No. 17-____

IN THE
Supreme Court of the United States

SHARP IMAGE GAMING, INC.,
Petitioner,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Indian Gaming Regulatory Act, 25 U.S.C. 2701–2721, contracts for the management of casino-style Indian gaming activity must be approved by the Chairman of the National Indian Gaming Commission. *See id.* §§ 2710(d)(9), 2711(a)(1). The Act provides that, for purposes of this requirement, a management contract "shall be considered to include all collateral agreements to such contract that relate to the gaming activity." *Id.* § 2711(a)(3). An implementing regulation provides that a "management contract" encompasses a collateral agreement "if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. 502.15.

The question presented is:

Whether a collateral agreement to a management contract for an Indian gaming operation is subject to approval by the National Indian Gaming Commission only if the collateral agreement itself provides for management of all or part of the operation.

RULE 29.6 STATEMENT

The parties to the proceeding below were Sharp Image Gaming, Inc. and Shingle Springs Band of Miwok Indians. Sharp Image Gaming, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

This case involves a frequently recurring question under the Indian Gaming Regulatory Act: must the Chairman of the National Indian Gaming Commission approve every collateral contract related to a casino-style Indian gaming operation? The answer to that question has great practical significance to Indian gaming, which plays a crucial role in funding tribal governments and providing economic opportunity on reservations.

The California Court of Appeal answered that question yes, requiring such approval here even for a plain-vanilla promissory note. It thus created a conflict with the approach taken by the Second and Seventh Circuits. In *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Cir. 2008), in a unanimous decision by then-Judge Sotomayor, the Second Circuit held that a collateral agreement requires Commission approval "only if it 'provides for the management of all or part of a gaming operation.'" *Id.* at 130 (quoting 25 C.F.R. 502.15). The Seventh Circuit, adopting the same interpretation, has twice held that collateral agreements that do not provide for the management of gaming operations are not subject to Commission approval. *See Stifel, Nicolaus & Co. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (7th Cir. 2015); *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011).

In the decision below, the California Court of Appeal expressly rejected *Catskill Development*'s interpretation and required Commission approval for a promissory note even though the note itself did not

provide for management of any gaming activity. This decision conflicts with the Second Circuit's approach and squarely conflicts with the Seventh Circuit's decisions.

The decision below also contradicts the plain language of the implementing regulation upon which *Catskill Development* and subsequent decisions relied. Under that regulation, the definition of management contract—and, thus, the Commission's authority to approve collateral agreements—includes only agreements that "*provide[] for the management of all or part of a gaming operation*." 25 C.F.R. 502.15 (emphasis added). Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this regulation is entitled to deference because Congress delegated rulemaking authority to the Commission, and because the regulation is a reasonable interpretation of the Act, comporting with both its text and its stated purposes and policies.

This Court should grant review to resolve these conflicts and dispel the uncertainty the decision below has created concerning the treatment of collateral agreements in California, the state with the largest segment of the rapidly growing Indian gaming industry.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District (App. 1a) is reported at 15 Cal. App. 5th 391. The opinion of the trial court denying respondent's motion to dismiss (App. 83a) is unreported.

JURISDICTION

The judgment of the California Court of Appeal, Third Appellate District was entered on September 15, 2017. App. 1a. The Court of Appeal denied a petition for rehearing on October 16, 2017. App. 108a. On December 20, 2017, the California Supreme Court denied a petition for review. App. 111a. This Court has jurisdiction under 28 U.S.C. 1257(a).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory provisions and regulations are reproduced in the appendix. App. 130a–141a.

STATEMENT

A. Statutory Framework

The Indian Gaming Regulatory Act (the "IGRA" or the "Act"), 25 U.S.C. 2701–2721, requires the Chairman of the National Indian Gaming Commission to approve any "management contract" concerning casino-style Indian gaming. *Id.* § 2711(a)(1); *see also id.* § 2710(d)(9) (extending approval requirement to "Class III" or casino-style gaming). For purposes of this requirement, the Act considers a "management contract" to include "all collateral agreements to such contract that relate to the gaming activity," *id.* § 2711(a)(3), and the Commission's implementing regulations clarify that the only collateral agreements that come within the definition of "management contract" are those that "provide for the management of all or part of a gambling operation," 25 C.F.R. 502.15.

Congress enacted the Indian Gaming Regulatory Act in 1988, shortly after this Court held Indian gaming largely insulated from state gaming regulations, *see California v. Cabazon Band of Mission Indians*,

480 U.S. 202, 218–222 (1987), in order "to provide a statutory basis for the regulation of gaming by an Indian tribe." 25 U.S.C. 2702(2). Congress recognized that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," *id.* § 2701(4). Accordingly, the Act regulates Indian gaming to shield it from organized crime, ensure that Indian tribes are its primary beneficiaries, and assure fair and honest gaming, *id.* § 2702(2), while simultaneously promoting tribal autonomy and economic development, *id.* § 2702(1). *See generally* Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99 (2010).

The Act establishes the National Indian Gaming Commission (the "NIGC" or "Commission"), *see* 25 U.S.C. 2704–2708, and, among other things, delegates to the Commission authority to promulgate regulations implementing the Act, *id.* § 2706(b)(10).

While the Act places some forms of traditional gaming involving minimal prizes under the exclusive jurisdiction of Indian tribes, *id.* § 2710(a)(1), it allows more serious gaming such as card games and bingo only if such gaming is permitted by the state in which it is conducted and the tribe conducting the gaming passes a resolution devoting gaming revenues to funding tribal government, the tribe's general welfare, and other specified purposes. *Id.* § 2710. Slot machines and traditional casino games such as blackjack are permitted only if these requirements are satisfied and there also is a Tribal-State compact permitting such games. *Id.* § 2710(b); *see also id.* §§ 2703(7)(B) & (8) (defining "class II" and "class III" gaming).

The Act also regulates contracts for the operation and management of regulated gaming activities. It limits the duration of such contracts and requires them to provide, among other things, minimum guaranteed payments to the relevant tribe, ceilings on repayment of costs, and adequate accounting and access procedures. *Id.* §§ 2711(b)(1)–(5). In addition, Section 11(a)(1) of the Act makes all management contracts for the operation and management of regulated gaming activity "[s]ubject to the approval of the Chairman" of the Commission. 25 U.S.C. 2711(a)(1); *id.* § 2710(d)(9); *see also* 25 C.F.R. 533.7 (stating that management contracts not approved by the Chairman "are void").

Section 11(a)(3) expands the meaning of management contract for purposes of Commission approval to include certain "collateral agreements":

> any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

25 U.S.C. 2711(a)(3). The Commission's implementing regulations in turn define management contract to include collateral agreements providing for "management of all or part of a gaming operation":

> Management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

25 C.F.R. 502.15.

B. Factual Background

The decision below, as relevant here, involves a promissory note issued in November 1997 (the "Note"), App. 126a–129a, as part of several agreements between petitioner Sharp Image Gaming, Inc. ("Sharp Image") and respondent Shingle Springs Band of Miwok Indians (the "Tribe").

The Tribe is a federally recognized Indian tribal government with a reservation in El Dorado County, California. App. 9a. Although this reservation is strategically located along one of the two highways from the Bay Area to Lake Tahoe, it had no access to public roadways and was effectively landlocked except for a single road through a residential neighborhood. *Id.*

The Tribe nonetheless decided to build a casino, and it contacted petitioner Sharp Image, which at that time supplied video gaming machines to over two dozen Indian casinos in California. App. 9a; 5 Reporter's Transcript ("RT") 1166, 1173, 1176–1178. Believing that the road to the reservation was public, 5 RT 1196, Sharp Image agreed to take on the project, and in May of 1996, it entered into a Gaming Machine Agreement with the Tribe under which it agreed to provide up to 400 gaming machines to a casino on the reservation in exchange for 30% of the net revenues from the machines and from table games at the casino. App. 10a. In addition, Sharp Image agreed to advance the Tribe the funds needed to build a temporary casino under a tent and to acquire equipment and furnishings for that facility as well as construction of a larger facility. App. 9a–10a.

Although the tent casino opened in October of 1996, it was shut down after only one night due in part to

safety problems created by limited access to the casino. App. 10a–11a. After a neighborhood association obtained a judgment that the access road to the reservation was private, 5 RT 1196–1197, Sharp Image explored alternative ways to access the reservation, including spending millions of dollars to purchase properties along the highway to provide a new access road. 5 RT 1203–1204.

In 1997, Sharp Image and the Tribe decided to update their contractual arrangements. Sharp Image proposed and the Tribe agreed to an Equipment Lease Agreement in which the Tribe agreed to lease 400 video gaming devices, once again in exchange for 30% of net revenues. App. 112a–125a. The Equipment Lease Agreement gave Sharp Image "the exclusive right to lease or otherwise supply additional gaming devices to Lessee [the Tribe] to be used at its existing or any future gaming facility or facilities." App. 112a. The Agreement also contained a waiver of sovereign immunity from any suit to enforce the Tribe's obligations under the Agreement. App. 122a.

At the same time, the Tribe executed the Note, which focuses on the advances that Sharp Image had made for construction of the Tribe's casino. App. 126a. The Note rolled up the advances into a single sum, $3,167,692.86, which "represents the full amount owed up to September 30, 1997." *Id.* The Note also reduced the interest rate from 12% to 10%. App. 10a, 13a, 126a.

The Note contains two references to gaming operations. *First*, the Note states that payment of principal and interest shall commence approximately two months after 400 video gaming devices "are installed

and in operation at Borrower's Gaming Facility and Enterprise." App. 126a–127a. *Second*, the Note provides that the principal and interest be paid in equal monthly installments over the course of a year, except that, if the Tribe "is not financially able to maintain the equal monthly installments and continue operating the casino without operating at a loss," the Tribe may "make a minimum payment equal to 25% of the gross net revenues it receives from the operation of the video gaming devices described above." App. 127a.

The Note also contains a waiver of sovereign immunity for suits to enforce the Note. App. 128a ("Borrower hereby express[ly] waives its sovereign immunity from any suit, action or proceeding to enforce the terms of this Note.").

Sharp Image continued to advance funds after the Note was signed, and, even though the Note was limited to its stated amount, App. 126a, the parties understood the Tribe was to repay these additional advances under the Note. 32 Appellant's Appendix ("AA") 8430, 8437. Sharp Image also sought to introduce the Tribe to potential gaming managers who could invest additional funds into the casino project. App. 14a–15a.

The Tribe, however, decided to sever its ties with Sharp Image. In June 1999, the Tribe entered into development and management agreements with a management company. App. 15a. Although initially offers were made to buy out Sharp Image's exclusive right to supply gaming machines, *id.*, the Tribe eventually repudiated its agreements with Sharp Image, including the Note, on the ground that they were void from their

inception because they had not been approved by the Commission. App. 15a–16a.

C. The Proceedings Below

When the Tribe began construction of a casino under its 1999 agreements, Sharp Image sued the Tribe in California state court, asserting breach of the Equipment Leasing Agreement and the Note as well as oral agreements concerning advances following the Note. App. 17a.[1]

The pre-trial proceedings focused on the Equipment Leasing Agreement rather than the Note. After obtaining an advisory opinion letter from the general counsel of the Commission that the Agreement was an unapproved management contract, the Tribe moved to dismiss, arguing that "complete preemption" deprived state courts of jurisdiction over claims concerning the Equipment Leasing Agreement. App. 18a–23a. After the trial court ruled the advisory opinion letter inadmissible and denied the motion, App. 23a, the Tribe obtained a decision letter from the chairman of the Commission to the same effect and again moved to dismiss the Equipment Leasing Agreement based on preemption. App. 24a–27a. The trial court denied this motion on the ground that the Tribe's repudiation of the Agreement deprived the Commission of jurisdiction

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[1] Sharp Image initially also alleged claims based on the Gaming Machine Agreement, App 17a, but later dropped those claims, App. 30a.

over the Agreement and precluded preemption.[2] App. 28a–29a; *see also* App. 30a (denying summary judgment based on statute of limitations).

The case then went to trial. The jury found that the Tribe breached the Equipment Lease Agreement and awarded approximately $20.4 million in damages. App. 30a–31a. The jury also found that the Tribe breached the Note and awarded approximately $10 million on the Note. App. 31a.

The Tribe filed an appeal, which the United States supported with an amicus brief, App. 32a, and the Third Appellate District of the California Court of Appeal reversed. App. 81a.

The Court of Appeal's decision focused primarily on preemption and the Equipment Lease Agreement rather than the Note. The Court first ruled that Sharp Image's claims were subject to preemption and that the trial court should have decided if the agreements at issue were subject to Commission approval. App. 34a–53a. Then, after considering the deference due the Commission's opinions concerning the Equipment Lease Agreement, App. 53a–65a, the Court determined that the Equipment Lease Agreement (as well as its predecessor, the Gaming Machine Agreement) was a management contract, which should have been submitted to the Commission for approval, because it gave

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[2] The Tribe filed a writ petition in the California Court of Appeal seeking to overturn this decision, which was denied, *see Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 WL 4054232, at *3 (E.D. Cal. Oct. 15, 2010), and then sought an injunction in federal court, which also was denied, *id.* at *6–*15.

Sharp Image too much control over the Tribe's use of gaming devices and provided for net revenues based on table games as well as the video gaming machines. App. 66a–72a.

The Court of Appeal did not turn to the Note until the end of its decision, ruling it a collateral agreement that should be considered a management contract and subject to Commission approval. App. 72a–81a. The Court of Appeal reasoned that the Note is related to the Gaming Management Agreement and the Equipment Leasing Agreement, which it had found were management contracts, because the Note concerns repayment of funds advanced in connection with those agreements, App. 75a, and the Note references gaming activities in triggering payment obligations and setting an alternative payment amount. App. 75a–76a; *see also* App. 81a (deeming Note subject to Commission approval because "the terms of the collateral agreement are connected to the gaming activity provisions of the management contracts").

The Court of Appeal did not find that the Note itself provided for management of any gaming activity. It recognized that the Second and the Seventh Circuits have interpreted the Act to require Commission approval of collateral agreements only if those agreements provide for management of gaming activities. App. 76a. However, attributing this interpretation to two related district court cases, *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005), and *Jena Band of Choctaw Indians v. Tri-Millennium Corp. Inc.*, 387 F. Supp. 2d 671 (W.D. La. 2005), the Court of Appeal rejected this interpretation. App. 76a–80a & n.30. In addition to deriding the interpretation for "[p]iecing together" language from the

Commission's implementing regulations, App. 77a, the Court of Appeal asserted that the interpretation would render superfluous both the Act's definition of management contracts and the definition of collateral agreements in the implementing regulations. App. 78a–79a. The court also asserted that the "*Jena Band* interpretation" conflicts with the text of the Act and serves no legitimate policy. App. 79a–80a.[3]

Sharp Image's subsequent petitions for rehearing in the Court of Appeal and for review in the California Supreme Court were denied. App. 108a, 111a.

REASONS FOR GRANTING THE WRIT

Although Sharp Image disagrees with the California Court of Appeal's ruling on the Equipment Leasing Agreement, this petition focuses solely on the Court's ruling on the Note. In that ruling, the decision below interpreted the Commission's authority to review management contracts so broadly that it encompasses a plain-vanilla promissory note simply because the Note was connected with and referred to gaming activity. That interpretation conflicts with the Second Circuit's approach, which requires collateral agreements to provide for the management of gaming activity, and it creates a square conflict with decisions of the Seventh Circuit over an important and recurring question concerning the scope of the National Indian Gaming Commission's authority that warrants review.

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[3] Because the Court found that Sharp Image's claims were preempted by the Act, it did not reach the Tribe's other arguments on appeal. App. 3a n.1.

I. THE CALIFORNIA COURT OF APPEAL'S DECISION CONFLICTS WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS

In a 2008 decision involving one of the nation's largest gaming companies, the Second Circuit held that Section 11(a)(1) of the Indian Gaming Regulatory Act, 25 U.S.C. 2711(a)(1), requires Commission approval of an agreement collateral to a management contract "only if it 'provides for the management of all or part of a gaming operation.'" *Catskill Development*, 547 F.3d at 130 (quoting 25 C.F.R. 502.15). Since that decision, federal courts have followed this interpretation. The California Court of Appeal's decision expressly rejects the interpretation and creates a square conflict with two Seventh Circuit decisions following that interpretation.

The decision below did not find that the Note provides for management of gaming operations. It found only that the Note is "connected to the gaming activity provisions of the management contracts." App. 81a. Nevertheless, the decision held that the Note required Commission approval. *Id.* Moreover, in so doing, the court expressly rejected federal decisions holding a collateral agreement requires Commission approval only if the agreement provides for the management of all or part of a gaming operation. App. 76a–80a.

In addition to contradicting the Second Circuit's interpretation of the Act in *Catskill Development*, this ruling squarely conflicts with two Seventh Circuit cases following *Catskill Development's* interpretation. In *Wells Fargo Bank*, 658 F.3d 684, an Indian tribe issued bonds secured by revenues from a casino, and the trustee of an indenture accompanying the bond sued for

breach, *id.* at 688–690. The Seventh Circuit held that the trustee could not rely on the waiver of sovereign immunity in the indenture because it was a management contract under the Act and the Commission had not approved it. *Id.* at 702. The Seventh Circuit, however, held that the trustee should have been allowed to amend its claims based on other documents containing sovereign immunity waivers. *Id.* at 700–701. Although these documents were related to the indenture and thus "collateral agreements," following *Catskill Development,* the Seventh Circuit held that "a document collateral to a management contract 'is subject to agency approval … only if it provides for the management of all or part of a gaming operation.'" *Id.* at 701, quoting *Catskill Development*, 547 F.3d at 130.

The Seventh Circuit reiterated this ruling in a related case with a more complete record concerning the collateral documents at issue In *Stifel, Nicolaus & Co.*, 807 F.3d 184, the trustee and several bond purchasers sued to enjoin the tribe from seeking a declaration in tribal court that the bond was invalid. The plaintiffs relied on two resolutions concerning the bond that contained sovereign immunity waivers. *Id.* at 191–192. Although these resolutions were "collateral" to the indenture it had found to be a management contract, the Seventh Circuit held that they were not subject to approval by the Commission because they did not provide for management of gaming operations. *Id.* at 203–205. In so doing, the court reiterated the rule adopted in *Catskill Development* and followed by *Wells Fargo*:

> a document that is collateral to a management contract in the sense that it is related does not require approval; it is only when that related agreement al-

> so provides for "the management of all or part of a gaming operation" that NIGC approval is required.

Id. at 203.

The decision below cannot be reconciled with the Seventh Circuit's decisions. The California Court of Appeal did not find that the Note was subject to Commission approval because it provided for the management of a gaming operation. Instead, in direct contradiction of *Catskill Development*'s interpretation of the Act and the holdings in *Wells Fargo* and *Stifel, Nicolaus & Co.*, the Court of Appeal held that the Note was subject to Commission approval merely because it is related to gaming activity and management contracts. App. 74a. The collateral agreements in *Wells Fargo* and *Stifel, Nicolaus & Co.*, however, also related to the trust indenture that was found to manage gaming activities. *See Wells Fargo*, 658 F.3d at 700–701. Thus, the California Court of Appeal's decision conflicts with the decisions of the Second and Seventh Circuits.

II. THE CALIFORNIA COURT OF APPEAL'S DECISION MISCONSTRUES THE INDIAN GAMING REGULATORY ACT

In rejecting the *Catskill Development* interpretation adopted by the Second and Seventh Circuits, the California Court of Appeal also departed from the plain language of the Commission's implementing regulations. It thus failed to give the Commission proper deference and misconstrued the Act.

Section 11(a)(1) of the Act makes any "management contract" subject to Commission approval, 25 U.S.C. 2711(a)(1), and Section 11(a)(3) states that under that provision a management contract "shall be considered

to include all collateral agreements to such contract that relate to the gaming activity," *id.* § 2711(a)(3). A Commission regulation defining management contract clarifies exactly how a collateral agreement must relate to gaming activity in order to be considered a management contract:

> Management contract means *any* contract, subcontract, or *collateral agreement* between an Indian tribe and a contractor … *if such* contract or *agreement provides for the management of all or part of a gaming operation*.

25 C.F.R. 502.15 (emphasis added). As *Catskill Development* recognized, under this definition, not all collateral agreements are deemed management contracts and require Commission approval. Instead, "a collateral agreement is subject to agency approval … only if it 'provides for the management of all or part of a gaming operation.'" 547 F.3d at 130 (quoting 25 C.F.R. 502.15).

This regulation is entitled to deference. Congress gave the Commission authority to promulgate regulations implementing the Act. *See* 25 U.S.C. 2706(b)(10). Accordingly, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to the interpretation of the Act in the Commission's regulations "if the statute is ambiguous and if the agency's interpretation is reasonable." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). The Commission's definition of management contract easily satisfies this test.

Section 11(a)(3) of the Act is ambiguous. It states that, for purposes of Section 11(a)(1), a management contract shall be considered to include all collateral

agreements that "relate to the gaming activity." 25 U.S.C. 2711(a)(3). But it does not specify how a collateral agreement must relate to gaming activity. The California Court of Appeal asserted that this provision plainly applies where a collateral agreement "become[s] subject to regulation by virtue of their relationship to management contracts or management contractors." App. 79a. That is plainly wrong. Section 11(a)(3) does not say that collateral agreements should be considered management contracts if they have a relationship with "management contracts or management contractors." It says that collateral agreements should be considered management contracts if they relate to "gaming activity," 25 U.S.C. 2711(a)(3), and because Section 11(a)(3) does not explain what sort of relationship is required, it leaves the provision ambiguous.

