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AT 1:00 O'CLOCK ..... P.M

MAY 03 2010

Circuit Court for Lane County, Oregon  
BY \_\_\_\_\_ *CSA*

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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

Relators,

Case No. 16-03-23044

v.

OPINION and ORDER

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

Defendants,

and

THE CONFEDERATED TRIBES OF THE  
COOS, LOWER UMPQUA AND SIUSLAW  
INDIANS,

Intervenor-Defendants.

After a tortured procedural path, this case returns to this court upon remand from the Supreme Court of the State of Oregon. *State ex rel. Dewberry v. Kulongoski* ("Dewberry I"), 346 Or 260 (2009). On April 16, 2010 this court heard argument on Defendants and Intervenor-Defendants' Joint Motion for Summary Judgment and Relators' Motion for Summary Judgment. There are no issues of material fact. Defendants and Intervenor-Defendants' Joint Motion for Summary Judgment is GRANTED, and Relators' Motion for Summary Judgment is DENIED. Accordingly, relators' petition for a writ of mandamus is DENIED.

## I. BACKGROUND

This case arises out of relators' challenge to a tribal gaming compact entered into between the Governor of the State of Oregon and the Confederated Tribes<sup>1</sup> (intervenor-defendants) that allowed gaming activities on a parcel of land known as the "Hatch Tract." The pertinent facts are stated below.

In 2002, the Confederated Tribes began negotiating a gaming compact with Governor John Kitzhaber<sup>2</sup> (hereinafter the "Compact"). The Compact authorized the operation of a gaming casino on the Hatch Tract, an area of land located in Florence, Oregon, which the Secretary of the Interior acquired for the benefit of the Confederated Tribes. The Compact recognized various types of gaming including blackjack, pai-gow poker, Caribbean stud poker, let-it-ride, mini-baccarat, big 6 wheel, keno, craps, roulette, off-track pari-mutuel wagering on animal racing, and video lottery games of chance.

By January 8, 2003, Governor Kitzhaber and the Confederated Tribes had signed the Compact. The Governor's authorization of the Compact, however, was contingent upon an appeal of the Secretary of the Interior's determination that the Hatch Tract was "restored lands" under 25 USC § 2719(b)(1)(B)(iii), and thus eligible as a gaming site under the Indian Gaming Regulatory Act (hereinafter the "IGRA"). 25 USC §§ 2701-2721. The United States District Court for the District of Oregon affirmed the Secretary's determination that the Hatch Tract was "restored lands." *Oregon v. Norton*, 271 F Supp 2d 1270 (D Or 2003). On January 5, 2004, the Tribes' Gaming Ordinance authorizing the Casino was approved by the Chairman of the National Indian Gaming Commission.

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<sup>1</sup> This Opinion refers to the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians (intervenor-defendants) as the "Confederated Tribes" throughout.

<sup>2</sup> Governor Kulongoski was sworn in on January 13, 2003, and has taken over responsibility and liability for official acts of Governor Kitzhaber.

By July of 2003, the Confederated Tribes had begun planning and developing the Three Rivers Casino & Hotel (hereinafter the “Casino”). The Casino opened in June of 2004 and currently includes a hotel with ninety rooms and three suites, a casino with approximately 700 electronic games of chance, a variety of table games, and five restaurants.

During planning and development of the Casino, relators<sup>3</sup> Susan Dewberry, Carol Holcombe, Suzanne Danielson, and Arnold Buchman opposed the location of the Casino. Relators are all residents and electors of Florence, Oregon, and assert that the Governor’s authorization of the Compact harms them because it violates their constitutional rights and will result in increased tax burdens.<sup>4</sup> Ultimately, relators petitioned this court for a writ of mandamus to enjoin development of the Hatch Tract for gaming purposes, and to rescind the Governor’s approval of the Compact.

## II. PROCEDURAL HISTORY

The procedural history of this case is best understood in three phases. First, relators petitioned this court for a writ of mandamus (hereinafter “*Dewberry I*”). This court’s decision in *Dewberry I* was subsequently appealed to the Oregon Court of Appeals, and then the Supreme Court of Oregon. After this court’s hearing, but prior to appellate review of *Dewberry I*, relators brought a declaratory judgment action in the United States District Court for the District of Oregon (hereinafter “*Dewberry II*”). Finally, upon remand of *Dewberry I*, this court commenced further proceedings (hereinafter “*Dewberry III*”).

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<sup>3</sup> Parties petitioning for a writ of mandamus are referred to as “relators.” See ORS 34.105. Parties filing a declaratory judgment action are referred to as “plaintiffs.” See ORCP 7. Susan Dewberry, Carol Holcombe, Suzanne Danielson, and Arnold Buchman not only petitioned for a writ of mandamus but also served as the plaintiffs in the later declaratory judgment action. As only the petition for writ of mandamus is before this court, this Opinion uses the term “relators” throughout.

<sup>4</sup> Additionally, Holcombe alleged she would suffer financial loss as she anticipated that tenants of her commercial leaseholds would be unable to compete with the untaxed businesses associated with the Casino, and Danielson alleged that she would be harmed by the increased traffic and roadway dangers, and decreases to her property value.

A. *Circuit Court of the State of Oregon for Lane County (2003-2004) (Dewberry I)*

On December 10, 2003, relators petitioned the Lane County Circuit Court of Oregon for a writ of mandamus to enjoin development of the Hatch Tract for gaming purposes, and to rescind the Governor's approval of the Compact.<sup>5</sup> Defendants included Theodore R. Kulongoski, Governor of the State of Oregon (successor of Governor Kitzhaber), and "Other Executive Officers in the State of Oregon." The basis of relators petition for a writ of mandamus was that the Governor, by executing the Compact on behalf of the State of Oregon, had exceeded his constitutional authority and had contravened Article XV, section 4(12) of the Oregon Constitution,<sup>6</sup> which requires the legislature to prohibit the operation of "casinos" in Oregon. In response, defendants filed a motion to dismiss on three grounds: (1) mandamus was inappropriate because relators failed to show that no other legal remedies were available; (2) relators failed to name the Confederated Tribes as a necessary party; and (3) relators' petition was not timely. On January 23, 2004, this court granted the motion to dismiss upon the first two grounds, and did not reach the third.

