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COA # 36130-2  
NO. 78829-4

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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EUGENE "CHIP" MUDARRI, an individual; LAKESIDE CASINO, LLC  
and C.F.S., LLC d/b/a FREDDIE'S CLUB OF FIFE,

Petitioners,

v.

THE STATE OF WASHINGTON, which is comprised of various State  
entities including, but not limited to CHRISTINE GREGOIRE, Governor  
of the State of Washington; GARY LOCKE, former Governor of the State  
of Washington, and as an individual; RICK DAY, Director of the  
Washington State Gambling Commission; KEN NAKAMURA, Director  
of the Washington State Lottery; the WASHINGTON STATE  
GAMBLING COMMISSION: Commissioners JANICE NIEMI, ALAN  
PARKER, CURTIS LUDWIG, and GEORGE ORR; and the  
WASHINGTON STATE LOTTERY COMMISSION: Commissioners  
RACHEL GARSON, CAROL KELJO, ROBERT SCARBROUGH,  
LARRY TAYLOR, and MELINDA TRAVIS,

Respondents.

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**STATE OF WASHINGTON'S RESPONSE TO PETITIONERS'  
OPENING BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERROR.....2

III. COUNTERSTATEMENT OF THE ISSUES .....2

IV. STATEMENT OF THE CASE .....3

V. STANDARDS OF REVIEW .....6

VI. ARGUMENT .....7

    A. Factual Clarifications Relevant To The Legal Issues  
    Before The Court. ....8

    B. The Tribe Is A “Necessary” And “Indispensable” Party  
    Whose Joinder Is Required By Superior Court Civil Rule  
    19.....13

        1. The Tribe Is A “Necessary” Party As Contemplated  
        By Superior Court Civil Rule 19(a).....14

        2. The Tribe Is An “Indispensable” Party As Defined  
        By Civil Rule 19(b). ....20

        3. The Petitioners’ Failure To Join The Tribe As A  
        Party Deprives The Court Of Jurisdiction And  
        Mandates Dismissal Pursuant To RCW 7.24.110. ....25

    C. Petitioners’ Legal Claims Are Unfounded And They Are  
    Not Entitled To The Relief They Request From This  
    Court. ....27

        1. Petitioners’ Erroneous Assertion Of A Statutory  
        Entitlement To Operate EST Devices Has Been  
        Made Moot By The 2006 Legislative Enactment Of  
        SSB 6613. ....27

- 2. Non-Tribal Entities And Individuals Have Never Been Legally Authorized To Possess Or Operate EST Gambling Devices In The State Of Washington.....29
- 3. The Washington State Lottery Commission Has No Duty (Or Authority) Under RCW 67.70.040(1) To Authorize Non-Tribal Entities Or Individuals To Operate EST Machines.....32
- D. The Washington And United States Constitutions Are Not Violated By Petitioners’ Legal Inability To Operate EST Machines.....33
  - 1. Substantive Due Process.....34
  - 2. Privileges and Immunities .....37
  - 3. Equal Protection .....40
- E. The Doctrine Of Equitable Estoppel Does Not Provide A Basis Upon Which Petitioners Can Be Afforded Affirmative Relief.....41
- F. The Puyallup Compact And Amendments Were Properly Executed And Are Legally And Constitutionally Valid.....43
- G. The Petitioners Are Not Entitled To Recover Attorney’s Fees And Costs In This Matter. ....50
- VII. CONCLUSION .....50

## TABLE OF AUTHORITIES

### Cases

<i>American Greyhound Racing, Inc. v. Hull</i> , 305 F.3d 1015 (9 <sup>th</sup> Cir. 2002) .....	passim
<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	38
<i>Atherton Condo Ass’n v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	7
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	34
<i>Confederated Tribes of the Chehalis Indian Reservation v. Lujan</i> , 928 F.2d 1496 (9 <sup>th</sup> Cir. 1991) .....	16, 21
<i>Conn v. Gabbert</i> , 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999).....	35, 36
<i>Dawavendewa v. Salt River Project Agric. Improvement &amp; Power Dist.</i> , 276 F.3d 1150 (9 <sup>th</sup> Cir. 2002) .....	15
<i>Dent v. West Virginia</i> , 129 U.S. 114, 121, 9 S. Ct. 231, 32 L. Ed. 623 (1889).....	36
<i>Everett v. State</i> , 99 Wn.2d 264, 661 P.2d 588 (1983).....	29, 50
<i>Fraser v. Monroe</i> , 1 Wn. App. 14, 459 P.2d 64 (1969).....	14
<i>Gildon v. Simon Prop. Group, Inc.</i> , 158 Wn.2d 483, 145 P.2d 1196 (2006).....	6, 7
<i>Glandon v. Searle</i> , 68 Wn.2d 199, 412 P.2d 116 (1966).....	26

<i>Grant County Fire Protection Dist. No. 5 v. City of Moses Lake,</i> 150 Wn.2d 791, 83 P.3d 419 (2004).....	38, 39
<i>Greaves v. Medical Imaging Systems, Inc.,</i> 124 Wn.2d 389, 879 P.2d 276 (1994).....	42
<i>Group Health Co-op. of Puget Sound v. King County Medical Soc.,</i> 39 Wn.2d 586, 237 P.2d 737 (1951).....	46
<i>Henry v. Oakville,</i> 30 Wn. App. 240, 633 P.2d 892 (1981).....	14, 26
<i>Klinke v. Famous Recipe Fried Chicken, Inc.,</i> 94 Wn.2d 255, 616 P.2d 644 (1980).....	42
<i>Larson v. Seattle Popular Monorail Auth.,</i> 156 Wn.2d 752, 131 P.3d 892 (2006).....	34
<i>Makah Indian Tribe v. Verity,</i> 910 F.2d 555 (9 <sup>th</sup> Cir. 1990) .....	passim
<i>Marriage of Johnson,</i> 96 Wn.2d 255, 634 P.2d 877 (1981).....	34
<i>Mashantucket Pequot Tribe v. Connecticut,</i> 913 F.2d 1024 (2d. Cir. 1990), <i>cert denied</i> , 499 U.S. 975 (1991).....	11
<i>Mikhail Kramarevcky v. The Dep't of Social and Health Services,</i> 122 Wn.2d 738, 863 P.2d 535 (1993).....	41
<i>Panzer v. Doyle,</i> 271 WI.2d 295, 680 N.W.2d 666 (2004).....	45
<i>Philippides v. Bernard,</i> 151 Wn.2d 376, 88 P.3d 939 (2004).....	41
<i>Provident Tradesmens Bank &amp; Trust Co. v. Patterson,</i> 390 U.S. 102, 88 S. Ct. 733, 19 L. Ed.2d 936 (1968).....	23

<i>Rumsey Indian Rancheria of Wintun Indians v. Wilson</i> , 41 F.3d 421 (9 <sup>th</sup> Cir. 1994), <i>amended</i> , 64 F.3d 1250 (9 <sup>th</sup> Cir. 1994), and 99 F.3d 321 (9 <sup>th</sup> Cir 1996), <i>cert. denied, sub nom</i> .....	11
<i>Shermoen v. United States</i> , 982 F.2d 1312 (9 <sup>th</sup> Cir. 1992) .....	16, 17, 21
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003) .....	7
<i>State v. Blilie</i> , 132 Wn.2d 484, 939 P.2d 691 (1997).....	35
<i>Sycuan Band of Mission Indians v. Wilson</i> , 521 U.S. 1118, 117 S.Ct. 2508 (1997).....	11
<i>Tift v. Professional Nursing Services</i> , 76 Wn. App. 577, 886 P.2d 1158 (1995).....	15
<i>Treyz v. Pierce County</i> , 118 Wn. App. 458, 76 P.3d 292 (2003).....	15, 26
<i>Wichita and Affiliated Tribes of Oklahoma v. Hodel</i> , 788 F.2d 765, 744 (D.C. Cir. 1986).....	17, 22
<i>Williams v. Poulsbo Rural Tel. Ass'n</i> , 87 Wn.2d 636, 555 P.2d 1173 (1976) .....	14, 26
<i>Xieng v. Peoples Nat'l Bank</i> , 120 Wn.2d 512, 531, 844 P.2d 389 (1993).....	15

**Statutes**

25 U.S.C. § 2701.....	2, 3, 4, 46
25 U.S.C. § 2702.....	22
25 U.S.C. § 2703 (4)(A).....	8, 9
25 U.S.C. § 2703 (4)(B).....	9

