer v. Doyle*, 271 Wis 2d 295, 680 NW2d 666, 688 (2004). (“Legislative silence on this topic has led to litigation in other states.”) For instance, in *Kansas ex rel. Stephan v. Finney*, 251 Kan 559, 836 P2d 1169 (1992) (“*Finney I*”), the Kansas Supreme Court found that “the

legislature has enacted no legislation authorizing the Governor to negotiate the compact herein and bind the State thereby”, *id.* at 1179, and concluded that “*in the absence of an appropriate delegation of power by the Kansas Legislature* * * * the Governor has no power to bind the State to the terms [of the compact],” *id.* at 1185 (emphasis added). *See also New Mexico ex rel. Clark v. Johnson*, 120 NM 562, 904 P2d 11, 23 (1995) (“While the legislature might authorize the Governor to enter into a gaming compact * * * the Governor cannot enter into such a compact solely on his own authority.”); *Saratoga County*, 798 NE2d at 1059-61 (not only was there no statutory authority for the governor to execute a compact but also the assembly adopted a resolution opposing unilateral gubernatorial action); *Narragansett Indian Tribe v. Rhode Island*, 667 A2d 280, 282 (RI 1995) (absent specific authorization from the general assembly, the governor had no authority to execute a compact).

Relators’ reliance on *Panzer* (App Br 11 n. 1) is also misplaced. The *Panzer* court held that the governor had statutory authority to enter gaming compacts, but held the statute unconstitutional with respect only to certain provisions in the compact, including a provision that authorized games not permitted by any person by Wisconsin law. 680 NW2d at 688, 694-5. Similarly, in *House of Representatives v. Crist*, 999 So 2d 601 (Fla 2008), the court found that the Governor lacked statutory authority to enter into the compact. In addition, in *Crist*, the compact entered into by the Governor

authorized new games that were not otherwise permitted under state law. *Id.* at 613-15; *see also* fn 19 *supra*. That is not the case here.

IV. The relief Relators seek cannot be granted through mandamus.

Relators' mandamus action also seeks relief that cannot be granted.²⁴

Mandamus is a narrow remedy. A writ of mandamus may only be used "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station." ORS 34.110. *See also Ross v. Marion County Court*, 147 Or 695, 700, 35 P2d 484 (1934) ("Mandamus can only be used to enforce a known, clear legal right.") In order for mandamus to lie, plaintiffs must be able to demonstrate that each defendant has a "clear legal duty to perform the act requested * * *." *Levasseur v. Armon*, 240 Or App 250, 246 P3d 1171 (2010) (emphasis added). Mandamus is not available where "the relief plaintiffs seek is not simply that the defendants comply with or enforce applicable law, but that they take *particular* actions to comply or to compel others to comply" which are not themselves supported by statute. *State ex rel. Oregon State Bldg. & Constr. Trades Council v. Bureau of Labor & Indus. for the State of Oregon*, 61 Or App 22, 24, 656 P2d 325 (1982) (emphasis in original). Here, Relators seek a commandment that defendants "[w]ithdraw the Governor's signature from the Compact and rescind the Compact on behalf of

²⁴ Respondents acknowledge that they did not raise this issue below, because the court did not order relief for Relators.

the State * * *.” (ER 34). That specific action is not authorized by the mandamus process.

The writ also seeks to forbid state employees from taking any action in furtherance of the Compact. Yet Relators have identified no specific action by other state actors that they claim is unauthorized. Relators are not entitled to the relief they seek.

CONCLUSION

Federal law—and more specifically IGRA— governs gaming on Indian lands. IGRA preempts the application on Indian lands of state law time, place and manner restrictions on games that are permitted for any purpose by any person(s) in Oregon. Because all of the games in the Compact are permitted in Oregon, the state was required under IGRA to negotiate for their inclusion in the Compact. As a venue restriction, the constitutional casino provision does not apply to Indian lands as a matter of federal law.

The Oregon legislature has authorized the Governor to enter into agreements with tribes to ensure that the state does not infringe on tribal rights under federal laws like IGRA, and the Governor has done so. The

circuit court correctly concluded that the Compact was lawful, and this court should affirm the judgment below.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 12, 2011, I directed the original Respondents' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and to be served upon Kelly W.G. Clark and Kristian Spencer Roggendorf, attorneys for appellants, by using the electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,827 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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