1. *Ground 1: Other Legal Remedies under ORS 34.110*

ORS 34.110 governs writs of mandamus and provides in pertinent part, "[t]he writ shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law." In their motion to dismiss, defendants asserted that relators had an alternate remedy, namely a declaratory judgment action. In response, relators argued that a declaratory judgment was not an "adequate" remedy. Relators reasoned that the declaratory judgment

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<sup>5</sup> On September 15, 2003, prior to relators petition in this court, relators petitioned the Supreme Court of Oregon for a writ of mandamus to enjoin development of the Casino and to rescind the Governor's approval of the Compact. On November 28, 2003, the Supreme Court denied the writ without comment.

<sup>6</sup> On September 17, 2002, the electorate ratified House Joint Resolution (HJR) 80 (2002), which in pertinent part renumbered, without substantive change, *former* Article XV, section 4(7) to Article XV, section 4(12). For the purposes of this opinion, this provision will be referred to as Article XV, section 4(12) of the Oregon Constitution.

statute, ORS 28.110, required joinder of any party who may be affected by the declaration of the court, and since the Confederated Tribes qualified as a necessary party under ORS 28.110,<sup>7</sup> but could be insulated from a claim brought in state court by asserting sovereign immunity, a declaratory judgment would not be “adequate.”

In a petition for a writ of mandamus, relators bear the burden to prove that there is no alternate remedy available. *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or 281, 293-94 (1958). This court held that relators had not offered evidence sufficient for it to determine the Confederated Tribes' position, thus this court did not know whether or not the Confederated Tribes would, or could, assert their sovereign immunity in response to a declaratory action regarding the Compact.<sup>8</sup> As this court explained:

At this juncture, this Court cannot determine if a declaratory remedy would be adequate because it does not know the position of the Confederated Tribes. It is the Plaintiffs-Relators' burden to convince this Court that a declaratory remedy is not adequate and they have failed to do so.

Hence, this court concluded that relators had not met their burden to prove that a declaratory judgment was an inadequate remedy.

*Ground 2: Failure to Join a Necessary Party*

This Court also granted defendant's motion to dismiss because relators had failed to join a necessary party under ORCP 29, though on appeal the Oregon Supreme Court held that ORCP 29 does not apply to mandamus proceedings.

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<sup>7</sup> ORS 28.110 provides in pertinent part: “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” ORS 28.110.

<sup>8</sup> Looking ahead in this case, the federal court granted the Confederated Tribes sovereign immunity in *Dewberry II*, while in *Dewberry III*, the Confederated Tribes actually intervened pursuant to ORS 34.130(4), thus submitting to this court's jurisdiction.

Although relators argued that ORS 34.130(2) specified a different procedure for joinder than ORCP 29 by only requiring joinder of the *defendant* in this case, this court adopted the defendants' position that the Oregon Rules of Civil Procedure apply to mandamus actions.

This Court reasoned, although acknowledges that it did not explicitly so state in its opinion, that the legislature intended ORCP 29 to apply to mandamus actions. ORCP 1 states the Oregon Rules of Civil Procedure “govern procedure and practice in all circuit courts of this state . . . for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule.” Since the court held ORS 34.130, the statute governing petitions for writ, service, order of allowance, and intervention, did not explicitly specify a different procedure for joinder of a necessary party, ORCP 29 applied. This court reasoned that had the legislature intended ORS 34.130 to supersede ORCP 29, the legislature would have done so explicitly, having already demonstrated that it knew how to supersede such a provision.

This court then proceeded to apply ORCP 29 A which requires a person to be joined as a party in an action if:

- (1) in that person's absence complete relief cannot be accorded among those already parties, or
- (2) that person claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest

Applying ORCP 29 A, this court held that the Confederated Tribes were a necessary party as their interests might be impaired by a disposition regarding the validity of the Compact, and that the petition could not proceed without them.

Having held that the relators had failed to prove that they had no other plain, speedy, and adequate legal remedy, and that relators had failed to join a necessary party, this court granted

defendants' motion to dismiss. On March 5, 2004, relators appealed, but moved to hold the appeal in abeyance, pursuant to ORCP 52, while they filed a declaratory judgment action in *Dewberry II*.

B. *United States District Court for the District of Oregon (2005) (Dewberry II)*

On March 9, 2004, relators<sup>9</sup> filed a declaratory judgment action against the State and the Confederated Tribes in Lane County Circuit Court. On April 7, 2004, the Confederated Tribes moved, pursuant to ORCP 21, to dismiss relators' claim against them by asserting the Confederated Tribes' right to sovereign immunity. On May 7, 2004, relators argued, pursuant to IGRA, that the Confederated Tribes had waived their sovereign immunity. Having raised a federal question by asserting sovereign immunity, the defendants then successfully removed the case to federal district court under 28 USC § 1331.

On December 21, 2005, the United States District Court for the District of Oregon granted summary judgment for the defendants. The court held that relators lacked standing to sue, the Confederated Tribes had not waived their sovereign immunity to a private cause of action, and relators had failed to join a necessary party. *Dewberry v. Kulongoski (Dewberry II)*, 406 F Supp 2d 1136, 1145, 1146, 1150 (2005). In its opinion, the district court held that relators failed to prove they had Article III standing. *Id.* at 1144. Specifically, Judge Aiken held that the alleged injuries suffered by relators were generalized grievances shared by the public at large, and therefore were not sufficiently personal to establish standing under federal law. *Id.* at 1143. Moreover, because relators failed to present evidence that the casino would cause higher taxes, reduce property values, increase traffic, or increase pollution, the district court held that relators'

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<sup>9</sup> As noted in footnote 3, parties petitioning for a writ of mandamus are referred to as "relators," while parties filing a declaratory judgment action are referred to as "plaintiffs." The "relators" who petitioned for a writ of mandamus in this case were also "plaintiffs" in declaratory judgment action along with Don Heath and Dale Schaffner. For consistency and simplicity, this court refers to them as "relators" throughout this Opinion, even when discussing the declaratory judgment action.

injuries were not actual or imminent. *Id.* at 1144. Finally, the district court held that the alleged injury was not immediate, because relators' mere "belief" that the harms would occur was too conjectural and insufficient to establish a threat of concrete and particularized harm that is actual or imminent. *Id.* at 1145.

