Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WENDY KNOX and RICHARD DOTSON, Plaintiffs, v. UNITED STATED DEPARTMENT OF THE INTERIOR, KENNETH LEE SALAZAR, Secretary of the Interior, and C.L. OTTER, governor of the State of Idaho, Defendants.	Case No. CV09-00162-E-BLW PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT OTTER'S MOTION TO DISMISS AMENDED COMPLAINT

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I.
INTRODUCTION

This action arises under the Indian Gaming Regulation Act ("IGRA") 25 U.S.C. § 2701, *et seq.* Plaintiff seeks declaratory and injunctive relief against the Secretary of the Interior and Governor of Idaho pertaining to, and judicial review of the Secretary of Interior's approval of, the tribal-state gaming compact between State of Idaho and the Shoshone-Bannock Indian Tribes (hereinafter "SBT"), entered pursuant to IGRA. The Secretary's approval was arbitrary, capricious, an abuse of discretion, and not in accordance with IGRA, because (1) the tribal video gaming machines putatively authorized by the compact are NOT permitted by the State of Idaho for any purpose by any person, organization or entity; (2) consequently, the SBT compact is void to that extent, and therefore not subject to approval by the Secretary; and (3) the SBT compact has not been amended to permit such gaming, as required by the Ninth Circuit in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), and therefore such gaming is in violation of IGRA, 25 U.S.C. § 2710(d)(1). Governor Otter's interpretation and application of Idaho law as authorizing class III gaming by SBT is in violation of IGRA and the Supremacy Clause of the U.S. Constitution.

II.
FACTUAL AND LEGAL BACKGROUND

The factual background recounted in Defendant Otter's Memorandum omits crucial information regarding Article III, §20 of the Idaho Constitution, and is misleading with regard to the proceedings in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1097 (9th Cir. 2006), which will be detailed below.

A. Article III, § 20, Idaho Constitution.

Prior to 1988, Article III, Section 20 of the Idaho Constitution provided as follows: "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever." *Coeur D'Alene Tribe v. Idaho,* 842 F. Supp. 1268, 1269 (D. Idaho 1994). Subsequently, on April 15, 1992, pursuant to IGRA, the Coeur d'Alene Tribe asked the State of Idaho to enter into negotiations for the purpose of entering into a tribal-state compact governing Class III gaming activities on the Coeur d'Alene Reservation in Idaho. The Kootenai and Nez Perce Tribes requested such negotiations with the State on June 8, 1992, and July 22, 1992, respectively. However, during the summer of 1992, Idaho called a special session of its legislature, enacted legislation, and drafted a proposed constitutional amendment prohibiting casino (Class III) gambling in Idaho. The Tribes filed suit, contending that these actions were taken to prevent them from conducting certain IGRA Class III gaming activities on their reservations. *Coeur D'Alene Tribe*, 842 F.Supp. at 1269.

Idaho voters approved the proposed constitutional amendment to Section 20 of Article III in 1992, which now reads as follows:

> Gambling Prohibited. -- (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and ***slot machines,*** *or employ any electronic or electromechanical imitation or simulation of any form of casino gambling*.
>
> (3) The legislature shall provide by law penalties for violations of this section.

Idaho Const. Art. III, § 20(1)-(3) (emphasis added). Pursuant to Subsection (3), the Idaho criminal statutes regarding gambling were also changed in 1992, making casino-style and other types of gambling a misdemeanor. *See* Idaho Code § 18-3801, *et seq.*

B. Indian Gaming Regulatory Act and Johnson Act.

"The Johnson Act, 15 U.S.C. §§ 1171-1178, prohibits the possession or use of 'gambling devices,' including slot machines, within Indian country. *Id.* § 1171(a). IGRA waives application of the Johnson Act if the slot-machine gaming is conducted under an effective Tribal-State compact that 'is entered into . . . by a State in which gambling devices are legal.'" *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 720 n.11 (9th Cir. 2003) (quoting 25 U.S.C. § 2710(d)(6)), *cert. denied*, 543 U.S. 815 (2004).