25 U.S.C. § 2705.....	22
25 U.S.C. § 2710.....	49
25 U.S.C. § 2710 (b)(2)(B)(i)-(v) .....	23
25 U.S.C. § 2710 (d).....	8
25 U.S.C. § 2710 (d)(1)(B).....	11
RCW 7.24.110 .....	2, 6, 13, 25, 27
RCW 9.46 .....	29, 45
RCW 9.46.291 .....	30
RCW 9.46.360 .....	45, 46
RCW 67.70 .....	passim
RCW 67.70.040 .....	passim
RCW 67.70.040 (1).....	30, 32
RCW 67.70.040 (1)(a) .....	13, 28, 30
RCW 67.70.040 (2).....	30
RCW 67.70.040 (f) .....	30
RCW 67.70.042 .....	30
RCW 67.70.210 .....	30

**Other Authorities**

H.B. 1948, 58 <sup>th</sup> Leg., Reg. Sess., (Wash. 2003) .....	12
H.B. 2282, 58 <sup>th</sup> Leg., 1 <sup>st</sup> Sp. Sess. (Wash. 2003).....	12
Initiative 892 (2004) .....	13, 28

Pub. L. 109-224, (May 18, 2006), (120 Stat.) 376.....	8, 50
Substitute S.B. 6613, § 3, Chap. 290, 59 <sup>th</sup> Leg., Reg. Session., (2006).....	passim

**Rules**

Fed. R. Civ. P. 19.....	15
Fed. R. Civ. P. 19 (b).....	20, 21
RAP 2.4 (a)(2).....	13, 14
RAP 4.2.....	1

**Constitutional Provisions**

Const. art. I, § 12.....	37, 39
Const. art. II, § 24.....	44
Const. art. VII, § 1.....	47
Const. art. VIII, § 5.....	45

## I. INTRODUCTION

The Respondents, the State of Washington, Governor Christine Gregoire, former Governor Gary Locke, the Washington State Gambling Commission and the Washington State Lottery Commission, and their respective Directors and Commissioners (collectively the “State”), ask the Court to affirm the decision of the trial court granting the State summary judgment in this matter and to deny the Petitioners’ Petition For Direct Review. Alternatively, because the Petitioners have failed to demonstrate that this cause presents issues appropriate for direct review under Rules of Appellate Procedure (RAP) 4.2, the State respectfully requests that the Court transfer this case to Division II of the Washington State Court of Appeals for consideration.

This case arises out of a declaratory judgment action filed by Eugene “Chip” Mudarri, Lakeside Casino, LLC, and C.F.S., LLC (collectively “the Petitioners” or “Petitioner Mudarri”) seeking a declaration that Washington’s Lottery Act, Chapter 67.70 RCW, requires the State to authorize the Petitioners to operate their own private lottery system through particular electronic gambling devices that are sometimes referred to as “electronic scratch ticket” machines. These machines are similar to devices that the Puyallup Tribe of Indians (the “Puyallup Tribe” or “the Tribe”) operates pursuant to a Federal Indian Gaming Regulatory

Act, 25 U.S.C. § 2701 *et seq.*, Compact with the State of Washington. In the alternative, the Petitioners also sought a declaratory judgment that the Tribe's Indian Gaming Regulatory Act compact with the State is unlawful and, accordingly, invalid. The trial court initially dismissed portions of Petitioners' claims based on their failure to join a necessary and indispensable party, the Puyallup Tribe, and then rejected the remainder of the Petitioners' contentions and granted summary judgment to the State.

For the reasons explained below, the trial court's decision in this matter should be affirmed.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in failing to completely dismiss this matter based on the Petitioners' failure to join a necessary and indispensable party as required by Superior Court Civil Rule 19.

## **III. COUNTERSTATEMENT OF THE ISSUES**

1. Does the Petitioners' legal inability to join the Tribe, a "necessary" and "indispensable" party under Superior Court Civil Rule (CR) 19 and an "interested" and "affected" party under the Uniform Declaratory Judgments Act, RCW 7.24.110, bar them from proceeding with their declaratory judgment action against the State? (Respondents' Assignment of Error.)

2. Are the Petitioners' statutory claims moot, given the Legislature's enactment of SSB 6613, Chapter 290, Laws of 2006 (effective June 7, 2006), which amends RCW 67.70.040 to require an affirmative vote of a supermajority of both houses of the Legislature before the Washington State Lottery Commission can be authorized to offer "electronic scratch ticket" games?

3. Are the Washington State Lottery Commission and the Washington State Gambling Commission statutorily authorized and required to permit private, non-governmental entities and individuals to operate their own personal lotteries through the use of "electronic scratch ticket" machines?

4. Is there a "fundamental right" under the United States Constitution or the Washington State Constitution for private, non-governmental entities and individuals to operate personal lottery systems and to do so through the use of "electronic scratch ticket" machines?

#### **IV. STATEMENT OF THE CASE**

The Puyallup Tribe is one of twenty-nine federally recognized Indian tribes in the State of Washington. CP 454. Twenty-seven of those tribes, including the Puyallup Tribe, have entered into federally approved agreements with the State of Washington pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, ("IGRA") and

state law, Chapter 9.46 RCW. CP 448-51, 454. Tribes that have entered into such agreements, designated in the Act as “compacts,” are legally authorized to offer various specifically agreed upon forms of casino-style gambling activities to the public. 25 U.S.C. § 2701 *et seq.* Additionally, tribes that have entered into compacts with the State of Washington are, as a result of the combined operation of state and federal statutes and interpretive case law decisions, specifically allowed in those compacts to offer gambling devices that are known as “Tribal Lottery System” (“TLS”) or “electronic scratch ticket” (“EST”) machines as one of their agreed upon forms of permitted gambling activities. CP 447-48. Under current Washington law, as interpreted and enforced by the agencies specifically charged with regulating gambling in the State, only Indian tribes with approved IGRA compacts can lawfully possess and/or operate TLS machines in Washington. CP 454. A significant portion of the total gambling revenue produced annually in the State of Washington is generated by the operation of TLS machines. CP 449.

Petitioners, the owners and operators of a non-tribal, house-banked cardroom, have filed the instant lawsuit seeking to have the court issue a declaratory judgment against the State of Washington and various current and former state officials. The Petitioners allege that the currently existing, federally approved compact between the Tribe and the State,

which includes an agreed upon provision that authorizes the Tribe to operate TLS machines at its specified gambling facilities (CP 449), violates various provisions of state and federal law and must be invalidated by this Court. In the event that the Court is not persuaded that the Compact is illegal, Petitioners seek, in the alternative, to have this Court declare that the Washington State Lottery Commission is also required, by statute, to operate electronic scratch ticket machines similar to the TLS devices and, further, that the Lottery Commission and the Washington State Gambling Commission must allow the Petitioners to operate a private lottery utilizing the machines at Petitioners' house-banked cardroom, in exchange for which Petitioner Mudarri has previously offered to agree to share a portion of the Petitioners' EST machine gambling revenue with the State. CP 454. To date, the files and records in this matter reflect that the Petitioners have not joined, and apparently have not attempted to join, the Puyallup Tribe, which is one of only two parties to the challenged IGRA Compact and its principal beneficiary, as a party to this cause of action. Similarly, the files and records in this matter give no indication that the Tribe is willing to waive the sovereign immunity from suit in state court that it possesses by virtue of its existence as a federally recognized Indian tribe. CP 2618-37.

On December 21, 2005, in response to the State's motion to dismiss this cause of action based on the Petitioners' failure to join the Puyallup Tribe, a necessary and indispensable party pursuant to CR 19 and RCW 7.24.110, the trial court entered an Order dismissing portions of the case, but preserving other claims for trial. CP 2745-47. Subsequently, on May 18, 2006, after previously hearing cross motions for summary judgment, the trial court issued a written Opinion holding that the State was entitled to summary judgment on all the claims remaining before the court. CP 2725-31. Finally, on July 21, 2006, the court entered an Order, consistent with its previously issued written Opinion, granting summary judgment in favor of the State. CP 2750-59. Petitioners now seek to have this Court grant their Petition for Direct Review of the above-mentioned trial court decisions and to reverse that court's rulings.

## V. STANDARDS OF REVIEW

### A. Dismissal For Failure To Join An Indispensable Party.

A trial court's dismissal of an action for failure to join an indispensable party under CR 19 is reviewed for an abuse of discretion, except that any legal conclusions underlying the ruling are reviewed de novo. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.2d 1196 (2006). A court abuses its discretion when its decision is manifestly unreasonable, is based on untenable grounds, or is made for untenable

reasons. *Id.* at 494. An abuse of discretion exists if the court relies on unsupported facts, takes a view no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.*

**B. Review Of Order On Summary Judgment.**

The standard of review of a trial court's order on summary judgment is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The appellate court performs the same inquiry as the trial court. *Id.* Summary judgment is appropriate if it is established that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). The parties prepared and submitted a Stipulation of the Parties to Agreed Facts for use by the trial court in its consideration of this matter. CP 442-1859.

