

IN THE COURT OF APPEALS OF  
THE STATE OF OREGON

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

Relators-Appellants,

v.

THE HONORABLE THEODORE R.  
KULONGOSKI, Governor of the  
STATE OF OREGON; Other  
Executive OFFICERS in the STATE  
OF OREGON,

Defendants-Respondents,

and

CONFEDERATED TRIBES OF  
COOS, LOWER UMPQUA, and  
SIUSLAW INDIANS,

Intervenor-Respondents.

Lane County Circuit Court

Case No. 16-03-23044

Case No. A146366

**AMICUS BRIEF OF CONFEDERATED TRIBES OF THE WARM  
SPRINGS RESERVATION, THE KLAMATH TRIBES, THE  
COQUILLE INDIAN TRIBE, THE COW CREEK BAND OF UMPQUA  
TRIBE OF INDIANS, THE CONFEDERATED TRIBES OF THE  
UMATILLA INDIAN RESERVATION, THE CONFEDERATED  
TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, AND  
THE CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON**

Appeal of Order Granting Summary Judgment Issued by the  
Honorable Karsten H. Rasmussen, July 13, 2010  
Circuit Court for Lane County

October 2011

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Come now the Confederated Tribes of the Warm Springs Reservation of Oregon (“Warm Springs Tribe”), the Confederated Tribes of the Umatilla Indian Reservation (“Umatilla Tribe”), the Klamath Tribes (“Klamath Tribes”), the Coquille Indian Tribe (“Coquille Tribe”), the Cow Creek Band of Umpqua Tribe of Indians (“Cow Creek Tribe”), the Confederated Tribes of the Grand Ronde Community of Oregon (“Grand Ronde Tribe”), and the Confederated Tribes of Siletz Indians of Oregon (“Siletz Tribe”), by and through undersigned counsel, and submit this amicus brief in support of the position of Respondents Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (“Coos Tribe”), and Governor John A. Kitzhaber and other Executive Officers of the State of Oregon (“State of Oregon”) in this appeal of the Order of the Lane County Circuit Court.

### **1. Introduction.**

Amici tribes desire to inform the Court about the interests and positions of seven of the eight other federally recognized Indian tribes located within the State of Oregon who may be impacted by the decision of the Court in this lawsuit.<sup>1</sup> The seven tribes will set out their interest in this case, discuss the

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<sup>1</sup> By federal statute, the United States Department of the Interior publishes a list of all federally recognized Indian tribes each year. 25 U.S.C. §

impact that an adverse decision in this case could have on the other tribes, their members, and the communities surrounding the tribes, note some of the issues that have been addressed by the Coos Tribe and State of Oregon that are of particular concern to the other Oregon Indian tribes, and address any relevant issues they feel have not been raised by the other parties.

## **2. Interest of Amici Tribes.**

Each of the seven amici tribes has a “Tribal-State Compact for the Regulation of Class III Gaming with the State of Oregon” that was entered into and approved pursuant to the requirements of the 1988 Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2701 et seq. The first of these Compacts was approved in 1992, with the Cow Creek Tribe, and every tribe except for defendant Coos Tribe had an approved Compact by the end of 1994. Most of these approved Compacts have been amended at least once, with the last round of major amendments occurring in 2007 and 2008, by Umatilla, Grand Ronde, and Cow Creek. The Cow Creek Tribe is currently seeking amendments to its existing Compact.

The State has proceeded with negotiations with each tribe in compliance

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479a-1. The most recent list appears at 75 Federal Register 60810 (October 1, 2010). The Burns Paiute Indian Tribe, the ninth federally recognized Indian tribe located within the borders of Oregon, is currently without legal counsel and was unable to be joined to this amicus brief in timely fashion.



with its obligations under IGRA. Not surprisingly, because the State's regulatory interests with regard to Indian gaming are the same for all tribes, the Compacts are substantially similar in most respects. This is not to say that the Compacts are identical. There are minor variations in each of the Compacts because individual tribes negotiated issues of particular interest or concern to them. But for the most part, the IGRA Compacts between the nine federally recognized Indian tribes located within the State of Oregon and the State of Oregon are identical, especially on issues of substantial interest or concern to the State.<sup>2</sup> In particular, on issues relevant to the present action – for example, the authority of the State to enter into a compact with a tribe and references in the compact to IGRA – the Compacts of the seven amici tribes are

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<sup>2</sup> Under the Indian Gaming Regulatory Act as interpreted by the United States Supreme Court, the State has superior negotiating position in the Compact process. IGRA strikes a balance between the interests of Indian tribes and States in the conduct of Class III casino style gaming by, on the one hand, generally requiring a Compact before an Indian tribe can engage in Class III gaming, 25 U.S.C. § 2710(d)(1)(C), and on the other hand, requiring the states to negotiate such a Compact in good faith, including the right of a tribe to initiate litigation in federal court in the absence of good faith to prevent states from vetoing tribal Class III gaming by refusing to negotiate or insisting on bad faith provisions. 25 U.S.C. § 2710(d)(7). The U.S. Supreme Court held this latter provision unconstitutional in *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44 (1996), but the remainder of the statute remains in effect. Indian tribes therefore now lack an effective direct legal remedy against a state that refuses to negotiate an IGRA Compact or does not negotiate such a Compact in good faith, or that insists on particular language or concessions.

indistinguishable from the Compact being challenged in the present action.