The Commission's implementing regulations provide a reasonable interpretation of the relationship required by Section 11(a)(3). The relevant regulation defines management contract to include collateral agreements that "provide for the management of all or part of a gaming operation." 25 C.F.R. 502.15. This is a perfectly reasonable interpretation. Collateral agreements that provide for "management … of a gaming operation" plainly relate to gaming activity, and the definition's focus on management activity is consistent with Section 11(a)(3)'s function—which is to identify the collateral agreements considered management contracts.

The regulation is also consistent with the Act's stated policies. *First,* the regulation ensures that the Commission reviews collateral agreements for which it has standards to apply. One of the problems noted by

the Act was the absence of clear standards for regulating Indian gaming. *See* 25 U.S.C. 2701(3) ("existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands"). While the Act provides standards for contracts that manage Indian gaming activity, the Commission "has no standards to use for approval" of collateral agreements that do not manage such activity, as a former Commission general counsel has recognized, *see* Kevin Washburn, THE MECHANICS OF INDIAN GAMING MANAGEMENT CONTRACT APPROVAL, 8 GAMING L. REV. 333, 345 (2004). Limiting the necessity for Commission approval to collateral agreements that provide for gaming management spares the Commission from reviewing agreements without any standards. *Id*.

Second, the regulation furthers the policy of promoting tribal autonomy. While the Act was intended to provide a statutory basis for regulating Indian gaming, 25 U.S.C. 2702(2), it also recognized and sought to further the federal policy of promoting "tribal self-sufficiency." *id*. §§ 2701(4), 2702(1). By limiting the requirement for Commission approval, the regulation ensures that agreements implicating the Act's core concerns are subject to approval, while leaving other agreements to the discretion of the tribes and thereby recognizing their self-sufficiency and autonomy.

Third, the regulation promotes tribal economic development. *See* 25 U.S.C. 2701(4); *id*. § 2702(1). The Commission typically takes one to three years to review and approve a management contract. *See* Washburn, *supra*, 8 GAMING L. REV. at 334. As commentators have recognized, however, "[f]requently in gaming-related transactions, time is of the essence." Staudenmaier & Khalsa, *Theseus, the Labyrinth, and*

the Ball of String: Navigating the Regulatory Maze to Ensure Enforceability of Tribal Gaming Contracts, 40 J. MARSHALL L. REV. 1123, 1125–1126, 1134 (2007). By limiting the scope of Commission review of collateral agreements, the regulation allows construction and other aspects of casino development projects unrelated to management of gaming activity to move forward while Commission review of related management contracts is being conducted.

The overwhelming weight of authority supports application of the plain language of the Commission's implementing regulation. *Catskill Development* relied on the regulation in ruling that a collateral agreement is subject to Commission approval under Section 11(a)(1) of the Act "only if it 'provides for the management of all or part of a gaming operation.'" *Catskill Development*, 547 F.3d at 130 (quoting 25 C.F.R. 502.15). While two district court decisions predating *Catskill Development* held that collateral agreements required Commission approval merely because they were related to management contracts,[4] every other federal decision both before and after *Catskill Development* has held that a collateral agreement must provide for management of gaming activity. *See Stifel, Nicolaus & Co.*, 807 F.3d at 203 ("it is only when that related agreement also provides for the 'management of all or part of a gaming operation' that NIGC approval is required"); *Wells Fargo Bank*, 658 F.3d at 701 ("a

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[4] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 249 F. Supp. 2d 901, 907 (W.D. Mich. 2003); *Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians of California*, 2002 WL 34727095, at *4 (N.D. Cal. Dec. 26, 2002).

document collateral to a management contract is subject to agency approval only if it provides for the management of all or part of a gaming operation") (quotation omitted).[5] *See generally* Washburn, *supra*, 8 GAMING L. REV. 333, 345 (2004) ("The NIGC has authority to approve a collateral agreement only if it also meets the definition of 'management contract,' that is, it provides for the 'management of all or part of a gaming operation.'").

Before filing its amicus brief in this case, the Commission also recognized this interpretation. In opinion letters, the Commission's general counsel repeatedly stated, often citing *Catskill Development*, that the Commission had "authority to review and approve gaming-related contracts and collateral agreements to management contracts *to the extent that they implicate*

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[5] *See also Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d at 678 ("only collateral agreements that also provide for the management of all or part of a gaming operation are void without NIGC approval"); *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d at 667 (same); *United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, 2005 WL 1397133, at *3 (N.D.N.Y. June 13, 2005) ("The Commission regulations clearly provide that a collateral agreement is a management contract if it provides for the management of all or part of a gaming operation.") (quotation omitted); *BounceBackTechnologies.com v. Harrah's Entertainment, Inc.*, 2003 WL 21432579, at *7 (D. Minn. June 13, 2003) (holding that an agreement did not require Commission approval because it "does not provide for the management of all or part of a gaming operation") (quotation omitted).

management."[6] In addition, the Commission as a whole took the same position in terminating a contemplated rulemaking proceeding concerning collateral agreements. National Indian Gaming Comm'n, Notice of No Action, 76 Fed. Reg. 63325, 63325 (Oct. 12, 2011) ("IGRA does not require approval of agreements collateral to management contracts unless those agreements also provide for management.").

The California Court of Appeal made no attempt to reconcile its interpretation of Section 11(a)(3) with the Commission regulation defining management contract upon which the *Catskill Development* relied—and, indeed, criticized the federal courts for "[p]iecing together" the language of the regulation. App. 77a. Instead, the Court of Appeal asserted that the plain language of

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[6] Letter from Eric Shepard to George Gholson, Chairman of Timbisha Shoshone Tribe, August 27, 2013 at 1 (emphasis added) (citing, among other authorities, *Catskill Development*, 547 F.3d at 130), *available at* http://bit.ly/2FyVZjM; *see also* Letter from Penny J. Coleman to Larriann Musick, Chairman of La Jolla Band of Luiseno Indians, April 2, 2010, at 1 ("The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management.") (citing, among other authorities, *Catskill Development*, 547 F.3d at 130), *available at* http://bit.ly/2HvKvKh; Letter from Penny J. Coleman to Edward Fleisher, Nov. 3, 2006, at 6 ("[O]nly collateral agreements that provide for the management of all or part of gaming operation are 'management contracts' requiring the NICG Chairman's approval."), *available at* http://bit.ly/2FA1BKG. These letters are available on the Commission's website at https://www.nigc.gov/general-counsel/management-review-letters.

the regulation should be ignored because following it would render the definition of management contracts in the Act and the definition of collateral agreements in its implementing regulations "mere surplusage." App. 78a–79a. This argument, which picks up on an abbreviated argument made by the United States in its amicus brief below, contradicts the positions repeatedly taken by the Commission prior to that amicus brief, and is demonstrably wrong.

The Commission's regulation does not render the Act's definition of management contracts meaningless or unnecessary. Section 11(a)(3) states that a management contract "shall be considered to include all collateral agreements to [a management contract] that relate to the gaming activity." 25 U.S.C. 2711(a)(3). The Commission's regulation does what a regulation is supposed to do: it clarifies what the ambiguous phrase "relate to the gaming activity" means by requiring a collateral agreement to "provide[] for the management of all or part of a gaming operation" to be considered a management contract. 25 C.F.R. 502.15.

The California Court of Appeal asserted that there would be no need to reference collateral agreements in the Act if such agreements must qualify as a management agreement to be subject to Commission review. App. 78a. But the Act imposes numerous requirements on management contracts, including provisions for "adequate accounting procedures," "access to daily operations of the gaming to appropriate tribal officials," a "minimum guaranteed payment to the Indian tribe," and "an agreed ceiling for the repayment of development and construction costs." 25 U.S.C. 2711(b)(1)–(4). By stating that collateral agreements may be considered management contracts for purposes

of Commission review, Section 11(a)(3) makes clear that, even when there is an agreement containing all the provisions that the Act requires a management contract to contain, some other, "collateral" agreements may be considered management contracts and subjected to Commission approval. In other words, contracts that do not satisfy all the Act's requirements for a "management contract" may nonetheless be "collateral agreements" subject to Commission review, but only where those "collateral agreements" provide for management of gaming activity. Moreover, this holds true under the regulation defining management contracts to include only collateral agreements that provide for management of gaming activity.

That regulation also does not render the regulation defining collateral agreement superfluous. Even though the Commission only approves management contracts (and collateral agreements that qualify as management contracts), it "has taken the position that … collateral agreements must be submitted" to it. National Indian Gaming Comm'n, Notice of Inquiry, 75 Fed. Reg. 70680, 70683 (Nov. 18, 2010). As a former Commission official has explained, "review of collateral agreements is a key ancillary aspect of management contract review," which the Commission needs to ensure it understands the management contracts it reviews. Washburn, *supra*, 8 GAMING L. REV. at 345–346. The definition of collateral agreement determines the scope of the agreements the Commission examines in reviewing a management contract. Indeed, the Commission "created a broad definition of the term 'collateral agreement' to insure that it can review all the documents needed for meaningful management contract review." *Id*. at 346.

Thus, the California Court of Appeal failed to offer any persuasive reason for ignoring the plain language of the Commission's implementing regulations and rejecting the overwhelming weight of federal authority.

III. THIS PETITION RAISES AN IMPORTANT AND RECURRING QUESTION THAT WARRANTS REVIEW

This case presents an important and recurring question concerning the scope of the Commission's authority—whether collateral agreements are subject to Commission approval even if they do not provide for management of gaming activities—that needs a clear and certain answer.

The importance of Indian gaming cannot be disputed. According to the Commission, there are now nearly 500 Indian gaming facilities with gross revenues exceeding $30 billion. National Indian Gaming Comm'n, Gross Gaming Revenues 2012-2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports; *see also* National Indian Gaming Comm'n, Growth in Indian Gaming Graph 2007-2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports (showing that, on average, Indian gaming revenues grew by more than half a billion dollars annually over the last nine years). These revenues are used "to fund education, improve health and elder care, enhance police and fire departments, build housing and roads, develop environmental programs, launch commercial ventures, and buy back reservations lands." Sandra J. Ashton, *The Role of the National Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 545–546 (2003); *see also* Randal K.Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on*

American Indian Economic Development, 29 J. ECON. PERSPECTIVES 185, 185, 187 (2015) ("Indian gaming has allowed marked improvement in several important dimensions of reservation life.").

This case raises a fundamental question concerning the scope of the Commission's authority over Indian gaming. Because expansion of the Commission's authority limits the corresponding authority of the Indian tribes, this issue has direct impact on the autonomy and self-sufficiency of Indian tribes in connection with their gaming operations. In addition, as noted above, the scope of the Commission's authority affects the potential for development. *See supra* p. 18. Indeed, the decision below construed the Commission's authority so broadly that it voided a plain-vanilla promissory note simply because the note referenced gaming activity.

Questions whether collateral agreements must be approved by the Commission arise frequently. Before the Second Circuit's decision in *Catskill Development* and its adoption by the Seventh Circuit effectively resolved the question in the federal courts, the question was raised in numerous cases. *See Stifel, Nicolaus & Co.*, 807 F.3d at 203; *Wells Fargo Bank*, 658 F.3d at 701; *Catskill Development*, 547 F.3d at 130; *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d at 678; *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d at 667; *United States ex rel. Saint Regis Mohawk Tribe,* 2005 WL 1397133, at *3; *BounceBackTechnologies.com*, 2003 WL 21432579, at *7; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 249 F. Supp. 2d at 907; *Sonoma Falls Developers, LLC*, 2002 WL 34727095, at *4. Tribes also frequently requested "declination" letters advising

whether collateral agreements are subject to Commission review.[7] And because the Act generally limits management contracts to a five-year term, *see* 25 U.S.C. 2711(b)(5), questions concerning what collateral agreements must be reviewed recur with each new cycle of management contracts.

This case is a good vehicle for considering the question presented. The Note plainly does not trigger Commission review under *Catskill Development*'s interpretation, because it does not provide for management of gaming activity. Indeed, the Note does not even give the Tribe the right to any revenue from that activity. It merely requires the Tribe to repay advances made to enable the Tribe to develop a casino (at a reduced interest rate). App. 126a; *see also supra* p. 7. The Note does *reference* gaming activity in describing when payments must be made and in setting reduced payment levels in case of financial difficulties. App. 126a. But those references do not confer any management authority over gaming activity. Thus, while the references make the Note "collateral" to a man-

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[7] *See, e.g.,* Letter from Eric Shepard to George Gholson, Chairman of Timbisha Shoshone Tribe, August 27, 2013 at 5, *available at* http://bit.ly/2FyVZjM; Letter from Penny J. Coleman to Larriann Musick, chairman of La Jolla Band of Luiseno Indians, April 2, 2010, at 7, *available at* http://bit.ly/2HvKvKh; Letter from Penny J. Coleman to Michell Hicks, Principal Chief of Eastern Band of Cherokee Indians, March 6, 2008, at 2, *available at* http://bit.ly/2FO1c6H; Letter from Penny J. Coleman to Edward Fleisher, Nov. 3, 2006, at 9, *available at* http://bit.ly/2FA1BKG; Letter from Penny J. Coleman to Chief Paul Spicer, Seneca-Cayuga Tribe of Oklahoma, June 21, 2006, at 9–10, *available at* http://bit.ly/2ImUjYx.

agement contract, they do not make it the sort of collateral agreement that qualifies as a management contract under the Commission's regulations and thus subject to Commission approval under *Catskill Development*.

It is also important to dispel the confusion that the decision below creates in California. Indian gaming has "especially thrived in California." Suzianne Painter-Thome, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 317 (2010). California has a disproportionate number of Indian casinos, and their revenues are the highest in the country. National Indian Gaming Comm'n, Gross Gaming Revenues by Region 2015 and 2016, *available at* https://www.nigc.gov/commission/gaming-revenue-reports. As a consequence, absent review, the California Court of Appeal's decision in this case will have a disproportionate impact on Indian gaming operations.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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March 19, 2018

APPENDIX

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

[Filed 9/15/17]

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C070512
(Super. Ct. No. PC20070154)

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SHARP IMAGE GAMING, INC.,

Plaintiff and Respondent,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Defendant and Appellant.

———

APPEAL from a judgment of the Superior Court of El Dorado County, Nelson Keith Brooks, Judge. Reversed and remanded with directions.

DENTONS US, Paula M. Yost and Ian R. Barker; KERR & WAGSTAFFE, James M. Wagstaffe, Daniel A. Zaheer and Kevin B. Clune; and Mary Kay Lacey for Defendant and Appellant.

Robert G. Dreher, Assistant Attorney General, John L. Smeltzer, Aaron P. Avila and Avi M. Kupfer for United States Department of Justice as Amicus Curiae on behalf of Defendant and Appellant.

DLA PIPER, Matthew R. Jacobs, Steven S. Kimball and Todd M. Noonan for Plaintiff and Respondent.

In this case, we reverse a judgment related to contractual claims that are preempted by the Indian Gaming Regulatory Act (IGRA).

Defendant Shingle Springs Band of Miwok Indians (the Tribe) appeals from a judgment after trial in favor of plaintiff Sharp Image Gaming, Inc. (Sharp Image), in plaintiff's breach of contract action stemming from a deal to develop a casino on the Tribe's land. On appeal, the Tribe argues: (1) the trial court lacked subject matter jurisdiction because Sharp Image's action in state court was preempted by IGRA; (2) the trial court erred in failing to defer to the National Indian Gaming Commission's (NIGC) determination that the disputed Equipment Lease Agreement (ELA) and a promissory note (the Note) were management contracts requiring the NIGC's approval; (3) Sharp Image's claims were barred by the Tribe's sovereign immunity; (4) the trial court erred in denying the Tribe's motion for summary judgment; (5) the jury's finding that the ELA was an enforceable contract was inconsistent with its finding that the ELA left essential terms for future determination; and (6) substantial evidence does not support the jury's verdict on the Note.

After the parties completed briefing in this case, we granted permission to the United States to submit an amicus curiae brief in partial support of the Tribe on the questions of preemption and lack of subject matter jurisdiction. The United States asserted that the trial court could only exercise jurisdiction over Sharp Image's breach of contract claim "upon a determination that the unapproved ELA was not a management contract, a legal determination that the [trial court] never made." The United States further argues that based on the NIGC's legal determination that the ELA

was an unapproved management contract and therefore void, the trial court should have dismissed this case under the doctrine of preemption. The United States urges us to defer to the NIGC's interpretation of its own regulations, contending that the agency's reasonable interpretation is entitled to "substantial deference." Lastly, the United States contends that the Note was an unapproved collateral agreement to a management contract subject to IGRA and as such, Sharp Image's claims related to the Note are also preempted.

We conclude that IGRA preempts state contract actions based on unapproved "management contracts" and "collateral agreements to management contracts" as such agreements are defined in the IGRA regulatory scheme. Thus, the trial court erred by failing to determine whether the ELA and the Note were agreements subject to IGRA regulation, a necessary determination related to the question of preemption and the court's subject matter jurisdiction. We further conclude that the ELA is a management contract and the Note is a collateral agreement to a management contract subject to IGRA regulation. Because these agreements were never approved by the NIGC Chairman as required by the IGRA and were thus void, Sharp Image's action is preempted by IGRA. Consequently, the trial court did not have subject matter jurisdiction.[1]

We reverse.

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[1] Because we agree with the Tribe and the United States that federal law preempts Sharp Image's state law claims and the trial court thus lacked subject matter jurisdiction, we need not reach the Tribe's other claims on appeal.

BACKGROUND

Indian Gaming Regulatory Act

The Supreme Court has consistently "recognized Indian tribes as 'distinct, independent political communities,' [citation], qualified to exercise many of the powers and prerogatives of self-government." (*Plains Commerce Bank v. Long Family Land & Cattle Co.* (2008) 554 U.S. 316, 327 [171 L.Ed.2d 457, 471].) Accordingly, the tribes may establish their own law with respect to "internal and social relations." (*Ackerman v. Edwards* (2004) 121 Cal.App.4th 946, 951.) "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. . . . '[W]ithout congressional authorization,' the 'Indian Nations are exempt from suit.'" (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [56 L.Ed.2d 106, 115].)

One area where Congress has exercised its plenary authority is IGRA. (25 U.S.C. § 2701 et seq.) When enacting IGRA, Congress recognized that "numerous Indian tribes [had] become engaged in . . . gaming activities . . . as a means of generating tribal governmental revenue." (25 U.S.C. § 2701(1).) Congress further observed that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." (25 U.S.C. § 2701(5).) Congress enacted IGRA to "provide a statutory basis for the operation of [Indian] gaming" as a means to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702(1)), but also to "shield [tribes] from organized crime and other corrupting influences, to ensure that [tribes are]

the primary beneficiary of . . . gaming operation[s], and to assure that gaming is conducted fairly and honestly by both the operator and the players." (25 U.S.C. § 2702(2).)

IGRA divides Indian gaming into three classes. Here we are concerned with class III gaming, which includes casino games played against the house such as blackjack and roulette, slot machines, and pari-mutuel betting such as horse racing and all other forms of gaming that are not class I gaming ("social games solely for prizes of minimal value" or traditional games associated with tribal ceremonies) or class II gaming (bingo and card games in which gamblers play against one another rather than against the house). (25 U.S.C. § 2703(6)-(8); *Wells Fargo Bank v. Lake of the Torches* (7th Cir. 2011) 658 F.3d 684, 687-688 (*Wells Fargo*).) Tribes are permitted to have class III gaming under the following conditions: (1) the gaming is conducted under a tribal ordinance that meets specified statutory requirements and that has been approved by the chairman of the NIGC (25 U.S.C. § 2710(d)(1)(A)); (2) the gaming is located in a state that otherwise permits such gaming (25 U.S.C. § 2710(d)(l)(B)); and (3) the gaming is conducted in "conformance with a Tribal-state compact" between the tribe and the state where the gaming will occur (25 U.S.C. § 2710(d)(1)(C)).

IGRA created the NIGC within the Department of the Interior (25 U.S.C. § 2704(a)), and granted the NIGC broad regulatory powers to implement and enforce IGRA (25 U.S.C. § 2706(a)-(b)), including the power to promulgate "appropriate" regulations (25 U.S.C. § 2706(b)(10)). The NIGC "oversees regulation, licensing, background checks of key employees, and other facets of gaming. [Citation.] It is the NIGC that

must approve license applications, management contracts, and tribal gaming ordinances." (*American Vantage Companies v. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 595-596 (*American Vantage*).)

Among its various powers, the NIGC has full authority over "management contracts." Under IGRA, an Indian tribe may enter into a management contract for the operation of class II or class III gaming activity if such contract has been submitted to, and approved by, the Chairman. (25 U.S.C. §§ 2710(d)(9), 2711(a)(1).) Under IGRA regulations promulgated by the NIGC, "[m]anagement contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." (25 C.F.R. § 502.15.) Further, a "management contract . . . shall be considered to include all collateral agreements to [the management contract] that relate to the gaming activity." (25 U.S.C. § 2711(a)(3).) The term "[c]ollateral agreement means any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." (25 C.F.R. § 502.5.) Management contracts "shall become effective upon approval by the Chairman" of the NIGC (25 C.F.R. § 533.l(a)), and "[m]anagement contracts . . . that have not been

approved by the . . . Chairman . . . are void" (25 C.F.R. § 533.7).[2]

Once the NIGC determines, in a final agency action, that it possesses authority over a particular Indian gaming contract, that decision is entitled to binding and preclusive legal effect "unless and until" it is successfully challenged in a federal district court pursuant to section 2714.[3] (*AT & T Corp. v. Coeur d'Alene Tribe* (9th Cir. 2002) 295 F.3d 899, 905, 908 (*AT&T*), boldface omitted [NIGC approval of a management contract and tribal resolution are final agency actions subject to review only in federal court under the Administrative Procedures Act].) Because the NIGC determination is a federal administrative action, judicial review of the NIGC's determination of whether a contract is subject to its authority is within the exclusive jurisdiction of the federal courts. (25 U.S.C. § 2714; *U.S. ex rel. Saint v. President* (2d Cir. 2006) 451 F.3d 44, 51 (*Saint*).)

