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 FEDERAL DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs submit the following points and authorities in opposition to the federal defendant's motion to dismiss Plaintiff's Amended Complaint.

For a more accurate and detailed factual and procedural background of events leading up to this case, please see Pages 1 through 10 of Plaintiffs' Memorandum in Opposition to Defendant Otter's Motion to Dismiss, which are incorporated herein by this reference. (Doc.# 12). Addition background information pertinent to this motion will also be discussed below.

I. PLAINTIFFS HAVE TIMELY CHALLENGED FINAL AGENCY.

The federal defendants argue that because there is no "proof" that the State of Idaho or Shoshone-Bannock Tribes (SBT) ever submitted their agreed amendment of their compact to the Secretary for approval. Consequently, the federal defendants conclude, the Secretary took no action that is reviewable under the APA. This argument fails for several reasons, as established below.

1. *Plaintiffs' claims did not accrue until they became aware of the wrong, and suffered sufficient concrete harm to successfully pursue a cause of action*.

Plaintiff's Amended Complaint challenges the Secretary's approval of the original, February 13, 2000 SBT compact as unlawful under IGRA on two grounds: "(1) the SBT Compact does not authorize the challenged Class III gaming, and, (2) the other Compacts and amendments thereto purport to authorize Class III gaming activity for Indian Tribes that the State of Idaho does not permit for any purpose by any person, organization, or entity." (Doc.# 4, ¶23).

It appears that the statute of limitations usually applicable to claims brought under the APA is the set forth in 28 U.S.C. §2401(a), which requires that an action be commenced "within six years after the right of action first accrues." *Wind River Mining Corp. v. U.S.*, 946 F.2d 710, 712 (9th Cir. 1991) (quoting 28 U.S.C. §2401(a)). The question is, when did Plaintiffs' causes of action accrue under section 2401? The answer, as federal defendants concede, is that "[a] cause of action generally accrues when a plaintiff knew or should have known of the wrong *and was able to commence an action based upon that wrong.*" (Doc. #17-1, page 9 of 22, n.3) (citing *Shiny Rock Mining Corp. v. United States*) (emphasis added). *See also Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1392, 1393, 1396 (9th Cir. 1986) ("Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action.").

In *Acri*, the Ninth Circuit held that the applicable statute of limitations did not even accrue when plaintiffs first learned of defendant's misrepresentations which gave rise to plaintiff's claims, because "Plaintiffs had not suffered any injury at this time." *Id.* Instead, the court held that the statute did not accrue until more than 2 years later, when the plaintiffs suffered sufficient injury to allow them to bring a cause of action. *Id.*

The rationale for this rule relaxing the statute of limitations for substantive claims is that "administrative rules and regulations are capable of continuing application" and "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music Inc. v. FCC*, 274 F.2d 543, 546 (D.C.Cir. 1958). This policy makes sense when one considers the "everpresent duty" agencies have "to insure that their actions are lawful. An agency can hardly be heard to say that at a time when it was considering whether to take a certain action, it would have steadfastly ignored a commenter's showing that the action was unlawful." *Public Citizen v. Nuclear Regulatory Com.*, 901 F.2d 147, 152 (D.C. Cir. 1990).

This principle that a cause of action accrues when (1) plaintiff first becomes aware of it, *and* (2) when plaintiff suffers sufficient harm to be successful in pursing the cause of action, dovetails with the principle expressed in *Wind River*. In *Wind River*, the Ninth Circuit adopted the reasoning of the D.C. Circuit, that there is NO limitation period barring substantive challenges to the legal authority of the agency to make the challenged decision. 946 F.2d at 715 (citing, *inter alia*, *Oppenheim v. Coleman*, 571 F.2d 660 (D.C. Cir. 1978), in which the Court found timely a substantive challenge to agency action take 28 years before, because the agency action was not *applied* to him until recently). *Wind River* did not go expressly so far, going only as far as the facts

of the care required. That is, since the claimant in *Wind River* challenged the agency action within six years of when the action was *applied* to him, it was unnecessary to apply the D.C. Circuit's "substantive challenge" rule beyond that time period. 946 F.2d at 716 ("We hold that a substantive challenge to an agency action decision alleging lack of agency authority *may* be brought within six years of the agency's *application* of that decision to the specific challenge.").