This means that any decision the Court makes with regard to the Coos Compact will likely impact the remaining federally recognized tribes in the State and their gaming revenue generating activities. This Court's decision will not directly bind the amici tribes, none of which are parties to this lawsuit and none of which have waived sovereign immunity with regard to this lawsuit. However, the relief sought by Relators could implicate the State of Oregon's breach of its compacts with amici tribes. The resulting potential legal quagmire could potentially have adverse consequences on continuing tribal gaming operations.

In a following section of this amicus brief, the seven amici tribes set out in greater detail examples of the impact closure of their gaming operations, located in rural communities throughout the State, could have on the tribes, on their members, and on the local communities who benefit from the presence of those gaming operations. To highlight this potential impact, the amici tribes present for the information of the Court, in the form of declarations from each tribe, some of the particulars of how each tribe has used its gaming revenues to benefit and provide services to its membership. Indians are also citizens of the State, entitled to the same privileges and benefits of other citizens. Amici incorporate those declarations by reference in this brief. When a tribe is able

provide services to its own members out of tribal revenues, it relieves the State from having to provide those services and benefits and allows the State to redirect some of its funding to other citizens in critical need of State services and benefits.

**3. The Impact of Tribal Gaming in the State of Oregon and on Oregon Indian Tribes.**

It is a common misperception in the media today, based on one or two East Coast Indian tribes who are fortunate enough to have gaming establishments near major population centers, that Indian tribes throughout the United States are awash in gaming revenues. Nothing could be further from the truth; the situation of the various Indian tribes in Oregon illustrates this point.<sup>3</sup>

Gaming has not been a panacea for the Indian tribes in Oregon; instead, it has allowed Indian tribes to supplement the inadequate funding provided by the federal government for Indian services and programs, and to provide additional services and benefits to tribal and tribal member needs that would otherwise go

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<sup>3</sup> The Burns Paiute Tribe actually lost money in its gaming operation for a number of years, based on its extreme rural location and the amount of state regulatory fees imposed on it. As stated above, the Burns Paiute Tribe currently lacks legal counsel to participate in this amicus filing. To fill in the information gap, undersigned counsel attaches to his Declaration as Exhibit 2 a true and correct copy of the 2005 Affidavit of the Chair of the Burns Paiute Tribe submitted in the federal court phase of this litigation.

unmet. Tribal government use of gaming revenues is restricted by federal law. 25U.S.C. §2710(b)(2)(B). The critical importance to the tribes of this source of revenue cannot be over-emphasized; gaming revenues represent the primary source of non-federal funds available to all the tribes in the State. For example, as expressed in the Declaration of Delores Pigsley attached to this Brief, gaming revenues constituted 15.5% of the Siletz Tribe's overall budget in 2010, including federal funds. The U.S. Commission on Civil Rights has estimated that insufficient federal Indian program funding resulted in \$7.4 billion nationally in unmet needs among Native Americans in 2000.<sup>4</sup>

Amici tribes present two classes of evidence in this section for the Court's information and use. The first category is set out in a recent study conducted for the tribes in Oregon by ECONorthwest, Inc., that compiled and analyzed the impact tribal gaming in the State in 2009 had on tribal and local communities located in rural areas of the State. The second category of evidence is set out in the declarations of tribal representatives for each of the seven amici tribes, setting out the uses to which each tribe has put their gaming revenues. As these declarations illustrate, some tribes in the State generate revenues sufficient only to pay financing costs for their gaming operations,

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<sup>4</sup> U.S. Commission on Civil Rights: A Quiet Crisis – Federal Funds and Unmet Needs in Indian Country. July 2003.

while others have been fortunate enough to provide significant benefits to their members and to the local community. The facts involving each Indian tribe in the State are unique and no generalizations about the impact of Indian gaming on a tribe can be made. A short summary from several of these declarations or affidavits is set out in this brief.

The ECONorthwest study, “The Contributions of Indian Gaming to Oregon’s Economy in 2009,” is attached to the Declaration of Craig J. Dorsay as Exhibit 1 and is incorporated herein by reference. A few of the highlights noted in that report illustrate the significant impact that tribal gaming has had on the Oregon economy.<sup>5</sup> Oregon Indian tribal gaming operations generated over \$574.2 million in gross revenues in 2009, pp. 17-18, and employed an annual average of 5,129 workers, most of whom were full-time employees, p. 19. Operational costs, not including financing costs and depreciation, were approximately \$368.38 million, p.18. Wages, salaries and benefits totaled \$201.92 million, p. 19. Casino employees in 2009 enjoyed approximately \$29.2 million in paid health benefits, and \$12.5 million in other types of

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<sup>5</sup> One of the most interesting facts shown in this report is that the State’s overall share of gaming revenues has been increasing over the past several years, and Tribes’ share has been decreasing, ever since the State introduced line games – slot machines - as part of its lottery line-up. For 2009, the State’s gaming share was 65.2% ,while the Tribes’ share was down to 34.8%, Report, p. 33.

employer-paid benefits, p.19.

Other casino expenses in 2009, including the cost of food and beverages, advertising, utilities, and outside support services, totaled \$210.55 million, p.18. Many of these services are obtained from Oregon companies. Tribal casino operations contributed \$7.67 million to Oregon charities and to support community benefit foundations, p. 18, and paid \$14.85 million total in gaming regulation costs, including \$1.26 million to the Oregon State Police for state gaming enforcement, p.14.