This requirement that the gambling be legal in the state in which it is conducted, is the same is mirrored in IGRA, 25 U.S.C. § 2710(d)(1), which similarly prohibits Class III gaming on Indian lands (such as SBT's "video gaming machings") unless ***each*** of three conditions are met: (1) such gaming is approved by the governing body of the Tribe and the Chairman of the National Indian Gaming Commission ("NIGC"); (2) such gaming is permitted by the state for any purpose by any person, organization or entity; **and** (3) the tribe and state enter into a compact that is approved by the Secretary of the Interior. *Artichoke Joe's*, 353 F.3d at 716, 720 & n.11 (citing 25 U.S.C. § 2710(d)(1)).

In order to be "permitted" by a state, within the meaning of 25 U.S.C. § 2710(d)(1), it is not enough that the state allow the gaming by compact. It must be *legal* under state law. *See American Greyhound Racing, Inc., v. Hull*, 146 F. Supp. 2d 1012, 1067-68 (D. Ariz. 2001) ("25 U.S.C. § 2710(d)(1) requires compact games to be **lawful under state *law***.") (emphasis added) (citing *Citizen Band Potawatomi Indian Tribe v. Green,* 995 F.2d 179, 181 (10th Cir. 1993); *United States v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558, 564 (8th Cir. 1998)), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002). In other words, "such gaming" is not "permitted by the state" within the meaning of IGRA if the state suffers such gaming *in violation of state law*. *Id.*

Furthermore, "[a]ccording to the structure of § 2710(d)(1) and its plain terms, a compact cannot make legal class III gaming not otherwise permitted by state law. The State must first legalize a game, even if only for tribes, before it can become a compact term." *Hull*, 146 F.Supp.2d at 1067 (favorably and cited by the Ninth Circuit in *Artichoke Joe's*, 353 F.3d at 720-21 & 724). *See also U.S. v. Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation,* 33 F. Supp. 2d 862 (C.D.Cal. 1998) (describing games illegal under state law as "uncompactable" and therefore the tribe must cease all such gaming). Likewise, the Secretary of the Interior cannot, by his approval, give life to a compact that is void from its inception because the governor entered the compact in violation of state law. *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997).

Idaho law prohibits casino gambling, including slot machines and any simulation of slot machines. *See* Idaho Const. Art. III, § 20, and Idaho Code §§ 18-3801, 18-3810. The only Idaho law purporting to "permit" the tribal slot machines is Idaho Code §§67-429B. However, as established in detail below, Idaho Code § 67-429B is in plain violation of Article III, § 20 of the

Idaho Constitution. The statute is therefore void, conferring no rights and affording no protection, *see Smith v. Costello*, 77 Idaho 205, 209, 290 P.2d 742, 744 (1955); *State v. Garden City*, 74 Idaho 513, 524, 265 P.2d 328, 333 (1953); and *Valente v. Mills*, 93 Idaho 212, 215, 458 P.2d 84, 87 (1969). Such gaming therefore is not "permitted" by Idaho within the meaning of IGRA, 25 U.S.C. § 2710(d)(1), but instead is *prohibited* under IGRA, 25 U.S.C. § 2710(d)(1), and the Johnson Act.

Likewise, because the SBT compact purports to authorize gaming prohibited by Idaho law, the compact is void to that extent. *Shoshone-Bannock Tribes,* 465 F.3d at 1098 (recognizing that federal courts apply general principles of contract law in construing a compact); *Total Medical Mgmt. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997) ("A contract which is plainly illegal is a nullity and void *ab initio*.") (citing *Reiner v. United States,* 163 Ct. Cl. 381, 325 F.2d 438, 440 (Ct. Cl. 1963)). Consequently, no compact exists authorizing SBT's tribal video gaming machines, in violation of IGRA, 25 U.S.C. § 2710(d)(1).

C. Federal Litigation Over the Tribal-State Gaming Compact.

In 2000, SBT and the State of Idaho entered into a Compact governing Class III gaming. *Shoshone-Bannock Tribes*, 465 F.3d at 1097. The Compact authorizes the Tribes to conduct any class III gaming activity "that the State of Idaho 'permits for any purpose by any person, organization, or entity,' as the phrase is interpreted in the context of the Indian Gaming Regulatory Act." *Id*. at 1098 (citing Compact § 4(a)).

