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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WENDY KNOX and RICHARD DOTSON, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, KENNETH LEE SALAZAR, Secretary of the Interior, and C. L. OTTER, Governor of the State of Idaho, Defendants.	Case No. 4:09-CV-00162-BLW REPLY MEMORANDUM IN SUPPORT OF DEFENDANT C.L. OTTER'S MOTION TO DISMISS AMENDED COMPLAINT (DOC. 4)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT C.L. OTTER'S MOTION TO DISMISS AMENDED COMPLAINT (DOC. 4)

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INTRODUCTION AND REPLY ARGUMENT SUMMARY

The first ground for dismissal—the absence of subject matter jurisdiction—is predicated on the amended complaint's straightforward allegation in its opening paragraph that "[t]his action arises under the Indian Gaming Regulatory Act." Doc. 4 ¶ 1. Plaintiffs (collectively "Knox") repeat this allegation in the first sentence of their memorandum opposing Defendant Otter's motion to dismiss. Doc. 12 at 1. Knox nevertheless later characterizes as "irrelevant" whether the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721, creates a private right of action. Doc. 12 at 12. She instead sees her claim as one arising under Article VI, Clause 2, U.S. Const., to "'enforce the structural relationship between the federal and state governments . . . as essentially private enforcers of the *Supremacy Clause*.'" *Id.* at 11 (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009)). Given this characterization, Knox continues, "'the specific relationship of those parties to the federal statute on which Supremacy Clause cause of action is premised does not matter.'" *Id.* (quoting *Cal. Pharmacists*, 563 F.3d at 850); *see also id.* at 10 ("Plaintiff need not assert a federally-created right but must only satisfy ordinary standing requirements"). Knox further relies upon the district court opinion in *Artichoke Joe's Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), for the proposition that, to the extent prospective enforcement of the "such gaming" provision in 25 U.S.C. § 2710(d)(1)(B) is requested, relief under *Ex parte Young*, 209 U.S. 123 (1908), may be awarded. Doc. 12 at 13 n.3.

As to the second ground for dismissal, Knox contends that Fed. R. Civ. P. 19 does not require dismissal in the absence of the Idaho gaming tribes' joinder as defendants because the Federal Defendants adequately represent their interests (Doc. 12 at 16-17) and that, in any event, the compacted-for right to offer video machine gaming is so insubstantial as not to warrant

protectable Rule 19 status since it is predicated upon a "'palpably unconstitutional' statute" (*id.* at 18). Knox urges, finally, that the public rights doctrine exception applies because she "seek[s] to enforce the pubic right to ensure that the Idaho governor comply with, and not engage in acts which they knew are in violation of, the Idaho Constitution and IGRA." *Id.* at 19.

None of Knox's arguments bears scrutiny. *First*, her attempt to recast the assertion that Governor Otter is violating IGRA by countenancing, at least at the Fort Hall Casino, tribal video machine gaming into a Supremacy Clause-based claim betrays a fundamental misunderstanding of both IGRA and the Clause. Congress expressly left the determination of the permissible scope of class III gaming to the States in § 2710(d)(1)(B) by requiring only that tribes be afforded the opportunity to negotiate over the right to engage in a gambling activity that "a State permits . . . for any purpose by any person, organization, or entity." Rather than displacing or removing the authority of States to prescribe permissible forms of "such gaming," therefore, IGRA *defers* to state law. The gravamen of Knox's claim instead lies in her perception of Idaho Code § 67-429B's inconsistency with Article III, Section § 20 of the Idaho Constitution and the resulting conclusion that tribal video machine gaming are not permitted under *Idaho* law and, therefore, outside the scope of permissible class III gaming under § 2710(d)(1)(B). *See* Doc. 4 ¶ 25. It is the Supremacy Clause, in other words, that has no "relevance" here.

Second, the Knox's reliance on the refusal by the *Artichoke Joe's* district court to apply *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), to the *Ex parte Young* issue in that case is misplaced. *Artichoke Joe's* involved *both* a claim centered on the proper construction of § 2710(d)(1)(B) and an alleged equal protection violation of the Fifth and Fourteenth Amendments for which *Young* relief is commonplace. The existence of the non-IGRA-based claim materially altered the analytical analysis controlling availability of *Young* relief.