All seven amicus tribes had positive cash flows in 2009. Based on information and belief, the Burns Paiute Indian Tribe lost money in 2007. *See* Declaration of Craig Dorsay, Exhibit 2. Tribes spent \$157.2 million in gaming revenues in 2009 on tribal government services and programs, p. 18, as required by the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(b)(2)(B) (tribal gaming revenues restricted by Congress to five named categories), and have spent \$1.2 billion since 2003, p. 3. Gaming revenues from 2009 were spent on tribal government programs in the following percentages: Resource management – 8%; Family/social services – 11%; Education/job training – 14%; Health programs – 58%, Public safety – 3%; Public works - 6%, p.20.

The total taxes and government revenues (non-tribal) generated by the gaming operations of Oregon tribes in 2009 are estimated at just over \$126.1

million, including \$21 million in state income taxes and \$11.4 million in payroll and other associated taxes, p. 25. Over 14,415 workers in Oregon were either employed directly or as a result of tribal casino revenue in 2009, p. 21. The total economic impact of tribal gaming in Oregon was almost \$1.516 billion, p. 21. Based on this economic activity, state and local governments collected almost \$53.5 million in taxes and other revenues, p. 25. From 2003 to 2009, Oregon tribal gaming was responsible for \$894.3 million in federal, state and local tax payments, p. 28.

Because of the existence of tribal gaming, the overall economic status of Indian tribes and tribal members improved in the last decade and unemployment decreased. However, a large gap still exists between the socio-economic status of Indians in Oregon and the rest of State citizens. Tribal gaming revenues have helped to close the gap, but tribal members are still more likely to live in poverty, be unemployed, and to lag behind in educational achievement. The U.S. Census Current Population Survey data of American Indians and Alaskan Natives living in Oregon for 2009 shows the unemployment rate among Native Americans to be 29.3 percent, with 26.2 percent of individuals over age 14 living in poverty and 46.6 percent not having graduated or achieved the equivalent of a high school diploma.

The ECONorthwest study shows the overall picture of tribal gaming in

Oregon in 2009. Each tribe, however, has its own story of how it has used its gaming revenues to meet the needs of its members and the local community. Each Tribe has its own story of how closure of its gaming operation would impact its members and the local community. These stories are told in the declarations of a tribal representative from each amicus tribe, which are attached to the Declaration of Craig J Dorsay as Exhibit 3 and incorporated herein by reference. A few excerpts from those declarations illustrate the impact this suit may have on the Oregon tribes.

The Siletz Tribe has used gaming revenues to purchase and install desktop computer systems, along with computer training, for every tribal household. Gaming revenues have been used to build a new health clinic in Siletz that serves both tribal and non-tribal community members, and is one of the only Medicaid providers on the central Oregon Coast. Gaming revenues have been used to provide health care services and reimbursement to tribal members that are outside the covered services or who do not qualify for federal Indian health services or funding because they reside outside the Tribe's federally approved service area. In addition, gaming revenues are used to provide supplemental catastrophic health care reimbursement when limited federal catastrophic health care funding runs out early each year. The Tribe is subsidizing the Siletz Valley School, part of the Lincoln County School



District, with gaming revenues. Lincoln County closed the regular Siletz school in 2003, transferring all students to schools in Toledo ten miles away. This led to increased dropout rates for Siletz students. The Siletz Tribe reorganized the Siletz school as a charter school, made substantial repairs to the building, and makes up the reduced funding provided by the County for the school. The school has increased enrollment every year, has attracted students back from other local schools, includes tribal language and culture classes, and the school recently has expanded to include a high school and college preparatory program. The Siletz Valley School received an achievement award in 2005 for the dramatic increase in State testing scores of its students, and its Class 1A boys basketball team won this year's State basketball tournament. The Siletz Tribe recently purchased 6,500 acres of timberland to supplement its federal timber base using gaming revenues.

The Klamath Tribes' Kla-Mo-Ya Casino is located in a rural location thirty miles north of Klamath Falls. The revenues that can be generated in such a location are limited, but such revenues are no less essential for being scarce. During the casino's first six years of operations, 100% of revenues generated were dedicated to repayment of financing. The Tribes have used the limited revenues generated by the Casino since 2003 primarily for governmental services and economic development geared toward reaching the goal of tribal

self-sufficiency. The federal government recently approved the Tribe's revenue allocation plan for utilization of tribal gaming revenues. Pursuant to the plan, the Tribe's gaming revenues have been used to provide essential governmental services such as education, housing, health care and social services. The Tribes currently have no day care center, no school, no law enforcement, limited higher education assistance, and limited elder assistance, but the Tribes hope to fund these services in the future with gaming revenues. The Tribes have also begun the operation of a tribal court system, and the only available source of funding for the court is gaming revenues. The Tribes lack funding at this time to provide health services to tribal members to supplement inadequate federal Indian health funding.

The Cow Creek Band of Umpqua Tribe of Indians has established a wide variety of economic development ventures under the umbrella of the Tribe's economic development arm, the Umpqua Indian Development Corporation. These ventures include the Tribe's casino, an RV Resort, a truck and travel center, a graphic design and media firm, a telephone and internet service company, a self-storage provider, a motel and lodge, a cattle and hay ranch, and a utility cooperative. Gaming revenue has provided 95% of UIDC's annual net income. As of 2007, the Tribe's gaming operations support an average of 930 gaming specific jobs, including over \$30 million in annual gaming, hotel and

tribal government wages. Gaming revenues funded over \$26 million in tribal government spending in 2007, and provided approximately \$6.5 million in taxes to local and state government. Approximately 96% of the Tribe's gaming employees are non-Indian. The Tribe donated over \$1.2 million to local charities in 2009. Gaming revenues subsidize health services to tribal members, and the Tribe operates two Community Health Centers that provide comprehensive health services to the community. The Tribe allocates \$100,000 annually from gaming revenues for higher education for tribal members, and a wide range of services for K through 12 education. The Tribe in 2009 funded \$22,500 in scholarships at 15 high schools in Douglas County, available to both tribal and non-tribal students. The Tribe provides a wide array of other services from gaming revenues. The Tribe has funded the Creekside Development Project with gaming revenues, which will provide clean drinking water and manage grey water and sewage for both the Tribe and local communities such as the City of Canyonville.