When the Compact was negotiated, SBT and the State could not agree on what types of class III gaming Idaho permits. "Idaho's position was that the electronic gaming currently conducted by the Tribes in Idaho is an imitation of casino games and prohibited under Idaho and federal law," *Shoshone-Bannock Tribes*, 465 F.3d at 1097, including Article III, section 20 of the Idaho

Constitution. (Exh. 4 to Declaration of Clay R. Smith, Doc. 8-7, p. 6). On the other hand, the Tribes' position was that Idaho allowed all class III gaming except sports betting. *Id*. *Shoshone-Bannock Tribes*, 465 F.3d at 1097. Unable to compromise on the scope of permissible class III gaming, the parties agreed to seek a declaratory judgment in federal district court to determine which class III games the Compact authorized. *Id.* The Tribes and State each filed suit in this Court seeking declaratory relief. *See Shoshone-Bannock Tribes v. Idaho*, Case Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW.

While the case was pending, the voters of Idaho adopted a ballot initiative called Proposition One, which purported to authorize Indian tribes to conduct gaming using "tribal video gaming machines." Proposition One informed voters about the disagreement between the tribes and Idaho regarding video gaming machines. The voters approved Proposition One on November 5, 2002. *Shoshone-Bannock Tribes*, 465 F.3d at 1097.

Proposition One added two sections to the Idaho Code, 67-429B and 67-429C. Section 429B purports to allow "Indian tribes . . . to conduct gaming using tribal video gaming machines pursuant to state-tribal gaming Compact which specifically permit their use." I.C. § 67-429B(1). Section 429C authorizes tribes to amend their gaming Compact to permit the use of tribal video gaming machines. The critical section, 67-429B, provides as follows:

> Authorized tribal video gaming machines. (1) Indian tribes are authorized to conduct gaming using tribal video gaming machines pursuant to state-tribal gaming Compact which specifically permit their use. A tribal video gaming machine may be used to conduct gaming only by an Indian tribe, is not activated by a handle or lever, does not dispense coins, currency, tokens, or chips, and performs only the following functions:
>
> > (a) Accepts currency or other representative of value to qualify a player to participate in one or more games;

> (b) Dispenses, at the player's request, a cash out ticket that has printed upon it the game identifier and the player's credit balance;
>
> (c) Shows on a video screen or other electronic display, rather than on a paper ticket, the results of each game played;
>
> (d) Shows on a video screen or other electronic display, in an area separate from the game results, the player's credit balance;
>
> (e) Selects randomly, by computer, numbers or symbols to determine game results; and
>
> (f) Maintains the integrity of the operations of the terminal.
>
> (2) Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) above is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling.

Notwithstanding subsection I.C. § 67-429B(2)'s Orwellian attempt to redefine "slot machines," the Idaho Supreme Court has since held that video gaming machines with the same characteristics described in and putatively authorized by I.C. § 67-429B(1), are in fact "slot machines" within the meaning of I.C. § 18-3810, which was enacted in furtherance of Article III, § 20, Idaho Const. *See MDS Investments, LLC v. State of Idaho*, 138 Idaho 456, 461-62, 65 P.3d 197, 202-03 (2003). In other words, I.C. § 67-429B purports to authorize slot an imitation or simulation of slot machines expressly and patently prohibited by Article III, § 20, Idaho Constitution. Of course, the Idaho Supreme Court is the final arbiter on the meaning of the Idaho Constitution and statutes in violation thereof.

During Proposition One's certification process, the Idaho Attorney General recognized the obvious unconstitutionality of I.C. § 67-429B. (*See* Exh. 1 to Declaration of T. Jason Wood)[1] (emphasis added) (Concluding that "tribal video gaming machines would be construed as slot machines or imitations or simulations of forms of casino gambling," that "in light of Idaho's blanket restriction on the use or possession of slot machines, it is unlikely that attempts to distinguish Tribal Video Gaming Machines from slot machines or imitations thereof under Idaho law will succeed," and that "the argument that such a gaming statute or initiative is permissible ***cannot*** be premised upon an assumption that such gaming is permitted by the Idaho Constitution.") (emphasis added).

The State of Idaho nevertheless rejected its Attorney General's opinion. It and enacted Proposition One into law, changed its position in the *Shoshone-Bannock v. Idaho* litigation, and withdrew its contention that the tribal video gaming machines were prohibited by Article III, § 20, of the Idaho Constitution. (Exh. 6 to Smith Decl., Doc. 8-8, p. 9 of 20). After Idaho's change in position, the only remaining issues in the declaratory judgment action were (1) whether an amendment to the SBT Compact was necessary before the SBT could be authorized to use tribal video gaming machines, and (2) whether the amendment process required renegotiation of the Compact. (Doc. 8-8, pp. 9-10 of 20).