**VI. ARGUMENT**

In support of their Petition to this Court, Petitioners' brief contains a number of factual assertions and legal conclusions that are central to their arguments, but which the State submits are inaccurate, incomplete, or erroneous. The State will, below, address and attempt to clarify those matters that it believes to be potentially germane and legally relevant to the Court's resolution of this matter. Additionally, certain important statutory and factual matters upon which the parties had previously agreed

have, subsequent to the trial court's decisions in this matter, changed in significant ways and those changes will also be addressed in this response.

**A. Factual Clarifications Relevant To The Legal Issues Before The Court.**

The Emerald Queen Casino and Hotel at Fife (hereinafter "EQC") is a Class III gaming facility owned and operated by the Puyallup Tribe on what was previously "fee land" in the city of Fife, Washington. CP 451-52. Subsequent to the trial court's decisions in this matter, the land on which the EQC is located was, by act of Congress, taken into trust by the United States Government for the benefit of the Puyallup Tribe and it is currently held in "trust status." Pub. L. 109-224, (May 18, 2006), (120 Stat.) 376. The EQC is operated by the Tribe pursuant to a federally approved IGRA Compact with the State of Washington and the trust land on which it is located is entirely within the external boundaries of the Puyallup Indian Reservation. CP 451-52. IGRA specifically provides that federally recognized tribes with Class III compacts may conduct gaming activities on lands that are within the boundaries of their reservation, regardless of the fee or trust status of the property. 25 U.S.C. § 2710(d), 25 U.S.C. § 2703 (4)(A). Tribal gaming facilities that are not located entirely within the boundaries of a reservation are required by IGRA to be located only on trust land, a clear indication that Congress was cognizant

of the distinctions that it was creating when it enacted that section of the statute. 25 U.S.C. § 2703(4)(B). Similarly, IGRA does not require that a tribe demonstrate jurisdiction over the land on which gaming activities are conducted when that land is entirely within the boundaries of the tribe's reservation. 25 U.S.C. § 2703(4)(A). Again, this stands in stark contrast with other provisions of IGRA that do require such a demonstration of jurisdiction over non-reservation lands before a compact can be approved by the United States Secretary of the Interior. 25 U.S.C. § 2703(4)(B). Moreover, the Puyallup Land Claim Settlement Agreement ("LCSA"), which was approved in 1988, actually predates the enactment of IGRA. CP 446-47. Obviously, the State of Washington did not, and could not, have any IGRA Class III gaming compacts with the Puyallup Tribe or any other tribe prior to IGRA's enactment and, accordingly, the LCSA makes no mention of IGRA or tribal gaming in any of its provisions. CP 871-1014. Significantly, no provision of the LCSA attempts to extinguish, diminish, or otherwise alter the previously surveyed, exterior boundaries of the Puyallup Indian Reservation. CP 871-1014.

The Tribe, pursuant to Appendix X and other provisions of its federally approved IGRA Compact, is authorized to, and does, operate TLS machines at its EQC gaming facility. CP 449, 628-777. TLS

machines are hybrid devices that operate by combining elements of two games that the Washington State Lottery Commission is statutorily authorized to, and does, offer to the public. The first game offered by the State Lottery is the traditional paper or cardboard “scratch ticket,” on which certain combinations of various pre-printed numbers or symbols will result in the awarding of a designated prize to a player who buys the ticket, sight unseen, from a finite set of randomly mixed tickets produced for that particular promotion. The second game is the state’s “Lotto” or “numbers” game, which involves a player selecting, or having selected for him, a series of numbers which will be deemed a winning entry if they match other numbers selected at random by a device operated by the Washington State Lottery. Once a player has selected and indicated his desired numbers, “Lotto tickets” memorializing that choice are printed and distributed to the player by an electronic terminal. As a consequence of legal decisions resulting from the “Friendly Lawsuit,” to which the State and the Tribe were parties, and other federal court cases interpreting IGRA’s mandate that tribal gaming must be allowed in “a State that permits such gaming for any purpose by any person, organization, or entity....” (emphasis added), federally recognized Indian tribes in Washington are now entitled to negotiate compacts that include “hybrid” TLS machines that combine electronic facsimiles of “scratch tickets” with

the electronic delivery element of the “Lotto” game. 25 U.S.C. § 2710(d)(1)(B); CP 448-49, 459-93, 571-88, 702-54. *See also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d. Cir. 1990), *cert denied*, 499 U.S. 975 (1991); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9<sup>th</sup> Cir. 1994), *amended*, 64 F.3d 1250 (9<sup>th</sup> Cir. 1994), and 99 F.3d 321 (9<sup>th</sup> Cir 1996), *cert. denied, sub nom. Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118, 117 S.Ct. 2508 (1997). The Washington State Lottery is not currently authorized to, and does not, operate TLS (or EST) machines which, as noted above, are the creation of IGRA and interpretive federal court decisions.

Subsequent to the commencement of this lawsuit, which was filed in January, 2005, the Washington State Lottery did briefly operate, directly and through licensed retailers, a “scratch ticket” promotion known as the “zip” game that was sold through a vending machine. CP 450, 1530-89, 1857-59. The paper tickets dispensed from the vending machines could be “played” by matching numbers printed on the ticket to those on a “bingo card” that was also printed on the ticket, or the ticket could be physically reinserted into a bar code reader that would indicate whether the ticket was a winner or loser by words displayed on an LED (light emitting diode) screen. CP 450, 1530-89, 1857-59. The Lottery Commission began offering the “zip” game promotion on July 16, 2005,

and, upon concluding that elements of the game exceeded the agency's current statutory authority, permanently terminated operation of the game on October 29, 2005. CP 2662. Absent amendment of its existing statutory authority, the Washington State Lottery Commission does not intend to offer the "zip" game or a similar game in the future. *Id.* Moreover, it should be noted that there is no evidence in the record to indicate that the Petitioners in this matter ever applied to become licensed retailers of the "zip" game or of any other game that is actually operated or approved by the Washington State Lottery Commission. To the contrary, the only evidence before the Court is that Petitioners' sole desire is to operate TLS-like EST machines; a device that the Lottery Commission has never operated and has consistently maintained cannot currently be lawfully possessed and/or operated by non-tribal entities or individuals.

Petitioners continue to seek to be authorized to offer EST machines, and contend that they have a right to do so under current law, in spite of the fact that the Legislature has twice considered and failed to pass proposed legislation that would have authorized the operation of such devices by non-tribal entities. H.B. 1948, 58<sup>th</sup> Leg., Reg. Sess., (Wash. 2003); H.B. 2282, 58<sup>th</sup> Leg., 1<sup>st</sup> Sp. Sess. (Wash. 2003) of the Washington Legislature. Moreover, Petitioners' contentions also ignore the fact that the people of Washington, even more recently, overwhelmingly rejected

an initiative in November, 2004, that specifically attempted to amend the existing provisions of Chapter 67.70 to allow the Washington State Lottery and its licensed retailers to offer electronic scratch ticket machines, which is exactly the form of relief that the Petitioners now seek from this Court. Initiative 892 (2004). And finally, in its 2006 Session, the Washington State Legislature passed legislation amending RCW 67.70.040(1)(a) specifically to make it unmistakably clear that the Washington State Lottery Commission has no authority to authorize electronic scratch ticket gaming and that the Petitioners' statutory claims, which were erroneous even before the passage of the 2006 legislation, are now moot. SSB 6613, Chapter 290, Laws of 2006 (effective June 7, 2006); RCW 67.70.040 (1)(a).

**B. The Tribe Is A “Necessary” And “Indispensable” Party Whose Joinder Is Required By Superior Court Civil Rule 19.**

As indicated above, on December 21, 2005, the trial court partially granted and partially denied the State's motion to dismiss this cause of action based on the Petitioners' failure to join the Puyallup Tribe, a “necessary” and “indispensable” party pursuant to CR 19 and an “interested” and “affected” party under RCW 7.24.110. Accordingly, although ultimately granted summary judgment in its favor, the State, pursuant to RAP 2.4(a)(2), assigns error to and seeks review of that portion of the trial court's decision that partially denied the State's motion

to fully and finally dismiss this cause based on the Petitioners' failure to join the Puyallup Tribe as a party to this matter. Under RAP 2.4 (a)(2), it is necessary and appropriate for this Court to review those actions in the proceeding below which, if perpetuated or repeated on remand, would constitute error prejudicial to the State. *Fraser v. Monroe*, 1 Wn. App. 14, 459 P.2d 64 (1969). Such is the case in the matter.