Next, the district court held that relators could not invoke IGRA to overcome the Confederated Tribes' sovereign immunity. *Id.* at 1146-47. Legal actions against Indian tribes are precluded unless the tribe waives its immunity or Congress has expressly abrogated tribal immunity by authorizing a suit. *See Kiowa Tribe v. Manufacturing Techs, Inc.*, 523 US 751, 754, 760 (1998). Since Congress has authorized a state or the federal government to bring actions to enforce gambling laws, *see* 25 USC § 2710(d)(7)(A)(ii)-(iii), but has not authorized a private cause of action to enforce a gaming compact under IGRA, the district court held that the relators' could not invoke IGRA to overcome the Confederated Tribes' sovereign immunity, and the court dismissed relators' claims.

Turning to whether the Confederated Tribes were a necessary party, the district court held that the Confederated Tribes were a necessary party under FRCP 19, that joinder was infeasible because the Confederated Tribes had actually asserted sovereign immunity, and that since the Confederated Tribes were indispensable, in equity the declaratory action could not proceed without them.<sup>10</sup>

Although standing and the indispensability of the Confederated Tribes were dispositive, in the interests of judicial economy the district court proceeded to address the substance of the

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<sup>10</sup> The language of FRCP 19 regarding necessary parties, is similar to the language found in ORCP 29, which this court originally applied in *Dewberry I*. The district court's analysis is consistent with this court's opinion that the Confederated Tribes were a necessary party as their interests would most certainly be affected by the invalidation of the Compact. *See Dewberry II*, 406 F Supp 2d at 1147; *State ex rel. Dewberry v. Kulongoski (Dewberry I)*, No 16-03-23044, 2004 WL 5613982 (Cir Ct Or Lane County 2004). However, as discussed later in this opinion, the Supreme Court of Oregon held that ORCP 29 did not apply to a petition for a writ of mandamus.

declaratory judgment action and concluded that Compact was valid and the Governor did in fact have authority to enter into the Compact. *Dewberry II*, 406 F Supp 2d at 1157. As an initial matter, the court concluded that the Compact itself is valid under IGRA and to the extent that Oregon law prohibits gaming activity authorized in the Compact, it is preempted by federal law. *Id.* at 1154. Therefore, even though Article XV, section 4(12) of the Oregon Constitution requires the legislature to prohibit the operation of casinos in Oregon, the district court held that the Compact is nonetheless valid because IGRA preempts state law to the extent that it interferes or is incompatible with federal law. *Id.* at 1152.

The district court next addressed the issue of whether the Governor had the authority under Oregon law to execute the Compact on behalf of the State of Oregon. Citing Article V, section 13 of the Oregon Constitution, which provides that the Governor “shall transact all necessary business with the officers of the government,” Judge Aiken reasoned that the Governor is authorized to execute Tribal-State gaming compacts on behalf of the State of Oregon. *Id.* at 1154. In addition to the constitutional authorization, the district court concluded that the Governor was authorized to execute the Compact under ORS 190.110. *Id.* at 1156. Specifically, the district court understood ORS 190.110(3) to provide that the Governor’s powers include the authority to enter into agreements with Indian tribes in order to prevent state interference with tribal gaming rights protected by federal law. *Id.* at 1155-56. After concluding the analysis of the substance of the case, the district court dismissed relators’ declaratory judgment action on the dispositive issues of standing, and failure to join a necessary party. *Id.* at 1157. No appeal was taken from the decision in *Dewberry II*.

C. *Court of Appeals for the State of Oregon (2008) (Dewberry I, continued)*

Upon the dismissal of *Dewberry II*, relators reactivated their appeal in *Dewberry I* before the Oregon Court of Appeals. On June 11, 2008, the court of appeals issued its decision, reversing this court's decision. *State ex rel. Dewberry v. Kulongoski (Dewberry I)*, 220 Or App 345 (2008).

The court of appeals reasoned first that this court was mistaken regarding ORCP 29 and held that ORS 34.130 governs joinder of necessary parties in a petition for a writ of mandamus, rather than ORCP 29. *Id.* at 354. Accordingly, the court held that under ORS 34.110 the Confederated Tribes were not a "defendant" and thus were not a necessary party to the action. *Id.* at 354 n 2.

The court of appeals next reasoned that under ORS 28.110 the Confederated Tribes were a necessary party to any adjudication of the merits of a declaratory judgment action. *Id.* at 358. Because the Confederated Tribes "completely controlled" the availability of adjudication on the merits of such an action through exercise of sovereign immunity, the declaratory action was not an adequate alternate remedy. *Id.* at 359.

Before concluding its opinion, the court of appeals dismissed the State's alternative basis for affirmance based on claim preclusion. *Id.* at 361. Specifically, the State argued that the issues relators sought to litigate were already litigated in federal court in *Dewberry II*. However, the court of appeals rejected this defense stating:

"Here, not only was claim preclusion not raised as an affirmative defense in the trial court, but it *could not* have been raised because, as noted, the basis for the state's claim preclusion argument-*viz.*, the federal court's *subsequent* disposition- did not exist when the present case was in trial court." *Id.* at 360.

D. *Supreme Court for the State of Oregon (2009) (Dewberry I, continued)*

On August 20, 2008, the State filed a petition for review of *Dewberry I* with the Supreme Court of Oregon. The Supreme Court granted review, and on June 18, 2009 issued an opinion affirming the court of appeals and remanding the case to this court. *Dewberry I*, 346 Or at 274.

First, the Supreme Court held that ORCP 29 does not apply to a mandamus proceeding, stating:

“ORCP 29 A mandates that certain persons be joined in an action in circumstances where complete relief cannot be accorded without the participation of a person or where the person’s ability to protect his or her interests will be impeded or impaired. The procedure outlined in the mandamus statute, ORS 34.130(4), on the other hand, *allows* interested parties to seek intervention and *requires* the participation of only a relator and a defendant. Because the mandamus statute specifies a “different procedure” than the procedure contained in ORCP 29 A, ORCP 29 A does not apply to mandamus proceedings. ORCP 1 A.” *Id.* at 269-70.