The Umatilla Tribes rely upon gaming revenues generated at its Wildhorse Casino to fund 25% of Tribal governmental operations. To the Umatilla Tribes, gaming revenues are the equivalent of tax revenue to a local or state government – it is the only source of revenue for which the Umatilla Tribes have discretion over how it is expended. Gaming revenues are allocated

to fund all aspects of Tribal government, but are focused on certain Tribal priorities. For example, 5% of gaming revenues are dedicated to restoring the Reservation land base reserved by the Tribes' Treaty of 1855. Gaming revenues support several educational programs including supplemental funding for the Nixyaawii High School, a charter school serving the unique educational needs of Reservation high school students, as well as a Tribal youth recreation program, Tribal youth employment program, a Tribal language program and a Tribal scholarship fund for college bound Tribal members. Gaming revenues fund an increasingly large percentage of the Umatilla Tribal Police Department and Tribal Fire Department, which includes emergency response services to all Reservation residents, Indian and non-Indian. Gaming revenues also support Tribal elders and their families by providing supplemental retirement income and burial assistance. Finally, gaming revenues provide essential funding to the Umatilla Tribal Court and associated programs including the Tribal Prosecutor and Public Defenders office and pays for the services of one lawyer in the Oregon Legal Services office in Pendleton to provide legal services to Tribal members.

The Coquille Indian Tribe owns The Mill Casino Hotel and RV Park in North Bend, Coos County, Oregon, a predominately rural and economically depressed area. Since 1979, the manufacturing sector of Coos County has

experienced a sixty percent reduction in jobs. The Coquille Indian Tribe's gaming operations currently directly supports at least 450 jobs. The Coquille Tribe also uses gaming revenues to subsidize the health services it provides to its members and employees. The Coquille Tribe has a health clinic that provides medical services to Native Americans and the general public. Additionally, gaming revenues allow the Coquilles to offer subsidized health insurance to tribal members and their dependents that live outside the Tribe's five county service area. The Coquille Indian Tribe was terminated from federal supervision in 1954, resulting in a wholesale loss of culture and language. Gaming revenues have provided critical funding for the effort to rebuild thirty five years of lost language skills and cultural knowledge. Finally, gaming revenues are used to fund education, burial benefits, emergency home repair, and winter home heating assistance for elders. The Tribe's provision of these services to its members lessens the burden on other local governments by reducing the need for services by Tribal members and their families.

For the Grand Ronde Tribe, gaming means less poverty, better standards of living, and less reliance on state and federal assistance. Gaming revenues provide the Tribal government with the financial resources necessary to provide essential services and programs such as housing grants, social services, education, elders' retirement, economic development, and natural and cultural

resources protection. Gaming revenues have enabled the Tribe to provide health services to Tribal members whose health care resources are inadequate or non-existent. The Tribe spends more than \$22 million a year on health care services for its members alone. Gaming is also an economic development program that has generated jobs and income for Tribal members and non-members in the surrounding community. Approximately 97% of the Casino's 1,400 employees reside within the surrounding community of the casino and likely shop locally for food and other services. In addition, the Tribe used gaming dollars to build a fire station in Grand Ronde and gaming dollars will be used to assist the West Valley Fire Department in operating the fire station. The fire station will provide service to Tribal and non-Tribal residents in Grand Ronde and the surrounding communities. The Tribe is also a large contributor to government and non-profit organizations in Oregon. In order to honor its tradition of sharing, the Tribe established the Spirit Mountain Community Fund in 1997. Through the Community Fund, the Tribe dedicates six percent of the gaming operation's net income for charitable organizations in eleven western Oregon counties and the local governments of Polk and Yamhill Counties, the two counties bordering the current Grand Ronde Reservation. As of December 2010, the Spirit Mountain Community Fund has given over \$53 million in grants.

#### **4. Argument.**

Amici tribes take the following positions on the substantive issues raised in this appeal. Amici incorporates the arguments made in the Joint Coos-State of Oregon Response Brief by reference. Amici also respond to several issues raised in Relators' Opening Brief.

##### **a. The consequences of Relators' success in this litigation.**

The consequences of a writ against the State that directs the Governor and Executive Branch officers and employees to not implement or enforce the Compact between the State of Oregon and the Coos Tribe or any other compacted tribe will be uncertain with regard to amici tribes. Tribes have a right to engage in gaming within Oregon under the *Cabazon* decision as a matter of inherent sovereignty, and under IGRA. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); 25 U.S.C. § 2701 et seq. Congress did not intend and the federal courts have not interpreted IGRA in a manner that deprives Indian tribes of their inherent and statutory gaming rights simply because of the state's inability or unwillingness to enter into a valid Tribal-State Compact.