**1. The Tribe Is A “Necessary” Party As Contemplated By Superior Court Civil Rule 19(a).**

The Petitioners have a mandatory duty under Civil Rule 19 of the Washington Rules for Superior Court to join all necessary and indispensable parties to the declaratory judgment action that they have brought before the Court. *Williams v. Poulsbo Rural Tel. Ass'n*, 87 Wn.2d 636, 643-44, 647-78, 555 P.2d 1173 (1976); *Henry v. Oakville*, 30 Wn. App. 240, 243-47, 633 P.2d 892 (1981). Failure to join such parties mandates denial of the declaratory judgment sought and dismissal of the action. *Williams*, 87 Wn.2d at 643.

In analyzing whether a party is “indispensable” to an action pursuant to CR 19, a court must first determine whether the party is “necessary”. Civil Rule 19(a) states, in pertinent part, that a party is “necessary” to an action if:

- (1) in his absence complete relief cannot be accorded among those already parties, or
- (2) he claims an interest relating to the subject of the action and is so situated that

the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of this claimed interest....

*See, Treyz v. Pierce County*, 118 Wn. App. 458, 462-63, 76 P.3d 292 (2003). While the reported Washington cases have apparently not had occasion to interpret and analyze CR 19 in the context of a fact pattern closely approximating that currently before this Court, Washington's Civil Rule 19 is modeled after and, in fact, uses essentially the same language as Federal Rule of Civil Procedure 19. In such circumstances, Washington courts will consider federal authority construing a similar federal provision to be persuasive. *Tift v. Professional Nursing Services*, 76 Wn. App. 577, 583, 886 P.2d 1158 (1995), *citing Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 531, 844 P.2d 389 (1993) The Ninth Circuit Court of Appeals has on several occasions analyzed the proper application of Fed. R. Civ. P. 19 in cases involving Indian tribes not made party to actions that involved potential impacts to the tribes' legal interests. *See e.g., American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9<sup>th</sup> Cir. 2002) (tribal interest in entering new, renewed, or modified gaming compacts with the State of Arizona); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9<sup>th</sup> Cir. 2002) (tribal interest in giving employment preference to qualified members of tribe);

*Shermoen v. United States*, 982 F.2d 1312 (9<sup>th</sup> Cir. 1992) (tribal interest in division of reservation land); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9<sup>th</sup> Cir. 1991) (tribal interest in representation in tribal negotiations with U.S. Government); *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9<sup>th</sup> Cir. 1990) (tribal interest in allocation of treaty fishing rights).

Application of the first prong of CR 19(a) requires making a fact specific inquiry to determine the extent of relief possible in the absence of the nonjoined party. The question is not whether relief is available to the absent party; but whether complete relief is possible for the joined parties without joining the absent party. *Makah Indian Tribe*, 910 F.2d at 558. For example, in *Makah*, the court upheld dismissal for failure to join an indispensable party in a case involving the allotment of fishing rights. The court held that the other tribes who were parties to the treaty in question were indispensable as their fishing rights would necessarily be impacted by attempting to accord complete relief to the Makah tribe. Similarly, in the case currently before this Court, the Tribe's TLS gaming rights would necessarily be impacted by attempting to accord the Petitioners complete relief by granting either of the remedies being sought, namely: 1) complete voiding of the Tribe's right to conduct TLS gaming under its federally approved IGRA Compact with the State; or 2) extinguishment of the

Tribe's currently exclusive, and admittedly valuable, right (co-extensive with that of the other tribes that have entered into IGRA compacts) to conduct TLS gaming under the State's existing interpretation of its relevant statutes and the requirements of the decision in the "Friendly Lawsuit." CP 448-49, 2618-37.

Analysis of the second prong of CR 19(a) mandates making several additional fact specific inquiries. Initially, an analysis of the second prong begins with an inquiry into whether or not an absent party has a claim to a legally protected interest at issue in the action. *Id.* If the court answers that question in the affirmative, then it must also answer two related, but separate, questions: First, if "a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit." *Id.* In analyzing the "impairment" question, it should be noted that various cases have held that impairment may be minimized if the absent party is adequately represented in the suit by a joined party. For instance, in certain circumstances, the United States, when joined as a party, may be able to adequately represent a nonjoined tribe when there is no conflict between the interests of the United States and that tribe. *Makah Indian Tribe*, 910 F.2d at 558, *citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 744 (D.C. Cir. 1986); *Shermoen*, 982 F.2d at 1318. However, in a recent case

challenging the validity of another state's IGRA compacting process, it was specifically held that a governor cannot adequately represent the interests of nonjoined tribes, as the states and tribes have often been adversaries in disputes over gambling and the state does not owe a trust duty to a tribe similar to the duty owed by the United States. *American Greyhound Racing, Inc., supra.* Second, the court must also determine whether a party already before the court may be subjected to a substantial risk of incurring multiple or inconsistent obligations by reason of the nonjoined party's claimed interest in the matter at issue. For example, in *Makah*, the court concluded that the government could be subject to additional lawsuits and inconsistent rulings if the Makah Tribe were awarded fishing rights that impacted the rights of other non-party tribes. *Makah Indian Tribe*, 910 F.2d at 559.

Application of the foregoing criteria to the instant case leads to the conclusion that the Puyallup Tribe clearly has a legally protected interest at issue in this action. As noted above, the Tribe has: 1) a federally approved IGRA Compact with the State that specifically authorizes the Tribe to conduct TLS gaming; and 2) the benefit of clearly articulated legal interpretations by the relevant, authorized regulatory agencies that state law, as construed by the federal court in the "Friendly Lawsuit," operates in conjunction with IGRA to allow tribal TLS gaming, but

prohibits the possession and/or operation of TLS or EST gaming machines by non-tribal interests. Further, the alternative forms of relief requested by the Petitioners, i.e., either voiding of the Tribe's IGRA Compact or elimination of the valuable legal exclusivity currently afforded tribal TLS gaming by the existing interpretations of state law, would seriously impair or impede that interest. Moreover, the currently joined Respondents in this cause of action, i.e., the State and various state officials, are exactly the type of parties that the court in *American Greyhound Racing, Inc.*, *supra*, made clear could not adequately represent the interests of nonjoined Indian tribes.

Additionally, if, in the absence of the Tribe, this Court entered a declaratory judgment granting the Petitioners either of the alternative forms of relief they request, the State would be subjected to a substantial risk of further litigation by the Tribe, as well as other Washington tribes with IGRA compacts, to enforce either the terms of their Compact or the TLS/EST gaming exclusivity currently afforded the Tribe by the existing interpretations of the relevant state statutes, IGRA, and federal case law. Such litigation, if decided adversely to the State, would leave it subject to "double, multiple, or otherwise inconsistent obligations" by reason of the Tribe's assertion of its interest in the subject matter of this action.

CR 19(a)(2)(B).

**2. The Tribe Is An “Indispensable” Party As Defined By Civil Rule 19(b).**

Once a court has concluded that an absent party is necessary to an action, the analysis then shifts to determining whether or not the absent party is “indispensable.” The court must determine whether, “in equity and good conscience,” a cause of action can continue without joinder of the absent party or if it should be dismissed. CR 19(b). In determining whether a party is “indispensable,” the court looks to the following factors:

(1) to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person’s absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). Again, Civil Rule 19(b) is modeled on Fed. R. Civ. P. 19(b) and, in the absence of reported Washington cases considering a closely analogous fact pattern to that before the Court, it is appropriate to look for guidance to federal cases that have applied Fed. R. Civ. P. 19 (b). The Ninth Circuit Court of Appeals and other federal courts have, on numerous occasions, noted that, due to the doctrine of sovereign immunity, Indian tribes cannot be joined in a state court action absent an express waiver of that immunity. *See e.g., American Greyhound Racing, Inc.*, 305 F.3d at

1025; *Shermoen*, 928 F.2d at 1317; *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499; *Makah Indian Tribe*, 910 F.2d at 560. As a result, some federal courts have held that, when a tribe is a necessary party to a lawsuit, it is not necessary to perform the balancing of interests analysis otherwise required under Fed. R. Civ. P. 19 (b) and that the case must be dismissed unless the tribe is willing to expressly waive its sovereign immunity. *American Greyhound Racing, Inc.*, 305 F.3d at 1025. However, the Ninth Circuit has thus far chosen to continue to perform the CR 19(b) analysis in such cases. *Id.*; *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499.

In weighing the first factor identified in CR 19(b), courts look to the same analysis done under CR 19(a). Once a court has determined that a party is necessary, a judgment rendered in that party's absence will, by definition, be prejudicial. The question before the court thus becomes whether, absent joinder of the necessary party, the prejudice is severe enough to warrant dismissal. Again, the Ninth Circuit has held that, "as in Rule 19(a)(2), the presence of a representative may lessen prejudice." *Makah Indian Tribe*, 910 F.2d at 560. As noted above, however, the State cannot act as a representative of a tribe, because of the lack of a trust relationship between the two entities. Additionally, it has also been held that, "amicus status is not sufficient to satisfy this test, however, nor is

ability to intervene if it requires waiver of immunity.” *Id.* at 560, *citing Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 775.