Second, the Court addressed and reversed this court’s holding that relators had a “plain, speedy and adequate remedy in the ordinary course of the law” in the form of a declaratory judgment action. Since the Confederated Tribes would be a necessary party to any declaratory judgment action under ORS 28.110, and since such adjudication on the merits could be prevented by the Confederated Tribes asserting their sovereign immunity, the Supreme Court reasoned that the Confederated Tribes *alone* possessed the authority to determine whether the declaratory judgment action would proceed to the merits. *Id.* at 273.<sup>11</sup> Therefore, the Court held

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<sup>11</sup> The premise of both the Supreme Court and the court of appeals decision seems in part to be that the Confederated Tribes alone possessed control over whether the declaratory judgment action would proceed. *Dewberry I*, 346 Or at 273; *Dewberry I*, 220 Or App at 355-59. Beyond the fact that the Confederated Tribes might elect to submit to state court jurisdiction (which, eventually, it did), this court did not know whether the Confederated Tribes’ control over the declaratory action was indisputable when it initially heard *Dewberry I*. It was not until *Dewberry II* that relators first raised the argument that under IGRA the Confederated Tribes may have waived sovereign immunity. 406 F Supp 2d at 1145-1146. Although the district court dismissed this argument with regard to a private cause of action, *Id.* at 1146, at the time of the initial hearing before this court, this argument had neither been raised nor decided. We now know that the Compact itself states that Confederated Tribes must waive their sovereign immunity “in state court for the limited purpose of enforcing this Compact . . .” Coos Class III Gaming Compact § 16(A)(2), Jan 8, 2003. It was unclear to this court whether the Confederated Tribes alone possessed control over a declaratory judgment action. Whether or not these arguments against sovereign immunity have merit, at the time of the initial hearing of *Dewberry I* this court was not prepared, absent the above arguments being raised and addressed, to conclusively state that the Confederated Tribes’ control over the progress of the declaratory action was absolute.

that relators met their burden to prove that a declaratory judgment was neither a plain, nor adequate remedy under ORS 34.110. *Id.* The Supreme Court reversed and remanded for further proceedings. *Id.* at 274.

E. *Circuit Court of the State of Oregon for Lane County (2010) (Dewberry III)*

On September 23, 2009, relators filed an amended petition for a writ of mandamus<sup>12</sup> in the case now denominated “*Dewberry III*,” and on October 1, 2009, Governor Kulongoski and the “other officers” filed their answer. On October 26, 2009, this court granted the Confederated Tribes’ motion to intervene in support of the defendants.<sup>13</sup> On December 1, 2009, relators moved for summary judgment pursuant to ORCP 47 requesting the court issue a peremptory writ of mandamus requiring Oregon Governor Kulongoski to rescind the Compact because he lacked the constitutional or statutory authority to enter the Compact on behalf of the State of Oregon. On January 5, 2010, defendants and intervenors filed a joint motion for summary judgment, pursuant to ORCP 47, on the grounds that: (1) Governor Kulongoski’s execution of the Compact was authorized by IGRA and did not violate Oregon law; (2) relators’ claims are barred by claim preclusion pursuant to the decision of the United States District Court for the District of Oregon; and (3) relators’ petition was not timely. On January 4, 2010, the Confederated Tribes of the Warm Springs, 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 moved for leave to file an amicus curiae brief. This court granted that motion, and the

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Therefore, this court concluded that relators had not met their burden to prove that they did not have a plain, speedy, and adequate remedy in the ordinary course of law.

<sup>12</sup> Relators later filed a second amended petition on the day of the April 16, 2010 hearing, amending the petition to add a claim for attorney fees.

<sup>13</sup> Thus, the Confederated Tribes waived sovereign immunity and voluntarily submitted to the jurisdiction of this Court.

amicus brief (hereinafter “Brief of the Amicus Tribes”) was received. Accordingly, the Confederated Tribes consented to the jurisdiction of this court, and every other federally recognized tribe in Oregon, except one, has asked this court to consider its view of this litigation.<sup>14</sup>

### III. DISCUSSION

#### A. *Jurisdiction*

This court, as the circuit court of the county wherein the defendant Governor Kulongoski exercises official functions, has jurisdiction over this petition for a writ of mandamus. ORS 34.120. Relators have standing to bring their petition for a writ of mandamus. The Supreme Court of Oregon has long described the standing requirements to bring a petition for a writ of mandamus as follows:

“When the question is one of public right, and the object of the mandamus is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a resident and citizen of the [jurisdiction], and as such is interested in the execution of the laws. . . .

. . . Hence, as the question at bar is one of public right, and the object of the mandamus is to enforce the performance of a public duty, the people being regarded as the real parties in interest, it is not necessary that the relators should show any special interest or particular right to be affected by the result.” *State ex rel. Durkheimer v. Grace*, 20 Or 154, 157-58 (1890) (citing *State v. Ware*, 13 Or 380 (1886)).

Relators are Oregon electors and citizens residing in or around Florence, Oregon.

Through this petition for a writ of mandamus, relators are interested in the execution of the laws of Oregon, and the enforcement of what relators believe is the Governor’s public duty under the Oregon Constitution. Regardless of their personal interests and rights in the matter, relators have standing to bring this petition for a writ of mandamus.

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<sup>14</sup> The Burns Paiute Indian Tribe is the only federally recognized tribe in Oregon which has either not intervened in *Dewberry III*, or joined in the Brief of the Amicus Tribes. Brief for Confederated Tribes of the Warm Springs Reservation et al. as Amici Curiae Supporting Defendants at 1 n 1.

B. *Preclusion*

Before reaching the merits of this case, this court must decide whether the decision in *Dewberry II* has preclusive effect on this court. The State has asserted that both claim and issue preclusion prevent this court from hearing some or all of the claims raised in *Dewberry III*. Federal law applies when deciding the preclusive effect of specific issues decided by the federal court, however Oregon appellate courts have continued to apply both federal and Oregon law, and therefore this court must as well. See, e.g., *Aguirre v. Albertson's, Inc.*, 201 Or App 31, 46 (2005); *Holmgren v. Westport Towboat Co.*, 260 Or 445, 448-49 (1971); *Multistate Tax Comm'n v. Merck & Co., Inc.*, 289 Or 717, 721-22, (1980).

1. *Claim Preclusion*

Both statutory and common law preclusion remain viable in this state. *Van De Hey v. U.S. Nat'l Bank of Or.*, 313 Or 86, 90 (1992).<sup>15</sup> Under the statutory scheme, a final judgment, decree, or order in an action of a court having jurisdiction is conclusive between parties with respect to the matter directly determined, if the parties are litigating for the same thing, under the same title and in the same capacity. ORS 43.130. Similarly, under common law, a plaintiff who has prosecuted an action against a defendant through to a final judgment is barred from prosecuting another action against the same defendant where there was an “opportunity to litigate” the merits of the claim that is currently before the court. *Drews v. EBI Cos.*, 310 Or 134, 140 (1989); *Hellesvig v. Hellesvig*, 294 Or 769, 776 (1983). At common law then, the dispositive question is whether the court in the first proceeding would have had jurisdiction to

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<sup>15</sup> Defendants first raised the claim preclusion defense during the appeal of this court's decision in *Dewberry I*. *Dewberry I*, 220 Or App at 359-61. The court of appeals dismissed that defense because it was not pleaded, nor was there a record in support of the defense of claim preclusion. *Id.* at 360. In *Dewberry III*, claim preclusion has been pleaded as an affirmative defense through the State's Answer to relators' Amended Alternative Writ of Mandamus, filed October 1, 2009.

hear the claim brought by plaintiff in the subsequent action. *Rennie v. Freeway Transp.*, 294 Or 319, 330-33 (1982).

