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MEMORANDUM

TO: Siletz Tribal Council
House Legislative Committee on Gambling Regulation

FROM: Craig Dorsay, Tribal Attorney

SUBJECT: State Legislative and Executive Policy Making Authority under the Indian Gaming Regulatory Act

DATE: April 19, 2023

The Indian Gaming Regulatory Act (IGRA) requires States to enter into "Compacts" with Indian tribes in order for those tribes to engage in casino-style gaming (Class III Gaming). 25 U.S.C. §2710. IGRA does not, however, contain any discussion or direction on how the State enters into a Compact, who within the State has authority to enter into an IGRA Compact, or what legal authority controls the State's action to enter into an IGRA Compact.

The Governor and certain opposition tribes wish to apply an asserted "policy" to the Siletz Tribe regarding its proposed gaming operation in Salem, Oregon. This alleged policy is referred to as the "One Casino per Tribe" policy. It is not written or formalized anywhere, as the Governor's interim Indian affairs policy advisor, Danny Santos, acknowledged. The critical legal question is – What authority does the Governor of Oregon have to develop and implement an asserted state gaming policy against an Indian tribe located in Oregon without express authority from the Oregon Legislature? Relevant case law from around the country has held that the Governor of the State has no constitutional or statutory authority to independently develop or apply "policy" regarding tribal gaming under IGRA, that only the Legislature does, and that the Governor's authority is limited to implementing policy specifically conferred by the Legislature.

First, a couple of introductory points that will help analyze and apply the relevant court decisions from around the country on this subject. Number one, the Siletz Tribe's current Class III IGRA Gaming Compact with the State of Oregon, dated September 14, 1999 and signed by then Governor John Kitzhaber, contains only the following statement regarding the Governor's legal authority to enter into the Compact: "**AND WHEREAS,** the State of Oregon is authorized to act through the Governor of the State; . . . ." Siletz IGRA Compact, p. 6 (7th Whereas Clause on page). No legal citation is given for this statement.

While IGRA is a federal statute, it does not specifically address or mandate how or under what authority the State can enter into those compacts. The relevant case law has uniformly

holds that "State law must determine whether a state has validly bound itself to a compact. (citations omitted). We agree with the district court that IGRA's very silence on this point supports the view that 'Congress intended that state law determine the procedure for executing valid compacts.'" *Santa Ana Pueblo v. Kelly*, 104 F.3d 1546, 1557-58 (10th Cir. 1997) (citing 932 F. Supp. at 1294). *See Dewberry v. Kulongoski*, 406 F.Supp.2d 1136, 1154-56 (D.Or. 2005) (determining whether Governor's entry into IGRA Gaming Compacts in Oregon is authorized by Oregon law).

There are a number of cases from different jurisdictions that have addressed the authority of a Governor to enter into a Class III Compact with an Indian tribe or tribes under IGRA. I can provide a list of those decisions upon request. All of these decisions have consistently concluded that under separation of powers principles, only the Legislature has authority to make "policy," that is to authorize something that is not currently permitted by existing state law. The Governor's authority is to execute law and policy that has been enacted by the Legislature, and the Governor's authority is limited to the specific terms of the Legislature's delegation. Since IGRA by definition authorizes Indian tribes to engage in gaming activities that are not expressly permitted by state law[a], the relevant case decisions have all required specific state legislative authorization in order for a Governor to enter into a Class III Gaming Compact under IGRA.[b] Most of the cited decisions have concluded that the Governor lacked the requisite authority under existing state law, and the State Legislatures in those states subsequently enacted legislation creating a specific Gaming Compact approval process that includes legislative involvement. *E.g.*, RCW 9.46.360 (Washington); NM ST. §11-13A-1 to -5 (New Mexico). The Washington Statute is attached for information.

In Oregon, the federal court in *Dewberry* concluded that the Oregon statute that gave the Governor authority to enter into IGRA Compacts with tribes is ORS 190.110, which allows specified State entities to enter into agreements with Indian tribes for certain purposes. Subsection (3) authorizes the Governor of the State to enter into agreements with Indian tribes in addition to state and local agencies, as follows:

> (3) With regard to an American Indian tribe, the power described in subsections (1) and (2) of this section includes the power of the Governor or the designee of the Governor to enter into agreements <u>to ensure that the state, a state agency or unit of local government does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe or members of a tribe held or granted under any federal treaty, executive order, agreement, statute, policy or any other authority</u>. Nothing in this subsection shall be construed to modify the obligations of the United

[a] For example, IGRA requires States to negotiate with tribes on any gaming activity that is authorized to be played under state law for "any purpose by any person, organization or entity." *Dewberry*, *supra*, at 1141. In Oregon, casino games such as roulette and craps are permitted only for certain charity events. *Id.* at 1151, 1153. But because Oregon law permits these gaming activities at all, Indian tribes under IGRA can operate those same games commercially. *Id.*

[b] *Clark v. Johnson*, 904 P.2d 11, 22-25 (N.M. 1995). Some of the relevant case law has held that the Governor can <u>negotiate</u> a Gaming Compact without express legislative authorization, but to execute that compact, there must be specific legislative authority. *E.g.*, *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992).