In *Wind River*, the action was held to have been applied to the plaintiff when the BLM finally rejected Wind River's application to have the regulation declared invalid. The procedural posture in the instant action is somewhat different. Unlike *Wind River*, Plaintiffs did not file an administrative request for relief from a regulation adversely affecting them, which was formally rejected. Indeed he had no opportunity or right to do so, until the Secretary's decision to approve (and continue to approve) the Idaho/SBT gaming compact was applied to him.

The question remains, when was the compact applied to Plaintiffs? When (1) he knew of the wrong, *and* (2) he suffered sufficient concrete harm to successfully bring a cause of action. *Acri*, 781 F.2d at 1396. *See also* Doc. #17-1, pp. 9 of 22 ("A cause of action generally accrues when a plaintiff knew or should have known of the wrong *and was able to commence an action based upon that wrong.*"). (citing *Shiny Rock*, 906 F.2d at 1364-65). Based upon these Ninth Circuit rules, there are Plaintiffs' substantive challenges to the Secretary's approval of the Idaho/SBT gaming compact are timely.

A. Plaintiffs' Claim That the Secretary's Approval of the 2000 SBT Compact Is Contrary to Law Because it was not Amended Did Not Accrue until after the Ninth Circuit's Decision in State v. SBT on October 11, 2006.

In entering the February 18, 2000 SBT compact, the parties could not agree on what types of class III gaming were "permitted" by the State of Idaho. At that time, the State correctly maintained that

> Accordingly, the only tribal Class III gaming activities that are legal in Idaho under federal law are those Class III gaming activities permitted by article 3, section 20 of the Idaho Constitution and not otherwise contrary to the criminal laws of the State of Idaho. Therefore, pursuant to federal law, tribal Class III gaming in Idaho is contrary to public policy and is strictly prohibited except for a lottery, pari-mutual betting and bingo or raffle games conducted in conformity with enabling legislation. Furthermore, no gaming activity shall employ any form of casino gambling including. but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling; and . . . it is the position of the State that the electronic gaming currently conducted by the Tribes in Idaho is an imitation of casino games and prohibited by Idaho and federal law.

(Doc.# 8-7, p. 7 of 34).

The SBT disagreed. Consequently, in order to reach an agreement, the parties agreed to disagree, leaving the issue open by simply authorizing SBT to "operate in its gaming facilities located on Indian Lands any 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." (Doc.# 8-7, ¶4.a., p. 8 of 34,). The parties agreed to submit the issue of what class III gaming is "permitted" by the State of Idaho within the meaning of IGRA to this Court via a declaratory judgment action. (Doc.# 8-7, ¶5, pp. 9-13 of 34). Cross complaints for declaratory judgment were subsequently filed in Case Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho).

After Proposition One passed, resulting in enactment of I.C. §§ 67-429B and -429C, the State of Idaho inexplicably withdrew its position that the tribal video gaming machines operated at

the Fort Halls Casino are strictly prohibited by Art. III, § 20 of the Idaho Constitution, which was noted by the Court in its Memorandum Decision and Order. (Doc.# 8-8, p. 9 of 20). Two issues remained for resolution, one which is pertinent here: *Must the SBT compact be expressly amended in writing in order for the tribal video gaming machines purportedly authorized by I.C. §§ 67-429B to be lawful under IGRA?*

The SBT argued that pursuant to section 24(d) of the compact, which authorizes any gaming that Idaho permits any other tribes to conduct, no amendment was necessary. (Doc.# 8-8, p. 10 of 20). This Court ruled that the compact MUST be so amended, and instructed the parties to do so. (Doc.#8-8, p. 18 of 20). This ruling was unequivocally affirmed on appeal to the Ninth Circuit: "We agree with the district court, therefore, 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." *Idaho v. Shoshone-Bannock Tribes,* 465 F.3d 1095, 1099 (9th Cir. 2006) (emphasis added). It is apparent SBT failed to comply with the Order of this Court and of the Ninth Circuit. (Doc.# 4, ¶21; Doc.# 17-3, p. 1).