In the present case, the Tribe, and potentially every other tribe in Washington that has entered a compact with the State authorizing the possession and operation of TLS gaming devices, has a significant interest in whether Petitioners’ non-tribal cardroom is permitted to conduct EST gaming. In passing the Indian Gaming Regulatory Act, Congress declared that its primary purpose was “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.” *American Greyhound Racing, Inc.*, 305 F.3d at 1018, *citing* 25 U.S.C. § 2702. IGRA also mandates that tribal ordinances regulating gaming must be approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2705.

IGRA specifically provides that the Chairman of the National Indian Gaming Commission shall approve ordinances if they provide that:

Net revenues from any tribal gaming are not to be used for purposes other than (i) funding tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

25 U.S.C. § 2710 (b)(2)(B)(i)-(v). If non-tribal businesses are permitted to begin participating in EST gaming, the loss of revenue to the tribes would be substantial. CP 2618-37. That loss of revenue would have a serious and detrimental impact on the Puyallup Tribe, given the purposes for which IGRA requires that tribal gaming revenue must be used. CP 2618-37. The alternative relief requested by Petitioners, invalidating the Tribe's federally approved IGRA Compact, would likely have an even more substantial impact on the Tribe, as it would completely revoke the Tribe's right to operate TLS gaming devices for the benefit of the Tribe.

Application of the second factor listed in CR 19(b) requires an analysis of whether shaping of relief by the court could minimize prejudice to the absent party. The United States Supreme Court has encouraged shaping relief to avoid dismissal. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111-12, 88 S. Ct. 733, 738-39, 19 L. Ed.2d 936 (1968). In this case, however, there is no possible way to shape the relief to minimize its impact on the Tribe. The only relief sought by, and the only relief possible for, the Petitioners is the opening of EST gaming to non-tribal interests or the revoking of the Tribe's own right to conduct TLS gaming. As noted above, either form of relief would inevitably have a substantial impact on the Tribe and would severely prejudice its interests.

The third factor listed in CR 19(b), whether an adequate remedy can be provided to a party in the absence of the non-joined party, also requires an analysis of the potential remedies. If a court can provide an adequate remedy, even if that remedy is not complete, then an action may proceed. *Makah Indian Tribe*, 910 F.2d at 560. Here, however, the relief sought by the Petitioners is issuance of a declaratory order that either voids the Tribe's right to conduct TLS gaming or eliminates the current exclusivity of that right. For the reasons noted above in connection with the analysis of the second prong of CR 19(a), adequate relief can not be provided in this matter without joinder of the Tribe.

The fourth and final factor listed in CR 19(b), whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder, is analyzed and weighed differently by the courts when the party not joined is an Indian tribe that has not expressly waived its sovereign immunity. In such cases, a tribe cannot be joined as a defendant and, therefore, dismissal is the only possible result. The Ninth Circuit has, nonetheless, consistently held that "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *American Greyhound Racing, Inc.*, 305 F.3d at 1025, citing *Dawavendewa*, 276 F.3d 1150. Therefore, the Petitioners' lack of an alternative remedy in the case before this Court does not outweigh the Tribe's right to rely upon the

rights afforded to it by both the doctrine of sovereign immunity and the requirements of CR 19.

Based on the foregoing authority and analysis, application of the four CR 19(b) factors identified above clearly weighs in favor of the Puyallup Tribe being held to be an indispensable party to the cause of action currently before this Court. As such, the failure and/or inability of the Petitioners to join the Tribe as a party in this matter requires, “in equity and good conscience,” that this case be dismissed. CR 19(b).

**3. The Petitioners’ Failure To Join The Tribe As A Party Deprives The Court Of Jurisdiction And Mandates Dismissal Pursuant To RCW 7.24.110.**

The Petitioners seek relief in this matter based on assertions that they are entitled to bring this cause of action under the terms of the Uniform Declaratory Judgments Act, RCW 7.24 *et seq.* That Act delineates the conditions upon which courts are authorized to render declaratory judgments and specifically provides, in pertinent part, that:

**When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.**

RCW 7.24.110. (Emphasis added.) As the above quoted language makes clear, the mandate to join interested parties that is set forth in RCW 7.24.110 is even more absolute than the strictures of CR 19.

RCW 7.24.110 expressly prohibits the granting of any declaratory judgment that affects the interests and rights of parties that have not been joined in the proceeding. Accordingly, this Court has long made clear that where parties whose rights would be affected and whose interests would be prejudiced are not joined, a declaratory judgment cannot be issued and the case must be dismissed. *Williams*, 87 Wn.2d at 643. Moreover, our courts have explicitly held that, “**The failure to join an affected party in a declaratory judgment action relates directly to the trial court’s jurisdiction.**” (Emphasis added.) *Henry*, 30 Wn. App. at 243, *citing Williams*, 87 Wn.2d at 643; *see also Treyz*, 118 Wn. App. at 463 (“the trial court lacks jurisdiction if the necessary parties are not joined.”) (*citing Henry*, 30 Wn. App. at 243, 246.) Similarly, the Court has held that declaratory judgments entered against nonjoined parties are not binding. *Glandon v. Searle*, 68 Wn.2d 199, 202-03, 412 P.2d 116 (1966). Accordingly, where the rights or interests of nonjoined parties may be affected by a declaratory judgment, those parties must either be joined or the case must be dismissed. *Id.*

Based on the foregoing arguments and authorities, the State submits that the Tribe has a substantial legal interest in the outcome of this case. Without joinder of the Tribe, complete relief cannot be afforded by a declaratory judgment of this Court. The Tribe is an indispensable party

to this action and a judgment rendered in its absence would prejudice its current right to operate TLS gaming devices at tribally owned casinos and/or detrimentally affect the existing, valuable exclusivity of that right. There is no way to shape the relief requested that could lessen or avoid that prejudice. Finally, the Tribe's well established governmental right to sovereign immunity from suit in state court precludes its joinder in this action. Accordingly, the State respectfully submits that pursuant to CR 19 and RCW 7.24.110 this case must, in the interests of equity and good conscience, be dismissed. Additionally, the State also respectfully submits that the Petitioners' failure and/or inability to join the Tribe as a party in this actions deprives the Court of jurisdiction to award the relief requested and that pursuant to RCW 7.24.110, this cause of action should be dismissed.

**C. Petitioners' Legal Claims Are Unfounded And They Are Not Entitled To The Relief They Request From This Court.**

**1. Petitioners' Erroneous Assertion Of A Statutory Entitlement To Operate EST Devices Has Been Made Moot By The 2006 Legislative Enactment Of SSB 6613.**

Petitioner Mudarri's statutory claims are moot, given the Legislature's recent enactment of § 3 of SSB 6613, Chapter 290, Laws of 2006 (effective June 7, 2006), which amends RCW 67.70.040 to require an affirmative vote of a supermajority of both houses of the Legislature before the Washington State Lottery Commission can be authorized to

offer “electronic scratch ticket” games. RCW 67.70.040, among other things, defines and limits the extent of the Washington State Lottery Commission’s authority to offer particular types of lottery games to the public. In enacting SSB 6613, § 3, the Legislature intentionally and unmistakably clarified the existing provisions of RCW 67.70.040 (1)(a) by adding the following amendatory language to that provision:

**(a) An affirmative vote of sixty percent of both houses of the legislature is required before offering any game allowing or requiring a player to become eligible for a prize or to otherwise play any portion of the game by interacting with any device or terminal involving digital, video, or other electronic representations of any game of chance, including scratch tickets, pull-tabs, bingo, poker or other cards, dice, roulette, keno, or slot machines.**

(Emphasis added.) Moreover, the Substitute Senate Bill Report for SSB 6613 reflects the Legislature’s awareness of the instant litigation by noting:

The state is currently a defendant in a trial pending in Thurston County Superior Court in which the plaintiff has argued that existing state law empowers the Lottery Commission to authorize electronic gambling devices similar to the electronic scratch ticket machines described in Initiative 892 and currently offered at Class III tribal casinos.

Substitute Senate Bill Report, SSB 6613 (2006), at p. 1. The Final Bill Report for the then-enacted SSB 6613 then goes on to summarize the intended effect of the above-quoted portion of that legislation in the following manner:

An affirmative vote of 60 percent of both houses of the Legislature is required before the Lottery Commission may offer any lottery game that allows or requires a player to use a device that electronically replicates any game of chance, including electronic scratch tickets.