Third, Knox's response to the Rule 19 issue effectively asks this Court to ignore settled Ninth Circuit authority establishing the need to join as defendants all parties to a contract whose entire or partial validity is under attack. Only with such joinder of all parties to the compacts can complete relief be accorded all parties, as required under Rule 19(a)(1), and only with joinder can the affected tribes be afforded the opportunity to defend the validity of a very valuable economic right in tribal video machine gaming, which Knox off-handedly dismisses as frivolous but which clearly falls with the scope of Rule 19(a)(2). Any attempt to apply the public rights exception here, finally, runs headlong into the uniquely private interest that Knox desires to advance—removal of a specific form of gaming at a specific location—and the inescapable fact that the relief sought will destroy access to a significant source of revenue for tribal programs and members.

REPLY ARGUMENT

I. KNOX'S SUBSTANTIVE CLAIM ARISES UNDER IGRA, NOT THE SUPREMACY CLAUSE, AND *SEMINOLE TRIBE* FORECLOSES *YOUNG* RELIEF EVEN IF AN IGRA-BASED PRIVATE RIGHT OF ACTION EXISTS

A. The Supreme Court has distinguished carefully between claims alleging violation of a statutory right and those seeking to vindicate the Supremacy Clause. Perhaps the most helpful of its decisions for present purposes are those in the *Golden State Transit* litigation in which a taxicab company argued that the National Labor Relations Act, 29 U.S.C. §§ 151-169, preempted Los Angeles from conditioning renewal of its operating franchise on settlement of a labor dispute. *Golden State Transit Co. v. City of Los Angeles*, 475 U.S. 608 (1986) ("*Golden State Transit I*"); *Golden State Transit Co. v. City of Los Angeles*, 493 U.S. 103 (1989) ("*Golden State Transit II*"). The *Golden State Transit I* Court concurred, finding the company's claim properly grounded in the Supremacy Clause claim because the renewal condition interfered with

an area of labor relations—the exercise of otherwise lawful tactics in a collective bargaining dispute—that Congress intentionally "left to be controlled by the free play of economic forces." 475 U.S. at 614 (quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976); internal quotation marks omitted). The district court held on remand, however, that retroactive relief could not be recovered under 42 U.S.C. § 1983 because the Supremacy Clause did not "'create individual rights that may be vindicated in an action for damages[,]'" and the Ninth Circuit affirmed. *See Golden State Transit II*, 493 U.S. at 104-05.[1]

The Supreme Court also affirmed. It stated that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983" but then added:

> Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority. Conversely, the fact that a federal statute has preempted certain state action does not preclude the possibility that the *same federal statute* may create a federal right for which § 1983 provides a remedy.

493 U.S. at 107-08 (emphasis supplied). The rule is plain: While it is possible for a federal statute to operate in a fashion that, by virtue of the Supremacy Clause, removes the authority of a State to legislate or act concerning certain matters, the availability of relief for *violation* of the statute itself necessitates a separate, analytically distinct inquiry. This is the rule applied in the Social Security Act Title XIX decisions relied upon by Knox where a private right of action was

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[1] The Court of Appeals had reached this conclusion previously in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984). It held there that a tribe and a logging business that had challenged successfully a state tax on preemption grounds were not entitled to attorney's fees under 42 U.S.C. § 1988. The Court reasoned that, although "[t]he Supreme Court has never directly addressed the question whether the Supremacy Clause creates 'rights, privileges or immunities' within the ambit of § 1983[,]" it understood *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1976), to stand for the principle that "the Supremacy Clause, standing alone, 'secures' federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983." 810 F.2d at 848.

unquestionably unavailable to Medicaid service providers. Doc. 12 at 10-12 (citing, *inter alia*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, *supra*).

Here, in contrast to the *Golden State Transit* plaintiff, Knox essentially contends that Idaho Code § 67-429B violates 25 U.S.C. § 2719(d)(1)(B) not because IGRA itself forecloses Idaho from authorizing tribal video machine gaming but because Idaho is foreclosed from doing so as a matter of law under Article III, Section 20 of its constitution. The Court of Appeals, of course, has left no doubt that the scope of permissible "such gaming" must be measured by reference to state, not federal, law. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) ("a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have"), *amended on other grounds*, 99 F.3d 321 (9th Cir. 1996). Knox, in short, simply attempts to re-label a statutory violation-grounded claim as one arising under the Supremacy Clause, and that she may not do in her effort to obviate the necessity of showing a private right of action under IGRA.[2]

B. Knox relies principally on the *Artichoke Joe's* district court decision for the proposition that *Seminole Tribe* does not preclude *Ex parte Young* relief "[b]ecause IGRA