The issue whether the compact must be expressly amended in order for the challenged class III video gaming machines to be authorized under the compact and IGRA, was a hotly contested legal issue, and the answer far from clear. It took a federal district judge, and a panel of the Ninth Circuit Court of Appeals, to decide the matter. A lay person such as Mr. Dotson or Ms. Knox, could hardly be expected to have anticipated what neither the State of Idaho nor the SBT could not anticipate. The issue was not finally resolved until October 11, 2006. The absolute earliest that Plaintiffs could have been placed on notice, assuming they could be expected to peruse decisions of the Idaho federal courts, is April 12, 2004, when the Court filed its Memorandum Decision and

Order, ordering the amendment of the compact. Of course, the order was stayed until the decision of the Ninth Circuit on October 11, 2006. Even then, the SBT would have a reasonable period of time to comply with the Courts' Orders to amend the compact, only after which the failure to do so could be deemed be discovered by the Secretary[1] or Knox and Dotson.

Consequently, Plaintiffs' causes of action did not accrue until after October 11, 2006. Accordingly, Plaintiff's Complaint filed April 8, 2009, and Amended Complaint filed March 31, 2010, challenging the Secretary's approval of the February 18, 2000 SBT compact, are timely and well within the applicable 6-year statute of limitations.

B. Plaintiffs' Claim That the Secretary's Approval of the February 18, 2000 SBT Compact Is Contrary to Law Because Tribal Video Gaming Machines Are Prohibited by Idaho Law Did Not Accrue until the Court filed its April 12, 2004 Memorandum Decision and Order Giving Notice Idaho Changed its Position.

As explained above, it was a very hotly contested issue, both in the negotiation of the February 18, 2000 SBT compact and the declaratory judgment actions filed by the parties, whether Idaho law permitted Class III gaming such as video slot machines or "tribal video gaming machines." The State of Idaho correctly and consistently maintained the position that such gambling was contrary to Art. III, § 20 of the Idaho Constitution. (Doc.#8-7, p. 7; Doc.# 8-8, p. 5 of 20). *See also* Idaho Fed. Dist. Ct. Case No. CIV 01-00171 (Doc.#1, ¶¶ 36-37).

The first time the State of Idaho made it clear that it was changing this position, and was abrogating its responsibility to enforce the Idaho Constitution's prohibition against the casino

[1]Having expressly approved the February 18, 2000 SBT compact, the Secretary is clearly charged with knowledge that the issue of what class III gaming is permitted by the State of Idaho was left open in the Compact and was to be litigated, and therefore also the legal proceedings pertaining to that issue. It had a duty, following the conclusion of those legal proceedings, to review the orders of the courts and whether its prior approval of the SBT compact was in accordance with IGRA. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1996) (holding, under very similar circumstances, that the necessity of "finality" of the secretary's approval of a compact does not obviate the secretary's to withdraw that approval after the compact is later established to be in violation of IGRA).

gambling conducted by SBT via its "tribal video gaming (slot) machines, was in its March 5, 2004 response to SBT's motion for summary judgment in Idaho Federal District Court Case No. CIV 01-0052-E-BLW (Doc.#40, p. 2). This is the first time Knox and Dotson could possibly have known that the State of Idaho would not enforce the Idaho Constitution's prohibition against the SBT's electronic or electromechanical simulation of a slot machine.