The tribes, including the Coos and amici tribes, have done everything required to legally engage in gaming under IGRA. They are legally entitled to engage in gaming activities, with or without IGRA. Indeed, the Ninth Circuit

has ruled that injunctive relief is inappropriate against an Indian tribe that has done everything required under IGRA, but which has been deprived of a compact simply because the state refuses to consent to the negotiation scheme established by Congress in that Act. *Spokane Tribe v. United States*, 139 F.3d 1297 (9<sup>th</sup> Cir. 1998). In response to those states who have asserted Eleventh Amendment immunity as a defense to IGRA suits brought by Indian tribes, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Department of the Interior has promulgated rules that allow such tribes to operate Class III gaming in the absence of a compact. 25 C.F.R. Part 291 (2010). Federal courts have not required tribal gaming operations to close when confronted by complications arising from the state's ability to formalize compact agreements.<sup>6</sup> In these instances, the courts allowed the tribal gaming operations to remain

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<sup>6</sup> Examples include *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10<sup>th</sup> Cir. 1997) (after court rules compacts illegal, court stays mandate to allow "satisfactory solution and good faith negotiation between all involved parties"); *United States v. 1020 Electronic Gambling Machines*, 38 F.Supp.2d 1219, 1225 (E.D.Wash. 1999)(Court concludes that tribal gaming without a compact violates federal law, but stays injunction pending appeal "since the balance of hardships tips sharply in the [tribe's] favor."); *In the Matter of Shoalwater Bay Indian Tribe*, U.S. Dept. of the Interior, Office of Hearings and Appeals, Docket # NIGC 99-2, Order dated Aug. 23, 2001 (enforcement stayed pending adequate remedy); *Chemehuevi Indian Tribe v. Wilson*, 987 F.Supp. 804, 809 (N.D.Cal. 1997)(court ruled that the federal government had a duty to bring an action against the State of California on behalf of an Indian tribe to set the IGRA compacting process in motion).



open while an alternate process to legalize the Compacts worked its way to successful conclusion.

This does not mean that success by Relators would have no impact on amici tribes, however. If Relators' writ is issued, such an order will impose substantial uncertainty on Oregon tribes. Such uncertainty could impact the tribes' ability to hire new employees, to engage in long term planning and development, and could adversely impact the tribes' ability to obtain credit or financing or make such financing more expensive, thus reducing revenues available to meet tribal needs. Financing firms could require additional security to secure their investments, or call such investments due. Such uncertainty would likely continue until the legal situation involving Indian gaming in Oregon is resolved politically or legally.

To grant the relief sought by Relators would place the State of Oregon in breach of its Compact agreements and hamstring the State of Oregon's ability to comply with federal law. Without the vehicle of a Class III compact, the State of Oregon has no authority or involvement over gaming conducted by an Indian tribe on tribal lands. *See Cabazon, supra*. The Indian Gaming Regulatory Act gives the State more involvement with and control over Indian gaming and its effect on the State through the compacting process at 25 U.S.C. § 2710(d) than it would otherwise have under the law. The likely outcome if Relators

prevail in this lawsuit will not be the closing of the Coos casino, but rather the diminishment of State involvement over and regulation of that gaming operation.

**b. The Coos Compact with the State of Oregon for the Regulation of Class III Gaming does not violate the Indian Gaming Regulatory Act or the Oregon Constitution.**

Amici tribes agree with and adopt the Respondents' arguments on whether the Coos Class III Gaming Compact with the State of Oregon violates the Indian Gaming Regulatory Act or the Oregon Constitution. The seven amici tribes have a slightly different perspective and additional comments to submit to the Court on this issue. Amici tribes adopt Respondents' discussion of the history of compacting under IGRA for this discussion.

As the Respondents' brief makes clear, a general principle of federal Indian law is that Indian lands and "Indian country" remain free of state authority and jurisdiction in the absence of express Congressional delegation. States were divested of authority over Indian tribes by the United States Constitution. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 62 (1996)(p. 58: "It is true enough that [IGRA] extends to the States a power [some measure of authority over gaming on Indian lands] withdrawn from them by the Constitution," *citing California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)), (p. 62: "States ... have been divested of virtually all authority

over Indian commerce and Indian tribes.”). This principle derives from one of the seminal Indian law cases, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Chief Justice John Marshall held that Indian land “is a distinct community, occupying its own territory.” *Id.* at 561-62. Indian territory has been held to be separate from the state where the tribe is located, except as expressly provided otherwise by federal law. *Id.*

In addition to these general principles, express federal law disclaims State authority and jurisdiction over Indian lands within the Territory and State of Oregon. This disclaimer is set forth in the Oregon Territorial Act, 9 Stat. 323 (Aug. 14, 1848):

That from and after the passage of this act, all that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon: *Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed ... .<sup>7</sup>

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<sup>7</sup> This disclaimer is confirmed in a different manner at Section 14 of the

The Oregon Constitution, Article XVIII, Section 7, entitled “Former laws continued in force,” expressly provides for the continued vitality and effect of the provisions of the Oregon Territorial Act, and other federal laws referenced in that Act: “All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.” Alteration of this disclaimer of State authority over Indian lands in Oregon would require express legislation by Congress.

This disclaimer of State authority over Indian land within Oregon boundaries is reflected in various court decisions, such as *North Pacific Insurance Co. v. Switzler*, 143 Or. App. 223, 924 P. 2d 839, 846 (1996), where

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Oregon Territorial Act, which incorporates the Northwest Ordinance of 1787: SEC. 14. *And be it further enacted*, That the inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty-seven; and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory; ... .