When establishing the pre-approval statute for IGRA management contracts, Congress referenced section 81 of title 25 of the United States Code, an existing pre-approval requirement for any contracts "relative

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[2] In full, 25 Code of Federal Regulations part 533.7 reads: "Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void."

[3] Section 2714 of title 25 of the United States Code provides in pertinent part: "Decisions made by the Commission pursuant to sections 2710 [and] 2711 . . . of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court." We discuss relevant provisions in sections 2710 and 2711, *post*.

to [Indian] land." (25 U.S.C. § 81.) At that time, section 81 of title 25 of the United States Code provided that "[n]o agreement shall be made by any person with any tribe of Indians, . . . in consideration of services for said Indians relative to their lands, . . . unless such contract or agreement be . . . approved" by the Secretary of the Interior. IGRA expressly transferred the Secretary of the Interior's authority under section 81 to the NIGC "relating to [IGRA] management contracts." (25 U.S.C. § 2711(h); *Saint, supra*, 451 F.3d at p. 48.) Based on this legislative history, courts have long held that federal approval of contracts falling under section 81 of title 25 of the United States Code is an "absolute prerequisite to . . . enforceability." (*A.K. Management Co. v. San Manuel Band of Mission Indians* (9th Cir. 1986) 789 F.2d 785, 789.) A void contract under section 81 of title 25 of the United States Code "cannot be relied upon to give rise to any obligation by the [tribe]." (*A.K. Management Co.*, at p. 789; accord, *Quantum Entertainment v. Dept. of the Interior* (D.C. Cir. 2013) 714 F.3d 1338, 1343-1344.) When enacting IGRA, Congress established the same rule for unapproved management contracts. (See *Catskill Development v. Park Place Entertainment* (2d Cir. 2008) 547 F.3d 115, 127-130 (*Catskill*).) "[T]he statute provides for pre-screening of contracts between the tribes and parties desiring to establish business relationships with the tribes that might impair [the] fundamental purpose of the federal statutory scheme, and *it is this comprehensive review that constitutes the core of Congress's protection for Indian gaming establishments*." (*Wells Fargo, supra*, 658 F.3d at p. 700, italics added.)

The Tribe's Reservation

The Tribe is a federally recognized Indian Tribal government with a reservation situated on the Shingle Springs Rancheria in El Dorado County (the Reservation). (See 25 U.S.C. § 479a-l; 77 Fed.Reg. §§ 47868, 47871 (Aug. 10, 2012).) When the State of California realigned Highway 50 during the 1960s, the Tribe's Reservation lost access to and from public roadways. While the original plans for the realignment proposed a tunnel underneath Highway 50 connected to the Reservation, the plans for building the tunnel were ultimately cancelled and the Reservation was effectively landlocked except for access through Grassy Run Road, a private road in a residential subdivision that dead-ended at the Reservation. Owned and controlled by the Grassy Run Homeowners' Association, the Tribe was prohibited from using the road for any commercial purpose, and was only allowed to use the road for residential and limited governmental purposes. Due to its landlocked location, the Tribe was initially unable to develop commercial gaming on the Reservation.

The Disputed Agreements

In 1996, Sharp Image met with the Tribe about developing a gaming venture. At the time, Sharp Image was supplying gaming machines to approximately 25 Indian casinos in California. Despite the lack of access to the Reservation on public roads, Sharp Image and the Tribe entered agreements to develop gaming on the Reservation.

The first was the Gaming Machine Agreement (GMA), entered on May 24, 1996, which required Sharp Image to fund a casino, to be known as Crystal Mountain Casino. Pursuant to the GMA, Sharp Image

agreed to advance "all funds necessary" for the "immediate construction" of a temporary casino under a tent, as well as all funds necessary for the "acquisition of all equipment" and furnishings "related to the interior or operation of the Casino." Sharp Image also agreed to "advance monies on behalf of the Tribe for construction of a larger Casino facility." In exchange, the Tribe agreed to repay all monies advanced by Sharp Image at an annual interest rate of 12 percent with the repayment terms for any advances to be "set forth at a later date."

In addition, the GMA stated Sharp Image would provide the Tribe with up to 400 gaming machines in the new facility and further provided that Sharp Image would maintain the exclusive right to supply all gaming machines located and operated within any of the Tribe's casinos or its gaming establishments during the term of the agreement. The term of the agreement was five years, but it would be extended two years if the Tribe did not exercise the option to purchase the machines at the end of the initial five-year term. The GMA further provided that Sharp Image "shall maintain complete responsibility with regards to promotions for the Casino and provide direction for the General Manager in this department."

Under the GMA, the Tribe would pay Sharp Image 30 percent of the net revenues "derived by the Tribe from the Equipment." It defined net revenues to mean "all gross revenues received by the Tribe in connection with its operation of all Machines or Table games on the Casino premises or Reservation, minus all jackpots or payouts made through such Equipment."

Pursuant to the GMA, the Crystal Mountain Casino opened as a temporary tent structure with Sharp

Image's gaming machines on October 4, 1996, but it was shut down after one night for safety reasons. The Tribe "had gotten word that there [were] problems with the operation and that the [NIGC] was going to issue an order to shut down." Among other issues, there were fire safety concerns about the temporary tent structure and furnishings, and concerns about emergency access on the narrow road to the casino.[4]

Shortly after the casino's closure, on November 5, 1996, general counsel for the NIGC, Michael Cox, sent a letter to the Tribe's Chairman, William D. Murray, declaring the GMA "null and void." The NIGC concluded Sharp Image had supplied gaming machines, class III machines under IGRA, which were illegal without an effective tribal-state compact in place, and which the Tribe did not then have. Crystal Mountain Casino reopened in the spring of 1997, without the gaming machines, but it was unsuccessful and closed within months.

On June 18, 1997, the President of Sharp Image, Chris Anderson, sent a letter to Chairman Murray proposing new contracts to replace the GMA: the ELA and the Note. The ELA and the Note were enclosed with the letter. The letter stated, that the ELA and Note "represent *a more complete agreement* between Sharp Image Gaming, Inc. and the Shingle Springs Rancheria." (Italics added.) It further stated, "These instruments incorporate the points of the original [GMA] agreement, but further address some points that benefit both parties in having formalized." The letter also explained, "The promissory note, which we

[4] At a later point in time, a neighborhood association sued in federal court, obtaining a ruling that the road is a private road and prohibiting its use for commercial purposes.

have delayed in submitting, incorporates the total owed as of May 31, 1997." The letter further stated that the ELA and the Note were produced by Cox, "former lead counsel for the NIGC," who had sent the November 1996 letter to the tribe advising that the GMA was null and void. Cox was by this time working for Sharp Image.

Subsequently, Anderson attended a Tribal Council meeting on November 15, 1997. The meeting minutes reflect, and Anderson confirmed in his trial testimony, that Sharp Image was attempting to solve the Tribe's access problem by "purchas[ing] property to provide an easement to the Rancheria." According to the minutes, Anderson stated that he had "purchased property to provide an easement to the Rancheria" and expected that the casino would reopen within months, by January 1, 1998. At the end of the meeting, the Tribal Council approved the ELA and the Note. The ELA, was entered on the day of the Tribal Council meeting, November 15, 1997, along with the Note, to replace the GMA.

The ELA provided a lease term of five years to "commenc[e] on the date that 400 gaming devices" to be provided by Sharp Image were "installed and in operation at Lessor's [Sharp Image] Crystal Mountain Casino or any other gaming facility owned and operated by Lessee [the Tribe]." Additionally, the ELA gave Sharp Image the right to provide the "video gaming devices" to the Tribe (the Equipment), as well as the "exclusive right" to "supply additional gaming devices . . . to be used at its existing or any future gaming facility or facilities." As with the GMA, the term would be automatically extended two years if at the end of the five-year term, the Tribe did not purchase the machines Sharp Image had provided. In

addition to the gaming devices, the ELA stated that Sharp Image would provide progressive hardware and software, as well as signage for the gaming devices and "fiber optic signs for placement throughout any gaming facility owned and operated" by the Tribe.

Similar to the GMA, the lease payments were fixed at 30 percent of net revenues from the equipment, defined as "gross gaming revenues from all gaming activities, which are solely related to the operation of Video Gaming/Pulltab devices and card games, less all prizes, jackpots and payouts." (Italics added.) Also, the ELA gave Sharp Image the right to inspect the books, and in the event of an audit, Sharp Image could select the auditor if the parties could not agree on who would conduct the audit.

Different from the GMA, the ELA contained a list of "[e]vents of [d]efault" by the Tribe. The ELA did not include a list of events relative to default by Sharp Image. Also, in the event of default by the Tribe, the ELA contained a list of remedies available to Sharp Image, but no similar list of remedies is set forth for the Tribe in the event of a default by Sharp Image.

In the Note, the Tribe acknowledged the total amount previously invested to develop Crystal Mountain Casino was $3,167,692.86. The Note stated this was "the full amount owed up to September 30, 1997," and that the "principal sum" of the Note was "not to exceed" this amount. The Note further provided that the Tribe would repay sums already advanced by Sharp Image to develop the Crystal Mountain Casino, and future sums advanced for casino development, at an annual interest rate of 10 percent. Like the ELA, the Note also referenced "four hundred (400) video gaming devices," and provided that repayment was to "commence . . . following the date that four hundred

(400) video gaming devices . . . are installed and in operation at Borrower's Gaming Facility and Enterprise."[5] The Note further provided that the principle and interest was to be fully amortized over twelve months and paid in equal monthly installments to commence two months after installation of the gaming devices.

As did the GMA, the ELA and the Note both stated that the Tribe "expressly waives its sovereign immunity from any suit, action or proceeding," in California state or federal courts, "to enforce [the Tribe's] obligations . . . for any claims arising out of this lease." Also, the ELA stated that the Tribe was "solely responsible for the management of [its] gaming facility," that the parties did not intend the ELA to "constitute a management contract," and that "nothing in [the ELA] authorizes [Sharp Image] to manage all or part of [the Tribe's] gaming facility."

Repudiation of the ELA

Due to the ongoing road access issues, the Crystal Mountain Casino never reopened, and consequently, the revenues needed to build a larger, permanent facility were never generated. Also, Sharp Image never "installed" or put "in operation" 400 gaming machines at Crystal Mountain Casino. Additionally, the parties sought other investors after Sharp Image

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[5] Inexplicably, the ELA refers to Crystal Mountain Casino as the "Lessor's Crystal Mountain Casino" and defines "Lessor" as Sharp Image, yet the Note refers to "Borrower's Gaming Facility and Enterprise" and defines "Borrower" as the Tribe. We assume the reference to "*Lessor*'s Crystal Mountain Casino" in the ELA is a typographical error because neither the Tribe, nor amicus make anything of it. (Italics added.)

was unable to invest further resources in developing gaming on the Rancheria.

In early 1999, Anderson introduced Lakes Gaming (Lakes), to the Tribe as a potential investor and manager. Anderson testified that he had heard Lakes was a "management company." During these negotiations, Sharp Image asserted an exclusive right, under the ELA, to supply gaming equipment to any future facility and sought to sell this interest to Lakes for $75 million. On June 11, 1999, the Tribe adopted a resolution to approve the development and management agreements with Kean-Argovitz Resorts (KAR), which were entered on the same date. Anderson testified that KAR offered to buy out Sharp Image's interest for $35 million, which he refused.

In June 1999, after receiving informal advice from the NIGC[6] that its contracts with Sharp Image were invalid, the Tribe repudiated its contracts with Sharp Image. In a June 1, 1999, letter from the Tribe to Anderson, the Tribe advised that it believed Sharp Image breached two provisions of the GMA and left the Tribe with outstanding debt. This letter also made reference to an attached letter from NIGC that "leaves doubt as to the validity of the Agreement with NIGC and BIA."[7] In a letter to Anderson dated a day later, June 2, 1999, the Tribe said that based on information from the NIGC and Bureau of Indian Affairs (BIA), it believed that the "Gaming Machine Agreements" may

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[6] The Tribe's May 15, 1999, meeting minutes make reference to a meeting tribal representatives had in Washington, D.C., with "NIGC and BIA gaming management" at which they were informed the agency would not approve the "[c]ontract as written."

[7] The letter attached to the June 1, 1999, letter to Anderson is not in the record.

be invalid.[8] The letter further advised that the Tribe was concerned about "Sharp Image's failure to meet certain financial requirements," asserting that the Tribe had accumulated debt related to gaming activities which Sharp Image had agreed to pay pursuant to the GMA and Anderson's personal affirmation.

On June 9, 1999, Cox sent a letter to the Tribe asserting that Anderson "expended approximately nine million dollars in a three-year effort to assist the Tribe in developing a gaming operation, fighting the NIGC's efforts to prevent the gaming operation from opening, litigating the Tribe's right of access to its reservation, purchasing parcels of land in the Grassy Run Subdivision to provide an alternative route into the reservation and paying the salaries of tribal employees at the Tribe's casino that is closed for business." Cox told the Tribe it was free to submit their agreements to the NIGC or BIA for review and expressed confidence that "neither Agreement" falls within either agency's jurisdiction. Sharp Image asserted that the agreements were not management contracts subject to IGRA but "essentially equipment lease and financing agreements" and accordingly, "neither Agreement" required approval of the NIGC or the BIA. Finally, Sharp Image asserted it was not its "intent to prevent the Tribe from negotiating an agreement with a gaming management company. Sharp [Image] recognizes that in order for that to occur there must be some type of modification to [Sharp Image]'s prior Agreements with the Tribe. That can only occur, however, if there [are] good faith negotiations by all concerned parties. Questioning the

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[8] The letter referred to the agreements in the plural, but did not specifically reference the ELA or the Note.

legality of these Agreements can only poison the negotiations process."

On June 28, 1999, the Tribe sent Anderson another letter stating the all of the agreements were "void" because they would not receive necessary federal approvals. The Tribe stated its position was based primarily on IGRA. The Tribe asserted, "Sharp [Image] and Mr. Anderson were given wide latitude in developing a gaming operation on tribal lands, despite the fact as you have pointed out that [Sharp Image]'s agreement was a machine lease contract. Unfortunately, these actions have only [led] to further restrictions on Tribal sovereignty and increasing debt for the Tribe. [Sharp Image]'s proposed solutions to these problems seem to only result in more debt. It is these realities which have [led] the Tribe to seek other alternatives." Anderson testified that his contract was "cancelled" and he was told that the Tribe would no longer do business with him.

Lakes, KAR, and the Tribe began construction of the Red Hawk Casino in 2007. Anderson testified that he waited until 2007 to file suit—eight years after the Tribe repudiated the contract—because that is when it first appeared the Tribe would have the financial assets to pay a judgment.

Procedural History

Sharp Image's Complaints

Sharp Image filed its original complaint on March 12, 2007. It alleged that the Tribe breached the GMA, the ELA, the Note, and a series of oral agreements purportedly entered later regarding the repayment of advances made after the Note was executed. In the original complaint, Sharp Image alleged, inter alia, that while "the time for [the Tribe's] payment of

monies under the contracts has not yet commenced, [the Tribe] has unequivocally repudiated its obligations under the contracts." Sharp Image subsequently filed a first amended complaint adding the allegation that the "Tribal Council" waived its sovereign immunity. A second amended complaint appears in the record[9] with causes of action based only on the ELA and the Note.

NIGC Opinion Letter

About a month after Sharp Image filed its original complaint, the Tribe asked the NIGC to review the GMA and ELA to determine the status of the agreements under federal law. On April 13, 2007, the Tribe's counsel sent a letter to the NIGC's Acting General Counsel, Penny Coleman, stating that the Tribe believed the GMA and ELA to be void management contracts granting Sharp Image an illegal proprietary interest in the Tribe's gaming operations. The letter further stated, "[A]s recommended by NIGC Bulletin 93-3,[10] the Agreements are being submitted

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[9] It is unclear from the record whether this document was filed.

[10] NIGC Bulletin No. 93-3, entitled "Submission of Gaming-Related Contracts and Agreements for Review," reads in pertinent part: "The NIGC has received several requests for guidance on whether particular gaming-related agreements require the approval of the NIGC or the Bureau of Indian Affairs (BIA). [¶] Certain gaming-related agreements require the approval of either the National Indian Gaming Commission (NIGC) pursuant to 25 U.S.C. § 2711 (25 CFR Part 533) or the Bureau of Indian Affairs pursuant to 25 U.S.C. § 81. [¶] In order to provide timely and uniform advice to tribes and their contractors, *the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA,*

to your office for review to determine if the Tribe's views are correct." The Tribe's counsel sent a supplemental letter to Coleman on April 24, 2007, expanding its legal arguments and asking the NIGC to advise the Tribe on the legality of the agreements. Neither Sharp Image nor its counsel was copied on either letter.

On June 14, 2007, the NIGC Acting General Counsel issued an advisory opinion letter (the Opinion Letter) advising the Tribe that the GMA and ELA were both management contracts pursuant to section 2711 of title 25 of the United States Code and void in the absence of approval by the NIGC's chairman. Counsel for Sharp Image was copied on this letter.

The Opinion Letter cited NIGC Bulletin No. 94-5,[11] an informal advisory opinion which provides a

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they should submit those agreements to the NIGC. [¶] The NIGC will review each such submission and determine whether the agreement requires the approval of the NIGC. If it does, the NIGC will notify the tribe to formally submit the agreement. [¶] If the NIGC determines that the agreement does not require the approval of the NIGC, the submitter will be notified of that fact and the NIGC will forward the agreement to the BIA for its review. [¶] For additional information, contact Michael Cox at the NIGC . . . or the BIA Gaming Management Office . . . ." (NIGC Bulletin No. 93-3 (July 1, 1993) at <https://www.nigc.gov/compliance/detail/submission-of-gaming-related-contracts-and-agreements-for-review> [as of Sept. 13, 2017], italics added (Bulletin No. 93-3).) (See *New Gaming Systems v. National Indian Gaming Com'n* (W.D.Okla. 2012) 896 F.Supp.2d 1093, 1096, fn. 4 (*New Gaming*).)

[11] The purpose of NGIC Bulletin No. 94-5 is stated therein: "Questions have been raised as to what distinguishes a management contract from a consulting agreement. The answers to these questions depend upon the specific facts of each case. The Commission stands ready to make a decision as to whether or not a particular contract or agreement is a 'management contract' under Commission regulations. However, before doing so, the

definition of "management" relative to management agreements. According to the bulletin, "[m]anagement encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling.) The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval." (Bulletin No. 94-5, *supra*.) The Opinion Letter observed that the GMA and ELA gave Sharp Image exclusive control over the gaming equipment to be installed at the casino and a high rate of compensation, both factors that are "indicative of a management agreement."

Regarding the GMA, the Opinion Letter noted that it provides that Sharp Image would maintain the responsibility for promotions and provides direction to the casino general manager. The letter opined, "This alone is sufficient to find management."

Regarding the ELA, the Opinion Letter specifically cited several provisions related to the "control" Sharp Image would have over the gaming operations: the term of the lease is for five years; Sharp Image has the exclusive right to lease to the Tribe additional gaming devices to be used at any of the Tribes existing or future facilities; the Tribe is required to pay 30 percent

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Commission must see the entire document including any collateral agreements and referenced instruments." (NIGC Bulletin No. 94-5 (Oct. 14, 1994) at <https://www.nigc.gov/compliance/detail/approved-management-contracts-v.-consulting-agreements-unapproved-managemen> [as of Sept. 13, 2017] (Bulletin No. 94-5).) The Bulletin goes on to offer "information and observations" (*ibid.*) about management contracts and other gaming related contracts, some of which we discuss *post*.

of the net gaming revenues defined as gross gaming revenues from all gaming activities less prizes, jackpots, and payouts; Sharp Image has the right to inspect and copy casino books and records; remedies for default are only available to Sharp Image, not the Tribe; and the Tribe may purchase the machines Sharp Image provided at the end of the five-year term, but if it does not, the agreement is automatically extended two years.

As for the payment terms in the GMA and ELA, the Opinion Letter stated that those terms violated IGRA, opining that "[t]he agreements show that [Sharp Image] seeks to use the Tribe's gaming facilities as a long term venue where [Sharp Image] is the exclusive supplier of machines and derives a majority of the profit." The Opinion Letter reasoned that if the agreements were enforced, they would give Sharp Image "a fee equaling thirty percent (30%) of adjusted gross revenue because they define 'net revenue' not as IGRA does but rather as all gross revenues received by the Tribe of all machines or table games minus all jackpots or payouts." The Opinion Letter noted that "IGRA defines net revenues as: 'gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees'" and went on to reason, "As a practical matter, it is possible for thirty percent (30%) of adjusted gross revenue to equal a far higher amount of net revenue because operating costs, such as electricity, building maintenance, and employee salaries, have not been deducted. Consequently, the majority of the benefit of [the] Tribe's gaming would be conveyed to [Sharp Image]." Because this definition of "net revenue" exceeds the "net revenue[]" allowed under IGRA (25 U.S.C. § 2711(c)(l)-(2)), the Opinion Letter concluded that Sharp Image would "receiv[e]

the majority of the benefit from the operation over a [five] or [seven] year term" of the ELA, and that allowing such payments would necessarily interfere with Tribe's ability to govern its gaming operation. The Opinion Letter thus stated the ELA would violate IGRA's mandate that "[t]ribes, not machine vendors, are supposed to be the primary beneficiaries of Indian gaming. 25 U.S.C. § 2702(2)."