The Court is entitled to presume that government authorities will enforce laws against illegal tribal gaming would do so. *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1108 (E.D. Cal. 2002) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992); *Made in the USA Foundation v. United States,* 242 F.3d 1300 (11th Cir. 2001); and *Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697 (9th Cir. 1992)). If Courts are entitled to presume this, certainly private lay citizens are likewise entitled. Knox and Dotson could not have been disabused of this presumption until March 5, 2004 at the very earliest. Their commencement of this action on April 8, 2009 (Doc.#1) to set aside the Secretary's approval of a compact purporting to authorize gaming expressly prohibited by the Idaho Constitution, in violation of IGRA, therefore is well with the 6-year statutory time period.

C. Plaintiff Knox Did Not Sufficient Concrete Harm to State a Claim for Relief until 2006.

As established above, even if Knox and Dotson became aware of the Secretary's wrongs, their claims still do not accrue until they have suffered sufficient harm to successfully bring a cause of action. (Doc. #17-1, page 9 of 22, n.3) ("A cause of action generally accrues when a plaintiff knew or should have known of the wrong *and was able to commence an action based upon that wrong.*") (emphasis added) (citing *Shiny Rock Mining Corp. v. United States*). *See also Acri v. Int'l*

Ass'n of Machinists & Aerospace Workers, 781 F.2d 1392, 1393, 1396 (9th Cir. 1986) ("Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action."). Thus, even if the Court for some reason were to disregard the application of the foregoing Ninth Circuit rules and hold that Knox and Dotson were on constructive notice of the Secretary's wrong when the Secretary published its approval of the Compact in 2000, that does not end the inquiry. Plaintiffs' claims still do not accrue until they suffered harm sufficient to state a claim. Because this case does not involve a claim for damages, the issue is whether there are sufficient allegations of concrete harm to establish standing.

In that regard, Plaintiff Dotson did not start gambling at Fort Hall or anywhere else with any frequency until late 2005. He did not suffer significant harm until 2006 when he was charged and convicted of forgery and lost his house because of the video slot machines at the Fort Hall Casino. *See* Affidavit of Richard Dotson filed herewith. The federal defendants claim that even NOW Plaintiffs have not suffered sufficient, concrete harm to establish standing. They can hardly be heard to now assert that Plaintiffs were able to state a claim for relief back in 2000-2003. Of course, for the reasons stated in more detail below, Knox and Dotson clearly have standing now to assert the claims set forth in their Amended Complaint. For this additional reason the federal defendants' motion to dismiss must be denied.

D. <u>The State Of Idaho And SBT Cannot Be Permitted To Collude To Deprive This Court Of Jurisdiction By Failing To Comply With The Order Of This Court and Of The Ninth Circuit.</u>

If for some reason this Court were to disregard the aforementioned authority from the Ninth Circuit and hold that the Secretary has taken no final agency action within the applicable limitations period, the Court should not allow the State of Idaho and SBT to collude to forever deprive this

Court of jurisdiction to review the legality of the video slot machine gaming taking place at the Fort Hall Casino.

"Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re Martin-Trigona,* 737 F. 2d 1254, 1261 (CA2 1984) (cited with approval in *In re McDonald,* 489 U.S. 180, 185 n.8 (1989)). The All Writs Act, 28 U.S.C. § 1651(a), states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In allowing courts to protect their "respective jurisdictions, "the Act allows them to safeguard not only ongoing proceedings, but potential future proceedings, as well as already-issued orders and judgments. *Klay v. United Healthgroup, Inc.,* 376 F.3d 1092, 1099-1100 (11th Cir. 2004) (citing *Wesch v. Folsom,* 6 F.3d 1465, 1470 (11th Cir. 1993) ("In addition, courts hold that despite its express language referring to 'aid . . . of jurisdiction,' the All-Writs Act empowers federal courts to issue injunctions to protect or effectuate their judgments.")).