9 Stat. 329. The Northwest Ordinance states in relevant part: “The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed ... .” Ordinance reenacted with minor amendments, 1 Stat. 50, Act of Aug. 7, 1789, ch. 8, art. 3. *See* F. Cohen, *Handbook of Federal Indian Law* 108, n. 383 (1982 ed.).

the Oregon Court of Appeals held:

Although the Warm Springs Reservation is located within the exterior boundaries of Oregon, tribal members living on the reservation do not “reside” in Oregon. “Under federal Indian law, the Warm Springs tribes, like other federally recognized tribes, are a distinct community. Although their reservation is within the exterior boundaries of Oregon, *it is not fully part of the state*. The tribes occupy their own territory, within particular boundaries, in which the laws of Oregon have no force, and into which the citizens of Oregon have no right to enter, except with the assent of the Indians themselves, or in conformity with treaties and acts of Congress. ...” *Warm Springs Forest Products Ind. v. EBI Co.*, 74 Or. App. 422, 433, 703 P.2d 1008 (1985) (Rossman, J., dissenting), *aff’d*, 300 Or. 617, 716 P.2d 740 (1986)(emphasis added by Court of Appeals).

In order for the State of Oregon to have any authority over Indian gaming within the exterior boundaries of the State, or for State laws such as the Oregon Constitution’s prohibition on casinos to apply to Indian tribes and Indian lands, there must be federal law expressly applying such laws to Indian tribes and Indian lands. Otherwise the constitutional prohibition on “casinos from operation in the State of Oregon” set out in Art. XV, Section 4(12) of the Oregon Constitution does not apply to the Indian tribes in the State who are operating gaming establishments on tribal lands because, as quoted above, Indian lands within the exterior boundaries of Oregon are not fully part of the State and the prohibition simply does not apply to Indian tribes on their own

lands.<sup>8</sup>

This line of authority completely undermines the premise of Relators' case, which relies on the assertion that the Governor of the State of Oregon has no authority to permit casinos "in the State." *E.g.*, Relators' Opening Brief, p. 12. Tribal casinos are not technically in the State of Oregon for purposes of State jurisdiction and authority, so the Governor is not violating any law. By complying with federal law, which merely references state law for purposes of which types of gaming activity an Indian tribe can offer at its gaming operation on tribal land, the Governor is not permitting a casino on State land within the scope of the Oregon constitutional prohibition. The State of Oregon has no authority, with or without the existence of a compact, to shut down a casino operating in Oregon run by an Indian tribe. Relators' Opening Brief, p. 23, 27-28.

Public Law 280 and IGRA are the two federal statutes that arguably

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<sup>8</sup> Relators cite *State v. Smith*, 277 Or. 251, 560 P.2d 1066 (1977) for the alleged proposition that Public Law 280 (discussed below) granted the State or Oregon criminal jurisdiction over tribal gaming on tribal lands. Relators' Opening Brief at 23, n. 10. Relators are wrong. In actuality, the primary holding of *Smith* is consistent with the present discussion – that the State of Oregon generally lacks any jurisdiction or authority over Indian lands. 560 P.2d at 1068, at n. 3. Relators' argument on this issue was expressly rejected by the Ninth Circuit Court of Appeals in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9<sup>th</sup> Cir. 1994). California is also a Public Law 280 State.

could apply state law to Indian lands in Oregon. An examination of the two statutes confirms, however, that they do not permit Oregon's constitutional prohibition on casinos to apply in Indian country within the exterior boundaries of Oregon.

Public Law 280 was a "termination" era statute designed to delegate part of the federal government's exclusive authority over Indian affairs to specified states, including Oregon, and to get the federal government out of the Indian business. 18 U.S.C. § 1162; 28 U.S.C. § 1360; F. Cohen, *supra*, at 175-77.<sup>9</sup> In an ironic twist, this statute in large part led to the establishment of gaming in Indian country. If a state did not have authority over Indian gaming in a Public Law 280 state, where Congress had intended to delegate at least partial authority over Indian affairs to the states, then non-Public Law 280 states – the great majority of states – certainly lacked such authority.

Public Law 280 was intended to delegate criminal jurisdiction and partial civil jurisdiction over on-reservation individual Indians in the named states from the federal government to those states. Public Law 280 was enacted in

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<sup>9</sup> The Warm Springs Tribe was expressly exempted from application of Public Law 280. Two other tribes, the Umatilla Tribe and the Burns Paiute Tribe, have retroceded criminal jurisdiction under Public Law 280 back to the United States.

1953, but it was not until 1976 that the United States Supreme Court addressed the scope of authority delegated to the States under the statute. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court held that the delegation of civil jurisdiction in Public Law 280 did not extend to regulatory matters, 426 U.S. at 384, and that the statute did not confer any state jurisdiction over Indian tribes themselves. *Id.* at 389. It was soon afterward that Indian tribes determined that gaming is a regulatory matter, that regulatory matters on Indian lands were not subject to state authority, and opened the first Indian gaming establishments.

The specific issue of whether gaming was a regulatory matter not encompassed within the delegation of jurisdiction to states under Public Law 280 was addressed by the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which upheld the ruling in *Bryan v. Itasca County* in all respects. The *Cabazon* court found that California's laws regarding gaming were regulatory in nature and therefore did not apply to gaming by tribes on tribal lands. As a result, states have no authority over gaming in Indian country unless the state completely prohibits all gaming within the state as a matter of state criminal law. Oregon's laws regarding gaming do not completely prohibit gaming and are therefore a regulatory framework that does not apply as a general matter to tribal gaming on tribal



lands.