In this case, the federal court's decision in *Dewberry II* does not bar relators' claims in *Dewberry III* under either statutory or common law claim preclusion principles. The court in *Dewberry II* held that it did not have jurisdiction to hear relators' declaratory judgment action because relators lacked Article III standing. 406 F Supp 2d at 1145. The federal court not only lacked jurisdiction to reach the merits of the declaratory judgment action, but would also not have had jurisdiction to hear a petition for a writ of mandamus had relators brought that claim in *Dewberry II*. Since there was not an opportunity to litigate the merits of relators petition for a writ of mandamus, claim preclusion does not bar this court from addressing the merits of the petition in this case.<sup>16</sup>

## 2. Issue Preclusion

In the alternative, defendants argue that the federal court's decision on the merits in *Dewberry II* act as a bar to relitigation under the doctrine of issue preclusion. Issue preclusion requires that an issue be "actually litigated and determined" in an earlier judicial setting where "its determination was essential to" the final decision reached. *Drews*, 310 Or at 139 (citing

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<sup>16</sup> Although not raised by the parties, this court also notes that the "waiver by acquiescence" exception to claim preclusion appears to apply in this case. Waiver by acquiescence is implicated when a plaintiff pursues multiple actions involving the same claim simultaneously ("claim splitting"), and the defendant acquiesces to defending against the multiple actions by not raising an available objection. *Aguirre*, 201 Or at 49. No more is required of defendant to avoid acquiescence than to raise a "timely objection in order to preserve their *res judicata* defense. *Rennie*, 294 Or at 329 n 9. Relators began pursuing multiple actions in this case once they brought the declaratory judgment action in *Dewberry II*, while their appeal from *Dewberry I* was pending. While the declaratory action was before this court (prior to removal), defendants neither raised the affirmative defense of claim preclusion through a responsive pleading (ORCP 19 B) nor did they move to dismiss the case because there was an action pending for the same cause (ORCP 21(A)(3)). After defendant's motion to remove *Dewberry II* to federal court was granted, defendants continued to remain silent while they defended multiple actions regarding the same factual transaction. Regardless of the merits of either potential objection, defendants' silence amounted to acquiescence to relators' claim splitting. Therefore, under the doctrine of waiver by acquiescence, defendants cannot assert claim preclusion now that one of those claims has been decided in their favor. "If a defendant chooses to defend the multiple actions without complaint rather than exercise any available remedies to force plaintiff to choose a single forum, there is no unfairness in holding the defendant to that choice." *Aguirre*, 201 Or App at 50.

*North Clackamas Sch. Dist. v. White*, 305 Or 48, 53 (1988); *Restatement (Second) of Judgments* §§ 17, 27, 28 (1982)). Relators argue that the district court’s determination on the merits in *Dewberry II* was not “essential” given that the court held that it lacked jurisdiction.

The judicial act of assuming jurisdiction for the purpose of deciding the merits of a case has been termed the “doctrine of hypothetical jurisdiction.” *Steel Co. v. Citizens for a Better Env’t*, 523 US 83, 94 (1998). In rejecting application of hypothetical jurisdiction the Supreme Court reasoned:

“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.’ *Ex parte McCardle*, 7 Wall. 506, 514, 19 L Ed 264 (1868). . . .

....

. . . For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Id.* at 94, 101-02.

Similarly, the Supreme Court of Oregon has held that a court cannot determine the merits of a case after holding that it has no jurisdiction. *Dippold v. Cathlamet Timber Co.*, 98 Or 183, 188 (1920) (“When a court has determined that it has no jurisdiction of the subject-matter of an action, it cannot properly consider any other question raised in the case.” (quoting 17 Stand. Prac. 657)), *superseded on other grounds by statute*, ORS 20.130, *as recognized by State Acting By and Through Or. State Bd. of Higher Educ. v. Cummings*, 205 Or 500, 537 (1955). It follows that a decision on other issues, after a court determines that it lacks jurisdiction to hear the case, is not essential to its final decision, and does not give rise to issue preclusion. *Black v. Arizala*, 182 Or App 16, 31 n 6 (2002).

After the district court in *Dewberry II* held that relators lacked Article III standing, it nonetheless addressed the merits of relators’ claim stating that “the interests of judicial economy support the discussion and resolution of all stated grounds for relief to avoid the necessity of

remand after appeal.” 406 F Supp 2d at 1142, 1145. While this court finds the federal court’s analysis of the merits persuasive, an aid to judicial economy regarding any appeal of *Dewberry II* in the federal court system, and, frankly, instructive, this court holds that relators are not precluded from relitigating these issues in *Dewberry III*. Once the federal court in *Dewberry II* held that relators lacked standing, it assumed hypothetical jurisdiction and its decisions regarding the merits of the case were not “essential” and cannot be given preclusive effect.

### C. *Laches*

As a final procedural matter, defendants argue that under the doctrine of laches, relators’ claims are barred because relators’ petition was not timely filed. This court adopts relators’ argument regarding laches and holds that relators’ mandamus action was filed within a reasonable time and that defendants were not prejudiced by any delay of relators.

### D. *Validity of the Compact*

Turning to the merits of this case, relators request that this court issue a peremptory writ ordering the Governor to rescind his approval of the Compact. Essentially, relators argue that the Compact is invalid because the Governor has no independent authority to sign IGRA Tribal-State gaming compacts, and any Oregon statute that would purport to give him such authority is in plain violation of Article XV, section 4(12) of the Oregon Constitution. In order to understand and address relators’ argument, a preliminary analysis of the impact of IGRA is necessary.