A court may grant a writ under this act whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it," and not only when it is "'necessary' in the sense that the court could not otherwise physically discharge its . . . duties." *Klay*, 376 F.3d at 1100 (quoting *Adams v. United States,* 317 U.S. 269, 273, (1942)). Such writs may be directed toward not only the immediate parties to a proceeding, but to "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any

affirmative action to hinder justice." *Id*. (quoting *United States v. New York Tel. Co.,* 434 U.S. 159, 174, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977).

"Thus, while a party must 'state a claim' to obtain a 'traditional' injunction, there is no such requirement to obtain an All Writs Act injunction -- it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by some action or behavior. The requirements for a traditional injunction do not apply to injunctions under the All Writs Act because the historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." *Klay*, 376 F.3d at 1100-1101 (citing *United States v. New York Tel. Co.,* 434 U.S. 159, 174, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977) and *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 219, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945)).

Here, lawful review of agency action under the APA could *forever* be thwarted by the collusion of the State of Idaho and SBT to disobey the Order of this Court and of the Ninth Circuit Court of appeals in *Idaho v. Shoshone-Bannock Tribes*, to amend the February 18, 2000 compact in order for the contested tribal video gaming to be lawful under IGRA. This Court has a *duty* to protect its jurisdiction and the integrity of its orders and judgments by enforcing the same, even when requested by persons who are not parties to the original action. A traditional "cause of action" for such relief need not be stated because the State of Idaho and SBT have threatened the integrity of the Courts' order requiring amendment of the SBT compact in order for tribal video gaming to be deemed lawful under IGRA.

In order to facilitate such relief, Plaintiffs intend to file a motion for leave to amend the complaint, in the event the same is deemed necessary, to request the Court's Order that Idaho and

SBT amend their compact or risk having the compact declared void. "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *Polich v. Burlington Northern, Inc*., 942 F.2d 1467, 1472 (9th Cir. 1991). Once the SBT is amended pursuant to the Courts' judgment, the Secretary must either approve or disapprove the amendment. If it approves the amendment, the same will constitute final agency action within the meaning of the APA. For this additional reason, the Court should deny the federal defendants' motion to dismiss.

II. THE PROPOSED SECOND AMENDED COMPLAINT REMOVES ANY PRAYER FOR AN ORDER MANDATING THE DEFENDANTS ENFORCE FEDERAL LAW.

The proposed amended complaint which Plaintiffs intend to file, would render moot this second ground for the federal defendants' motion to dismiss.

III. PLAINTIFFS CLEARLY HAVE STANDING.

The federal defendants argue what the Governor knew he could not argue with a straight face, namely that the plaintiffs somehow lack standing to bring this action. The federal defendants challenge standing on two grounds: (1) Plaintiffs' injuries are not "fairly traceable" to the defendants' challenged action; and (2) a favorable decision would not "likely" redress the injury. (Doc.# 17-1, p. 12 of 22) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Both of these arguments are entirely without merit.

A. Plaintiffs' Injuries Are "Fairly Traceable" To The Secretary's Actions.

The federal defendants maintain that this prong of Article III standing has not been established "because Plaintiffs' injury [sic] is the result of independent action of a third party, SBT, who is not before the Court. The Secretary did not cause the alleged injury because the Secretary

has not approved an amendment to SBT's Compact." (Doc.# 17-1, p. 12 of 22). This argument fails for the reasons set forth above. Plaintiffs' claim for review of the Secretary's approval the February 18, 2000 SBT compact, and failure to properly withdrawn it in a timely fashion, is admittedly final agency action, and is not untimely. Because the compact does not authorize tribal video gaming machines until expressly amended and because such gaming is prohibited by Idaho law and therefore prohibited by IGRA, the video gaming machines would be deemed unlawful by federal and state law enforcement. As explained above, the Court is entitled to presume that federal authorities will enforce IGRA and the Johnson Act in this regard. *Artichoke Joe's*, 216 F. Supp. 2d at 1108 (citing *Franklin,* 505 U.S. 788; *Made in the USA,* 242 F.3d 1300; and *Eu,* 979 F.2d 697). Consequently, there can be no doubt that in applying the liberal standards in reviewing this motion to dismiss, that Plaintiffs' injuries are "fairly traceable" to the Secretary's approval of the 2000 SBT compact.