Final Bill Report, SSB 6613 (2006), at p. 1. By its actions in enacting the above-quoted clarifying statutory amendment to RCW 67.70.040, the Legislature has once again clearly evidenced its intent not to allow non-tribal electronic scratch ticket gaming in this state absent a supermajority approval of such gaming by both houses of the Legislature. Accordingly, the Petitioners' erroneous statutory interpretations relating to the asserted authority of the Lottery Commission to permit non-tribal EST gaming have been rendered moot and should be dismissed. *Everett v. State*, 99 Wn.2d 264, 267, 661 P.2d 588 (1983) (issue before appellate court is moot to extent question is resolved through passage of subsequent legislation).

**2. Non-Tribal Entities And Individuals Have Never Been Legally Authorized To Possess Or Operate EST Gambling Devices In The State Of Washington.**

As noted in the above factual summaries, the Washington State Lottery Commission is currently authorized by Chapter 67.70 RCW to offer, and does offer, both the traditional paper "scratch ticket" games and the "Lotto" game. These games are exempt from the prohibitions contained in the Gambling Act, Chapter 9.46 RCW, not because, as Petitioners assert, "Any state lottery game is not illegal gambling as a

matter of law” (Br. of Petitioners at 9) but rather because they are played in accordance with the requirements of RCW 67.70.040 and the other provisions of RCW 67.70 and its implementing regulations. Only games that are operated in strict compliance with the requirements of RCW 67.70 are exempt from the provisions and prohibitions of the Gambling Act. RCW 9.46.291; RCW 67.70.210. Also, contrary to Petitioners’ assertions, the lottery chapter does impose a number of statutory limitations, in addition to the important restrictions listed in RCW 67.70.040(1)(a), on the games that can be permissibly be played pursuant to the Chapter. *See, e.g.,* RCW 67.70.040(f); RCW 67.70.040(2); RCW 67.70.042. Additionally, as Petitioners conceded in their memorandum in support of their motion for summary judgment before the trial court, even when the Washington State Lottery Commission in the exercise of its expertise determines that a game may be statutorily permissible, it still has absolute discretion to decide whether or not to offer such a game. RCW 67.70.040(1); CP 393.

To date, the Washington State Lottery Commission has consistently interpreted Chapter RCW 67.70 RCW, which it is statutorily entrusted with administering, as not allowing the operation of EST machines by non-tribal entities or individuals and has never promulgated enabling rules or otherwise acted to authorize such gaming. As noted

above, the temporary and quickly aborted operation of the “zip” game provides no support for Petitioners’ contentions, since the “zip” game is not the functional equivalent of an EST machine, a fact borne out by an examination of the operating characteristics of the respective devices and by the Petitioners’ failure to apply to be licensed as a “zip” game retailer, even though Petitioners’ brief demonstrates their awareness that non-tribal retailers were, even if erroneously, being allowed to offer the game. CP 449-50, 702-54, 1530-89, 1855-59.

Similarly, Petitioners’ arguments that Indian tribes “have no authority to offer illegal gaming” and, therefore, since tribes are currently operating TLS machines pursuant to their federally approved IGRA compacts, such devices must be legal for non-tribal use, are unfounded. As indicated in the factual summaries above, the TLS machine is a hybrid device created as a result of the combined operation of state statutes and regulations, the IGRA, and interpretive federal case law decisions. While this interaction of federal and state legal authorities has authorized tribal governments to lawfully operate TLS machines, it nonetheless remains the case that no existing Washington statute or regulation permits the operation of EST machines by non-tribal interests.

**3. The Washington State Lottery Commission Has No Duty (Or Authority) Under RCW 67.70.040(1) To Authorize Non-Tribal Entities Or Individuals To Operate EST Machines.**

Petitioners contend that RCW 67.70.040 requires the Washington State Lottery Commission to license them to operate EST machines at their place of business, in order to maximize revenue for the State. Br. of Petitioners at 36-38. This assertion is necessarily built, and completely dependent, upon the assumption that non-tribal entities and individuals are lawfully authorized to operate EST machines in the State of Washington. However, for the reasons indicated above, this fundamental assumption is incorrect. Moreover, as also noted above, Petitioners have conceded that the Washington State Lottery Commission has absolute discretion to decide which games to operate and offer to the public. RCW 67.70.040(1); CP 393. Thus, even if it were lawful for the Lottery Commission to operate EST machines, Petitioners have offered no factual or legal basis to support its claim that the Lottery Commission would be statutorily compelled to exercise its discretion in the manner desired by Petitioners. The fact, relied upon by Petitioners, that the State, various local governments, and the Tribe, responsibly and legally, reached agreements that helped to facilitate an important economic development project does not provide that support.

**D. The Washington And United States Constitutions Are Not Violated By Petitioners' Legal Inability To Operate EST Machines.**

Petitioners assert that various provisions of both the United States Constitution and the Washington State Constitution are violated by the legal inability of non-tribal entities and individuals to operate EST machines. Br. of Petitioners at 38-43. Specifically, Petitioners claim that the rights secured to them by the Privileges and Immunities Clause of the Washington Constitution and by the Due Process provisions of both the Washington and the United States Constitutions have been violated. *Id.* at 38-42. Similarly, it appears that Petitioners contend that the Equal Protection clause of the Fourteenth Amendment to the United States Constitution has also been violated. *Id.* at 42-43.

As a threshold point, it should be noted that all Petitioners' constitutional claims proceed from the fundamentally incorrect premise that non-tribal interests have a legal right to operate EST machines, based on the fact that federally recognized Indian tribes with Class III gaming compacts are currently authorized to operate such devices. As explained above, the right claimed by Petitioners does not exist either by statute or interpretation of law. As a consequence, Petitioners insert a fundamental statutory flaw into his constitutional theories.

Once Petitioners' misinterpretation of the statutes is subtracted, they offer no analysis showing that any constitutional violations have occurred. Indeed, in order to prevail on any of their constitutional claims, Petitioners would have to demonstrate that the constitutional provisions they rely upon require the State to allow them to offer gaming contrary to state law because the Puyallup Tribe is able to offer such gaming as a result of the interplay between federal (IGRA) and state statutes. As shown below, the constitutional provisions relating to due process, equal protection, and the privileges and immunities clause are not violated when a private party like Petitioner Mudarri is not treated in the same manner as a federally recognized Indian tribe subject to the terms of IGRA.<sup>1</sup>

### **1. Substantive Due Process**

Petitioners' substantive due process claims begin with the assertion that it cannot be lawful for the tribes to offer TLS/EST gaming, but unlawful for Petitioner Mudarri to offer such gaming. Br. of Petitioners at 40. Petitioners' passing reference to the Magna Carta fails to support their conclusions. Indeed, by substituting rhetoric for case law and analysis, Petitioners' arguments are simply "naked castings" into the constitutional

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<sup>1</sup> Constitutional challenges are questions of law subject to de novo review. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). Statutes are presumed to be constitutional, and the burden to show unconstitutionality is on the challenger. *Marriage of Johnson*, 96 Wn.2d 255, 258, 634 P.2d 877 (1981). A party challenging a statute's constitutionality bears the heavy burden of establishing its unconstitutionality. *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757, ¶9, 131 P.3d 892 (2006) (internal citation omitted).

sea that lack the detail and analysis that requires judicial attention. *e.g.* *State v. Blilie*, 132 Wn.2d 484, 939 P.2d 691 (1997). Assuming for the sake of discussion that Petitioners had presented a substantive due process issue, their argument would fail because it is premised on the theory that they have a fundamental right to engage in the gaming business and that the regulatory powers of the state are limited by that fundamental right.

Analysis of a substantive due process challenge begins with the nature of the right involved. The Washington Supreme Court recognizes that some cases evaluate the pursuit of an occupation or profession as a type of liberty interest protected by substantive due process limits. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, ¶ 20, 143 P.3d 571 (2006). *Amunrud* cites a number of cases for this proposition, but not one case holds that a fundamental right is at stake when government regulates a business, occupation, or profession.<sup>2</sup>

*Amunrud* then goes on to expressly reject strict scrutiny and hold that rational basis review is the only applicable requirement for substantive due process challenges to regulation of a business or profession. The Court thus squarely rejects the argument presented by Petitioners. Petitioners have no fundamental right to operate EST

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<sup>2</sup> *Amunrud* cites *Conn. v. Gabbert*, 526 U.S. 286, 291-92, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) and a number of other U.S. Supreme Court and federal appellate court decisions. None of these cases holds that a fundamental right is at stake when the government lawfully regulates a business, occupation, or profession.

machines and their arguments premised on that theory cannot demonstrate a violation of substantive due process.