#### 1. *Validity of the Compact under IGRA*

The United States Supreme Court held in *California v. Cabazon Band of Mission Indians* that the states have no jurisdiction over Indian lands unless Congress expressly cedes them that jurisdiction. 480 US 202, 207 (1987). After *Cabazon*, Congress passed IGRA to establish a comprehensive federal statutory scheme governing gaming on Indian lands. 25 USC §§ 2701-

2721. Under IGRA, the only avenue for state involvement in Indian gaming is with respect to class III gaming.<sup>17</sup> Tribes wishing to conduct the type of class III gaming the Compact at issue here authorizes must satisfy three requirements. First, the gaming must be authorized by a tribal ordinance or resolution. *Id.* § 2710(d)(1)(A). Second, the gaming must be located in a state that “permits such gaming for any purpose by any person, organization, or entity.” *Id.* § 2710(d)(1)(B). Third, the gaming must be conducted in accordance with a Tribal-State gaming compact entered into by the Indian tribe and the state. *Id.* § 2710(d)(1)(C).

In this case, the first requirement is satisfied because the Compact was approved by tribal ordinance. Under the second requirement, this court must determine whether Oregon permits the gaming authorized by the Compact for any purpose by any person. *Id.* § 2710(d)(1)(B). Under the Ninth Circuit’s “game-specific” approach to this inquiry, this court must determine whether state law permits a specific type of game. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F3d 1250, 1257-58 (9th Cir 1994); *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. State of S.D.*, 3 F3d 273, 278-79 (8th Cir 1993). If state laws permit a particular game for any purpose then the State must negotiate with the tribe for that specific game. *Rumsey*, 64 F3d at 1258.

Relators do not identify any specific type of game authorized by the Compact that is prohibited by Oregon law. In fact, Oregon law permits a wide range of gaming activities that is inclusive of the gaming authorized by the Compact. *See* ORS 167.118 (authorizing charitable, religious and fraternal organizations to conduct bingo, lotto or raffle games, and “Monte Carlo”

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<sup>17</sup> IGRA classifies gaming activities into three categories, class I, class II, and class III. Class I includes traditional forms of Indian gaming or social games for prizes of minimal value. *Id.* §§ 2703(6), 2710(a)(1). Class II includes bingo and other similar games, pull-tabs, lotto, punch boards, tip jars, and certain card games. *Id.* § 2703(7). Class III gaming includes most forms of gaming that are not class I or II, such as slot machines, roulette, craps, and house-banked card games. *Id.* § 2703(8). The Compact at issue in this case authorizes class III gaming.

events such as blackjack, roulette, and craps); ORS 167.121 (authorizing counties and cities to permit “social games” including poker or blackjack in places of public accommodation). Since Oregon permits a wide range of gaming for various purposes, the State is required by IGRA to negotiate with the tribes.

Article XV, section 4(12) of the Oregon Constitution cannot prevent the Confederated Tribes from conducting gaming within a casino on Indian land. Article XV, section 4(12) provides “[t]he Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.” Or Const, Art XV, § 4(12). This language does not, and indeed cannot, invalidate the Compact since it only regulates the location and manner of gaming in the State of Oregon, and does not prohibit specific types of games. *See Ecumenical Ministries of Or. v. Or. State Lottery Comm’n*, 318 Or 551, 562-64 (1994) (holding that the voters intended Article XV, section 4(12) to “prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling.”). Under IGRA, tribes are permitted to offer gaming on *Indian land*, even if the state limits gaming on *state land* by regulating the time, place, and manner of that *state land* gaming. *Northern Arapaho Tribe v. Wyoming*, 389 F3d 1308, 1312 (10th Cir 2004) (citing *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F2d 358, 365 (8th Cir 1990); *Mashantucket Pequot Tribe v. State of Conn.*, 913 F2d 1024, 1029-32 (2d Cir 1990) *cert den*, 499 US 975 (1991)). Where a state regulation “interferes or is incompatible with federal or tribal interests,” IGRA preempts the state regulation. *Confederated Tribes of Siletz Indians of Or. v. Oregon*, 143 F3d 481, 487 (9th Cir 1998). Since Article XV, section 4(12)’s prohibition on casinos is a time, place, and manner regulation, the regulation is preempted by IGRA and does not apply to gaming on the Hatch Tract. Therefore, the second requirement of IGRA is met

because the gaming is located in a state that “permits such gaming for any purpose by any person, organization, or entity.” 25 USC § 2710(d)(1)(B).

2. *Governor Kulongoski’s Authority to Execute a Compact*

The core of relators’ argument before this court focuses on IGRA’s third requirement that any gaming must be conducted in accordance with a Tribal-State gaming compact. *Id.* at § 2710(d)(1)(C). Relators argue that the compact here is invalid because the Governor of Oregon has no authority to execute an IGRA Compact on behalf of State or Oregon. Relators assert that the Governor is not authorized to enter the compact pursuant any federal law, the Oregon Constitution, or any Oregon statute.

a. *Federal Law Authority*

While federal law governs gaming on Indian lands, state law governs which state actors are competent to negotiate and agree to Tribal-State gaming compacts. *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 822, 798 NE2d 1047, 1060 (NY 2003) (citing *Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 (10th Cir 1997) *cert. denied*, 522 US 807, (1997)). As New York’s highest court recognized:

“IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts. IGRA imposes on “the State” an obligation to negotiate in good faith (25 USC § 2710(d)(3)(a)), but identifies no particular state actor who shall negotiate the compacts; that question is left up to state law . . . .” *Id.*

This court follows the interpretation of other jurisdictions and holds that federal law, including IGRA, does not provide the Governor with authority to execute a Tribal-State gaming compact on behalf of the state.

b. Oregon Constitutional Authority

The Governor of Oregon has the constitutional authority to enter into a Tribal-State gaming compact with an Indian tribe. When interpreting the intended meaning of the Oregon Constitution, Oregon courts apply the same methodology applied in statutory interpretation. *State v. Lanig*, 154 Or App 665, 670 (1998). That methodology requires examination of the text in context, and if necessary, a review of legislative history and applicable canons of construction. *Id.* (citing *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12 (1993); *Roseburg Sch. Dist. v. City of Roseburg*, 316 Or 374, 378-79 (1993)). The Oregon Constitution imposes a mandatory duty on the Governor to “take care that the Laws be faithfully executed.” Or Const, Art. V, § 10. The term “Laws” is not limited only to the laws of Oregon. As provided in Article XV, section 3, the Governor is required 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, and in the area of Indian gaming, federal law controls. Because IGRA requires the State to negotiate a Tribal-State compact in good faith upon request by an Indian tribe, 25 USC § 2710(d)(3)(A), the Governor must faithfully execute IGRA by negotiating that compact with the tribes on behalf of the State of Oregon. Further, the Oregon Constitution provides that the Governor “shall transact all necessary business with the officers of government . . . .” Or Const, Art. V, § 13. The Governor’s negotiation and authorization of gaming activities within the scope allowed under IGRA represents the transaction of “necessary business” that the Governor is constitutionally bound to transact with the officers of government of the requesting tribe.

c. Oregon Statutory Authority

Even if the Oregon Constitution does not confer such authority, there is authority pursuant to ORS 190.110 for the Governor to execute the compact. ORS 190.110 provides in pertinent 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 a unit of local government or a state agency of this or another state, or with the United States, or with a United States governmental agency, or with an American Indian tribe or an agency of an American Indian tribe. This power includes power to provide jointly for administrative officers.