Regarding the exclusive right to provide the gaming machines and software, the Opinion Letter stated that under both agreements, the Tribe is "beholden to [Sharp Image] for all of its machines" and that, under the circumstances here, the agreements provide Sharp Image with "de facto management ability." Under the agreements, if the Tribe desired more machines, it is dependent on Sharp Image to purchase and lease them to the Tribe and there is nothing in the agreements to prohibit Sharp Image from refusing. "Likewise, if the Tribe wishes to change the payout percentages, it can only get new game software from [Sharp Image] who may or may not have it or may or may not choose to get it." Thus, the Opinion Letter noted that Sharp Image "effectively has a veto over the number and kinds of machines the Tribe may offer."

The Opinion Letter further noted that the default provisions in the ELA expressly list events triggering default by the Tribe and Sharp Image's remedies, but set forth no default events that would apply to Sharp Image and no potential remedies for the Tribe. According to the Opinion Letter, "[s]uch one-sided provisions are a further indication of [Sharp Image]'s apparent ability to control the gaming activity. This level of control coupled with the term and compensation provided is indicative of a management agreement."

The Opinion Letter concluded, "After careful review, we have determined that there are sufficient indicia of control to conclude that the Agreements are management agreements that would require the approval of the Chairman. Under IGRA, a management contract is void if it has not been reviewed and approved by the Chairman of the NIGC pursuant to 25 U.S.C. §2711."

The Tribe's Motion to Dismiss and Bifurcate the Preemption Issue

Citing the Opinion Letter, the Tribe moved, on July 9, 2007, to dismiss Sharp Image's complaint based the federal doctrine of complete preemption, contending that the GMA and ELA were unapproved management contracts in violation of IGRA.[12] The Tribe also sought to bifurcate the preemption issue. Sharp Image challenged the admissibility of the Opinion Letter, objecting on hearsay grounds as well as asserting the letter was not properly subject to judicial notice because the letter was not an "official act" of the NIGC.

The trial court denied the motion to bifurcate, and it sustained Sharp Image's objection to the NIGC's Opinion Letter, reasoning that the letter did not have a "binding effect" and did not appear to be an "official act of the NIGC." The court further reasoned that it appeared the Tribe was seeking to introduce the Opinion Letter "to prove the truth of the matter asserted therein, that the Acting General Counsel of the NIGC was of the opinion that two of the contracts that are part of the subject litigation violate IGRA."

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[12] The Tribe also sought dismissal based on the doctrine of sovereign immunity.

NIGC Chairman's Formal Review

After the trial court's ruling, on January 24, 2008, the Tribe asked the NIGC for a formal review of the agreements and to make a "final determination" on the status of the GMA and ELA under federal law. Tribal Chairman Nicholas Fonseca sought a meeting with the NIGC Chairman, which Sharp Image was not privy to. Fonseca testified that the purpose of the meeting was to see if he could "get the NIGC to make some sort of decision" on the legality of the agreements. Fonseca testified that he told Chairman Philip Hogen that he believed that the ELA was "illegal" and asked the NIGC to "please do something about it."

On July 18, 2008, the NIGC advised both parties that it would undertake a formal review of the agreements and would "give Sharp [Image] an opportunity to share [its] views on this subject." Both parties were given an opportunity to provide written submissions to the NIGC, and both did so.

On August 1, 2008, Sharp Image provided its initial written submission. Much of Sharp Image's submission argued that NIGC was acting beyond its legal authority because the agreements are not management contracts and the Tribe did not submit them for approval as management contracts.[13] Sharp Image further complained about the Tribe's numerous ex

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[13] Contrary to Sharp Image's argument, the NIGC "has broad power to determine what does and does not require approval." (*Saint, supra*, 451 F.3d at pp. 50-51 [rejecting a tribe's argument that IGRA and its implementing regulations provide no mechanism for the NIGC to render decisions concerning unapproved contracts and holding that before a tribe can seek a declaration in federal court that a contract is void because it has not been approved by the NIGC, the tribe must first exhaust administrative remedies by submitting the contract to the NIGC].)

parte communications with NIGC. As for the nature of the agreements, Sharp Image simply asserted they are not management contracts and whether they are is a disputed issue in the state litigation and "may properly be decided in that forum." Sharp Image offered no analysis or argument supporting its assertion that the contracts are not management contracts; nor did it offer any rebuttal to the analysis in the Opinion Letter or the guidance in Bulletin No. 94-5.

Thereafter, Sharp Image made numerous other procedural related submissions up until December 11, 2008, when, according to the Chairman, it submitted a letter repeating the arguments it had made in it August 1, 2008, letter.[14] The Chairman kept the record open for additional submissions through the end of discovery in the instant litigation and all the way up to the day he issued his decision. Sharp Image submitted no additional arguments.

On April 23, 2009, the Chairman issued a 15-page decision letter (Decision Letter) determining that both the GMA and ELA were management contracts. The Chairman characterized the Decision Letter as a "formal determination under 25 U.S.C. § 2711." While acknowledging the statement in the ELA that the parties did not intend to enter a management contract, the Chairman observed that "[d]espite what it calls itself, the 1997 ELA is a management contract." In addition to his determination about the management nature of the agreements, the Chairman disapproved each agreement because they "fail[ed] to include certain statutory provisions required for management contracts," rendering them "void."

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[14] The December 11, 2008, letter is not part of the record on appeal.

As did the Opinion Letter, the Decision Letter advised that "under the 1996 GMA, Sharp [Image] has responsibility for casino promotions and provides direction to the casino's general manager. . . . This directing, coordinating, and controlling alone makes the 1996 GMA a management contract under IGRA." Additionally, the Decision Letter stated, "[B]oth agreements provide Sharp [Image] with broad operational control sufficient to make them management contracts. In short, Sharp [Image] will have the exclusive right to provide gaming machines for all of the casino floor space at such facilities for five, and potentially seven, years. Freedom to configure the gaming floor, the essence of managing a casino, is not in the control of [the Tribe]. This too is sufficient to make both agreements management contracts. I therefore adopt the management analysis in the 2007 OGC opinion. The 1996 GMA and 1997 ELA are management contracts within the meaning of IGRA, 25 U.S.C. § 2711, and, as such, must be reviewed and approved by the NIGC Chairman."

The Decision Letter also advised that any challenge to the NIGC's formal determination is "subject to appeal to the full Commission" pursuant to former "25 C.F.R. Part 539" and thereafter to "a federal district court" pursuant to "25 U.S.C. § 2714." Sharp Image appealed the Chairman's decision to the full commission. However, on June 5, 2009, the Chairman advised Sharp Image by letter that because the vice commissioner had recused himself from all matters related to the Tribe and the Commission as constituted at that time consisted of only the vice commissioner and the Chairman, the Commission was "functionally unable

to review and decide your appeal."[15] The letter further advised, "Your appeal is governed by [former] 25 C.F.R § 539.2, which provides that, '[i]n the absence of a decision within [thirty days after receipt of the appeal], the Chairman's decision shall constitute the final decision of the Commission.'" The letter concluded, "Because no appeal decision will issue, the Chairman's decision will become the final decision of the Commission on June 20, 2009. Final Commission decisions may be appealed to the appropriate Federal district court pursuant to 25 U.S.C. § 2714."[16] Sharp Image never filed such an appeal.

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[15] The full Commission consists of three full-time members. Two members are necessary for a quorum. (25 U.S.C. § 2704(b)(1), (d).) The chairman is appointed by the President with the advice and consent of the Senate and the other two commissioners are appointed by the Secretary of the Interior. (25 U.S.C. § 2704(b)(1)(A), (B); *Tamiami Partners v. Miccosukee Tribe of Indians* (11th Cir. 1995) 63 F.3d 1030, 1033 (*Tamiami Partners*).)

[16] Former part 539.2 of 25 Code of Federal Regulations provided: "A party may appeal the Chairman's disapproval of a management contract or modification under parts 533 or 535 of this chapter to the Commission. Such an appeal shall be filed with the Commission within thirty (30) days after the Chairman serves his or her determination pursuant to part 519 of this chapter. Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal. An appeal under this section shall specify the reasons why the person believes the Chairman's determination to be erroneous, and shall include supporting documentation, if any. Within thirty (30) days after receipt of the appeal, the Commission shall render a decision unless the appellant elects to provide the Commission additional time, not to exceed an additional thirty (30) days, to render a decision. *In the absence of a decision within the time provided, the Chairman's decision shall constitute the final decision of the Commission*." (Italics added.) This provision was later replaced with two regulations. Part

The Tribe's Motion to Quash/Dismiss

On July 9, 2007, the Tribe filed a motion to quash/dismiss for lack of subject matter jurisdiction, contending that the trial court lacked jurisdiction to hear Sharp Image's contractual claims because the claims were completely preempted by IGRA. On April 17, 2009, the Tribe filed an amended motion to dismiss for lack of subject matter jurisdiction on the ground of preemption. The Tribe argued that Sharp Image's claims were completely preempted because (1) if enforced, they would give Sharp Image a proprietary interest in the Tribe's gaming operation in violation of IGRA, and (2) the agreements were unapproved management contracts conferring managerial control to Sharp Image without prior approval by the NIGC in violation of IGRA.

On November 17, 2009, the trial court denied the Tribe's motions. The court reasoned that, because the GMA and ELA were "terminated and/or cancelled" by the Tribe, the NIGC lacked jurisdiction to take any action on them. The court stated, "Since the contract was not viable and had been terminated or cancelled according to the parties, it obviously was not a contract which dealt with gaming." Thus, since the agreements were terminated or cancelled, there was "no jurisdiction in the [NIGC] . . . to review, regulate, approve or

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583.6 of 25 Code of Federal Regulations, effective October 25, 2012, provides that the Commission "*shall* issue its final decision within 90 days after service of the appeal brief or within 90 days after the conclusion of briefing by the parties, whichever is later." (25 C.F.R § 583.6(a), italics added.) Part 580.11 of the 25 Code of Federal Regulations, effective on the same date, provides in pertinent part: "In the absence of a decision of a majority of the Commission within the time provided, the Chair's decision shall constitute the final decision of the Commission."

disapprove them. Absent such regulatory authority in the NIGC, the dispute regarding damages from any alleged breach . . . rests with the State of California courts."

As "a separate and independent basis for determining the character of the action of the Chairman," the trial court reasoned that the Chairman's decision "was not a final action and must be disregarded because it was fatally flawed." The court found that the Chairman's action violated Sharp Image's due process rights and contravened various IGRA procedural requirements. The court further found that the Tribe's request to NIGC was not a request for approval of a management contract, rather it was a "request for an expression of opinion . . . . As such it is, in the Court's opinion, *not entitled to any deference*." (Italics added.)

The trial court did not determine, as a matter of law, whether the GMA and ELA were management contracts or whether the Note was a collateral agreement to a management contract.

Motion for Discovery Sanctions

While the litigation was pending, the Tribe discovered that Sharp Image failed to produce documents during discovery concerning Sharp Image's interactions with the California Bureau of Gambling Control (the Bureau), referencing its business dealings with the Tribe. The documents included an investigative report prepared by the Bureau, dated November 19, 2008 (Bureau Report), which specifically referenced Sharp Image's instant lawsuit against the Tribe. The Bureau concluded in a letter dated January 26, 2009, that Sharp Image was not "suitable to conduct business within the California gaming environment," in part due to its business dealings with the Tribe.

After discovering this information, the Tribe sought sanctions against Sharp Image commensurate with the withholding of this evidence. Because the Bureau's finding of unsuitability meant that the Tribe could not accept gaming machines from Sharp Image effective November 19, 2008, about a month before Red Hawk Casino opened, the Tribe sought an issue sanction establishing that fact and prohibiting Sharp Image from rebutting the withheld evidence. The trial court denied the Tribe's motion for issue sanctions.

Motion for Summary Judgment

The Tribe moved for summary judgment on various grounds, including the following: (1) the lawsuit was time barred because Sharp Image's 2007 complaint was premised on an actual breach of its claimed right to exclusivity, which allegedly occurred in 1999; (2) alternatively, if the statute of limitations had not run, the Tribe was nevertheless entitled to summary judgment because Sharp Image could not prove its claims under the law governing anticipatory breach; and (3) under any theory of its complaint, the Tribe was not the "but for" cause of any alleged damages because under the Tribe's Compact with the State, the Tribe could not accept gaming machines from Sharp Image in December 2008, when Red Hawk Casino opened. The trial court denied the Tribe's motion for summary judgment.

The Trial

After Sharp Image dismissed all causes of action except the breach of contract claims related to the ELA and the Note, the case proceeded to jury trial on those claims. The jury determined that the Tribe had breached both contracts and returned a verdict in favor of Sharp Image of approximately $20.4 million

on the ELA and approximately $10 million on the Note.[17] The Tribe then moved for judgment notwithstanding the verdict, which the trial court denied. The court found there was substantial evidence to support the verdict "that the ELA and promissory note agreements were formed and that the agreements also covered any future gaming facility or facilities of [the Tribe]."

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[17] The trial court did not, as Sharp Image claims, instruct the jury to determine whether the ELA and the Note were management contracts. Rather, as a defense to Sharp Image's breach of implied covenant of good faith claim, the Tribe presented evidence that it had repudiated the ELA and the Note based on the good faith belief that the agreements were void under IGRA. At the Tribe's request, the trial court instructed the jury on the definition of the term "management contract" and advised the jury that unapproved management contracts are void. The instruction read as follows: "A management contract is any contract between an Indian tribe and a contractor that provides for any management activity with respect to all or part of a gaming operation. Management encompasses activities such as planning, organizing, directing, coordinating and controlling. [¶] When multiple agreements, read together, provide for management of an Indian gaming operation, each of the agreements requires federal approval. Management contracts that have not been approved by the [NIGC] Chairman are void." The instruction did not explain that "[t]he performance of *any one of such activities* with respect to all or part of a gaming operation constitutes management" as set forth in Bulletin No. 94-5, which we discuss in more detail, *post*. (Italics added.) Nor did the instructions list the specific "activities" set forth in the bulletin that are suggestive of management contract, which we also discuss *post*. In any event, contrary to Sharp Image's contention about what the jury was asked to decide, the verdict forms asked the jury to make a number of specific findings, but not whether the ELA is a management contract or whether the Note is a collateral agreement to a management contract. Moreover, as we discuss *post*, these were questions of law for the trial court.

DISCUSSION

I. Arguments on Appeal

On appeal, the Tribe argues that IGRA completely preempts Sharp Image's contractual claims and the superior court lacked subject matter jurisdiction as a result. The Tribe contends that the NIGC issued a final agency determination that Sharp Image's contracts violated IGRA and were invalid management contracts and that we should defer to this determination. Thus, the Tribe argues, "[b]ecause the NIGC has determined the agreements fall within 'IGRA's protective structure,' [Sharp Image]'s claims predicated upon the agreements are preempted." Sharp Image responds that the trial court correctly declined to defer to the NIGC Decision Letter because it does not constitute a final agency action and the Tribe failed to carry its burden of establishing preemption.

Amicus United States provided extensive argument on preemption. First, amicus contends that the trial court erred in rejecting the Tribe's preemption argument before first determining whether the agreements were management contracts or collateral agreements of management contracts under IGRA. If the agreements are unapproved management contracts or unapproved collateral agreements of management contracts, then Sharp Image's claims are preempted by IGRA, amicus argues. Additionally, amicus contends that the trial court erred in failing to defer to the NIGC's regulatory interpretation that the GMA and ELA were management contracts under IGRA. Finally, amicus contends that while the NIGC did not expressly address whether the Note is a management contract, it is nevertheless a collateral agreement to the ELA for IGRA purposes.

The Tribe filed a response to the amicus brief, agreeing with its analysis and additionally arguing that that the trial court erred in assuming jurisdiction to reach the merits of Sharp Image's arguments on the NIGC's alleged procedural violations without first establishing its jurisdiction. Sharp Image responds that the trial court was not required to make a determination about whether the agreements were management contracts under IGRA before assuming jurisdiction. It argues that under *American Vantage, supra*, 103 Cal.App.4th 590, "an Indian tribe's contention that a contract was an unapproved management contract and therefore unlawful and void is an affirmative defense to be ascertained and adjudicated in the ordinary course of trial proceedings" rather than as a jurisdictional question. Additionally, Sharp Image relies upon the *American Vantage* court's suggestion that whether a contract is found to be a consulting agreement or a void management agreement, either characterization leads to the same result; the contract is not subject to IGRA regulation. Sharp Image further contends that the trial court was not required to defer to the NIGC's 2007 and 2009 letters opining that the ELA was an unapproved management contract and therefore void. Finally, concerning the nature of the agreements, Sharp Image argues that ELA is only a lease for gaming equipment and is not a management contract and even if the ELA is a management contract, the Note is not a collateral agreement subject to IGRA because it does not "provide for some aspect of management."

For the reasons we shall discuss, we hold that the trial court was obligated to determine whether the agreements were management contracts or collateral agreements to management contracts under IGRA, a necessary determination related to the question of

whether Sharp Image's action was preempted by IGRA. We further hold that the ELA is a management contract and that the Note is a collateral agreement to a management contract. Thus, these agreements are within the protective scope of IGRA. Because these agreements were not approved by the NIGC Chairman as required by IGRA and are consequently void under federal law, Sharp Image's action is preempted by IGRA and thus, the trial court did not have subject matter jurisdiction.

II. Analysis

A. Preemption and IGRA

In general, a plaintiff can avoid federal subject matter jurisdiction by pleading claims relying exclusively on state law, such as contractual claims. (*Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 392 [96 L.Ed.2d 318, 327].) The presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule: federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (*Ibid.*) However, certain federal statutory schemes "'convert[] an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" (*Id.* at p. 393.) There are four different types of preemption that have been recognized by our Supreme Court: (1) express preemption, which occurs when Congress defines the extent to which a federal law preempts state law; (2) conflict preemption, which occurs when it is impossible to comply with both state and federal laws; (3) obstacle preemption, which arises when a state law creates an obstacle to the full execution of an objective of federal law; and (4) field preemption, which "applies 'where the scheme of federal regulation is sufficiently

comprehensive to make [a] reasonable . . . inference that Congress "left no room" for supplementary state regulation.' [Citation.] [¶] "'[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it.'" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936.) Under the field preemption doctrine, which applies here, any claim purportedly based on the preempted state law is considered, from its inception, to be a federal claim and therefore arises under federal law for subject matter jurisdiction purposes. (*Caterpillar*, at p. 393.) Whether and to what extent IGRA preempts state contract-enforcement actions is a question of law and is reviewed de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 (*Farm Raised Salmon*) ["federal preemption presents a pure question of law"]; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371 [federal "[p]reemption is a legal issue involving statutory construction and the ascertainment of legislative intent"].)

"One of IGRA's principal purposes is to ensure that the tribes *retain control* of gaming facilities set up under the protection of IGRA and of the revenue from these facilities." (*Wells Fargo, supra*, 658 F.3d at p. 700, italics added; *id.* at p. 687 [requiring tribes to be the "primary beneficiary" of gaming].) "The regulatory scope of IGRA is . . . far reaching in its supervisory power over Indian gaming contracts." (*Gaming World Int., Ltd. v. White Earth Chippewa Indians* (8th Cir. 2003) 317 F.3d 840, 848.) IGRA so dominates the field of regulating Indian gaming that it not only completely preempts the field of Indian gaming but is also incorporated into gaming contracts by operation of law. (*Ibid.*) Indeed, the legislative history is quite

clear on Congress's intent to occupy the field. "The Senate Report unequivocally states . . . that IGRA 'is intended to expressly preempt the field in the governance of gaming activities on Indian lands.'" (*Tamiami Partners, supra*, 63 F.3d at p. 1033, citing Sen.Rep. No. 446, 2d Sess. (1988) reprinted in U.S. Code Cong. & Admin. News, p. 3076.) Our own Supreme Court has recognized the intent of Congress to preempt the field. "In the structure and scope of IGRA, which comprehensively addresses all forms of gambling on Indian lands, Congress made clear its intent that IGRA preempt the field of regulation of Indian gambling." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 618 [noting the express intent of Congress set forth in the Senate report to preempt the field of Indian gaming].)

In the context of federal removal jurisdiction, courts have applied the doctrine of complete preemption to IGRA. For example, in *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 544 (*Gaming Corp.*), the court stated: "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law." The *Gaming Corp*. court also noted that every reference to court action in IGRA specifies federal court jurisdiction and that state courts are never mentioned in IGRA. (*Id.* at p. 545.) The court went on to hold: "The statute itself and its legislative history show the intent of Congress that IGRA control Indian gaming and that state regulation of gaming take place within the statute's carefully defined structure. We therefore conclude that IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule." (*Id*. at p. 547.)