As discussed in Respondents' brief, the *Cabazon* decision led directly to enactment of IGRA, which is the second federal statute that arguably could authorize some state authority or the application of state law to tribal gaming on Indian lands. Respondents' Brief at 16. But as that brief emphasizes, IGRA was a statute that was enacted primarily to benefit Indian tribes. While the statute allows states to participate in the regulation of Indian gaming if a tribe desires to engage in Class III gaming, that involvement is limited and tailored to avoid any adverse impact on tribal sovereignty and jurisdiction. As discussed above in the context of the *Seminole* decision, *see* pp. 19-20, *supra*, IGRA gives the states limited authority in the field of Indian gaming that the states would otherwise not have. In the absence of IGRA and the Class III compacting process set out therein, the State of Oregon would have no authority over or involvement in Indian gaming conducted within the State. *See Cabazon, supra*, 480 U.S. at 221.

As the Respondents' brief correctly notes, because State law, including the Oregon Constitution, does not apply to Indian lands except to the extent expressly provided by Congress, plaintiffs will need to explain exactly how and to what extent Congress has made Oregon law applicable to tribal lands. Respondents' Brief, pp. 13-22. IGRA provides for the application of state law

in two extremely limited contexts. The first is through the vehicle of the Tribal-State Compact for the regulation of Class III gaming, where the state can advocate and negotiate for its regulatory interests. *See, e.g., Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481 (9<sup>th</sup> Cir. 1998)(application of State public records laws in Siletz Compact). Even this narrow intrusion of State law is limited to matters directly connected to regulation of tribal gaming activity. *See Rincon Band of Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1034 (9<sup>th</sup> Cir. 2010), cert. denied, - U.S. -, 131 S.Ct.3055 (2011)

Aside from the fact that IGRA allows certain aspects of a state's regulatory framework to be included as part of a compact negotiation, however, the sole application of state law provided for in IGRA and relevant to this case is as follows: "[T]he statute says ... that, if a state allows a gaming activity 'for any purpose by any person, organization or entity,' then it also must allow Indian tribes to engage in that same activity." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9<sup>th</sup> Cir. 1994). Respondents' brief addresses this subject, and that discussion will not be repeated here. The important point to stress is that IGRA's only incorporation of state law is to determine whether a gaming activity that an Indian tribe desires to operate is permissible under IGRA, and hence a subject for Class III compact negotiation:

“Class III gaming activities shall be lawful on Indian lands only if such activities are ... located in a State that permits such gaming for any purpose by any person, organization, or entity ... .” 25 U.S.C. § 2710(d)(1)(B). As the definitions section makes absolutely clear, “gaming activities” and “such gaming” refers to types of games, such as blackjack, bingo, slot machines and the like. 25 U.S.C. § 2703 (6)(definition of class I gaming); § 2703(7)(definition of class II gaming); § 2703(8)(definition of class III gaming).

IGRA does not incorporate the Oregon Constitution’s ban on casinos into federal law. IGRA only references state law related to specific gaming activities, and state law does not otherwise apply to the conduct of gaming on Indian lands. It is not a conflict with the public policy of Oregon when gaming takes place on Indian lands. The Oregon Supreme Court has previously addressed the connection between Oregon’s prohibition on casinos and its impact on the legality of particular gaming activities, as a matter of State law. In *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission*, 871 P.2d 106 (Or. 1994), the Court held that the Oregon Constitution’s ban on casinos applies to the type of building in which gaming activities are conducted, not to the gaming activities themselves. The Court expressly noted that State law allows all kinds of specific gaming activities. This issue was addressed in

the context of Indian gaming in *Willis v. Fordice*, 850 F. Supp. 523, 531-32 (S.D. Miss. 1994), *aff'd*, 55 F.3d 633 (5<sup>th</sup> Cir. 1995), where the federal district court rejected the contention that tribal gaming on Indian lands was illegal because state law limited gaming in the state to ships located on navigable waters.

**c. Governor's Authority to Enter into IGRA Compacts with Oregon Tribes.**

The second issue in this case concerns the Governor's authority to enter into the Compact with the Coos Tribe pursuant to IGRA. Amici tribes desire to add to some of the points made by Respondents on this issue. ORS 190.110(3), which permits agreements with Indian tribes, states as follows:

(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, a state agency or unit of local government does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe or members of a tribe held or granted under any federal treaty, executive order, agreement, statute, policy, or any other authority.

Amici tribes direct the attention of the Court to how similar the language of this State statute is to the language in the Oregon Territorial Act discussed above:

“[N]othing in this act ... shall ... affect the authority of the government of the United States to make any regulation respecting such Indians, their lands,

property, or other rights, by treaty, law, or otherwise . . . .” See pages 21 - 22, *supra*. ORS 190.110(3) in essence authorizes the Governor to implement the mandate of the Oregon Territorial Act with regard to Indian tribes.

As discussed above and in Respondents’ brief, the operation of gaming by Indian tribes on Indian lands free of state regulation is one of the rights Indian tribes possess and retain as a matter of inherent sovereignty, and pursuant to treaties and federal statutes. ORS 190.110 authorizes the Governor of Oregon to enter into agreements with Indian tribes to ensure that the State does not interfere with or infringe with such rights.

Relators argue that only the Indian Gaming Regulatory Act authorizes Indian gaming and authorizes the Governor to enter into gaming compacts establishing tribal casino gaming. Relators’ Opening Brief at 22. Relators also claim that it was only the Supreme Court’s 1987 *Cabazon* decision, *see supra* at p. 9, that “allowed” gaming on tribal lands, Relators’ Opening Brief at 23, and that before 1987 tribal gaming was a criminal act subject to state criminal law and jurisdiction. *Id.* These arguments are completely wrong under controlling law. The Supreme Court in *Cabazon* confirmed that Indian tribes have inherent sovereign authority to engage in gaming activities, and that Public Law 280 – a delegation of some federal authority over Indian affairs to the states – did not delegate any authority to the state to regulate Indian gaming.