[1]Pursuant to the principles cited by Otter in his brief (Doc. 8-1, pp. 9-10), the Court may consider the Certificate of Review in ruling on the motion to dismiss because (1) it is referenced in the Amended Complaint (Doc. 4, ¶16), and (2) it is a matter of public record, of which the Court may take judicial notice. (Quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), and *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2002)). The Certificate of Review was made a part of the record in the Idaho Supreme Court in *Knox v. Idaho*, 222 P.3d 266 (Idaho 2010) (Dkt. No. 35787-2008), and is also available to the public on the official website of the State of Idaho Office of Attorney General, at http://www2.state.id.us/ag/ops_guide_cert/2001/C071201.pdf.

In ruling on cross motions for summary judgment on these issues, this Court concluded that the Compact does not require renegotiation, but that the Compact must be amended in order for SBT to be permitted to operate "tribal video gaming machines." (Doc. 8-8, pp. 18-19 of 20). The Ninth Circuit affirmed on appeal, expressly holding that "an amendment of the Tribes' Compact is ***required*** for the Tribes to be able to operate their video gaming machines as a result of the permitted operation of such games by other tribes in Idaho." *Shoshone-Bannock Tribes*, 465 F.3d at 1099 (emphasis added). No such amendment has ever occurred. (Doc. 4, ¶21). Consequently, there is no compact authorizing SBT's operation of its tribal video gaming machines, and such gaming is therefore in violation of IGRA, 25 U.S.C. § 2710(d)(1).

D. Harm Suffered By Plaintiffs Knox And Dotson.

After the enactment of § 67-429B and § 67-429C, Plaintiffs Knox and Dotson became compulsive gamblers, traveling the short distance from their homes to SBT's Fort Hall Casino to use the slot machines there. This was basically the only place they gambled, due to the proximity of the Fort Hall Casino As a result, Knox and Dotson developed clinical and devastating addictions to slot machine gambling, causing them to suffer not only significant monetary losses, but also to incur additional debt they otherwise would not have incurred, and subjected them to intrusive and humiliating collection efforts, stress, anxiety, marital and family strife, and tremendous emotional distress. Richard Dotson lost his house and job, and committed forgery in order to obtain gambling funds, for which crime he was convicted and sentenced. (Doc. 4, ¶28 pp. 7-9 of 10).

III.
DISCUSSION

A. The Court Has Subject-Matter Jurisdiction Over Plaintiffs' Claims Against Otter.

Defendant Otter argues this Court lacks subject-matter jurisdiction over Plaintiffs' claims against Otter, because (1) IGRA does not confer on Plaintiffs a private right of action for violation thereof, and (2) *Ex Parte Young* does not confer jurisdiction because IGRA created a "detailed remedial scheme," evidencing congressional intent to foreclose *Ex Parte Young* relief. These arguments are without merit as established below.

1. *Jurisdiction is available under the Supremacy Clause.*

It is well established in the Ninth Circuit that "private plaintiffs seeking injunctive or declaratory relief may challenge a state statute or local ordinance pursuant to the Supremacy Clause, regardless whether a federal statute confers a private right of action on the plaintiffs." *Qwest Comm'n v. City of Berkeley*, 146 F.Supp.2d 1081, 1090 (N.D. Cal. 2001) (citing *Shaw v. Delta Airlines,* 463 U.S. 85, 96 n.14, 103 S.Ct. 2890, 2899 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which eh federal courts have jurisdiction under 28 U.S.C. §1331 to resolve.") and *Bud Antle, Inc. v. Barbosa,* 45 F.3d, 1261, 1269 (9th Cir. 1994) ("Even in the absence of an explicit statutory provision establishing a cause of action, a private party may ordinarily seek declaratory and injunctive relief against state action on the basis of federal preemption.")).