Petitioners cite an 1889 U.S. Supreme Court case that held that a citizen may pursue any lawful business or profession he or she may choose, subject to reasonable government regulation. *Dent v. West Virginia*, 129 U.S. 114, 121, 9 S. Ct. 231, 32 L. Ed. 623 (1889). Br. of Petitioners at 40. *Dent* offers no support for Petitioners' claims. It does not speak to the Legislature's powers to lawfully regulate businesses, including its ability to appropriately utilize the police power to regulate gambling. Instead, as indicated in *Amunrud*, no United States Supreme Court case supports Petitioners' claim that a "fundamental right" is implicated if the State lawfully regulates a business or profession. Indeed, the Court clearly rejected that notion in *Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d. 399 (1999), when it said that any of its cases that imply a higher scrutiny for the exercise of state police powers over business only reflect situations in which an individual is completely prohibited from engaging in a particular lawful calling or profession. Such cannot be said of the Petitioners.

Accordingly, no case law supports Petitioner Mudarri's theory that he has a fundamental right or that strict scrutiny analysis applies to the State's power to regulate gaming. Petitioners are prevented from

operating a particular type of gambling device that is not currently authorized for operation by non-tribal entities or individuals in Washington. Petitioners may still, and do, conduct their otherwise lawfully authorized and licensed gambling business. Since the Petitioners have no “fundamental right” to operate EST machines, they have no basis on which to seek to have strict scrutiny applied to their substantive due process claim.

Petitioners then offer no argument that Washington law lacks a rational basis. That rational basis, of course, is that Washington law has been implemented according to IGRA and applicable federal case law, which has led to an existing State-Tribal Compact with the Puyallup Tribe, but which does not authorize private EST gaming by Petitioner Mudarri.

## **2. Privileges and Immunities**

Petitioners also claim that the state’s refusal to allow them to operate EST machines violates the privileges and immunities clause of the Washington Constitution, article I, § 12. Their theory apparently is that state law is conferring a benefit on a class of citizens – the Puyallup Tribe – and that the benefit conferred is a fundamental right. Br. of Petitioners at 38.

The Washington Constitution, article 1, § 12 provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation

other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” For most of the state’s history, the Privileges and Immunities clause has been read to have the same meaning as the federal Equal Protection Clause. However, in *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County II*) the Supreme Court held “that an independent analysis applies only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism.” See *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006) (plurality opinion discussing *Grant County II*). “For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens.” *Grant II*, 150 Wn.2d at 812.

Petitioners’ argument fails because it is founded on the erroneous premise that state law is conferring a privilege on a class and thereby creating “positive favoritism.” This ignores the significant role of federal law. Without federal law (IGRA) and the supremacy clause of the United States constitution, the Puyallup Tribe would be authorized to operate the EST gaming that Petitioners claim violates the privileges and immunities clause. While the State has been required to enter into compacts under IGRA, one cannot simply ignore the effect of federal law and allege that

state law is bestowing a privilege to a class. Petitioners' privileges and immunity argument therefore fails.

Petitioner Mudarri is also wrong when he contends that a fundamental right is at stake. A fundamental right is necessary to support a claim that state law is unconstitutionally bestowing a privilege on a class in violation of article I, § 12. As the Washington Supreme Court has stated, "not every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, section 12." *Id.* at 812. Rather, the terms "privileges and immunities"

pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, *Constitutional Limitations* (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

*Grant II*, 150 Wn.2d at 813.

In *Grant II*, the Supreme Court held that the petition method of annexation was not a privilege for the purpose of article I, § 12. Similarly, for the reasons explained in *Amunrud*, Petitioner Mudarri's private interest

in offering EST gaming is not a “privilege” because operating gaming machines does not implicate a fundamental right.

### **3. Equal Protection**

Petitioners’ equal protection argument is based on a claim that the State has “granted exclusive gaming rights to a sovereign based on its sovereign status.” Br. of Petitioners at 42. As a threshold matter, it makes little sense for Petitioners to argue that they are denied equal protection at the same time that they admit the critical difference between themselves and the Puyallup Tribe – namely, that the Tribe is a governmental entity, recognized under federal law as such, with clearly established attributes of sovereignty.

Petitioners’ equal protection argument also fails because they cannot show that the State is affecting a fundamental right of the Petitioners’ to which strict scrutiny applies. In fact, they fail to show an equal protection violation under any standard of scrutiny because they misinterpret state law and overlook the fact that federal law is a significant reason that the Puyallup Tribe possesses the legal ability to operate EST gaming and they do not.

Case law clearly establishes that the courts apply a “rational basis” or “minimum scrutiny” standard of review to equal protection claims that do not implicate a suspect class or involve fundamental rights. *Philippides*

*v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004). This standard requires the Court to initially determine whether the legislation in question applies alike to all members of the designated class. *Id.* at 391. The state statutes at issue in this matter do not designate any classes or mandate disparate treatments for anyone. The relevant state statutes, as indicated above, simply prohibit what Petitioner Mudarri seeks. It is only the interpretation of those statutes in combination with IGRA and the holdings of the applicable federal cases that have allowed the Tribe to conduct TLS gaming that would otherwise not be allowed under state law. That result provides no basis for an equal protection challenge.

**E. The Doctrine Of Equitable Estoppel Does Not Provide A Basis Upon Which Petitioners Can Be Afforded Affirmative Relief.**

Petitioners assert that they are entitled to affirmative relief from this Court based on the doctrine of equitable estoppel. Br. of Petitioners at 43-44. Petitioners' assertion is unfounded for several reasons. Initially, it should be noted that equitable estoppel against the government is not favored. *Mikhail Kramarevsky v. The Dep't of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Additionally, it has been held, that courts should be most reluctant to find the government equitably estopped when public resources are involved, as they are here. *Id.* at 744. Most importantly, however, it is well established that equitable estoppel "is not available for offensive use by plaintiffs." *Greaves v.*

*Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 397, 879 P.2d 276 (1994). Stated another way, equitable estoppel is available only as a “shield” or defense and cannot be used as a “sword” in a cause of action. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980).

Even if Petitioners were entitled to assert equitable estoppel as an affirmative cause of action it would not apply in the matter before this Court. First, there has been no inconsistent statement by the named Respondents. For the reasons detailed above, federally recognized Indian tribes with IGRA compacts are, as a matter of law, legally authorized to operate TLS machines, but non-tribal entities and individuals are not. And the Petitioners, as they admitted, have been consistently so informed in their contacts with the State. CP 418-19. Second, Petitioners committed no act in reasonable reliance on any statement by the State. As Petitioners concede, Appendix X was approved in 1998 and Petitioners did not open their establishment until two years later. CP 420. At no time, before or since, have non-tribal entities or individuals been legally authorized, or advised by the State that they were legally authorized, to operate EST machines. Petitioners’ mistaken personal interpretations of the law relating to their desire to operate EST machines do not constitute a basis for finding that any action was taken in reasonable, detrimental reliance on

any statement by the State. CP 419-20. Third, as just mentioned, the State has consistently stated its position that non-tribal entities and individuals are not legally authorized to operate EST machines in Washington. Thus, the Petitioners can not, and do not, demonstrate that they have suffered any injury by changing their position in reasonable, detrimental reliance on any statement by the State. *Kramarevcky*, 122 Wn. App. at 747. Fourth, as noted above in the discussion of Petitioners' constitutional challenges and subsequently, Petitioners have no "fundamental" or any other right to operate EST machines. It cannot constitute a manifest injustice for the State to refuse to accede to the Petitioners' demand that they be authorized to commit what is, for non-tribal entities and individuals, an unlawful act. Finally, state governmental functions would clearly be impaired if the Court improperly issued an order compelling the Washington State Lottery Commission to operate an unlawful gambling activity and further enjoining the Washington State Gambling Commission from taking enforcement action against that unlawful activity.

**F. The Puyallup Compact And Amendments Were Properly Executed And Are Legally And Constitutionally Valid.**

Throughout their Opening Brief, Petitioners mount a sweeping attack on the constitutional validity of the Puyallup Tribe's federally approved IGRA Compact, its Third Amendment. *See, e.g.*, Br. of

Petitioners at 25-36. However, Petitioners' claims are not supported either by the facts, the actual terms of the documents being challenged, or by the laws governing gambling and the IGRA compacting process in the State of Washington. Contrary to Petitioners' claims, there is no basis upon which this Court should invalidate the Puyallup Compact and, by necessary extension, all 26 other tribal gaming compacts in the State of Washington.

Petitioners commence their constitutional challenges by observing that Article II, § 24 of the Washington Constitution requires approval of gambling by a supermajority of the Legislature. Br. of Petitioners at 25-30. As noted above, TLS gaming is a hybrid, created by the operation and interpretation of federal law, of two games, i.e. "scratch tickets" and "Lotto," that are operated by the Washington State Lottery Commission pursuant to authority conferred upon it by just such a supermajority legislative approval. Chapter 67.70 RCW. The fact that a confluence of the IGRA, state laws, and federal court interpretations have led to tribal governments being legally authorized, pursuant to federal law, to operate TLS machines while non-tribal entities cannot, does not support Petitioners stated conclusion that Appendix X to Washington's IGRA compacts must be "unconstitutional."