In *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, Division Seven of the Second Appellate District also recognized the preemptive effect of IGRA. There, a gaming management company brought various contract-related claims against a tribe. (*Id*. at p. 1411.) The tribe filed a motion to stay the proceedings, or in the alternative to quash on ground that federal law completely preempted Indian gaming and gaming contract regulation and thereby deprived the state court of jurisdiction to rule on claims alleged in the complaint. (*Id*. at p. 1414.) The trial court found that the allegations in the complaint all concerned Indian gaming, ruled that IGRA preempted the field and dismissed the action. (*Id*. at p. 1424.) The appellate court, following the analysis in *Gaming Corp., supra*, 88 F.3d 536, held that the management company's claims, however styled, were completely preempted by IGRA and affirmed the trial court's dismissal because it lacked jurisdiction. (*Great Western Casinos*, at pp. 1426, 1428.)

In *American Vantage*, our sister court in the Fifth Appellate District noted that application of the doctrine of complete preemption is not limited to the determination of federal removal jurisdiction. (*American Vantage, supra*, 103 Cal.App.4th at p. 595.) "[I]f the complete preemption doctrine applies, the state court does not have jurisdiction over the action" and where the case is not removed from state court to federal court, the state court must dismiss for lack of jurisdiction. (*Ibid*.)

However, federal courts recognize that IGRA's preemptive force is limited to claims that fall within its scope. (See *Gaming Corp., supra*, 88 F.3d at pp. 548-549.) IGRA does *not* apply to all contract disputes

between a tribe and a non-tribal entity, but only those pertaining to management contracts and collateral agreements to those contracts, as those terms are defined under IGRA. (See 25 U.S.C. § 2711; 25 C.F.R. §§ 502.5, 502.15; see also *Casino Resource Corp. v. Harrah's Entertainment* (8th Cir. 2001) 243 F.3d 435, 439-440.)

Similar observations were made by the court in *American Vantage*. That court has observed that "[b]ased on its text and structure, legislative history and jurisdictional framework, the IGRA has been construed as having the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule. [Citation.] Thus, claims that fall within the preemptive scope of the IGRA, i.e., those that concern the regulation of Indian gaming activities, are considered to be federal questions. [¶] *However, not every contract between a tribe and a non-Indian contractor is subject to the IGRA.* [Citations.] *Rather, IGRA regulation of contracts is limited to management contracts and collateral agreements to management contracts*." (*American Vantage, supra*, 103 Cal.App.4th at p. 596; 25 U.S.C. § 2711, italics added.)

Sharp Image argues that for purposes of preemption, it does not matter whether the agreements are unapproved management contracts under IGRA. Relying on *American Vantage*, Sharp Image contends that where a plaintiff contractor sues to enforce an agreement and a defendant tribe alleges the agreement is a management contract that is void because it was not approved by the NIGC, there can be no IGRA preemption no matter whether the agreement is a management contract or not. We disagree with the point made in *American Vantage* upon which Sharp

Image relies. To explain our disagreement, a review of *American Vantage* is required.

To begin with, the agreement ultimately at issue in *American Vantage* was not a management contract and the NIGC said so. In that case, the Table Mountain Rancheria retained American Vantage Companies for the development and operation of a casino and initially entered into various management contracts. (*American Vantage, supra*, 103 Cal.App.4th at p. 593.) As the *American Vantage* court explained, because these earlier agreements were in fact management contracts subject to IGRA, American Vantage was required to obtain NIGC approval under section 2711 of title 25 of the United States Code. (*American Vantage*, at p. 593.) Because the agreements were never approved, the NIGC initiated an enforcement action against American Vantage. The NIGC concluded, "[T]he original management contract improperly delegated gaming authority to [American Vantage]." (*Ibid*.) Thereafter, Table Mountain, American Vantage, and the NIGC reached a settlement agreement providing that American Vantage would pay a fine, the parties would enter an agreement terminating the existing management contract, and the parties would enter a consulting agreement in lieu of the management contract. (*Ibid.*) The termination agreement, executed contemporaneously with and as part of the settlement agreement, cancelled the existing management contract in exchange for a payment of $16,800,000. (*Ibid*.)

The second contract executed pursuant to the settlement, the consulting agreement, obligated American Advantage to provide technical assistance, training and advice to Table Mountain in the operation of its gaming activities in exchange for a monthly fee. The

NIGC reviewed both agreements and determined that they did not require NIGC approval. (*American Vantage, supra*, 103 Cal.App.4th at p. 593.) Significantly, the NIGC expressly determined that the termination and consulting agreements pursuant to the settlement were *not* management contracts or collateral agreements to management contracts subject to its authority under IGRA. (*Id.* at pp. 593-594.)

Several years after executing the termination and consulting agreements, after a change in tribal leadership, Table Mountain notified American Vantage that it was cancelling these agreements and would make no further payments. (*American Vantage, supra*, 103 Cal.App.4th at p. 594.) American Vantage then filed a breach of contract action. (*Ibid.*) Table Mountain moved to quash the complaint on jurisdictional grounds, contending that American Vantage's claims were completely preempted under IGRA because the termination and consulting contracts were purportedly unapproved management contracts. (*Ibid.*) The trial court granted Table Mountain's motion, reasoning that "whether [American Vantage] acted as a manager or not, the contracts themselves related to the governance of Table Mountain's gaming activities" and accordingly, the contractual claims were completely preempted. (*Ibid.*)

On appeal, the *American Vantage* court observed that "the NIGC determined that neither the termination agreement nor the consulting agreement required the approval of the NIGC chairman." (*American Vantage, supra*, 103 Cal.App.4th at p. 596.) Thus, the *American Vantage* court correctly reasoned, "it must be concluded that the contracts fall outside the IGRA's protective structure." (*Ibid*.) This key fact distinguishes *American Vantage* from the instant case. In

American Vantage, the termination and consulting agreements were executed pursuant to a settlement agreement involving the NIGC itself after an NIGC enforcement action pertaining to prior agreements the NIGC had determined were management contracts. (*Id.* at pp. 593-594.) As for the termination and consulting agreements, there was nothing for the NIGC to approve, because the NIGC had already determined the agreements were not management contracts within the scope of IGRA. Thus, the protective purposes of IGRA were not implicated by American Vantage's state claims based on those agreements. In the instant case, the Tribe and Sharp Image entered agreements that the NIGC never approved and subsequently determined were management contracts. In other words, the closer analog in the *American Vantage* case to the case before us is not the termination and consulting agreements that were the subject of the litigation on appeal but the earlier unapproved management contracts that led to the NIGC enforcement action in the first place.

Even though the NIGC had essentially determined there was nothing for it to approve by determining that the termination and consulting contracts were not management contracts, the *American Vantage* court went on to address Table Mountain's argument that the consulting agreement was actually an unapproved management contract and thus void. (*American Vantage, supra*, 103 Cal.App.4th at p. 596.) The court stated, "At this point it is *unknown whether Table Mountain will be able to prove this defense*. Such a determination will require an examination of the relationship between the parties. Once those facts are ascertained in the trial court, they will determine the

character of the contract under the IGRA."[18] (*Ibid.*, italics added.) The court then said, "there are only two

[18] At oral argument, Sharp Image contended that whether the agreement here is a void management contract was a question of contract illegality and an affirmative defense that could be determined by the jury if there is a factual dispute. Sharp Image cited the above discussion in *American Vantage* in support of this procedure. Additionally, in its response to the amicus brief, Sharp Image cited Civil Code section 1667, subdivision (1), which provides that a contract is not lawful if it is "[c]ontrary to an express provision of law" and Civil Code section 1598, which provides, "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." However, citing *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349-350, Sharp Image conceded in its written response to the amicus brief that whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case, and it further suggested that the trial court would have been obligated to decide this issue first if its determination was "essential to the court's subject matter jurisdiction." Moreover, we note that all but one of the several cases Sharp Image cites do not involve federal preemption and none involve questions of subject matter jurisdiction. The one case that references federal law, *Duffens v. Valenti* (2008) 161 Cal.App.4th 434, involves a motion to compel arbitration, provisions of the Federal Arbitration Act (FAA) and a belated contention on appeal that the FAA applied. In *Duffens*, the illegality of the contract was asserted as a defense to arbitrability, a matter the court said was a question of law to be decided by the trial court. (*Duffens*, at p. 444.) As for the applicability of the FAA, the court rejected that contention, in part because of language in the contract making the choice of law California law. It applied the rule that generally, procedural state rules are not preempted by the FAA if the parties have agreed to arbitrate under California law. (*Id*. at p. 452.) As we have said, preemption involves a question of law for the trial court and as we make clear *post*, the instant case should never have gone to the jury

possible outcomes[:] The contract will be found to be either a consulting agreement or a void management agreement. Nevertheless, either characterization leads to the same result. The *contract is not subject to IGRA regulation*." (*Ibid.*, italics added, citing *Gallegos v. San Juan Pueblo Business Dev. Bd. Inc.* (D.N.M. 1997) 955 F.Supp. 1348, 1350 (*Gallegos*).) It is this portion of the *American Vantage* discussion upon which Sharp Image extensively relies in its argument on appeal. And it is this point in *American Vantage* with which we disagree.

Our disagreement begins with the case the *American Vantage* court cited for this proposition, *Gallegos, supra*, 955 F.Supp. 1348. That case is also distinguishable and the reasoning flawed. In *Gallegos*, a gaming company sued a tribe in New Mexico state court to recover gaming equipment after the tribe repudiated an equipment lease agreement the NIGC had concluded was an unapproved management contract. (*Gallegos*, at p. 1349.) The tribe removed the case to federal court, alleging federal question jurisdiction because the action was based on an unapproved management contract. (*Ibid*.) Thus, according to the tribe, the state law claim was preempted. The gaming company moved to remand the case back to the state court. (*Id*. at p. 1348.) The district court granted that motion, holding that whether the contract was a lease or an unapproved management contract did not affect the action; however, the court reached this conclusion, in part, because the action was for a writ of replevin to return the equipment based on breach of the agreement. (*Id.* at pp. 1349-1350.) In our view, this was the correct result because the primary purpose of

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because the action was preempted by IGRA, and thus the trial court lacked subject matter jurisdiction.

a replevin action in New Mexico "is to give or restore the actual possession of goods and chattels to the person lawfully entitled" (*Wood v. Grau* (1951) 55 N.M. 429, 433), and where the plaintiff is simply seeking the return of his property, the protective scope of IGRA is not implicated.

While the *American Vantage* court cited *Gallegos* for the proposition that unapproved management contracts are not subject to IGRA regulation, it did not reference what the district court in *Gallegos* actually said on this point. (*American Vantage, supra*, 103 Cal.App.4th at p. 596.) The district court reasoned that an unapproved management contract is "only an *attempt* at forming a management contract"; as such the plaintiff's "suit in no way interferes with the regulation of a management contract because none ever existed. . . . It is quite a stretch to say that Congress intended to preempt state law when there is no valid management contract for a federal court to interpret." (*Gallegos*, *supra*, 955 F.Supp. at p. 1350, fn. omitted.) But this seemingly unnecessary discussion is flawed and thus, so too is the discussion in *American Vantage*.

First, that a management contract is not approved by the NIGC does not mean the agreement is not a management contract. It is a void management contract, but it is nevertheless still a management contract within the meaning of IGRA given the rights and obligations set forth therein. Second, the district court's reasoning in *Gallegos* is contrary to the clear purpose of IGRA. If state actions against tribes can go forward to enforce agreements that are management contracts by virtue of the rights and obligations created therein even though those agreements have not been approved, IGRA will be circumvented and

tribes will lose the protections Congress intended IGRA to provide. As we have noted, "[o]ne of IGRA's principle purposes is to ensure that the tribes *retain control* of gaming facilities set up under the protection of IGRA and of the revenue from these facilities." (*Wells Fargo, supra*, 658 F.3d at p. 700, italics added.) And the "pre-screening" of contracts between tribes and non-tribal entities that might impair this "fundamental purpose of the federal statutory scheme . . . constitutes the core of Congress's protection for Indian gaming establishments." (*Ibid.*) Thus, to permit the enforcement of agreements that are management contracts within the meaning of IGRA that have not been prescreened and approved by the NIGC would defeat the purposes of IGRA and undermine Congress's protective scheme. Third, the district court's reasoning in *Gallegos* is inconsistent with enforcement authority granted NIGC. The Chairman may order temporary closure of gaming operations conducted pursuant to an unapproved management contract and the NIGC may order permanent closure. (25 U.S.C. § 2713(b)(1), (2); 25 C.F.R. § 573.4(a)(7).) Thus, the notion that the agreement is a mere "*attempt* at forming a management contract" because it has not been approved (*Gallegos, supra*, 955 F.Supp. at p. 1350), does not mean the agreement somehow is outside the protective scope of IGRA.

The *American Vantage* court also missed this point, and indeed its statement that an unapproved management contract is "not subject to IGRA regulation" is inconsistent with its earlier observation concerning NIGC's regulatory authority. Earlier in the opinion, the court stated, "When, based on an examination of the relationship of the parties and the IGRA, the NIGC finds de facto management *under an unapproved agreement*, it has the authority to institute an

enforcement action." (*American Vantage, supra*, 103 Cal.App.4th at p. 596, italics added.) In our view, the *American Vantage* court's recognition of NIGC's enforcement authority concerning unapproved management contracts cannot be squared with the notion that an unapproved management contract is not subject to IGRA regulation. Indeed, it would be quite incongruous to allow a state court contractual claim related to a gaming facility the NIGC shut down because the agreement underlying the litigation had not been approved by NIGC as was therefore void.

Despite the pronouncement that an unapproved management contract is not subject to IGRA regulation, the court in *American Vantage* still saw the possibility of IGRA preemption. Relying on *Gaming Corp., supra*, 88 F.3d 536, the court in *American Vantage* wrote: "Potentially valid state claims are those that would not interfere with [the tribe]'s governance of gaming. [Citation.] Thus, to be preempted, the claim must do more than *involve* Indian gaming activities. The claim must intrude on the tribe's *control* of its gaming enterprise. Accordingly, appellant's claims must be analyzed in this context." (*American Vantage, supra*, 103 Cal.App.4th at p. 597.) But the *American Vantage* court did not consider the actual context in which the *Gaming Corp*. court reasoned that the claim must intrude on the tribe's *control* of its gaming enterprise before the claim could be preempted.

Gaming Corp. did not involve a contractual dispute over an agreement like the dispute in the instant case. Nor was an Indian tribe a party in that litigation on appeal. In *Gaming Corp*., the lawsuit related to claims made by Gaming Corp. and another casino management company against an attorney, Dorsey, for

violation of federal and state law while representing a tribe during a tribal casino management licensing process. Dorsey removed the case to federal district court, but the court remanded the case back to the state court after dismissing several causes of action and concluding no federal questions remained. (*Gaming Corp., supra*, 88 F.3d at p. 539.) Dorsey appealed the remand.

The factual backdrop in *Dorsey* was unusual. Prior to the litigation, Dorsey had represented Gaming Corp., but then accepted representation of the tribe after obtaining the consent of Gaming Corp. and the other management company. (*Gaming Corp., supra*, 88 F.3d at p. 539.) Thereafter, Dorsey represented the tribal gaming commission in assessing applications the two management companies made for a permanent license to manage one of the tribe's casinos. Dorsey presented evidence during several commission hearings, and the commission ultimately denied the applications. (*Id*. at p. 540.) The management companies sued Dorsey in state court, alleging various common law violations in which they essentially asserted that Dorsey made the companies appear unsuitable during the commission hearings. (*Ibid*.) They also alleged Dorsey violated a fiduciary duty to Gaming Corp. (*Ibid*.)

As we have noted, the *Gaming Corp*. court held that IGRA completely preempts state law. (*Gaming Corp., supra*, 88 F.3d at pp. 544, 547.) The court went on to reason that a claim is preempted if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." (*Id*. at p. 548.) The court noted that the line of cases upon which this rule was based

"demonstrates a continuing federal concern for tribal economic development, self-sufficiency, and self-government which Congress reaffirmed in the text of IGRA." (*Ibid.*) It was in this context—a case involving a dispute between "non-Indian" parties—that the *Gaming Corp.* court reasoned the key question was whether any of the claims would "interfere with tribal governance." (*Id*. at p. 549.) The court ultimately reasoned that, because the tribal licensing process is required and regulated by IGRA, "[a]ny claim which would directly affect or interfere with a tribe's ability to conduct its own licensing process . . . fall[s] within the scope of complete preemption." (*Ibid.*, fn. omitted.) The court observed that tribes need to be able to hire agents, including attorneys, to assist them, and Dorsey was hired to carry out the tribe's licensing responsibilities. (*Id*. at pp. 549-550.) It was in the context of determining whether any claims related to Dorsey's duty to the management companies were preempted, that the court said, "Potentially valid claims under state law are those which would not interfere with the [tribe]'s governance of gaming." (*Id*. at p. 550.) However, any claims related to Dorsey's duty to the tribe during the licensing process were preempted. (*Ibid*.)

In our view, in citing the *Gaming Corp*. court's language that "[p]otentially valid claims under state law are those which would not interfere with the [tribe]'s governance," (*Gaming Corp., supra*, 88 F.3d at p. 550) the *American Vantage* court did not consider the nature of management contracts. Indeed, in lifting the language from *Gaming Corp*. and applying it to the case before it, the *American Vantage* court emphasized that the plaintiff's claims were based on contracts the NIGC had determined did not require approval. (*American Vantage, supra*, 103 Cal.App.4th at p. 597.)

But it then reasoned that since American Vantage was not seeking to have the contract reinstated, but rather was seeking monetary damages only, the claim against Table Mountain did not undermine the tribe's decision to terminate the agreement or diminish the tribe's control over its gaming operations. (*Ibid*.)

However, unlike the termination and consulting contracts in *American Vantage*, management contracts, by their nature, impact a tribe's control of its gaming enterprise. That is why they must be preapproved. And as we discuss *post*, the control given to Sharp Image over the Tribe's gaming operations here is what makes the ELA a management contract. Furthermore, the threat of a state court lawsuit and judgment grounded on a breach of an unapproved and void management contract gives the contractor leverage over the tribe and in that way, impacts the tribe's control of its gaming operations. Moreover, a judgment on a void contract requiring the payment of money damages, would necessarily interfere with Tribe's ability to govern its gaming operation to the extent it could not use the monies necessary to pay the judgment for its operation. As a consequence, IGRA's goals of ensuring that tribes are the primary beneficiary of gaming operations and advancing tribal economic development would be undermined. (See 25 U.S.C. § 2702(1)-(2).)[19] Thus, even if we were to apply

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[19] In *American Vantage*, Table Mountain argued that money damages would adversely impact its operations of its only economic asset. The *American Vantage* court dismissed this argument as conflating "control" with "profitability." According to the court, while money damages might decrease Table Mountain's net profits, "Table Mountain's ability to autonomously govern its gaming operation would remain intact." (*American Vantage, supra*, 103 Cal.App.4th at pp. 597-598.) But this reasoning overlooks the leverage a management contractor would have over

an *interference with control* test as suggested in *American Vantage*, we would conclude Sharp Image's action is preempted by IGRA.

However, our approach is much more straight forward. We conclude that a state court claim cannot go forward based on an agreement that is an unapproved management contract or an unapproved collateral agreement to a management contract under IGRA. Such actions are preempted by IGRA. Accordingly, the threshold question that must be answered is whether the agreements underlying this litigation are management contracts or collateral agreements to management contracts, bringing them within IGRA's protective scope. If not, Sharp Image's action was not preempted. If so and the agreements were not approved, Sharp Image's action to enforce the agreements is preempted by IGRA and the trial court did not have subject matter jurisdiction. As we next discuss, the trial court erred when it failed to answer this legal question critical to the preemption determination and its subject matter jurisdiction.

B. The Trial Court's Failure to Determine the Status of Agreements

When questions of preemption are raised, "state courts retain jurisdiction" to resolve the preemption question and determine their own subject matter jurisdiction. (*Mack v. Kuckenmeister* (9th Cir. 2010) 619 F.3d 1010, 1021; see also *People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1062 ["'a court has jurisdiction to determine its own jurisdiction'"]; 2 Witkin, Cal.

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a tribe during the pendency of an unapproved management contract stemming from the threat of litigation and the impact on the tribe's control of its operations. It also overlooks the protective purposes of IGRA.

Procedure (5th ed. 2008) Jurisdiction, § 339, p. 963.) When the trial court here ruled on the question of preemption, it failed to determine whether the agreements were subject to IGRA, a pure question of law. (*Farm Raised Salmon, supra*, 42 Cal.4th at p. 1089, fn. 10 [preemption is a pure question of law]; *Wells Fargo, supra*, 658 F.3d at p. 694 [resolution of the question whether an agreement is a management contract is "fundamentally" a legal question of statutory interpretation]; *New Gaming, supra*, 896 F.Supp.2d at p. 1102 ["Determining whether the Agreement is a management contract for the operation of a gaming facility within the meaning of IGRA is a matter of statutory interpretation"].) The question of whether the agreements are subject to IGRA requires an analysis involving contractual interpretation and statutory/regulatory interpretation. (See *State Farm Fire & Casualty Co. v. Lewis* (1987) 191 Cal.App.3d 960, 963 [contractual interpretation is a question of law]; (*Dean W. Knight & Sons, Inc. v. State of California ex rel. Dept. of Transportation* (1984) 155 Cal.App.3d 300, 305 (*Dean W. Knight & Sons*) ["construction of a statute and the question of whether it is applicable present solely questions of law"]; *Wells Fargo*, at pp. 694-699 [concluding that the bond indenture at issue was a management contract under IGRA based on an analysis involving statutory and regulatory interpretation, identification and interpretation of relevant terms of the bond indenture, and application of the statutory and regulatory rules as interpreted].) Thus, the trial court's failure to determine whether the agreements at issue were subject to IGRA was error since the question of whether an agreement is a management contract or a collateral agreement to a management contract is a foundational question of

law critical to the preemption/subject matter jurisdiction issue the trial court needed to resolve.