Thus, "a plaintiff seeking injunctive relief under the *Supremacy Clause* on the basis of federal preemption need not assert a federally created 'right,' in the sense that terms has recently been used

in suits brought under §1983, but need only satisfy traditional standing requirements."[2] *California Pharmacists Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 850-51 (9th Cir. 2009) (quoting *Independent Living Ctr. v. Shewry (ILC)*, 543 F.3d 1050, 1058 (9th 2008)). As the Ninth Circuit explained,

> Cause of action based on the *Supremacy Clause* obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights-based. In contrast, a case brought to enforce the *Due Process* or *Equal Protection Clauses* is rights based, and requires that the rights of *someone* be advanced, even if not the rights of the plaintiffs who have been injured.
>
> Consistent with this understanding, in the various precedents cited throughout the *ILC* opinion, in which plaintiffs brought cases directly under the *Supremacy Clause*, the interests asserted were basically economic, and there was no inquiry into whether the plaintiffs asserting the economic injury were in any sense intended beneficiaries of the federal statute on which the *Supremacy Clause* cause of action was premised. . . . Essentially, the line of cases on which we relied held that private parties could enforce the structural relationship between the federal and state governments so long as they have Article III standing as, essentially private enforcers of the *Supremacy Clause*; the specific relationship of those parties to the federal statute on which the *Supremacy Clause* cause of action is premised does not matter.

Id., 563 F.3d at 851 (citations omitted).

Unlike *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223 (9th Cir. 2008), and the other cases cited in Otter's brief, Plaintiffs do not seek an award of money damages arising from Otter's violation of IGRA. Instead, Plaintiffs seek to enforce the structural relationship between the State of Idaho and the United States. Otter continues to flout 25 U.S.C. § 2710(d)(1) and its requirement that Idaho law must permit the Class III gaming at issue, in reliance upon Idaho Code § 67-429B which is patently unconstitutional. Otter's continued reliance upon Idaho Code § 67-429B as justification for SBT's illegal gambling is in direct conflict with 25 U.S.C. §

[2]Defendant Otter has not challenged Plaintiffs' standing to bring this action.

2710(d)(1)'s requirement that Idaho law must permit the tribal video gaming machines. Consequently, it is irrelevant whether IGRA grants Plaintiffs a private right of action. This Court clearly has jurisdiction to determine the proper structural relationship between the State of Idaho and the United States, regarding SBT gaming and IGRA, 25 U.S.C. § 2710(d)(1).

2. *Jurisdiction is conferred by* Ex Parte Young.

This Court also has jurisdiction over Plaintiffs' claims against Otter under the *Ex Parte Young* doctrine. "Under *Ex Parte Young* and its progeny, a suit seeking prospective equitable relief against a state official who has engaged in a continuing violation of federal law is not deemed to be a suit against the State for purposes of state sovereign immunity." *Goldberg v. Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (citing *Ex parte Young*, 209 U.S. 123 (1908) (stating that "official-capacity actions for prospective relief are not treated as actions against the State."). Since the State cannot authorize its officers to violate federal law, such officers are "stripped of their official or representative character and are subjected in their person to the consequences of their individual conduct." *Id.* (quoting *Ex Parte Young*, 209 U.S. at 160). "*Ex Parte Young* relief is available to remedy continuing violations of federal statutory as well as constitutional law." *Id.* (citing *Sofamor Danek Gp., Inc. v. Brown*, 124 F.3d 1179, 1184 (9th Cir. 1997)).

"[T]he availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause, as remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Ellett*, 254 F.3d at 1138 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). *Ex Parte Young* relief has been recognized in IGRA cases under circumstances very similar to the instant action. *See Artichoke*

Joe's v. Norton, 216 F.Supp.2d 1084, 1109-10 & n.34 (E.D. Cal. 2002), *aff'd,* 353 F.3d 712 (9th Cir. 2003), *cert. denied,* 543 U.S. 815 (2004).[3]

Otter's reliance on *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for the proposition that *Ex Parte Young* relief is unavailable to Plaintiffs in the instant action, is misplaced. In *Seminole Tribe*, the Supreme Court found IGRA contains a detailed scheme requiring the state to negotiate in good faith with the tribe to develop a tribal-state compact, and provides detailed remedies in the event no agreement for a compact has been reached, thereby "evidenc[ing] Congress's intent to *foreclose* the availability of *Ex Parte Young* injunctive relief against state officials for violations of the substantive provisions of the IGRA." *Ellett*, 254 F.3d at 1145-46 (emphasis in original).