Further, contrary to Petitioners' arguments, the procedure followed by then Governor Locke in approving and signing the Puyallup Compact and its Third Amendment, is exactly the process that was enacted into law for that purpose by the Washington State Legislature. RCW 9.46.360. The legislative creation of a statutory process that results in authorizing the Governor to execute IGRA compacts on behalf of a State has repeatedly been acknowledged as proper. *See, e.g., American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001) (*vacated and remanded on other grounds* by 305 F.3d 1015 (9<sup>th</sup> Cir. 2002); *Panzer v. Doyle*, 271 W1.2d 295, 339, 340, 680 N.W.2d 666 (2004). Moreover, as described above, it was the Legislature that authorized, by a supermajority, the gambling activities permitted under Chapter 67.70 RCW and Chapter 9.46 RCW, not the Governor. Thus, contrary to Petitioners' assertions, there has been no unconstitutional delegation of legislative authority.

Petitioners also assert that, somehow, the State has made a gift of public funds and/or credit in violation of Article VIII, § 5 of the State Constitution. Br. of Petitioners at 36. Nothing in Petitioners' argument, however, identifies any funds or credit of the state that have been expended or loaned in connection with the execution of the Puyallup Compact or its Third Amendment. To the contrary, all the State has done

in connection with the Puyallup Compact and its Amendments is to perform its mandatory duty of “good faith” negotiation as required by IGRA and state law. 25 U.S.C. § 2701 *et seq.*; RCW 9.46.360. The State, for the reasons detailed below, also specifically rejects Petitioners’ unsupported and irrelevant allegations that the State conveyed any jurisdiction, eliminated any state tax obligations, or provided exclusive gaming rights to anyone. Br. of Petitioners at 30-36.

Petitioners’ claim that the State has “granted” the Tribe an unconstitutional monopoly is without merit. None of the three required elements of a monopoly cited in Petitioners’ Opening Brief exist in the matter. *Id.* at p. 35-36. Simply put, there is no evidence before this Court that the State has: 1) entered into an arrangement, 2) relating to a product or commodity, 3) for the purpose of fixing prices, limiting production, or regulating the transportation of such product or commodity. *Group Health Co-op. of Puget Sound v. King County Medical Soc.*, 39 Wn.2d 586, 237 P.2d 737 (1951). In fact, in the only sentence in Petitioners’ summary judgment memorandum to the trial court that even attempts to identify any sort of factual basis for this claim, Petitioners refer vaguely to “contractual obligations” entered into by “local municipal, port, and county public corporate entities,” none of which has been made a party to this case, and none of which is the State of Washington. CP 431.

Accordingly, Petitioners' claim that the State has "granted" an unconstitutional monopoly is unfounded.

Finally, asserting two similarly unfounded claims, the Petitioners attack various other provisions of the Puyallup Compact's Third Amendment. First, Petitioners incorrectly allege that the State, through the Third Amendment, gave favorable tax treatment to the Tribe in violation of Article VII, § 1 of the Washington Constitution. Br. of Petitioners at 36. Apparently, Petitioners make this claim based on an agreement that the Tribe and the City of Fife entered into for the purpose, in part, of having the Tribe help defray the costs of the impact on Fife's infrastructure that would be occasioned by the relocation of the Tribe's gaming facility. CP 431-35, 813-24. Contrary to Petitioners' assertions, examination of that document reveals nothing that surrenders or alters any state, local, or federal taxing authority. Indeed, it appears that the City of Fife and the Tribe have merely agreed to ensure that any direct impact associated with the relocation of the EQC facility would be paid for by the Tribe. Also, significantly, the State is not a party to the complained-of agreement between Fife and the Tribe. Moreover, the Puyallup Compact's Third Amendment, to which the State is a party, required only that the Tribe provide the State with copies of any agreements that the Tribe entered into with local governments. CP 772-77. The State was not

involved in negotiating the terms of those agreements, has never ratified them, and has no enforcement role or responsibility with regard to their provisions.

Similarly, Petitioners incorrectly assert that the Puyallup Compact's Third Amendment unlawfully conveyed to the Tribe the state's civil and criminal jurisdiction over the land on which the EQC gaming facility is located. Br. of Petitioners at 30-35. As detailed in the factual summary above, it is important to any current discussion of the Petitioners' contentions to recognize that the EQC gaming facility is located on land that is now held in trust by the United States government for the benefit of the Puyallup Tribe and over which those two sovereigns have independent and concurrent jurisdictional authority along with the State. In any event, no provision of the Third Amendment purports to convey the state's jurisdiction to the Tribe, and the Petitioners have not identified such a provision. CP 772-777. Further, Petitioners' contention that the LCSA extinguished or altered the surveyed, external boundaries of the Puyallup Indian Reservation is also incorrect. A review of the factual references listed by the Petitioners in connection with that assertion indicates that they do not support that contention. In fact, the LCSA document specifically disclaims any intention of attempting to alter the surveyed boundary. CP 871-1014. Moreover, and again contrary to

Petitioners' arguments, IGRA does not require any demonstration of either tribal jurisdiction or trust status in order to authorize tribal gaming facilities to be located on land that is entirely within the external boundaries of a tribe's reservation. 25 U.S.C. § 2710.

Since an Indian tribe does have various forms of jurisdiction over its own members when they are within the boundaries of a reservation, regardless of the trust or fee status of that land, an Interlocal Agreement between the Tribe and the City of Fife does contain provisions designed to minimize conflicts between law enforcement agencies and to establish a basis upon which those agencies may provide each other with mutual aid. CP 813-824. As mentioned above, the State is not a party to the agreement between Fife and the Tribe and played no role in its negotiation. CP 772-77. In conclusion, State jurisdiction over the land on which the EQC gaming facility is located was not altered or conveyed to the Tribe by the Third Amendment to the Puyallup Compact and the Petitioners' assertions to the contrary are without merit. Moreover, to the extent that the Petitioners base this claim of error, as well as several others addressed above, on the erroneously asserted relevance to this case of the distinction between "fee" and "trust" lands, their challenges have been rendered moot by the actions of Congress in taking the land in question

into trust. *Everett v. State*, 99 Wn.2d 264, 267, 661 P.2d 588 (1983); Pub. L. 109-224, (May 18, 2006), (120 Stat.) 376.

**G. The Petitioners Are Not Entitled To Recover Attorney's Fees And Costs In This Matter.**

The Petitioners have not prevailed in this matter and they have not made the required factual or legal showing to justify an award of attorney's fees and costs. Accordingly, the State objects to Petitioners' request and reserves the right to contest such a request if the Court elects to consider it at a future date.

**VII. CONCLUSION**

Based on the foregoing the State respectfully submits that the Petitioners have failed to establish a legal entitlement to the relief that they request and, that the trial court's dismissal of this cause should be affirmed.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2007.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

EUGENE "CHIP" MUDARRI, an individual; LAKESIDE CASINO, LLC and C.F.S., LLC d/b/a FREDDIE'S CLUB OF FIFE,  
Petitioners,

v.

THE STATE OF WASHINGTON, which is comprised of various State entities including, but not limited to CHRISTINE GREGOIRE, Governor of the State of Washington; GARY LOCKE, former Governor of the State of Washington, and as an individual; RICK DAY, Director of the Washington State Gambling Commission; KEN NAKAMURA, Director of the Washington State Lottery; the WASHINGTON STATE GAMBLING COMMISSION: Commissioners JANICE NIEMI, ALAN PARKER, CURTIS LUDWIG, and GEORGE ORR; and the WASHINGTON STATE LOTTERY COMMISSION: Commissioners RACHEL GARSON, CAROL KELJO, ROBERT SCARBROUGH, LARRY TAYLOR, and MELINDA TRAVIS,  
Respondents.

DECLARATION OF SERVICE

I, Martha Sellars, declare as follows:

1. I am over 18 years of age and not a party to this action.
2. I am a Legal Assistant employed by the Washington State Attorney General's Office located at 1125 Washington Street SE, PO Box 40100, Olympia, Washington 98504-0100.
3. On January 30, 2007, I deposited in the United States Mail, postage prepaid, a copy of the State of Washington's Response to Peititioner's Opening Brief to: Joan K. Mell, Miller, Quinlan & Auter, P.S. Inc. 1019 Regents Blvd., Suite 204, Fircrest WA 98466.

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of January, 2007 at Olympia, Washington.

  
MARTHA SELLARS  
Legal Assistant