States to an American Indian tribe or its members concerning real or personal property, title to which is held in trust by the United States. (emphasis added).

The New Mexico Supreme Court addressed a similar New Mexico Joint Powers statute in *Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), holding that statute did not grant the Governor of that State authority to enter into an IGRA Compact with tribes. But the New Mexico comparable statute did not include a separate subsection authorizing the Governor to enter into agreements with tribes.

It is instructive to look more closely at the Oregon *Dewberry* decision in looking at whether the Governor of Oregon even has authority to enact an Executive Branch policy limiting Oregon tribes to one casino. The Federal Court in *Dewberry* found that the statutory language in ORS 190.110(3) - "to ensure that the state, a state agency or unit of local government does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe or members of a tribe held or granted under any federal treaty, executive order, agreement, statute, policy or any other authority" - was sufficient to grant the Governor of Oregon authority to enter into Class III Compacts with Oregon based Indian tribes because doing so protected and implemented tribal rights under IGRA. *See Dewberry* at 1155 ("The State maintains that 190.110(3) authorizes the Governor to negotiate and execute tribal-gaming compacts <u>to ensure that state or local governments do not interfere with Indian tribes' rights to conduct gaming under IGRA.</u>"), ("I thus agree with the State that the negotiation and execution of gaming compacts <u>ensure that state and local governments do not interfere with tribal gaming rights protected by federal law</u>.") (emphasis added).

This underlined language is critical in analyzing whether the alleged One Casino Per Tribe Policy adopted by Oregon Governors, assuming for the moment that it exists, is valid. As discussed above, the case law is clear that the Governor has only that authority to implement Legislative policy specifically granted by the Legislature. As the *Dewberry* federal court decision held, ORS 190.110(3) gave the Governor authority to enter into gaming agreements with tribes to ensure that the state does not interfere with tribal rights to conduct gaming under federal law. The federal Indian Gaming Regulatory Act contains no limits on the number of gaming operations a tribe may have; a number of tribes in different states operate more than one casino. The policy of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Obviously a one casino limitation does nothing to protect or enhance tribal gaming under IGRA, or to fulfill the federal policy of promoting tribal economic development, self-sufficiency or strong tribal government. A one casino per tribe policy restricts tribal gaming, economic development and self-government and self-sufficiency. There does not appear to be any statutory authority for the Governor's office to advance a one casino per tribe policy in the absence of specific State Legislative policy and authority.

Two related issues that were brought up during the Committee's March 21 Informational Hearing are relevant here. First, one of the Committee members asked the Governor's witness, Danny Santos, whether the Legislature could have an increased role in the Compact negotiation and approval process. Mr. Santos dismissed the idea, stating that it would not be practical for all 90 members of the Legislature involved in Compact negotiations with Indian tribes. This answer ignored the fact that other States have come up with intermediate models that do allow Legislative involvement, but at a practical level. As stated above, the relevant case law is unanimous that State Legislatures have the constitutional authority to set Tribal Compact policy. In at least two States.

Washington and New Mexico, the Legislatures – after courts ruled that the Governor did not have authority under existing law to unilaterally negotiate and approve tribal gaming compacts – the Legislature set up a hybrid system where the Governor's office or a state gaming commission conducted the initial negotiation of a tribal gaming compact and forwards the final draft product to a specified Legislative committee for review and approval. Once any changes required by that Committee are made and the Committee approves the Compact, it goes to the entire Legislature which then has a specified period of days to disapprove the Compact, or it is approved. I attach the Washington statute for your information.

Second, Committee members expressed some confusion about the relative volumes of State Lottery vs. tribal gaming revenue. I attach a few pages from the most recent ECONorthwest Report prepared annually for Oregon Tribes entitled "The Contributions of Indian Gaming to Oregon's Economy in 2018 and 2019." On page 38, it states that in 2019, the State Lottery made $1,120,709,280 and Oregon Tribes generated $537,725,665 in gaming revenue. The more important point reflected in the other attached pages is that the overall share of tribal gaming revenue in Oregon has been in a steady decline since 2004 as the Lottery has ramped up its VLT line game offerings, from 35.5% in 2004 to 29.6% in 2019. State Lottery gaming continues to expand as the Lottery expands the numbers of Lottery locations and VLT terminals (not to mention proposed additional Lottery gaming options such as mobile betting, which have not yet been approved) while tribal gaming revenue has been flat or even declined, and is at a competitive disadvantage because of their rural locations.

This concludes my memo.