The crucial aspect of this remedial scheme, as the Ninth Circuit explained, was that it "evidenced Congress's intent to 'limit significantly' ***the state's*** substantive duty under the IGRA to negotiate in good faith with the tribes," in contrast to the sanctions "available in an action brought against a state official under *Ex parte Young*, which would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions.'" *Ellett*, 254 F.3d at 1146

[3]In *Artichoke Joe's,* the plaintiffs, California card clubs and charities, challenged the validity of a tribal-state gaming compact between of California and certain Indian tribes. The Compact permitted the tribes to offer Las Vegas style high stakes gaming, including slot machines. The Compacts were specifically authorized by a California constitutional amendment, Proposition 1A, which gave the Governor the authority to negotiate and conclude Compact for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California. The plaintiffs were prohibited under state law from offering similar types of gambling, and argued that they were placed at a competitive disadvantage. Plaintiffs also alleged that the defendants, various state and federal officers, including the Governor and the Secretary of the Interior, violated the IGRA and the Fifth and Fourteenth Amendments to the United States Constitution by creating a tribal monopoly on Las Vegas style gaming. Plaintiffs sought both declaratory and injunctive relief to invalidate the existing Compact and to block the execution of any future Compact. The Court held that *Ex Parte Young* relief was available against the California governor for his ongoing alleged violations of IGRA caused by his past approval of a tribal-state gaming compact. 146 F.Supp.2d at 1110-11.

(emphasis added) (quoting *Seminole Tribe, supra)*. "[I]f the intricate remedial scheme established by the IGRA could be enforced in a suit under *Ex Parte Young*, the intricate remedial scheme established by the IGRA 'would have been superfluous; it is difficult to see why an ***Indian tribe*** would suffer through the intricate scheme of ***§ 2710(d)(7)*** when more complete and more immediate relief would be available under *Ex Parte young.*'" *Id*. (emphasis added) (quoting *Seminole Tribe*, *supra)*. Thus, the tribe's remedies were limited to what was available under IGRA.

However, the situation in the instant case is much different, and almost identical to *Artichoke Joe's,* in which the court explained that "Congress did not create a detailed remedial scheme ***to enforce section 2710(d)(1)***, which permits class III gaming on certain conditions, unlike the provisions of IGRA which the Court held could not be enforced by an Ex parte Young action in *Seminole Tribe*, 517 U.S. at 74." 216 F.Supp.2d at 1110 n.34 (emphasis added). *See also Ellett*, 254 F.3d at 1146 (similarly distinguishing *Seminole Tribe* and contrasting IGRA's intricate remedial scheme limiting the rights and duties of the *tribes and states* under IGRA, with the Bankruptcy Code, which unlike IGRA, "does not contain a detailed *remedial* scheme *limiting* debtors' remedies in enforcing their rights under bankruptcy law against States, as did the IGRA. . . . Thus, it cannot be said that congress intended to 'limit significantly' the sort of relief available to debtors against States that violate provisions of the Bankruptcy Code, as the Court found Congress intended to do in the IGRA.").

Because IGRA contains no remedial scheme limiting these Plaintiffs', or anyone else's, remedies for violations of section 2710(d)(1), *Seminole Tribe* does not apply, and therefore the Court has jurisdiction to grant the relief Plaintiffs request, pursuant to *Ex Parte Young*.

B. The Tribes Are Not Necessary Or Indispensable Parties.

A two part test applies to motions to dismiss for failure to join necessary and indispensable parties. *Washington v. Daley,* 173 F.3d 1158, 1167 (9th Cir. 1999). "First, the court must decide if the tribes are necessary to the suit. If the tribes are necessary, and if they cannot be joined, the court must determine if they are 'indispensable' so that in 'equity and good conscience' the suit should be dismissed. The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. The moving party has the burden of persuasion in arguing for dismissal.'" *Artichoke Joe's*, 216 F.Supp.2d at 1118 (quoting *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990)). An absent party is necessary if complete relief is not possible among those already parties to the suit, or if the absent party has a "nonfrivolous claim" to a legally protected interest in the suit. *Shermoen v. United States,* 982 F.2d 1312, 1317 (9th Cir. 1992) (reversing district court's decision that United States could not represent tribes due to potential conflict noting that court identified "no argument the United States would not or could not make on the Community's behalf").