B. An Order Setting Aside the Secretary's Approval Of The SBT Compact Would Likely Redress Plaintiffs' Injuries.

To establish redressability, "plaintiffs must show that it likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Artichoke Joe's*, 216 F.Supp.2d at 1107 (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 869 (9th Cir. 2002)).

"As this court has noted, the Article III standing requirements are rather 'undemanding.'" *Family & Children's Center, Inc. v. School City*, 13 F.3d 1052, 1058 (7th Cir. 1994) (citation omitted). *Id*. "In addition, the plaintiff need not show absolutely that a favorable judgment would redress his injury; a 'probabilistic benefit from winning a suit' is adequate." *Id*. (citation omitted). "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision. . . . Plaintiffs 'must show only that a favorable decision is likely to redress [their

injuries], not that a favorable decision will inevitably redress [their injuries].'" *Wilbur* at 1108-09 (quoting *Graham v. FEMA,* 149 F.3d 997, 1003 (9th Cir. 1998)).

In applying this "undemanding" standard, the Court's review is not limited to the four corners of the complaint. "A motion to dismiss for lack of standing should not be granted unless there are ***no set of facts*** consistent with the complainant's allegations that could establish standing." *Lac Du Flambeau v. Norton*, 422 F.3d 490, 496 (4th Cir. 2005) (emphasis added) (citing *Hishon*, 467 U.S. at 73). "A plaintiff needs only to plead **general** allegations of injury in order to survive a motion to dismiss, for 'we presume that general allegations embrace those specific fact necessary to support the claim." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 866 (9th Cir. 2002) (emphasis added); *See also Lac Du Flambeau,* 422 F.3d at 496 (quoting *Lujan v. Defenders of Wildlife*, 497 U.S. 871 (1990)). Even where the complaint is silent on facts necessary to establish standing, the courts will consider new facts raised for the first time on appeal, so long they are consistent with the complaint. *Id*. (*citing Highsmith v. Chrystler v. Credit Corp.*, 18 F.3d 434, 439 (7th Cir. 1994)).

Consequently, to establish redressability it is unnecessary to make specific allegations in the complaint delineating how or why the requested relief will redress the plaintiff's injuries. Instead, to survive a motion to dismiss for lack of standing based on redressability, "***a plaintiff need only plead 'that there is a substantial likelihood that the relief requested will redress the injury claimed***.'" *Lac Du Flambeau*, 422 F.3d at 501. Plaintiff's Amended complaint makes precisely this allegation. (Doc.# 4, ¶28). "At this stage of the proceedings, we do not speculate as to the plausibility of this allegation, [citation omitted], or as to its sufficiency to establish liability." *Bernhardt*, 279 F.3d at 869 (citing *Parsons v. Del Norte County*, 728 F.2d 1234, 1240 (9th Cir. 1984) (Poole J., concurring) ("The point is not whether these arguments will prevail but whether they have

enough substance to require addressing.")). The federal defendants' motion to dismiss for lack of redressability must therefore be reversed for this reason alone.

1. *Absence of the Attorney General, U.S. Attorney and NIGC Chairman does not prevent Plaintiffs' injuries from being redressed*.

First, the federal defendants ironically argue because the Attorney General, U.S. Attorney and NIGC Chairman, who are charged with criminal and civil enforcement of IGRA and presumably the Johnson Act, have not been joined in this action, "there is no certainty that any action would be taken against SBT." (Doc.# 17-1, p. 12 of 22). This argument is ironic because the federal defendants just finished arguing that no such remedy is available. It is *wrong* because "certainty" is not required to establish redressability, as established above. The argument is also wrong because it has been roundly rejected by all federal courts to have addressed it under similar circumstances.