The trial court avoided ruling on the management contract issue in its ruling on preemption by reasoning that because the Tribe repudiated the agreements, there were no agreements for the NIGC to approve or disapprove. The court reasoned, "Since the [Tribe] asserts the GMA[], ELA and Note herein are terminated and/or cancelled, there is no jurisdiction in the NIGC with regard to said instruments, either to review, regulate, approve or disapprove them." This reasoning puts the cart before the horse. An unapproved management contract is void *ab initio* because it is not approved by the NIGC, regardless of whether it is subsequently repudiated. Indeed, the tribe expressly repudiated these agreements after learning they would not be approved by the NIGC. Moreover, it is the content of these agreements—the respective rights and obligations contained therein—that triggers the IGRA protective scheme, not how the parties treat such agreements. Under the statutory and regulatory scheme, management contracts must be approved by the NIGC Chairman (25 U.S.C. § 2705(a)(4)), such contracts only "become effective upon approval by the Chairman" of the NIGC (25 C.F.R. § 533.l(a)), and "[m]anagement contracts . . . that have not been approved by the . . . Chairman . . . are void" (25 C.F.R. § 533.7). Thus, if an agreement is a management contract, it must be approved by the NIGC or it is void *ab initio*. (*Catskill, supra*, 547 F.3d at pp. 127-130 ["we confront a voiding provision entrenched within a federal regulation, 25 C.F.R. § 533.7, suggesting a federal intent that, lacking the [NIGC]'s approval, contracts subject to IGRA are void *ab initio*, notwithstanding general contract principles to the contrary, like good faith"]; see also *Wells Fargo, supra*, 658 F.3d

at pp. 688, 699; *First Amer. Kickapoo Operation v. Multimedia Games* (10th Cir. 2005) 412 F.3d 1166, 1168 (*First Amer. Kickapoo*).)

Consequently, it does not make a difference under the IGRA scheme whether an agreement is later repudiated, because an unapproved management contract is always void *ab initio*. And an unapproved management contract is nevertheless still a management contract within the statutory and regulatory meaning; thus, litigation related to that contract falls squarely within the preemptive force of IGRA. (See 25 U.S.C. § 2711.) Accordingly, the trial court could not determine whether Sharp Image's claims were preempted by IGRA without first determining whether the claims involved management contracts or a collateral agreement to a management contract. We conclude the trial court erred in failing to determine the threshold question of whether the agreements supporting Sharp Image's claims are management contracts and a collateral agreement to management contracts.

C. Deference to NIGC Letters

1. Additional Background

As noted, the trial court ruled that the Decision Letter was "not entitled to any deference," because it "was not final [agency] action and must be disregarded because it was fatally flawed." The court reasoned that the Decision Letter violated Sharp Image's due process rights because of ex parte communications between the NIGC Chairman, the Tribe's Chairman, and their attorneys. Additionally, the trial court found that the Tribe failed to submit items required for request to *approve* management contracts under part 533.3 of 25 Code of Federal Regulations, and the NIGC

failed to comply with the time limits set forth in section 2711(d) of title 25 of the United States Code.[20] The trial court further found that the NIGC waived compliance with these and other procedural requirements without stating any authority permitting such a waiver. The court concluded that, "at most, the so-called 'decision' is a legal opinion which was the result of an almost total disregard of mandated procedures and an obvious lack of due process." The court did not cite authority relevant to the specific regulatory process at issue here supporting its due process concerns.

As for the Opinion Letter authored two years earlier, the trial court rejected that advisory opinion on the grounds that it was not a final agency action. The trial court also sustained Sharp Image's hearsay objection to the Opinion Letter, because according to the trial court, it was offered "to prove the truth of the matter asserted therein," namely that "the Acting General Counsel of the NIGC was of the opinion that

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[20] For example, one of the items that must be submitted along with a request for *approval* of new contracts for new operations is a three-year business plan setting forth "the parties' goals, objectives, budgets, financial plans, and related matters." (25 C.F.R. 533.3(e)(1).) In our view, the failure to adhere to these procedural matters—which are required when a tribe submits management contracts *for formal approval*—had no impact on the Chairman's ultimate conclusion that the GMA and ELA are management contracts requiring approval or his underlying reasoning. Indeed, NIGC Bulletin No. 93-3, which encourages tribes and contractors to submit agreements *for review* and determination by the NIGC as to *whether NIGC approval is required* instruct that if the NIGC determines approval is required, "the NIGC will notify the tribe to formally submit the agreement." (See fn. 10, *ante*.) It is the formal submission of the agreement *for approval* that triggers the requirements upon which the trial court erroneously focused, not the submission *for review* contemplated in NIGC Bulletin 93-3.

two of the contracts that are part of the subject litigation violate IGRA." Thus, the trial court implicitly declined to defer to, or even consider, the findings and analysis in the Opinion Letter.

Because of the NIGC's authority to promulgate regulations and preapprove agreements under IGRA, the trial court should not have simply ignored the NIGC interpretations of the statute and its own governing regulations or its application of those rules in concluding that the GMA and ELA are management contracts. As we shall explain, this does not mean that the trial court was required to accord full deference to the NIGC's opinions and conclusions. We will first consider what deference, if any, should have been given to the NIGC's interpretation of its own regulations. We next look to what deference, if any, should have been given to the opinions and reasoning in the Opinion Letter and the Decision Letter as to the management nature of the GMA and ELA.

2. NIGC Bulletin No. 94-5

As noted, IGRA requires that management contracts be approved by the Chairman of NIGC. (25 U.S.C. §§ 2710(d)(9), 2711(a)(1).) NIGC promulgated the regulations[21] concerning management contracts, including the following definition of management contract: "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such

[21] "Regulations properly promulgated by the agency charged with administration of a federal statute are as much a part of federal law as the statute itself." (*Dean W. Knight & Sons, supra*, 155 Cal.App.3d at p. 305, citing *Fidelity Federal S. & L. Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153-154 [73 L.Ed.2d 664, 674-675].)

contract or agreement provides for the *management* of all or part of a gaming operation." (25 C.F.R. § 502.15, italics added.) No definition of "management" as that term applies to "management contracts" can be found in the IGRA statutes or the NIGC regulations. However, in 1994, NIGC issued an informal interpretation of the NIGC regulations related to management contracts in Bulletin No. 94-5. The trial court here never mentioned the bulletin. Instead, it impliedly refused to defer to that interpretation by refusing to afford *any* deference to the Opinion Letter and the Decision Letter, which were based, in part, on the advisory bulletin.

In *Auer v. Robbins* (1997) 519 U.S. 452, 461 [137 L.Ed.2d 79, 90] (*Auer)*, the high court held that an agency's interpretation of its own regulation is "controlling unless it is '"plainly erroneous or inconsistent with the regulation."'" (*Id*. at p. 461.) Thus, under *Auer*, "wide deference" should be given "to an agency's reasonable interpretation of its own regulation." (*Public Lands for People v. Dept. of Agriculture* (9th Cir. 2012) 697 F.3d 1192, 1199 (*Public Lands*); *Bassiri v. Xerox Corp.* (9th Cir. 2006) 463 F.3d 927, 930.) "'[W]here an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under *Auer* unless "plainly erroneous or inconsistent with the regulation."'" (*Public Lands*, at p. 1199; *Bassiri*, at p. 930.)

Bulletin No. 94-5 provides guidance on the meaning of "management" as that term applies to "management contracts." The specific purpose of the bulletin was to answer questions and provide advice about what distinguishes a management contract from a consulting agreement. (See fn. 11, *ante*.) To this

end, the advisory bulletin noted that "management" encompasses many activities, including "planning, organizing, directing, coordinating, and controlling." According to the bulletin, "[t]he performance of any one of such activities with respect to all of part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval." (Bulletin No. 94-5, *supra*.)[22]

Amicus United States and the Tribe contend we must afford *Auer* deference to the NIGC's interpretation of its own regulations. If such were the case, we would accord wide deference to the interpretation of the word management in Bulletin No. 94-5 and conclude that the bulletin is controlling because it is not plainly erroneous or inconsistent with the regulation. However, the discussion in Bulletin No. 94-5 is not strictly an interpretation of the NIGC regulations. "[M]anagement contract[s]" is a term in the IGRA statutes (25 U.S.C. §§ 2710(d)(9), 2711(a)(1), (3)); it is not a term that originated in the NIGC regulatory scheme. *Auer* does not apply because the bulletin actually interprets a statutory term.

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[22] Concerning "consulting contract[s]," Bulletin No. 94-5 notes, "An agreement that identifies finite tasks or assignments to be performed, specifies the dates by which such tasks are to be completed, and provides for compensation based on an hourly or daily rate or a fixed fee, may very well be determined to be a consulting agreement. On the other hand, a contract that does not provide for finite tasks or assignments to be performed, is open-ended as to the dates by which the work is to be completed, and provides for compensation that is not tied to specific work performed is more likely to be construed as a management contract." (Bulletin No. 94-5, *supra*.)

Sharp Image points out that the federal courts have spoken as to the level of deference afforded to Bulletin No. 94-5. We shall follow the lead of these federal courts because we find the reasoning persuasive. (*California Assoc. for Health Services at Home v. Dept. of Health Care Services* (2012) 204 Cal.App.4th 676, 684 [lower federal court decisions on federal questions are persuasive authority, although not binding on California courts].) Rather than requiring deference, the informal pronouncements of an agency, which are not subject to agency rule-making procedures, may be accepted by a court only as they have power to persuade. (*First Amer. Kickapoo, supra*, 412 F.3d at p. 1174, citing *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140 [89 L.Ed. 124, 129] (*Skidmore*); *New Gaming, supra,* 896 F.Supp.2d at pp. 1103-1104; *Machal, Inc. v. Jena Band of Choctaw Indians* (W.D.La. 2005) 387 F.Supp.2d 659, 666 (*Jena Band I*); see also *Wells Fargo, supra*, 658 F.3d at p. 696 [Bulletin No. 94-5, while not entitled to deference, "is of relevance to our inquiry"].) In *Skidmore*, the high court considered what level of deference should be given an agency administrator's informal "policies and standards" set forth in an advisory bulletin that was utilized by the agency in its application of a statute. (*Skidmore*, at pp. 137-140.) While such pronouncements are not controlling upon the courts, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." (*Id*. at p. 140.) Given these factors and the additional circumstance that federal courts have found the analysis in

Bulletin No. 94-5 persuasive, we conclude the bulletin has significant persuasive power.

3. The Opinion and Decision Letters

Amicus United States argues that *Auer* deference should also be afforded to the Opinion Letter and Decision Letter determination that the GMA and ELA are management contracts. Again, we disagree. In writing those letters, NIGC was not interpreting its own regulations; rather it was applying its regulations and interpretation thereof to a particular set of circumstances.

Federal courts apply the same level of deference given to an agency's informal interpretations of statute to informal advisory letters of NIGC; they apply limited *Skidmore* deference. (*Catskill, supra*, 547 F.3d at p. 127 [opinion letter of NIGC General Counsel's Office]; *First Amer. Kickapoo, supra*, 412 F.3d at p. 1174 [same].) Such a letter "is entitled to deference only to the extent that is has the power to persuade us." (*Catskill*, at p. 127.) Again, we find this approach persuasive and follow the lead of the federal courts.

The Decision Letter presents a different consideration. It is arguably a final agency action. But Sharp Image complains the decision-making process is tainted by the Tribe's active solicitation of the NIGC's opinions and its ex parte meeting with the Chairman while litigation was pending. It contends that the NIGC letters do not warrant "any deference because [they are] infected with both procedural and substantive error."[23] Also, the regulations provide a

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[23] Sharp Image cites *Citizens Action League v. Kizer* (9th Cir. 1989) 887 F.2d 1003, 1007, for the proposition that "NIGC letters solicited and procured by the Tribe to help it defend [a] lawsuit are entitled to limited or no deference." *Kizer* has no application

mechanism for appeal to the full commission, but even though Sharp Image made the request, that did not happen here due to the inability to achieve a quorum. Although the regulations appear to contemplate the full commission might not act on such appeals, making

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here. The discussion upon which Sharp Image relies from that case relates to the rulings of the district court, with which the circuit court apparently agreed. (*Ibid.*) The district court expressly found the letter, prepared during and for the litigation, "'lack[ed] . . . indicia of deliberative administrative review.'" (*Ibid.*) The district court further concluded that the subject matter of the letter was not one in which the agency possessed "specialized expertise or one which was beyond judicial competence; indeed, the letter discusse[d] statutory construction of a legal term, a task particularly well-suited for courts." (*Ibid.*) It also found that the letter's "pronouncements are not ones of long standing." (*Ibid.*) None of these circumstances are present in the instant case. The NIGC possesses specialized expertise. Moreover, it has made similar determinations in other cases, using similar reasoning. As we discuss *post*, NIGC's position appears to be consistently applied. We also note that it does not appear from the opinion in *Kizer* that the opposing party in that litigation had an opportunity to comment on the agency's letter, whereas here, Sharp Image had the opportunity to provide substantive comments on the management nature of the agreements to the NIGC Chairman long before the Decision Letter was issued.

We also note that NIGC has solicited inquiries like the one made by the Tribe here for a long time. Bulletin 93-3, published while the general counsel was Cox, who later provided legal representation for Sharp Image, tells tribes and contractors that consulting and leasing agreements should be submitted to NIGC for review. (See fn. 10, *ante*.) We also note that in a letter dated June 1, 1999, the Tribe told Sharp Image it intended to "formally request a written opinion from the [BIA]." And in his letter of June 9, 1999, Cox, while counsel for Sharp essentially invited the Tribe to consult with NIGC when he wrote, "The Tribe is, of course, free to submit these Agreements for review by the NIGC and the BIA."

the Chairman's decision the decision of NIGC (see fn. 16, *ante*), it is not clear whether under the circumstances here, a Chairman's decision should be afforded the same deference as the NIGC's final agency action. (See *Saint, supra*, 451 F.3d at p. 51 [decision of NIGC is a final agency action]; *AT&T, supra*, 295 F.3d at pp. 905, 908 [same].) We need not make that determination, because when we afford the same limited deference to the opinion and reasoning in the Decision Letter as we do to the Opinion Letter, we arrive at the same result. We afford the Decision Letter deference to the extent that is has the power to persuade us, and as we explain *post*, the Decision Letter coincides with our view that ELA is a management contract.

We reject Sharp Image's argument that we should essentially ignore the NIGC letters. First, as we have noted, both the General Counsel and the Chairperson relied on Bulletin No. 94-5, an advisory bulletin produced outside the context of this litigation. We find the definition of management activities therein—planning, organizing, directing, coordinating, and controlling—to be consistent with a common understanding of such activities. We also agree with the observation in the bulletin that the performance of any one of such activities with respect to all or part of a gaming operation can constitute management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval. Indeed, Sharp Image does not dispute this interpretation or offer any other interpretation. Second, it does not appear that the NIGC has taken a position on the agreements here or employed an analysis in this case that is different from what it has done in other cases.

For example, in *Gallegos, supra*, 955 F.Supp. 1348, the NIGC was asked to review an agreement involving leasing provisions similar to those here. The contract in *Gallegos* granted the lessor exclusive rights to provide slot machines to a tribal casino for five years and forty percent of the net proceeds from each machine as rent.[24] (*Id.* at p. 1349.) Upon the submittal of the agreement in 1996 to the NIGC to determine whether it was a management contract, the matter was reviewed and an opinion letter authored by Coleman later that year, who was at that time Associate General Counsel. (*Ibid.*) She opined that the agreement was a management contract. (*Ibid.*)

New Gaming, supra, 896 F.Supp.2d 1093, is remarkably similar to the instant case factually and procedurally. Like here, it involved a leasing agreement and a promissory note. (*Id.* at p. 1096.) Following the suggestion in Bulletin No. 93-3 (see fn. 10, *ante*), the tribe sent the agreements to NIGC for a determination as to whether they constituted management contracts requiring approval. These submissions were made in 2003 and 2004. (*Id.* at p. 1096 & fn. 4.) In 2004, well before the litigation in the instant case, Coleman, Acting General Counsel at the time, authored an informal opinion in which she concluded the lease and note constituted a management contract. (*Id.* at p. 1096.) Thereafter, the tribe terminated the agreements, which was followed by New Gaming's lawsuit for breach of the lease and note. (*Id.* at pp. 1096-1097.) Like here, while the litigation was

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[24] Two provisions in the *Gallegos* agreement were different from the agreements in the instant case. Under the lease in that case, Gallegos's business was allowed to set the payout rate and maintain the books and records for the machines. (*Gallegos, supra*, 955 F.Supp. at p. 1349.)

pending, the tribe requested a final agency determination as to whether the agreements constituted a management contract under IGRA, and the NIGC invited comment by both parties. (*Id.* at p. 1097.) The request was made in 2007 and in 2008, about a year after the litigation in the instant case commenced, the NIGC Chairman issued a decision concurring with the informal opinion authored by Coleman and concluding that the equipment lease and promissory note constituted a management contract. (*Ibid.*)

The specific lease provisions are not set forth in detail in the *New Gaming* opinion. However, in addressing New Gaming's void for vagueness claim related to the failure of the regulations to define "'management,'" the court indicated that the main reason NIGC had concluded the combination of the lease and note in that case was a management contract was because under the lease, New Gaming had the right to determine the type or mix of the gaming machines on the casino floor. (*New Gaming, supra*, 896 F.Supp.2d at p. 1100.) Under the GMA and ELA, Sharp Image had similar rights. However, unlike here, where Sharp Image has the right to choose *all of the machines*, the lease in *New Gaming* actually provided slightly more control to the tribe. Under the lease, New Gaming was to provide 80 percent of the machines with the remaining 20 percent to be provided by other manufacturers agreed upon by the parties. The lease expressly stated, "The exact mix of the machines that [New Gaming] [was to] make available [was to] be agreed upon by the parties." (*Id*. at pp. 1100, fn. 13, 1102.) As noted in the court's opinion, Coleman concluded, "'[c]hoosing the mix of machines on the casino floor is an essential management function.'" (*Id*. at p. 1102.) This was a significant reason why both the Opinion Letter and Decision

Letter here concluded the GMA and ELA are management contracts.

Gallegos and *New Gaming* demonstrate that the NIGC has applied the same analysis to arrive at similar opinions in similar cases that predated the litigation in this case. While the NIGC's pronouncements in informal opinions are not controlling, they do constitute "a body of experience and informed judgment" to which "courts . . . may properly resort for guidance." (*Skidmore, supra*, 323 U.S. at p. 140.) Given the "thoroughness evident" in the NIGC reasoning here and the apparent "consistency with earlier . . . pronouncements" (*ibid.*), we conclude that the Opinion Letter and the Decision Letter have persuasive power. Both letters thoroughly analyzed the agreements under IGRA, the salient case law, and applied the interpretation in the NIGC's cornerstone bulletin on management contracts, Bulletin No. 94-5.

Citing Bulletin No. 94-5, the Opinion Letter opined that the GMA and ELA gave Sharp Image exclusive control over the gaming equipment to be provided at the casino and a high rate of compensation—both indicia of a management contract. It further opined that "[t]he agreements show that [Sharp Image] seeks to use the Tribe's gaming facilities as a long term venue where [Sharp Image] is the exclusive supplier of machines and derives a majority of the profit." It further reasoned that if the agreements were enforced, they would give Sharp Image "a fee equaling thirty percent (30%) of adjusted gross revenue because they define 'net revenue' not as IGRA does but rather as all gross revenues received by the Tribe of all machines or table games minus all jackpots or payouts. [¶] . . . Consequently, the majority of the benefit of [the] Tribe's gaming would be conveyed to [Sharp Image]."

Regarding Sharp Image's exclusivity right, the Opinion letter noted that under the ELA, the Tribe would be "beholden" to Sharp Image for all of its gaming machines and software and that Sharp Image effectively had a "veto over the number and kind of machines the Tribe may offer." Under the circumstances, the ELA provided Sharp Image with "de facto management ability." Thus, the Opinion Letter concluded that the ELA violated IGRA's mandate that "[t]ribes, not machine vendors, are supposed to be the primary beneficiaries of Indian gaming. 25 U.S.C. § 2702(2)."

After both parties provided written arguments that were considered by the NIGC Chairman, he issued a formal opinion in the Decision Letter. In the Decision Letter, the Chairman determined that the GMA and ELA individually are management contracts. The Decision Letter expressly referenced Bulletin No. 94-5 and adopted the analysis of the Opinion Letter, concluding that both the ELA and GMA provided Sharp "broad operational control sufficient to make them management contracts." Specifically, the Decision Letter noted that the ELA and GMA gave Sharp Image "the exclusive right to provide gaming machines for all of the casino floor space," observing that "[f]reedom to configure the gaming floor, the essence of managing a casino, is not in the control of the [Tribe]."

We conclude that the Opinion Letter and Decision Letter are persuasive and consider the opinions and reasoning therein in our determination as to whether the agreements at issue are a management contract and a collateral agreement to a management contract.