(2) The power conferred by subsection (1) of this section to enter into an agreement with an American Indian tribe or an agency of 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 or an agency of an American Indian tribe.

(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. Nothing in this subsection shall be construed to modify the obligations of the United States to an American Indian tribe or its members concerning real or personal property, title to which is held in trust by the United States.”

The plain language of ORS 190.110 establishes statutory authority for the Governor to execute the Compact. Relators argue that this provision does nothing more than authorize the Governor to exercise powers conferred by other statutes or constitutional provisions. This court disagrees. ORS 190.107 provides: “In the interest of furthering economy and efficiency in local government, intergovernmental cooperation is declared a matter of statewide concern. The provisions of ORS 190.003 to 190.130 shall be liberally construed.” ORS 190.107. ORS

190.110(1) authorizes a unit of local government or a state agency of Oregon to enter into an agreement for a lawful purpose pursuant to a duty or power conferred upon it. ORS 190.110(1). Subsection (3) clarifies subsection (1) by stating that the powers discussed in subsection (1) include the Governor’s authority to enter into agreements with the American Indian tribes ensuring Oregon “does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe . . . granted under any . . . statute.” ORS 190.110(3). IGRA, a federal statute, grants the tribes in Oregon a federal right to good-faith negotiations for a compact, upon request. 25 USC § 2710(d)(3)(A). Therefore, upon the Confederated Tribes’ request to negotiate a compact with the State of Oregon, ORS 190.110 authorized the Governor to execute the Compact on behalf of the State of Oregon so as not to infringe upon the Confederated Tribes’ rights under IGRA.<sup>18</sup>

Legislative history supports this interpretation. ORS 190.110(3) was enacted during the 1985 legislative session. Representatives of the tribes gave testimony before the Senate Government Operations and Elections Committee regarding the Indian tribes’ right to engage in gaming activities free from state regulation, and the Governor’s ability to address concerns arising from such activities if the proposed legislation became law. Testimony, Senate Government Operations and Elections Committee, SB 159, Apr 1, 1985, Tape 58, Side A (statement of Attorney Leroy Wilder).

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<sup>18</sup> Contrary to relators assertion, *State ex rel. State Office for Services to Children and Families (SCF) v. Klamath*, 170 Or App 106 (2000), does not stand for the proposition that ORS 190.110(3) cannot form the basis for the Governor’s authority to enter into the Compact. All the court in *SCF* held was that ORS 190.110 did not authorize an agreement that exceeded the scope of a tribe’s rights under a federal state. *Id.* at 115. In fact, the court in *SCF* did not even squarely address whether ORS 190.110 *would have* authorized the agreement had it had been within the scope of the federal statute. If anything, the logical extension of the *SCF* court’s language in invalidating the agreement upon the limited grounds it did, paired with the plain language of ORS 190.110, supports defendant’s position that ORS 190.110 authorizes the Governor to execute Tribal-State agreements within the scope of tribe’s rights to that agreement under a federal statute. Since relators do not allege that the Compact in this case exceeds the scope of IGRA, ORS 190.110 authorizes the Governor to enter into that agreement on behalf of the State of Oregon.

Additionally, after SB 159 was enacted and codified as ORS 190.110, the Oregon legislature has declined on several occasions to take legislative action that would limit the Governor's authority to execute these Tribal-State gaming compacts. In 1997, the legislature declined to take action on SB 881, which would have required the Governor to consult with the legislature before and during negotiations with Indian tribes. SB 881 (1997). In 2001, the Senate Committee on Business, Labor, and Economic Development took no action on a proposed joint resolution that would have referred a constitutional amendment to voters of Oregon to require legislative approval of proposed Tribal-State gaming compacts. SJR 29 (2001). Thus, both contemporaneous and subsequent legislative history supports the interpretation that the legislature intended ORS 190.110 to authorize the Governor of Oregon to execute Tribal-State agreements such the Compact at issue in this case.

In addition to the plain language and legislative history, an Oregon Attorney General Opinion supports this Court's interpretation. The opinion states:

“Both by its terms and in light of its legislative history, ORS 190.110 directly applies here. In sum as head of the executive branch, the Governor may negotiate a tribal-state compact under the IGRA, or delegate that responsibility to any officer or officers within the executive branch.” Or. Op. Att’y Gen. OP-6300 (1990).

Considering the plain language, legislative history, and the advisory interpretation of the attorney general, Governor Kulongoski had the statutory authority pursuant to ORS 190.110 to authorize the Compact with the Confederated Tribes.

Relators argue that even if this court were to adopt the above interpretation of ORS 190.110, that delegation by the legislature is impermissible because it lacks adequate safeguards. In reviewing such legislative delegation “the 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.” *See Warren v. Marion County*, 222 Or 307, 314-15 (1960). In testing a statute for the adequacy of the safeguards it contains, this court must begin by looking to the character of the action that the statute authorizes. *Id.* The Supreme Court of Oregon has previously identified adequate safeguards where the delegating statute references other statutes that contain general standards for the exercise of authority, while delegating specific authority to the counties to adopt more precise regulations and provide procedures for appeal of county decisions applying those regulations. *Id.* Moreover the Supreme Court of Oregon has recognized that legislative delegation contains adequate safeguards where the statute permits judicial review of allegations that the decision-maker exceeded statutory or constitutional authority. *City of Wilsonville v. Dept. of Corr.*, 326 Or 152, 160 (1998).