IGRA was actually a limitation imposed by Congress on the inherent authority of Indian tribes to engage in gaming, by requiring a compact before a tribe could engage in Class III gaming. In the absence of IGRA, Indian tribes would retain the inherent sovereign authority to engage in virtually unlimited gaming, free of any state authority, with or without approval of the state's Governor. The situation is therefore the exact opposite of the position argued by Relators – IGRA actually gives the State more authority over Indian gaming than it would otherwise have had before IGRA. This increased involvement is exercised by the Governor under the delegated authority in ORS 190.110, through the vehicle of a negotiated compact.

Relators also argue, however, that the Governor of Oregon is prohibited from agreeing to a compact that allows an activity within the State of Oregon that is not permitted by State law. Amici tribes would point out to the Court that this is the same argument that was made and rejected by the federal courts thirty years ago in the context of Indian fishing rights. When the Indian fishing controversies arose in the 1960s in Oregon and Washington, state agencies and non-Indian fishing groups were extremely resistant to acknowledging and implementing Indian treaty fishing rights. Once the scope of Indian fishing rights was established by the federal courts, opposition groups and entities argued that Indian treaty fishing rights could not be implemented,

acknowledged or protected by the states because state law prohibited or did not recognize special Indian rights, and that the state executive branch could not authorize something not permitted by the state legislature. These arguments were rejected by the courts. For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693-95 (1979), the United States Supreme Court held:

Moreover, the State continues to argue that the District Court exceeded its authority when it assumed control of the fisheries in the State, and the commercial fishing groups continue to argue that the District Court may not order the state agencies to comply with its orders when they have no state-law authority to do so. ... State-law prohibitions against compliance with the District Court's decree cannot survive the Supremacy Clause of the United States Constitution.<sup>10</sup>

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<sup>10</sup> See *United States v. Washington*, 520 F. 2d 676, 693 (9<sup>th</sup> Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)(Burns, J., District Judge, sitting by designation, concurring)(“The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.”); *Puget Sound Gillnetter's Ass'n v. United States District Court*, 573 F.2d 1123, 1126 (9<sup>th</sup> Cir. 1978), *aff'd*, *Washington Fishing Vessel Ass'n*, *supra*, 443 U.S. 658 (1979)(“Except for some desegregation cases ... the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”); *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P.2d 1373 (1977), *reversed*, *Washington Fishing Vessel Ass'n*, *supra* (State Director of Fisheries' orders implementing

The State of Oregon and Indian tribes within the exterior boundaries of the State worked through the fishing rights controversy of the 1970s and since that time have enjoyed an era of government-to-government cooperation, as the Gaming Compacts with all nine tribes in the State illustrate. This cooperative approach acknowledges the sovereignty of each government and has avoided unnecessary litigation. In this case, as Respondents demonstrate conclusively in their brief, IGRA is a federal statute which is expressly intended to preempt the field of Indian gaming. *E.g.*, Respondents' Brief at 16. As such, implementation of IGRA is subject to the same Supremacy Clause mandate held binding on state officials in the Indian fishing context. Relators' argument that the Governor of Oregon lacks the authority to enter into an agreement with Indian tribes in the State of Oregon that conflicts with state law is without merit.

Amici wish to address one final, related point made in Relators' Opening Brief. Relators argue that ORS 190.110 cannot constitute authority for the Governor to enter into Class III Gaming compacts with Indian tribes in Oregon because Indian gaming did not exist at the time ORS 190.110 was enacted in

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Indian fishing rights in *U.S. v. Washington* void as beyond the director's authority under state law).



1985. Relators' Opening Brief at 4, 12-13, 22, 24-27. First, this argument is incorrect in its factual predicates. As discussed above, Indian tribes have always had inherent sovereign authority to engage in gaming. *See* p. 30-31, *supra*. The Supreme Court's 1987 *Cabazon* decision did not "allow" tribes to engage in gaming for the first time; it confirmed tribes' pre-existing inherent sovereign authority to engage in gaming so long as gaming was not completely prohibited by state law. It also affirmed that Public Law 280, passed in 1953, 18 U.S.C. § 1162; 28 U.S.C. § 1360, did not vest States with authority over Indian gaming that they previously lacked.

Casino gaming has long been permitted in Oregon, first under Happy Canyon charitable gaming, and then in 1984 when the Lottery was adopted by referendum and slot machine gaming was authorized. Indian tribes in Oregon already had the right to conduct gaming in 1985 when ORS 190.110 was enacted. Under the express language of ORS 190.110(3), the Governor was authorized to enter into agreements with tribes to acknowledge that right.

Relators' arguments on this subject also do not make any sense under applicable doctrines of statutory construction or the standard function of the legislative process. Many state laws are written in general terms so as to apply to new activity that may subsequently arise after a statute is first passed. To adopt Relators' argument on this subject would be to say that current laws do

not apply to businesses created or persons born after a law was passed, or that criminal statutes do not apply to crimes committed using technological assistance or techniques that were not in existence at the time a criminal statute became law. Such arguments make no sense, and are not the law.

### 5. Conclusion.

For the foregoing reasons, and consistent with the arguments made by the Respondents in their Brief, which Amici tribes adopt and incorporate by reference herein, Relators' appeal should be denied and the judgment of the Circuit Court affirmed.

DATED this 18<sup>th</sup> day of October, 2011.

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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) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,874 words as determined by the word count feature of Microsoft Word 2010.

**Type size**

I 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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I certify that on October 18, 2011, I served a true copy of this *Amicus*

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RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October 2011.

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