D. The Status of the Agreements under IGRA

1. The GMA and ELA – Management Contracts

Before we set forth the reasoning for our independent determination that the GMA[25] and ELA were management contracts, we note that an agreement need not completely strip a tribe of decision-making authority before it can be characterized as a management contract under IGRA. (*First Amer. Kickapoo, supra*, 412 F.3d at p. 1175.) Rather, the regulations' definition of a management contract is an agreement that provides for the management of "'*all or part*' of a gaming operation" (italics added), and this characterization "suggests a definition of management that is partial rather than absolute, contingent rather than comprehensive." (*Ibid.*) Thus, even when an agreement relates principally to just one aspect of the casino's operation, such as its gaming machines, that can be sufficient under both the regulations and case law for the agreement to be governed by the IGRA. (*New Gaming, supra*, 806 F.Supp.2d at p. 1102; see also *Wells Fargo, supra*, 658 F.3d at pp. 694-699.)

We recognize that in the ELA, the parties disclaimed any intent to enter into a management contract. "However, the parties' expressed intent is not controlling when the agreement they executed, due to the rights and obligations it created is a management contract. An agreement's status as a 'management contract,' or not, is determined by the substance of the agreement, not the label the parties

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[25] Even though Sharp Image elected not to pursue claims related to the GMA, that agreement is still relevant to our discussion because of its connection to the ELA and Note.

attach to it." (*New Gaming, supra*, 896 F.Supp.2d at p. 1104, fn. omitted.)

As we have noted, Bulletin No. 94-5 defines management broadly to include "planning, organizing, directing, coordinating, and controlling . . . all or part of a gaming operation." (Bulletin No. 94-5, *supra*.) Any one of these activities may constitute management. The provision in the GMA providing that Sharp Image would maintain the responsibility for promotions and "provide direction for the General Manager in this department" was alone sufficient to find management of part of the gaming operation.

In addition to defining management, "The Bulletin singles out seven management activities as especially probative of the question whether an agreement is a management contract. [Citation.] An agreement need not include all seven activities to be a management contract; the 'presence of all or part of these activities in a contract with a tribe strongly suggests that the contract or agreement is a management contract requiring [NIGC] approval.'" (*First Amer. Kickapoo, supra*, 412 F.3d at p. 1174; accord, *New Gaming, supra*, 896 F.Supp.2d at p. 1104.) The GMA and ELA contain at least four of the seven management activities that the bulletin identifies as highly suggestive of a management agreement: provisions for accounting procedures, development and construction financed by a non-tribal party, a contractual term that establishes an ongoing relationship between a tribe and non-tribal party, and compensation based on a percentage fee. (See Bulletin No. 94-5, *supra*.)[26]

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[26] The three other activities from the bulletin are: access to the gaming operation by tribal officials (which we understand to mean a specific provision in the agreement requiring such access); payment of a minimum guaranteed amount to the tribe;

Similar to the courts in *First American Kickapoo* where the court identified five such activities (*First Amer. Kickapoo*, at p. 1174) and *New Gaming*, where the court also identified five activities from the list (*New Gaming*, at p. 1104), we conclude that the presence of the four out of seven activities present here is strong indicia of a management contract.

Our conclusion that the GMA and ELA constitute management contracts is "reinforced by the fact that [they do] not much resemble a consulting agreement." (*First Amer. Kickapoo, supra*, 412 F.3d at p. 1174; see fn. 22, *ante*.) Nor do the agreements resemble a traditional lease. The GMA and ELA were open-ended agreements for gaming machine rentals in exchange for a thirty percent of the casino's "net revenues." The GMA defines "'[n]et [r]evenues'" as "all gross revenues received by the Tribe in connection with its operation of all Machines *or table games* on the Casino premises or Reservation, minus all jackpots or payouts made through such Equipment." (Italics added.) Similarly, the ELA defines "'[n]et revenues'" as "gross gaming revenues from *all gaming activities*, which are solely related to the operation of Video Gaming/Pulltab devices *and card games*, less all prizes, jackpots and payouts." (Italics added.) Accordingly, both agreements provided that Sharp Image would receive thirty percent of the net revenues from not only the leased gaming machines but also other table or card games in the casino. We find that this provision, which provides compensation other than from revenue related to the leased machines, goes beyond a traditional lease

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and provision for assignments or subcontracting of responsibilities. (See Bulletin No. 94-5, *supra*.)

agreement for equipment and is further indicia of a management contract.[27]

Additionally, the agreements did not contain an express provision allowing the Tribe to determine the exact mix of the machines and the floor configuration of the casino or to even participate in making that decision. Instead, the agreements gave Sharp Image control of the number of gaming machines, the "hardware, software, and signage" for the gaming machines, and signage to be placed throughout the casino. Additionally, Sharp Image selected machines it placed in its inventory and it was from this inventory that machines would be made available for the casino. Selecting and providing gaming equipment is

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[27] Sharp Image contends that on its face the ELA is a lease for gaming equipment and leases for equipment are not management contracts. It relies on *In re U.S. ex rel. Hall* (1993) 825 F.Supp. 1422, a case that Sharp Image acknowledges involved section 81 of title 25 of the United States Code, not IGRA. In examining the section 81 requirement that agreements within the scope of that statute pertain to services "relative to Indian lands," the court in *Hall* stated, "*these* contracts do not relate to the management of a facility on Indian lands. A *mere* sale or *lease of equipment* clearly is not management." (*Hall*, at p. 1433, italics added.) *Hall* does not help Sharp Image here. First, the reference to "these contracts" makes clear that the district court was referring to the specific contracts in *Hall*, not equipment leases in general, and because the specifics of the *Hall* agreements were not detailed in the opinion, we can make no comparison to the agreements at issue in the instant case. Second, while we have no disagreement with the statement that generally, a *mere* lease of equipment is not management, what we have here are not *mere* leases. Third, where gaming management agreements and collateral agreements are concerned, IGRA superseded section 81. (*Saint, supra*, 451 F.3d at pp. 52-53.) Consequently, we look to the IGRA statutes, regulations, and the reasoning we have found persuasive in Bulletin No. 94-5 in determining whether the agreements at issue in this case are subject to IGRA.

"planning, organizing, directing, coordinating, and controlling" (Bulletin No. 94-5, *supra*) an essential aspect of casino operations. Under both the GMA and ELA, Sharp Image had "the *exclusive* right to lease or otherwise supply additional gaming devices to [the Tribe] to be used at its existing or any future gaming facility or facilities" in addition to the original 400 machines it was to provide. This meant that the Tribe would have been stuck with whatever machines Sharp Image provided. No replacement machines could be obtained from any other vender, even if the machines Sharp Image provided or could provide from its inventory were unpopular, had fallen into disrepair, and/or lagged behind technology advancements. As noted in the Opinion Letter, there is nothing in the agreements to prohibit Sharp Image from *refusing* to provide different or updated machines. Even after the five-year term, the Tribe would have been required to use only the machines Sharp Image had provided for an additional two years unless the Tribe purchased those machines, which again, could have been out-dated or in disrepair by that time. And if the Tribe wanted to change the payout at anytime, it was dependent upon Sharp Image to change the software payout percentages. Sharp Image may or may not have had the software and even if it did, there was nothing in the agreements requiring Sharp Image to provide it. Thus, we agree with the Opinion Letter when it noted Sharp Image "effectively has a veto over the number and kind of machines the Tribe may offer." And we agree with the NIGC Chairman when he concluded in the Decision Letter that the ELA and GMA gave Sharp Image "the exclusive right to provide gaming machines for all of the casino floor space" as well as the "[f]reedom to configure the gaming floor." We further agree that this appears to be "the essence

of managing a casino" and alone was "sufficient to make both agreements management contracts."

Our decision is reinforced by the analysis in *New Gaming, supra*, 896 F.Supp.2d 1093. As we have noted, the lease term concerning the provision of gaming machines was in that case actually less restrictive than the lease at issue here. The court determined that the combination of the lease and note at issue in that case was a management contract, even though the lease actually provided the tribe more control than here by allowing it to obtain twenty percent of its gaming machines from other venders and further expressly providing that the exact mix of machines was to be agreed upon by the parties. (*Id.* at p. 1102.) Agreeing with the informal NIGC opinion, the court concluded that "[t]he right to participate in game selection altered [New Gaming System]'s role from that of equipment supplier to manager of at least one aspect of the Nation's gaming operation." (*Id.* at pp. 1102-1103.)

We also note, as did the NIGC in this case, that the ELA gave Sharp Image the right to inspect the books. In addition, we further note that in the event of an audit, Sharp could select the auditor if the parties could not agree on who would conduct the audit. This was further indicia of control over the Tribe's gaming operations.

So too were the default provisions. In the event of default by the Tribe, the ELA contained a list of remedies available to Sharp, but no events of default or remedies are set forth for the Tribe in the event of a default by Sharp. For example, there was no express remedy under the ELA for the Tribe if Sharp Image failed to deliver and keep 400 gaming machines or any number of machines in the casino throughout the life

of the lease. We agree with the Opinion Letter. The "one-sided" default and remedy provisions are further indications of Sharp Image's ability to control the gaming activity in the Tribe's casino.

The level of control, the term of the agreement, and the amount of and percentage formula for compensation lead us to conclude that the GMA and ELA were unapproved management contracts subject to IGRA. While Bulletin No. 94-5, the Opinion Letter and the Decision Letter "do not compel our deference, they do offer confirmation of our conclusion." (*First Amer. Kickapoo, supra*, 412 F.3d at p. 1174 [concluding that while the Bulletin and an informal opinion letter from the NIGC general counsel did not compel deference, they offered confirmation of the court's conclusion that the lease at issue was a management contract].)

"Congress wrote in broad strokes in crafting [IGRA]," to "ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from these facilities." (*Wells Fargo, supra*, 658 F.3d at pp. 695, 700.) Giving full effect to congressional intent further compels the conclusion that the GMA and ELA are unapproved management contracts subject to the preemptive force of IGRA.

2. The Note – Collateral Agreement to a Management Contract

Having concluded that the GMA and ELA are unapproved management contracts, we must address whether the Note is a collateral agreement to a management contract and thereby also subject to IGRA regulation. The tribe never submitted the Note to NIGC. Consequently, the Opinion Letter and Decision Letter did not address the Note executed contemporaneously with the ELA.

IGRA provides that management contracts "shall be considered to include all collateral agreements to such contract that *relate to the gaming activity*." (25 U.S.C. § 2711(a)(3), italics added.) The definition of the term "collateral agreement" can be found in the definitions part of the regulations. There, "[c]ollateral agreement" is specifically defined to mean "any contract, whether or not in writing, *that is related, either directly or indirectly, to a management contract*, *or* *to any rights, duties or obligations created between a tribe* (or any of its members, entities, or organizations) *and a management contractor* or subcontractor (or any person or entity related to a management contractor or subcontractor)." (25 C.F.R. § 502.5, italics added & underscoring.) The use of the conjunction "or" we have underlined suggests two separate varieties of collateral agreements: (1) a written or oral contract that is directly or indirectly *related to* a "management contract," or (2) a written or oral contract that is directly or indirectly *related to* "any rights, duties or obligations created between a tribe . . . and a management contractor." A separate provision in the definitions part of the regulations defines management contract to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." (25 C.F.R. § 502.15.) The manifest purpose of the collateral agreement provisions is to ensure that all the rights and liabilities of tribes and management contractors (or subcontractors) with respect to a gaming operation are jointly considered as comprising the relevant "management contract," notwithstanding the labels parties attach to the agreements. Otherwise, parties

could subvert IGRA by splintering relevant obligations into separate agreements.

As we have noted, Anderson explained the ELA and Note to the Tribe in his letter of June 18, 1997. There, he wrote, "These instruments . . . represent *a more complete agreement* between Sharp Image Gaming, Inc. and the Shingle Springs Rancheria." (Italics added.) His reference to the word "agreement" (singular) indicates the intent that the ELA and Note be viewed together. Anderson further explained, "These instruments incorporate the points of the original agreement, but further address some points that benefit both parties in having formalized. The promissory note . . . incorporates the total amount owed as of May 31, 1997." The GMA had expressly stated that the repayment terms for monies advanced would be "set forth at a later date." Thus, the Note related to liabilities previously incurred under the GMA and liabilities to be incurred in the future in connection with the ELA, both of which we have determined are management contracts.

As the *Wells Fargo* court noted, neither the statutory nor the regulatory scheme provide an exemption for financing agreements that contain provisions related to management of a gaming facility. (*Wells Fargo, supra*, 658 F.3d at p. 697.) This is not a surprise, given the purposes of IGRA. (*Ibid*.) Instead, in our view, IGRA and the regulations cover financing agreements that are collateral agreements to a management contract.[28]

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[28] IGRA also covers leases and promissory notes that combined, constitute one management contract. (See *New Gaming, supra*, 896 F.Supp.2d at p. 1105.) The Tribe and amicus argue that the Note is a collateral agreement to the ELA, but the Tribe also

The Note does not stand on its own; rather it relates to the gaming activity and the management contracts. The Note provides that the total amount previously invested to develop Crystal Mountain Casino was $3,167,692.86. The Note states this was "the full amount owed up to September 30, 1997," and that the "principal sum" of the Note was "not to exceed" this amount. The Note further provides that the Tribe would repay sums advanced by Sharp Image to develop the Crystal Mountain Casino, and future sums advanced for casino development, at an annual interest rate of 10 percent.

The Note also expressly references the 400 video gaming devices in the ELA twice. First, the Note states that the initial payment on the Note was to be made two months after delivery and installation of the machines. Second, the Note provides that if the Tribe is unable to make the monthly payments on the Note, but is able to continue to operate the casino without operating at a loss, "the [Tribe] shall then be allowed to make a minimum payment equal to 25% of the gross net revenues it receives from the operation of the video gaming devices . . . until the note is paid in full." Similar to, but not the same as the GMA and ELA, gross net revenue is defined in the Note as "all monies paid in by players less jackpots and payouts."[29] In

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argues that the Note became "'constructively a part of the [ELA]'" and amicus also argues the two agreements are effectively one contract. We need not decide whether the two agreements are actually one contract, because we conclude the Note is a collateral agreement to the ELA and thereby subject to regulation under IGRA.

[29] The note did not limit the "monies paid in by players" to players on the machines Sharp Image provided and thus appears

other words, if the Tribe is unable to make the monthly payments on the Note, Sharp Image could then be paid twenty-five percent of the "gross net revenues" from all of the gaming on top of the thirty percent it would receive under the ELA for the machines and card games, and the Tribe would still have to pay operating expenses for the casino. Thus, the Note defines a key part of the financial relationship between the parties with respect to casino development and tribal gaming operations, as well as the gaming machines Sharp Image was to provide under the ELA. And it provides Sharp Image with the potential to collect nearly all of the net revenues for all gaming activities until the note is paid off.

Sharp Image argues that the Note is not subject to IGRA's approval requirement because the Note does not itself provide for the management of all or part of the gaming operation. In support of its position, Sharp Image cites *Catskill, supra*, 547 F.3d at page 130 and *Wells Fargo, supra*, 658 F.3d at pages 700-702, which rely on *Jena Band I, supra*, 387 F.Supp.2d 659 and *Jena Band of Choctaw Indians v. Tri-Millennium* (W.D.La. 2005) 387 F.Supp.2d 671 (*Jena Band II*),[30] respectively. Both of the *Jena Band* cases were decided by the same district court judge. That district court reasoned that a collateral agreement is not subject to the statutory screening and approval requirement unless the collateral agreement *itself* meets the definition of management contract. (*Jena Band I*, at pp. 666-667; *Jena Band II*, at p. 678.) The court reached this conclusion by its reading of part

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to also include players of *any* gambling activities offered at the casino, including card and table games.

[30] See *Wells Fargo, supra*, 658 F.3d at p. 701, fn. 16, for its reliance on *Jena Band II*.

502.15 of 25 Code of Federal Regulations, the definition of management contracts. As we have noted, that provision reads: "Management contract means any contract, subcontract, *or collateral agreement* between an Indian tribe and a contractor or between a contractor and a subcontractor *if such contract or agreement provides for the management of all or part of a gaming operation*." (Italics added.) Piecing together the italicized language in the definition of management contract, the district court concluded that even if the agreement is a collateral agreement, pursuant to part 502.5 of 25 Code of Federal Regulations, NIGC approval would not be required unless such collateral agreement itself *provides for the management of all or part of a gaming operation*. (*Jena Band I*, at pp. 667-668; *Jena Band II*, at p. 678.)

Beyond the language of the definition of management contract in the regulation, the district court in *Jena Band I* and *Jena Band II* also reasoned that IGRA's policy of providing for "'tribal economic development, self-sufficiency, and strong tribal governments'" also supported its conclusion that only collateral agreements that provide for the management of gaming operations are void if not preapproved by NIGC. (*Jena Band I, supra*, 387 F.Supp. at p. 667; *Jena Band II, supra*, 387 F.Supp.2d at p. 678.) The district court reasoned that requiring pre-approval of collateral agreements that merely relate to gaming without also including management related provisions would make it more difficult for potential investors to contract with Tribes and thus tribal economic development would be inhibited. The court wrote, "By making it easier for tribes to obtain financial backing, we make it easier for tribes to acquire the economic development and self-sufficiency that accompanies the income from tribal gaming operations." (*Ibid*.)

We disagree with the interpretation of the regulations originating in the *Jena Band* cases, because it would render the term "collateral agreement" in both the statute and the regulation defining collateral agreement mere surplusage. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 [holding that "interpretations that render statutory terms meaningless as surplusage are to be avoided"].) If a collateral agreement must independently meet the definition of "[m]anagement contract" under 25 Code of Federal Regulations part 502.15 to fall within IGRA's preapproval requirement, the statutory inclusion of "all collateral agreements . . . *that relate to the gaming activity*" would be rendered a nullity. (See 25 U.S.C. § 2711(a)(3)), italics added.) Likewise, the separate definition of "collateral agreement" in 25 Code of Federal Regulations part 502.5 would also be meaningless surplusage. As we have noted, the definitional language of that regulation appears to contemplate two varieties of collateral agreements: (1) a written or oral contract that is directly or indirectly *related to* a "management contract," or (2) a written or oral contract that is directly or indirectly *related to* "any rights, duties or obligations created between a tribe . . . and a management contractor." (25 C.F.R. § 502.5.) Notably, that definition does not include a requirement that a collateral agreement itself provide for the management of all or part of the gaming operation. If the *Jena Band* interpretation is correct, there simply would be no need to reference collateral agreements in the statute or to include a separate definition thereof in 25 Code of Federal Regulations part 502.5 if such an agreement must also be a management agreement to be subject to IGRA. The only consideration as to any agreement would be whether it "provides for the management of all or part of a gaming operation" by

itself. (25 C.F.R. § 502.15.) We decline to read the IGRA statutory and regulatory provisions in a way that would render the aforementioned provisions surplusage.

Further, the *Jena Band* interpretation ignores the regulatory context and the plain meaning of the term "collateral" as used in section 2711(a)(3) of title 25 of the United States Code. By authorizing the NIGC to regulate management agreements inclusive of all collateral agreements *that relate to the gaming activity*, we conclude from this plain language that Congress intended to extend IGRA's reach to all instruments and agreements that become subject to regulation by virtue of their relationship to management contracts or management contractors when all relevant agreements are read together.

As for the *Jena Band* court's separate reason for its reading of the regulatory text—the notion that the policy of advancing tribal economic development is fostered by providing greater opportunity for investors to provide financial backing for tribal gaming—we disagree with that reasoning as well. First, we note that the district court cited no authority supporting its view that requiring regulatory approval of collateral agreements related to gaming activity would stifle non-tribal investment. Second, even if investment would be chilled, other provisions in IGRA and the NIGC regulations can be read as making involvement in tribal gaming by non-tribal entities and persons more difficult as well. Indeed, regulation inevitably makes it more difficult for those who would be regulated to engage in regulated activities. And it is up to the Congress and the regulators, not the courts to strike the policy balance. Third, if financing agreements that relate to gaming activity must also be

management contracts before NIGC approval is required, IGRA could be circumvented by setting forth financial obligations in separate instruments. This, of course, could potentially undermine the economic development purpose as well as the other purposes of IGRA, including providing a shield against corrupting influences, ensuring that tribes are the primary beneficiaries of the gaming operations, and protecting gaming as a means of generating tribal revenue. (25 U.S.C. § 2702(2)-(3).) Further, if the "comprehensive review" that constitutes the core of Congress's protection for Indian gaming establishments does not apply to such agreements, loss of tribal control over gaming operations could result and thus the fundamental purpose of the federal regulatory scheme impaired. (See *Wells Fargo, supra*, 658 F.3d at p. 700.)

As we have noted, the ELA and the Note were proposed together, considered together, and executed together. The ELA and Note were both entered on the day of the Tribal Council meeting, November 15, 1997, with Anderson's express purpose of replacing the prior GMA. Significantly, the Note both references the prior debt apparently accrued under the defunct GMA and is expressly contingent upon the installation of gaming machines under the ELA. Thus, the key terms of the Note are expressly dependent on the gaming activity under the unapproved management contracts. These factors demonstrate that the Note is indeed a collateral agreement to a management contract that "relate[s] to the gaming activity." (25 U.S.C. § 2711(a)(3); 25 C.F.R. § 502.5).

Our rejection of the regulatory interpretation in *Jena Band* does not mean that all unapproved agreements collateral to unapproved management contracts are necessarily void. (See *Catskill, supra*,

547 F.3d at p. 130, fn. 20.) However, where, as here, the terms of the collateral agreement are connected to the gaming activity provisions of the management contracts (the GMA and the ELA), the collateral agreement "relates to the gaming activity" under IGRA and falls within both definitions of collateral agreements in the regulation defining such agreements. (25 U.S.C. § 2711(a)(3); 25 C.F.R. § 502.5.) Because the collateral agreement was not approved by the NIGC Chairman, it is subject to IGRA preemption.