For example, in a closely analogous case, *Artichoke Joe's,* the plaintiffs, California card clubs and charities, challenged the validity of Compact entered into under the Indian Gaming Regulatory Act ("IGRA"), between the State 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 defendants similarly argued Plaintiffs lack standing because redressability depends upon enforcement decisions of government authorities not a party to the action. The Court rejected this argument, reasoning as follows:

> To establish redressability, plaintiffs must show that it is **"likely, as opposed to merely speculative** that the injury will be redressed by a favorable decision." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 869 (9th Cir. 2002). A "claim may be too speculative if it can be redressed only through 'the unfettered choices made by independent actors not before the court.'" *Id.* (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). **However, a plaintiff can still satisfy the redressability requirement in such a case by meeting "the burden . . . to adduce facts showing that those choices have been or will be made in such manner as to . . . permit redressability of injury."** *Lujan*, 504 U.S. at 562. Thus, in *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992), decided less than two weeks after *Lujan*, the Court held that the plaintiffs satisfied redressability in a suit brought against the Secretary of Commerce to require her to reallocate the apportionment of overseas military personnel in the 1990 census, even though the President would make a final determination on the census. A plurality of the Court held that declaratory relief against the Secretary would redress the plaintiffs' injuries because "she has an interest in litigating [the census's] accuracy . . . **[and] it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination."** *Id.* at 803. **Therefore, although redressability depended at least in part on the actions of third parties, the Court was satisfied that the third parties would follow and enforce the law thus making redressability likely.**

Id. at 1107-08 (emphasis added).

The Court found the logic and reasoning in *Lujan* and *Franklin* persuasive and reached the following conclusion:

> As to count II and the IGRA and equal protection claims on the existing Compact, the state defendants contend that redressability is too speculative to support standing because the tribes are not parties to the suit and a decision in the plaintiffs' favor would, therefore, not be binding on them. Moreover, they argue that if the court invalidates the Compact and Proposition 1A, the State would lose its power to stop any continued class III gaming because, in the absence of a valid IGRA-sanctioned compact, 18 U.S.C. § 1166 gives the federal government exclusive enforcement authority over Indian gaming. *See United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996) ("Section 1166(d) grants the United States 'exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country.'"). Thus, the state defendants contend that if the plaintiffs prevail on the merits, the state defendants will be powerless to stop any illegal Indian gaming.
>
> The state defendants' arguments are misplaced for several reasons. **First, the plaintiffs do not need to prove a negative, namely that the tribes would not engage in illegal gaming in order to demonstrate redressability**. If plaintiffs had to "negate . . . speculative and hypothetical possibilities . . . in order to demonstrate the likely effectiveness of judicial relief," they would rarely ever be able to establish standing. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978).
>
> Second, even if the tribes were inclined to violate IGRA and state penal code prohibitions, there is no reason to assume that the federal government would shirk its enforcement responsibilities under 18 U.S.C. § 1166 by countenancing illegal class III gaming by Indian tribes. Thus, although redressability may depend, at least in part, on the actions of third parties, this case more closely resembles *Franklin* than it does *Lujan*. Indeed, unlike in *Lujan* where it was unclear whether outside agencies would be bound by the Secretary of the Interior's interpretation to require consultation for international projects, a ruling that invalidates the Compact and Proposition 1A would conclusively establish the illegality of any continued class III gaming by Indian tribes. *Lujan*, 504 U.S. at 555. **The sole contingency, therefore, would be whether the federal authorities responsible for prosecuting illegal gaming would do so, and, as in *Franklin, Made in the USA, and Eu*, *the court is entitled to expect that they will follow the law***.

> Because "plaintiffs need **not** demonstrate that there is a **'guarantee'** that their injuries will be redressed by a favorable decision," it is likely, and not merely speculative, that a declaratory judgment invalidating the existing Compact and Proposition 1A would redress the plaintiffs' injuries. *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998); *see also Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 284 U.S. App. D.C. 1, 901 F.2d 107, 117-18 (D.C. Cir. 1990).