1. *SBT is not a necessary party because the Secretary of Interior can adequately represent SBT's interests.*

An existing party may adequately represent the interests of an absent party if (1) a present party will undoubtedly make all of the absent party's arguments, (2) the present party is capable and willing to make the absent party's arguments, and (3) the absent party would not offer any necessary elements that the present parties would neglect. *Artichoke Joe's*, 216 F.Supp.2d at 118 (citing *Shermoen,* 982 F.2d at 1318). Under relevant facts almost indistinguishable from the instant case, the District Court in *Artichoke Joe's* held that "although the tribes can claim a legal interest in this lawsuit, they are not necessary parties because their legal interest can be adequately represented by

the Secretary." 216 F.Supp.2d at 1118 (quoting *Washington,* 173 F.3d at 1167 ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.")).

The reason the Secretary is presumed to adequately represent a tribe's interest is his statutory obligations toward Indian tribes. "In general, the United States' trust obligations to the Indian tribes, which the Secretary has a statutory duty to protect, 25 U.S.C. § 2710(d)(8)(B) (Secretary may disapprove compact if it violates trust obligations of the United States to Indians), *United States v. Eberhardt,* 789 F.2d 1354, 1360 (9th Cir. 1986) ("We hold that the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States."), satisfies the representation criteria and allows it to adequately represent the absent tribes 'unless there exists a conflict of interest between the United States and the tribe.'" *Artichoke Joe's*, 216 F.Supp.2d at 1118-19 (quoting *Southwest Ctr. for Biological Diversity v. Babbitt,* 150 F.3d 1152, 1154 (9th Cir. 1998)). *See also Citizens Against Casino Gambling v. Kempthorne*, 471 F.Supp.2d 295, 315 (W.D.N.Y. 2007) ("The Department of the Interior, as trustee for Indian tribes, has an interest in Indian self-government, including tribal self-sufficiency and economic development, that makes it uniquely qualified to represent a tribes' interests unless there is the clear potential for inconsistency between the government's obligations to the tribe and its other obligations to the tribe and its other obligations in the context of the pending case.").

However, for a conflict of interest to preclude a tribe's representation by the Secretary, there must be a "clear potential for inconsistency between the Secretary's obligations to the Tribes and its other obligations that arises in the context of the pending case." *Artichoke Joe's*, 216 F.Supp.2d at

1119 (quoting *Washington,* 173 F.3d at 1168-69 (holding that United States could adequately represent tribes' interests because there was no direct conflict between tribes and the United States, or between the tribes themselves)). *See also Southwest Center for Biological Diversity*, 150 F.3d at 114 (reversing district court's decision that United States could not represent tribes due to potential conflict, noting that court identified "no argument the United States would not or could not make on the Community's behalf").

Like *Artichoke Joe's,* Otter has failed to carry his "burden of demonstrating an actual conflict of interest in the pending litigation that would prevent the United States from adequately representing [Idaho's] Indian tribes." 216 F.Supp.2d at 1119. The SBT is therefore not necessary under Rule 19, and Otter's motion must be denied.

2. *The SBT does not have a non-frivolous interest protectible by Rule 19.*

As indicated above, in order to be a necessary party under Rule 19, the absent party must also have "'a nonfrivolous claim' to a legally protected interest in the suit." *Artichoke Joe's*, 216 F.Supp.2d at 1118 (citing *Shermoen,* 982 F.2d at 1317). A party cannot be deemed "necessary" under Rule 19(a)(1)(2) if the absent party's claimed interest is based upon a "palpably unconstitutional" statute. The Ninth Circuit recognized this principle in *Shermoen,* which involved 70 individual Native Americans and a community of Yurok Indians who sought review of a judgment from a California federal district court dismissing the tribes' suit seeking injunctive relief and a declaration that the Hoopa-Yurok Settlement Act violated their constitutional rights, on the grounds that the absent Hoopa and Yurok tribes were necessary and indispensable parties pursuant to Rule 19. Addressing Rule 19's "claimed interest" requirement, the Ninth Circuit stated:

> We do not hold, of course, that a district court would be required to find a party necessary based on patently frivolous claims made by that party. But such is clearly not the case before us; the absent tribes have an indisputable interest in the outcome of appellants' suit, and the Act, which has created that interest, is not so palpably unconstitutional that we could readily say the absent tribes' claims are fatuous.

Shermoen, 982 F.2d at 1318. *See also Andree v. Ashland County,* 818 F.2d 1306, 1313 (7th Cir. 1987). Because the statutes at issue in *Shermoen* and *Andree* were not obviously in violation of the Constitution, as the statutes at issue in the instant case, the Ninth Circuit found the tribe had a protectable interest and was therefore a necessary party under Rule 19(a)(2). The broad constitutional principles outlined in the Bill of Rights, which were implicated in *Shermoen* and *Andree,* simply made it too difficult to make a definitive determination whether the statutes at issue were facially unconstitutional.