In this case, the Governor is bound by the requirements in ORS 190.110 to negotiate with the tribes only as necessary to not “interfere with or infringe” on a right of the American Indian tribes as “granted under any federal treaty, executive order, agreement, statute, policy or any other authority.” ORS 190.110(3). This reference to other statutes and law necessarily applies standards limiting what the Governor can and cannot negotiate with the tribes, because IGRA defines the permissible scope of any compact. *See* 25 USC § 2710(d)(3)(C). Also, IGRA provides that the state must permit a specific game before tribes and the governor may negotiate for that type of gaming on Indian land. 25 USC § 2710(d)(1)(B). Thus, the legislature’s ability to completely prohibit the play of specific games provides an additional procedural safeguard to the Governor’s delegated authority to negotiate and sign a Tribal-State gaming compact. Even though the Oregon legislature has authorized broad class III gaming, the legislature’s ability to prohibit specific games still acts as a procedural safeguard. Finally, just as relators have done in

this case, persons dissatisfied can bring an action against the Governor for exceeding the statutory authority granted to him by ORS 190.110, or for negotiating a compact outside of the scope Congress intended through IGRA. For these reasons, ORS 190.110 provides adequate safeguards to persons wishing to contest a Governor's compact with an American Indian tribe, and it represents a valid delegation of authority by the legislature.

d. Impact of Or Const, Art. XV, § 4(12) on the Governor's Authority to enter the Compact

As discussed above, Article XV, section 4(12) is a regulation of the manner and location of gaming activities, and accordingly does not have any impact on the Governor's authority to enter the compact. *See Ecumenical Ministries of Or.*, 318 Or at 562-64. While prohibiting the operation of a "casino," Article XV, section 4(12) does not prohibit any specific game, and thus is preempted by IGRA with respect to gaming on Indian lands. Although IGRA leaves to the states the question of *who* has the authority to execute a Tribal-State gaming compact, this does not mean that a state is free to ignore IGRA by declaring that state law prohibiting the operation of a casino prevents *anyone* in the state from complying with IGRA's requirement that the state negotiate a compact in good faith with an American Indian Tribe. To the extent that Article XV, section 4(12) of the Oregon Constitution might prohibit the legislature from passing a law authorizing *any* Oregon official to negotiate in good faith a compact approving a casino on Indian lands, it is preempted since it clearly "interferes or is incompatible" with IGRA.<sup>19</sup>

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<sup>19</sup> In the Brief of the Amicus Tribes, the Klamath, Coquille, Cow Creek, Grand Ronde, and Siletz Tribes (hereinafter "the Amicus Tribes"), cite to the Oregon Territorial Act of 1848 as additional authority for the proposition that Oregon Law, including Article XV, section 4(12) of the Oregon Constitution, is inapplicable to Indian Tribes on Indian lands. Brief for Confederated Tribes of the Warm Springs Reservation et al. as Amici Curiae Supporting Defendants at 12, *Dewberry v. Kulongoski (Dewberry III)*, No 16-03-23044 (Cir Ct Or Lane County 2010). The Amicus Tribes argue that the Oregon Territorial Act of 1848 remains in effect pursuant to the Oregon Constitution. Or Const, Art. XVIII, § 7 ("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."). While this argument is intriguing, this opinion does not address the continued validity of the Oregon Territorial Act, nor its impact on the State of Oregon's authority over the Indian Tribes.

#### IV. DISPOSITION

Relators' claims are not barred by the doctrine of claim preclusion, issue preclusion, or laches. Under the Indian Gaming Regulatory Act, Governor Kulongoski and the Confederated Tribes entered into a valid gaming compact, which lawfully permits the Confederated Tribes to operate the Three Rivers Casino & Hotel on restored lands. The Governor had the constitutional and statutory authority to bind the State of Oregon to the terms of the Compact. In short, the no casino prohibition of the Oregon Constitution is preempted by federal law on Indian lands. Accordingly, Relators' Motion for Summary Judgment is DENIED, and Defendants' Motion for Summary Judgment is GRANTED. No preemptory writ shall issue. Defendants shall prepare and submit the judgment to the court, which shall incorporate this opinion by reference.

Dated this 3 day of May, 2010.

A handwritten signature in black ink, appearing to read 'Karsten H. Rasmussen', written over a horizontal line.

Karsten H. Rasmussen, Circuit Court Judge

cc:

Kelly W. Clark (Of Attorneys for Relators)  
Kristian Roggendorf  
O'Donnell & Clark LLP  
1650 NW Naito Pkwy., Ste. 302  
Portland, OR 97209

Stephanie Striffler  
Nathan B. Carter  
(Of Attorneys for Defendants)  
Oregon Department of Justice  
1515 SW Fifth Avenue, Suite 410  
Portland, OR 97201

Bruce R. Greene (Of Attorneys for Intervenors)  
Stephanie Zehren-Thomas  
Law Offices of Bruce R. Greene & Associates  
1500 Tamarack Avenue  
Boulder, CO 80304

Patricia L. Davis (Of Attorneys for Confederated Tribes)  
1245 Fulton Avenue  
Coos Bay, OR 97420

Rob Greene (Of Attorneys for the Confederated Tribes of the Grand Ronde Community of Oregon)  
Confederated Tribes Grand Ronde  
Tribal Attorneys Office  
9615 Grand Ronde Rd.  
Grand Ronde, OR 97347

Dan Hester (Of Attorneys for the Confederated Tribes of the Umatilla Indian Reservation)  
Hester & Zehren LLC  
1900 Plaza Dr.  
Louisville, CO 80027

Craig J. Dorsay (Of Attorneys for the Confederated Tribes of Siletz Indians of Oregon)  
Dorsay & Easton LLP  
1 SW Columbia St Ste 440  
Portland, OR 97258

Dennis C. Karnopp (Of Attorneys for the Confederated Tribes of the Warm Springs Reservation of Oregon)  
Karnopp Petersen LLP  
1201 NW Wall St. Ste. 300  
Bend, OR 97701

Dirk E. Doyle (Of Attorneys for the Cow Creek Band of Umpqua Tribe of Indians)  
2371 NE Stephens Ste 100  
Roseburg, OR 97470

Edmund Clay Goodman (Of Attorneys for the Klamath Tribes)  
Hobbs Straus Dean & Walker LLP  
806 SW Broadway Ste. 900  
Portland, OR 97205

Brett Kenny (Of Attorneys for the Coquille Indian Tribe)  
Scott Crowell  
Coquille Indian Tribe  
3050 Tremont  
PO Box 783  
North Bend, OR 97459