Id. at 1108 (emphasis added). The court therefore concluded that the plaintiffs satisfied the "redressability" element of standing. On appeal, the Ninth Circuit praised this reasoning and conclusion of the district court. *See Artichoke Joe's*, 453 F.3d at 719 n. 9 ("We agree with the district court's cogent application of U.S. Supreme Court precedent regarding constitutional standing, *Artichoke Joe's,* 216 F. Supp.2d at 1100-09. . . .").

Little more needs to be said. For purposes of this motion to dismiss, the Court must presume that federal officials will follow the law and abide by an Order of this Court and enforce the law. Should that Order be entered in Plaintiff's favor, the tribal video gaming machines will be removed and the Plaintiffs injuries will be redressed.

2. *Availability of other forms or locations of gambling does not preclude redressability***.**

The federal defendants next argue that redressability cannot be established because there are other places for Plaintiffs to gamble than the Fort Hall Casino. This argument just flat ignores the facts alleged in the Amended Complaint, in Plaintiff Dotson's affidavit, and the redressabilty standards of review recited above. Redressability need not be established with certainty. A "probabilistic benefit from winning a suit' is adequate." *Family & Children's Center, Inc. v. School City*, 13 F.3d 1052, 1058 (7th Cir. 1994). Taken as true, the amended complaint and affidavit of Richard Dotson establish unequivocally that Plaintiffs gamble virtually *nowhere* else anywhere else

than Fort Hall due to its proximity and the great distance of any other casinos from their residence. But for the Fort Hall Casino, they would not have become gambling addicts and would not have suffered the tremendous financial and personal losses they ultimately suffered. Redressability has been established.

III. THE TRIBES ARE NEITHER NECESSARY NOR INDISPENSIBLE PARTIES.

The federal defendants' argument for dismissal based upon failure to join the SBT as a necessary and indispensable party suffers from the same obvious defects as the Governor's argument in its motion to dismiss. Those defects are exposed in detail in Plaintiffs' memorandum in opposition to the Governor's motion to dismiss, and is incorporated herein by this reference. (Doc.# 12, pp. 15-20). The arguments need not be restated in detail here. In summary, "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 Secretary is presumed to adequately represent a tribe's interest because of his statutory obligations toward Indian tribes. *United States v. Eberhardt,* 789 F.2d 1354, 1360 (9th Cir. 1986); *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).

Moreover, 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 v. United States,* 982 F.2d 1312, 1317 (9th Cir. 1992). A party cannot be

deemed "necessary" under Rule 19(a)(1)(2) if the absent party's claimed interest is frivolous or based a frivolous "palpably unconstitutional" statute. *Id*. *See also Andree v. Ashland County,* 818 F.2d 1306, 1313 (7th Cir. 1987). The interest of the tribes in the present case is based upon statutes that are as frivolous and "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. Also, it is uncontroverted that the Governor and SBT have failed and/or refused to comply with the decision and order of this Court and the Ninth Circuit that the compact, in order to be deemed to authorize such gaming, must be expressly amended accordingly. The Tribes have no protectible interest in such patently frivolous claims.

Finally, the SBT are not "indispensable" under Rule 19, because Knox and Dotson do not merely seek to vindicate their own rights in obtaining a money judgment, but they seek to enforce the public right to administrative compliance with federal law, namely IGRA. Their claims "transcend the private interests of the litigants and seeks to vindicate a public right." *Wilbur v. Locke,* 423 F.3d 1101, 1115 (9th Cir. 2006). The SBT there is not indispensible under Rule 19. *See also 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).

For the foregoing reasons, the federal defendants' Motion to Dismiss Plaintiffs' Amended Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 2nd day of August, 2010.

THOMSEN STEPHENS LAW OFFICES, PLLC

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