[2] Governor Otter recognizes the distinction between a jurisdictional defect subject to Fed. R. Civ. P. 12(b)(1) and the failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 681-83 (1948). Instantly, however, the amended complaint leaves no doubt that Knox seeks to invalidate § 67-429B, together with the four compacts, on the rationale that they run afoul of IGRA § 2710(d)(1)(B). Her grievance, again, is not that IGRA forecloses a State from determining the scope of "such gaming" but that Idaho law does not authorize the machine gaming at issue. It is thus revealling that she challenges the compact approvals under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, because the Secretary misapplied § 2710(d)(1)(B) by failing to deem §§ 67-429B and -429C void as a matter of state law rather than void because IGRA deprives States of their authority to identify permissible forms of class III gaming. Doc. 4 ¶ 23. The amended complaint's substance, not her determination to term an alleged *statutory* violation as a claim under the Supremacy Clause, should control the exercise of this Court's subject matter jurisdiction under 28 U.S.C. § 1331. Nevertheless, it is clear from the analysis above that Knox's reliance on the Supremacy Clause, even if considered on the merits, fails under Rule 12(b)(6).

contains no remedial scheme limiting [her], or anyone else's, remedies for violation of section § 2710(d)(1)." Doc. 12 at 14; *see Artichoke Joe's*, 216 F. Supp. 2d at 1109 n.34. Governor Otter, however, addressed the one-sentence *Artichoke Joe's* rationale in his opening brief (Doc. 8-1 at 13 n.5), and she does not respond to the patent difficulty with that rationale: Congress in fact established a detailed process under IGRA for Secretarial review of class III gaming compacts and, through the APA, provided a forum to contest—as Knox has done here—the Secretary's determination. It also makes no sense to find *Young* relief available for alleged violation of § 2710(d)(1)(B) when the Supreme Court has deemed such relief inappropriate in an action specifically authorized under 25 U.S.C. § 2710(d)(7)(A)(ii).

Aside from the highly-disputable footnote observation in *Artichoke Joe's*, it must be stressed that the controversy there entailed more than simply a claim that § 2710(d)(1)(B) did not authorize class III gaming activities in which only tribes possessed the right to engage. The plaintiffs additionally argued that the tribes' favored treatment under the constitutional amendment violated the Fourteenth Amendment's Equal Protection Clause, as well as the equal protection component of the Fifth Amendment with regard to § 2710(d)(1)(B) itself, as the Court of Appeals' extended analysis of the latter issue reflected. *See Artichoke Joe's*, 353 F.3d at 731-41. Settled circuit law establishes that the limitation on *Young* relief applied in *Seminole Tribe* did not control the availability of such relief for the alleged equal protection violation. *See Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1055 (9th Cir. 2001) ("the *Seminole Tribe* exception to *Ex parte Young* . . . pertains only to *Ex parte Young* actions brought to enjoin state officials from on-going violations of federal *statutory,* rather than *constitutional,* law"). Since prospective relief against the federal defendants in *Artichoke Joe's* on either claim against them would have mooted the need to issue any prospective relief against the state

officials as compact implementation, a *Young*-based remedy would have been necessary only if the alleged Fourteenth Amendment violation arising from the California Constitution amendment had been found.

II. THE IDAHO GAMING TRIBES HAVE A SIGNIFICANT ECONOMIC INTEREST IN THEIR COMPACTED-FOR RIGHT TO OFFER VIDEO MACHINE GAMING WHICH KNOX SEEKS TO INVALIDATE, AND THAT INTEREST REQUIRES A FINDING OF THEIR RULE 19(a) STATUS AND THIS ACTION'S DISMISSAL UNDER RULE 19(b)

A. Knox relies on the adequate-representation consideration embodied, at least under Ninth Circuit precedent, in Fed. R. Civ. P. 19(a)(2)(i) as the cornerstone of her contention that dismissal of this action because of the inability to join the four Idaho gaming tribes as defendants. Doc. 12 at 15-17; *cf. Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 666-70 (6th Cir. 2004) (reviewing circuit authority over whether adequate-representation factor examined under Rule 19(a)(2)(i) rather than as part of Rule 19(b) analysis). She argues, again citing chiefly to the district court opinion in *Artichoke Joe's*, that "'an actual conflict'" between the Federal Defendants and the absent tribes must exist before the United States will not be presumed to represent the tribal interests adequately. Doc. 12 at 17. She ignores the wholly-independent complete relief basis for Rule 19(a) status provided for under subparagraph (1). Knox additionally ignores the significance of sovereign immunity when resolving Rule 19 issues in the wake of *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008), and the distinct possibility that the Federal Defendants will not make every argument in defense of her claim that the tribes would raise. *See* Doc. 8-1 at 18 n.6.[3]