In contrast, the interest of the tribes in the present case is based upon statutes that are as "palpably unconstitutional" as a statute could possibly be. As previously established, I.C. §§ 67-429B and -429C, upon which SBT's purported interest in the right to conduct slot machine gaming, is in direct conflict with Art. III, §20 of the Idaho Constitution, which unambiguously prohibits such slot machine gaming. The governor's attorney general has conceded such unconsitutionality. The Idaho Constitution's narrowly drafted, unambiguous prohibition of slot machine gaming makes it very easy to make this facial determination. As such, the tribes cannot claim an interest sufficient to render them a "necessary party" within the meaning of Rule 19(a)(1)(2).

3. *SBT are not "indispensable" under Rule 19, by application of the "public rights" doctrine*.

Even if SBT were necessary (which it is not), SBT is not indispensable pursuant to the "public rights doctrine," concerning "litigation .... [which] transcends the private interests of the

litigants and seeks to vindicate a public right." *Wilbur v. Locke,* 423 F.3d 1101, 1115 (9th Cir. 2006). Under this exception the absent party's interests may be impaired but will not be allowed to *destroy* those interests in the party's absence. *Id*.

The Ninth Circuit first applied this doctrine in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988), *cert. denied,* 489 U.S. 1012, 109 S. Ct. 1121, 103 L. Ed. 2d 184 (1989). In *Conner,* an environmental group challenged the issuance of oil and gas leases by the BLM on the ground that an adequate EIS had not been prepared. On appeal, several lessees claimed that they were necessary parties under Rule 19, but the Ninth Circuit held the public rights exception applicable:

> Subsequent courts have also refused to require the joinder of all parties affected by public rights litigation -- even when those affected parties have property interests at stake -- because of the tight constraints traditional joinder rules would place on litigation against the government. [many citations omitted] . . . Like the cases cited above, this case is amenable to the application of the *National Licorice* public rights doctrine. The appellees' litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA.

Id. at 1459-60.

Likewise, Plaintiffs Knox and Dotson do not purport to adjudicate any rights of the parties under the SBT compact. They seek to enforce the public right to ensure that the Idaho legislature and governor comply with, and not engage in acts which they knew are in violation of, the Idaho Constitution and IGRA. Unlike the cases in which courts have refused to apply public rights doctrine, the present controversy does not involve a close question. The challenged statute is in *patent violation* of the Idaho Constitution and therefore IGRA, a fact of which the Governor was well aware.

The fact that Knox and Dotson have suffered particularized injury does not somehow convert this issue from a public to a private one. Otherwise, since the doctrine of standing requires that every plaintiff suffer particularized harm, the "public interest" exception could never be satisfied and would be rendered meaningless. Indeed, the Ninth Circuit has recognized that "[t]he general subject of gaming [is] of great public interest." *Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1026 (9th Cir. 2002). But unlike *Am. Greyhound*, Knox and Dotson are not competitors of the tribes seeking to share in the spoils of casino gambling. They seek to vindicate the public's right to enforcement of IGRA and the Idaho Constitution. If there is a public right in administrative enforcement of the merely procedural rules under NEPA and ESA as declared in *Conner*, then surely there is an even greater public right of the citizens of Idaho in enforcement of the substantive provisions of the Idaho Constitution and IGRA, under the rather egregious circumstances of this case.

Furthermore, SBT's interests here would not be entirely "destroyed" by proceeding in their voluntary absence. SBT would still retain their full rights under the compact to engage in all gaming permitted by Idaho law, including bingo and raffle games which the tribes continue to conduct. Consequently, SBT is not indispensable, by application of the public interest doctrine.

CONCLUSION

For all these reasons Otter's Motion to Dismiss Amended Complaint should be denied.

RESPECTFULLY SUBMITTED this 28th day of April, 2010.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
T. Jason Wood, attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Clay R Smith: clay.smith@ag.idaho.gov, dustin.russell@ag.idaho.gov, pat.boehm@ag.idaho.gov

Curt R. Thomsen: cthomsen@custertel.net

THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
T. Jason Wood, attorney for Plaintiffs

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