[3] Governor Otter's opening brief discussed *Pimentel*'s impact on the proper application of Rule 19 where the absent party possesses immunity from suit, and that discussion need not be expanded upon here. Doc. 8-1 at 15. It nonetheless bears iteration that the decision's ultimate teaching—*i.e.*, the absence of a sovereign immunity-entitled entity requires dismissal under Rule

The Court of Appeals' opinion in *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999), is particularly instructive in identifying the flaws in Knox's single-minded reliance on the *Artichoke Joe's* district court ruling. There, a group of Navajo Nation members residing on lands partitioned to the Hopi Tribe sued the Secretary of the Interior to invalidate on equal protection grounds certain "accommodation leases" whose terms were specified under a settlement agreement between the two tribes and later ratified by Congress. The Court deemed Rule 19(a) status required under subparagraph (1) because "[i]n the [Hopi] Tribe's absence, complete relief may not be afforded between the parties to this action" and because "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Id.* at 1088 (citing *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1326 (9th Cir.1975)). As for subparagraph (2), *Clinton* reasoned in part that "[t]he settlement of [the term at issue] affected the conditions under which [the coal company] may mine [at sites covered by the lease agreements]" and that invalidation, even if limited to that term, "could affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members." So, too, here no question exists that the availability of tribal video machine gaming under the north Idaho tribes' compacts, which indisputably has substantial economic value, formed the predicate for resolution of the federal court litigation over the Shoshone-Bannock Tribes' compact and, as such, constitutes the "single legal thread from the tapestry" whose pulling allegedly (Doc. 4 ¶ 28.f and g) will "unravel" that disposition (*Clinton*, 180 F.3d at 1088)—a result that would be attended by the unavoidable consequence of depriving the tribes of machine gaming revenue. *All* parties to a challenged agreement, in sum, enjoy Rule

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19 when the absentee possesses a non-"frivolous" interest in the litigation—dictates the outcome here. *Pimentel*, 128 S. Ct. at 2189.

19(a) status and *must* be joined if feasible regardless of federal government's presence as a defendant. *E.g.*, *Kettle Range Conservation Group v. USBLM*, 150 F.3d 1083, 1086-87 (9th Cir. 1998); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311-12 (9th Cir. 1996).

B. Knox's *ipse dixit* assertion (Doc. 12 at 17-18) that the four tribes have no protectable interest in the integrity of their compacts generally and the challenged video machine gaming specifically cannot be squared with the SBT litigation before this Court and the Ninth Circuit. Plainly enough, the myriad types of gaming activity subject to IGRA are not fungible either legally or, as suggested by Knox's own allegations (Doc. 4 ¶ 28.c), in their capacity to generate revenue. California's experience is also quite telling about the economic importance of machine gaming. *See, e.g.*, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, Nos. 08-55809 & 08-55914, 2010 WL 1542452, at *1-*3 (9th Cir. Apr. 20, 2010); *Artichoke Joe's*, 353 F.3d at 716-19. Knox's description of the Idaho tribes' interest as "frivolous" is, under the circumstances, strikingly discordant with reality.

C. The resort to the "public rights" exception by Knox is no less feckless than her other efforts to escape Rule 19-based dismissal. Doc. 12 at 18-20. As the Court of Appeals has observed, "[a]lmost any litigation . . . can be characterized as an attempt to make one party or another act in accordance with the law." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002). As in *American Greyhound*, "[t]his litigation does not *incidentally* affect the gaming tribes in the course of enforcing some public right" but, rather, "[t]his litigation is *aimed* at the tribes and their gaming." *Id.* Here, Knox apparently is motivated by a desire to terminate gaming at the Fort Hall Casino (Doc. 4 ¶ 28.g)—the only gaming causing her harm; in *American Greyhound*, the plaintiffs sought injunction relief for a similarly private interest—"to avoid competitive harm to their own operations" (305 F.3d at 1026). The same conclusion

reached by the *American Greyhound* Court applies to this dispute: "The general subject of gaming may be of great public interest, but the rights in issue between the plaintiffs in this case, the tribes and the state are more private than public." *Id.*

Lastly, for the reasons discussed above, invalidation of the tribes' contracted-for right to engage in video machine gaming consistent with § 67-429B would wholly "destroy" a valuable entitlement. Such destruction precludes application of the public rights exception. *See, e.g.*, *Kettle Range*, 150 F.3d at 1087 ("We have no doubt that an order declaring the executed portion of the land exchange void *ab initio* would 'destroy the legal entitlements of the absent parties'") (quoting *Conner v. Burford,* 848 F.2d 1441, 1449 (9th Cir.1988)).

CONCLUSION

Governor Otter's motion to dismiss should be granted.

Dated this 14th day of May 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May 2010, I electronically filed the foregoing document, with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System:

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