III. Conclusion

The federal circuit court in *First American Kickapoo* noted that, "[n]on-tribal parties who enter into contracts relating to tribal gaming undertake, in addition to ordinary business risks, certain regulatory risks as well." (*First Amer. Kickapoo, supra*, 412 F.3d at pp. 1178-1179.) As in *New Gaming*, the instant case "illustrates the accuracy of that observation." (*New Gaming, supra*, 896 F.Supp.2d at p. 1105.) Because we conclude that both the unapproved ELA and unapproved Note are agreements subject to the IGRA requirement for NIGC approval, Sharp Image's contractual claims under both agreements are preempted by IGRA and the trial court lacked subject matter jurisdiction to adjudicate these claims.

Accordingly, we reverse.

DISPOSITION

The judgment is reversed, and the trial court is directed to dismiss the action on remand. Sharp Image shall pay the Tribe's costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1), (5).)

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND
FOR THE COUNTY OF EL DORADO

[Filed 11-17-09]

Case No: PC20070154

SHARP IMAGE GAMING, INC.,
A CALIFORNIA CORPORATION

Plaintiff,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS

Defendants.

RULING ON MOTIONS TO DISMISS/QUASH BASED UPON PREEMPTION AND SOVEREIGNTY

On September 11, 2009, the Court heard oral argument upon the Defendant Shingle Springs Band of Miwok Indians' (hereinafter referred to as "Band") motions to quash/dismiss the Complaint herein for lack of jurisdiction on the basis of preemption and sovereign immunity. It should be noted that tribe filed separate motions to quash/dismiss on the basis of lack of jurisdiction on July 7, 2007 and September 22, 2008, an amended motion to dismiss/quash on April 17, 2009, and a second amended motion to quash/dismiss on May 6, 2009. With the exception of the July 7, 2007 motion, each was accompanied by separate motions to quash/dismiss on the grounds of preemption and sovereign immunity. The Court will hear all motions as one on the basis of preemption and sovereignty.

The ruling will first address preemption and then sovereignty. Plaintiff Sharp Image Gaming, Inc., a California Corporation (hereinafter referred to as Sharp), disputed that the motions should be granted. The Court authorized limited discovery by each party *(Goehring vs. Superior Court* (1998) 62 Cal.App.4th 894, 910; the *18809 Corporation vs. Superior Court* (1962) 57 Cal.2d 840, 843 and *Milhlon vs. Superior Court* (1985) 169 Cal.App.3d 703, 710). After considerable disagreement, discovery was completed with the help of a referee.

Sharp was represented at the hearing by attorneys Matt Jacobs and Steve Kimball and Band was represented by attorneys Mary Kay Lacey and Matt Marostica. The Court heard extensive argument from both sides and permitted Band to file a response to citations not previously presented which Band did by Letter grief. The matter was ordered submitted one week after the transcript of the hearing was filed with the court which was done on October 9, 2009. The date of submission was October 16, 2009.

Since the only matter before the Court at this stage of the proceedings and since the challenge to jurisdiction is based upon a claim of preemption and sovereign immunity, the Court's rulings will be based exclusively on facts relevant to the resolution of the motion and any facts not relevant thereto or dealing with any facts or argument not directly involved in ruling on the motion and the two areas upon which the motion is based will be disregarded. Rather than attempt to rule on the vast number of objections filed in this matter, the Court overrules all objections to documents hereinafter referred to in the findings and any testimony forming the basis of any finding and declines to rule upon the remaining objections.

RULING ON PREEMPTION

In order to address the issues presented, it is appropriate to set forth the chronology of events from the inception of contact between the parties until the most recent event, the issuance of the Chairman of the National Indian Gaming Commission, Philip N. Hogan's ("Chairman") decision regarding agreements between the Shingle Springs Band of Miwok Indians (Band) and Sharp Image Gaming, Inc. (Sharp), under date of April 23, 2009)[1] which was filed with the court as an attachment to the Shingle Springs Band of Miwok Indians' Request For Judicial Notice In Support Of Amended Motion To Quash/Dismiss filed May 5, 2009.

ANALYSIS PROCEDURE

When a challenge to jurisdiction is made it may be done by motion to quash (CCP Sec 418.10) and such may be joined with a motion to dismiss (*Boisclair vs. Superior Court* (1990) 51 Cal.3d 1140, 1144 n1). The Plaintiff has the initial burden of proving by a preponderance of the evidence the prima facie facts entitling the Court to assume jurisdiction. If such is shown, the Defendant must proceed to present evidence in the action. The Defendant herein has raised two grounds for asserting lack of jurisdiction: preemption by federal statute and sovereign immunity. The Court is addressing the preemption assertion in this part of the ruling and the sovereignty assertion will be addressed *infra*.

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[1] The first page of which is under date of April 23, 2009 and the remaining pages are under date of March 25, 2009

CHRONOLOGY OF MAJOR EVENTS

Date	Reference[2]	Document
1. April 27, 1996	AE 118	Band Resolution 96-4 adopting Gaming Ordinance, Exhibit B Declaration of Jeff Murray attached as Exhibit 9 to Defendant's Joint Appendix filed September 22, 2008.
2. April 27, 1996	AE 119-157	Band Gaming Ordinance, Exhibit C to J. Murray Declaration, Exhibit 9 to Defendant's Joint Appendix filed September 22, 2008.

[2] Reference are as follows: AE refers to documents presented by Band and SSR refers to documents presented by Sharp. The respective numbers appears at the bottom of most documents and appear to be references to documents by the respective parties. The exhibit reference appears after the description of each document. In many instances the document referred to has been referred to in many other pleadings but normally only one exhibit is cited.

3. May 8, 1996	AE 84-89	NIGC[3] acknowledgement of receipt of Gaming Ordinance Exhibit D to J. Murray Declaration. Exhibit 9 to Joint Appendix filed by Defendant on September 22, 2008.
4. May 21, 1996	AE 160	Band Resolution 96-12 adopted authorizing officers to sign any necessary Agreements, Contracts or Promissory Notes Exhibit 9-E of Joint Appendix of Defendant filed on September 22, 2008.
5. May 24, 1996	SSR 0023 & AE 84-89	GMA[4] signed, Exhibit 1, sub exhibit B to Declaration of S. Kimball filed June 4, 2009.

[3] National Indian Gaming Commission

[4] Gaming Machine Agreement

6. May 25, 1996	SSR 0113	Promissory Note for $200,000.00 Exhibit H to S. Kimball Declaration filed May 14, 2009.
7. July 6, 1996	AE 158-159	NIGC approval of Gaming Ordinance by NIGC – on July 6, 1996, Exhibit 9-D of Defendant's Joint Appendix filed September 22, 2008.
8. August 21, 1996	AE 161	Band Resolution 96-18 authorizing Creation of Gaming Exhibit F to exhibit 9 of Band's Joint Appendix filed September 22, 2008.
9. August 26, 1996	AE 163-164	Gaming Commission appointed by Resolution of Band 96-19 Exhibit 9-G of Defendant's Joint Appendix filed September 22, 2008.

10.	October 30, 1996	AE 165-169	Band adopts Resolution 96-24, Environmental Requirements, Exhibit H to Exhibit 9 to Band's Joint Appendix filed September 22, 2008.
11.	November 2, 1996	SSR 3713-17	NIGC Notice of health violation, Exhibit X to S. Kimball Declaration, filed May 15, 2009.
12.	November 5, 1996	AE 165-169	M. Cox letter to William D. Murray stating GMA is void, Exhibit C to Declaration of S. Kimball filed June 4, 2009.
13.	December 18, 1996	SSR 1400	Minutes of Band, December 18, 1996, Sharp will continue to fund Band, Exhibit k to Declaration of S. Kimball filed May 15, 2009.

14.	November 15, 1997	SSR 209-210	Band not payable to Sharp for $3,167,692.86. Exhibit 14 to Defendant's Joint Appendix filed September 22, 2008.
15.	November 15, 1997	AE 84-89 & SSR	2009 Equipment Lease Agreement[5] Exhibit D to S Kimball Declaration of June 4, 2009.
16.	December 15, 1997	SSR 0015	Band minutes, 12/15/97– negotiations discussion, Exhibit M to Declaration of S. Kimball filed May 15, 2009.
17.	December 17, 1999	AE 175	Band Resolution 99-67 rescinding Resolution 92-12 re gaming agreements authority, Defendant's Joint Appendix filed September 22, 2008, Exhibit E to Exhibit 9 thereof.

[5] Equipment Lease Agreement, hereinafter referred to as ELA

18. May 5, 2000	AE 176-178	Department of Interior approval of State Compact June 16, 2000 AE 176 SSR 2399. Exhibit L to Exhibit 9 of Defendant's Joint Appendix of Evidence filed September 22, 2008.
19. June 16, 2000	SSR 2399	Band Gaming Commission Summary Suggested Cash Owed Sharp - Exhibit 125, N. Fonseca deposition, Exhibit T. S. Kimball Declaration filed May 15, 2009.
20. August 25, 2000	SSR 2970	Band Resolution 200-42, Workout Instructions to attorneys re Sharp Proposed settlement – Exhibit 126 11/21/08 deposition of N. Fonseca, Declaration of S. Kimball filed May 15, 2009, Exhibit V.

21.	September 16, 2002	AE 066& SSR 1387	September 16, 2002 letter to Cal Trans stating Sharp Agreement terminated by Tribe, Defendant's Joint Appendix filed September 22, 2008. Exhibit D to Exhibit 6.
22.	June 14, 2007	AE 070-075	Advisory Opinion of Ms. Coleman, NIGC attorney, Exhibit L to S. Kimball Declaration filed June 4, 2009.
23.	January 24, 2008	Letter	NICHOLAS Fonseca to Chairman Hogan requesting review of GMA and ELA, enclosing Coleman Opinion of June 14, 2007 and advising available for meeting, Exhibit EE Declaration of S. Kimball filed June 4, 2009.

Spring of 2008		Meeting by Band Chairman and attorney with NIGC Chairman and his attorney. Deposition of Nicholas Fonseca, taken November 21, 2008, portions of which are set forth in Declarations of S. Kimball filed as follows: Exhibit U to May 15, 2009. Exhibit J to Supplemental Declaration and Exhibit S to Exhibit I to August 17, 2009.
24. April 23, 2009		Chairman Hogan's Opinion, Exhibit A to Declaration of S. Kimball filed June 4, 2009 and Exhibit Z to Declaration of S. Kimball filed May 15, 2009.

STATEMENT OF FACTS

On April 27, 1996, the Tribal Council of the Band adopted Resolution 96-4 [6] (Chron-1), whereby the Tribal Council of the Band approved and requested the NIGC approve the Shingle Springs Gaming Ordinance attached thereto, and it was approved by the NIGC on July 6, 1996, (Chron -7), On May 24, 1996, the Plaintiff and Defendant signed the GMA (Chron- 5) pursuant to authority granted by Resolution 96-12 on May 21, 1996 (Chron-4). On May 24, 1996, the officers of the Band signed a promissory note as above described in Chron-6. In the Fall of 1996, on October 4, 1996, the Band opened for an "Opening Night" where all machines were on free play and the facility was a sprung tent (Deposition of Henry Fonseca taken November 19, 2008, Exhibit E, Page 119, lines 12 – 22). The sprung casino closed that evening and did not reopen in 1996. It opened briefly in 1997 but without machines and never reopened in the sprung tent thereafter. On November 2, 1996, a Notice of Health violation was sent to the Band (Chron-11) setting forth numerous violations of IGRA and health and safety items. On November 5, 1996, Michael Cox. NIGC General Counsel, signed a letter declaring the GMA void. It is unclear what brought about the rendering of the opinion by Mr. Cox; however, ii appears such did not result from a submission by the Band to the NIGC of the agreement and request for approval since there was no formal agency action taken and none of the required supporting documents were filed as described in "Helpful Hints For Submitting a Management Contract and Obtaining the Chairman's Approval"

[6] All references to the chronology above set forth designated as follows: "Chron" followed by the number preceding the item as in the above Chronology

(Exhibit F to Points and Authorities In Opposition To Motion To Stay). Mr. Cox's opinion was based upon the statements to him by tribal members that they planned on having Class III gambling (Chron-12).

On December 18, 1996, at a Tribal Council meeting of the Band, Chairman Murray stated that Mr. Anderson (Sharp) would continue to fund the Band (Chron-13).

On November 15, 1997, the Band held a Tribal Council Meeting and the Band considered the ELA (Chron-15 and the Promissory Note (Chron-14). After some negative discussion, Mr. Anderson, President of Plaintiff, appeared and discussed the situation with the council. The Promissory Note and ELA had been sent to Tribal Council members by their Chairman on October 27, 1997 (Exhibit N to the Declaration of S. Kimball filed May 15, 2009). Thereafter, the Council voted to approve the Promissory Note and ELA in the form set forth in Chron-14 and 15 respectively and the documents were signed.

On December 17, 1999; by Resolution 99-67 (Chron-17), the Band rescinded Resolution 96-12 (Chron-4) which authorized the officers to sign the above referenced GMA, the ELA and the Promissory Note for $3,167,692.86.

By letter under date of May 5, 2000, the Department of the Interior, Office of the Secretary, approved the Compact between the Band and the State of California which authorized Class III gambling machines (Chron- 18). With a date of June 16, 2000, on Band Gaming Commission letterhead, a statement was written that the suggested total owed by the Band to Sharp was 53,162,453.73 (Chron-19). By Band Resolution 200042 adopted August 25, 2000, the Band

Council authorized and directed its attorneys immediately to begin to prepare "the Workout Agreement" and initial documentation to sue Sharp if it is rejected or expires subject to their prior approval of any action (Chron-20).

Under date of September 16, 2000, Band's Tribal Chairman Nicholas H. Fonseca advised the California Transportation Commission that its response to the Comments of Mr. Chris Anderson at an EIR Hearing that he was a current investor with the Tribe and did not support the design of the interchange was that Mr. Anderson was not a present investor. He further said the Tribe's development partner was Lakes Gaming, Inc. (Chronology item 21). Mr. Anderson was the President of Sharp Image Gaming, Inc. who signed the above referenced GMA and ELA. The said letter further stated Mr. Anderson was a spoiler and his investment agreement was terminated by the Tribe in 1998 (Chron-21). Mr. Anderson in his deposition stated that he understood his contract was cancelled by the Band when KAR and Lakes entered the scene (Exhibit 11 to Supplemental Joint Appendix filed April 17, 2009, pages 333, lines 22-23 & 338, line 23 – 339, line 12). He stated he understood it was cancelled in 1999.

Sometime after 1997, the Band signed a contract with Keane-Argovitz (Deposition of Jim Adams taken on November 4, 2008, Exhibit D to Declaration of S. Kimball filed May 15, 2009, page 147, lines 7-9.) The Band then moved ahead with Keane-Argovitz (Adams deposition, page 148 lines 11-12). Thereafter the Band "all of a sudden was working with Lakes Gaming" (Deposition of Jim Adams, Page 149, lines 1-3). By December 31, 2002, the Band had incurred $25,124,750.00 of indebtedness to Lakes Kean

Argovitz Resorts for sums expended on the casino project (Audit Report of Shingle Springs Rancheria by Goodell, Porter & Fredericks. LL, C.P.A.s Dated December 31, 2002. Exhibit W, page 17, SSR 2557 to Declaration of S. Kimball filed May 15, 2009).

On March 12, 2007, Sharp filed and served its legal action against the Band in the Superior Court of the State of California in and for the County of El Dorado.

After that action was filed, a number of events transpired involving the Band's assertion that this litigation was under the jurisdiction of the Federal Court because it involved action of the NIGC. It is necessary to trace the various actions of the parties which preceded the hearing on the motions to quash/ dismiss this action which was heard on September 11, 2009.

In order to follow the various communications involving the Band, its attorneys, and the NIGC, it is necessary to list the participants and their affiliations. In this litigation the Band attorneys are Sonennenschein Nath & Rosenthal and from that firm, Paula M. Yost, Mary Kay Lacey, David Diepenbrock, Alan Fedman (a former NIGC attorney) and Matt Marostica. Other attorneys representing the Band on various matters whose names appear with regard to matters involved with this litigation include: Karshmer and Associates, appearing by Melissa Schlichting; Faegre & Benson LLP by Kent E. Richey; and Clement, Fitzpaytrick & Kenworthy by Anthony Cohen (who was counsel in the Queen vs. Band litigation). The NIGC had the following attorneys and participants: Michae1 Cox, General Counsel (later employed by Sharp), Penny Coleman, Acting General Counsel, Maria Geloff, Senior Attorney, John Hay, attorney, Harold Monteau, the former Chairman of

NIGC. Cynthia Shaw, attorney, and Philip Hogan, current Chairman of NIGC.

Ms. Penny J. Coleman, Acting General Counsel of the NIGC, sent a letter to Kent Richey, an attorney for the Band under date of June 14, 2007 which opined that the GMA and ELA and collateral agreements, i.e., the Promissory note (Chron-14) were management agreements and not in compliance with the NIGA (Chron -22). This followed a number of communications between the NIGC attorneys and Kent Richey as set forth as attachments to the Declaration of S. Kimball filed June 4, 2009 as exhibits F, G, H, I, J, K and L (Advisory Opinion Letter). It appears Sharp's attorneys were not made aware of these contacts until after this action was filed. On January 24, 2008, Chairman Fonseca of Band sent a letter to Phil Hogan. Chairman of NIGC submitting copies of the GMA and ELA and submitted such for review for the first time pursuant to Section 533.2, Code of Federal Regulations, Title 25 (Chron-23). No documents required by 25 FCR section 533.3 were submitted with said request for review although it states a copy of the June 14, 2007 Advisory letter (Chron-22) was included which had been sent to Mr. Mr. Richey as well as other documents supporting the Band's position. On July 18. 2008, John Hay for Penny Coleman, Acting General Counsel, advised Chairman Fonseca and Mr. Jacobs, Sharp's attorney that "...due to the age of the Agreements, the OGC did not request they be submitted" as required by section 533.3 FCR (Exhibit K. to Supplemental Declaration of S. Kimball filed on August 17, 2009). Insofar as the record reflects, the Band never took action to formally submit the GMA to the NIGC and request approval until 2008. It appears that the letter of January 24, 2008 by Chairman Fonseca (Chron - 23) requesting opinion confirmation is

asserted to be the request for formal disapproval. Insofar as the record reflects, the Band never took action to formally submit the GMA to the NIGC with documents required in be included CFR 533.3. and request approval. In his letter of January 24, 2008, (Chron-23) Chairman Fonseca stated he would be available to meet with Chairman Hogan. In that letter, Tribal Chairman Fonseca made it clear that he would like to discuss the matter with Chairman Hogan, preferably before February 22, 2008. As is evident from communications hereinafter described, Band's attorneys urged such a meeting and extensive e-mails were exchanged among them and the NIGC with regard thereto. The Court has reviewed the e-mails above referred to attached as exhibits to the declaration of S. Kimball filed May 15, 2009 as exhibits AA, BB, CC and DD. As a result of the above e-mails, Chairman Hogan met with Band Chairman Fonseca, Band Administrator Ms. Delgado, Band Attorney Ms. Lacey, and Penny Coleman, Counsel for the NIGC. The meeting took place at a hotel in Seattle, Washington 4 or 5 months before Fonseca's November deposition, hereinafter referenced. Sharp representatives were not given notice as Mr. Fonseca wished to talk to the NIGC himself without interruption, which he in fact did for about 45 minutes (Deposition of Nicholas Fonseca November 21, 2008, Exhibit S to the Declaration of S. Kimball filed June 4, 2009, Pages 107- 109).

CONCLUSIONS

On March 12, 2007, the date this legal action was filed, there was no viable contract existing between the Band and Sharp.

The Band had made it clear by the statement of it's Chairman that the contract had been terminated and

Mr. Anderson of Sharp had the same understanding as above stated. Since the contract was not viable and had been terminated or cancelled according to the parties, it obviously was not a contract which dealt with gaming. By the time this action was filed, as stated above. Lakes had advanced considerable funds and the EIR process for the overpass funded by Lakes assistance and bonds was in progress at least since 2002. The evidence is clear that the Band considered Sharp and its agreements no longer viable and had replaced Sharp by Lakes. The purpose of The Indian Gaming Regulatory Act (S. Rep. 100-446 U.S.C.A. N. 3071) was to provide for joint regulation by the tribes and the Federal Government of Class II gaming on Indian Lands and to create a gaming commission which would have a regulatory role for Class II gaming and an oversight role with respect to Class III (Senate Report No. 100-446; August 3, 1988). The Findings set forth in 25 USCA sec. 2701 and the Declaration of Policy in Sec. 2702. 2703, 2704 and 2705 USCA clearly establish that the powers of the NGIC with regard to management contracts are limited to gaming on Indian Land. Since the Band asserts the GMAC. ELA and Note herein are terminated and/or cancelled, there is no jurisdiction in the NGIC with regard to said instruments, either to review, regulate, approve or disapprove them. Absent such regulatory authority in the NIGC, the dispute regarding damages from any alleged breach such as is set forth in the Complaint in this action rests with the State of California courts. Although factually distinguishable, the Court of Appeals in *American Vantage Companies vs. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 597 held that the claim must intrude on the tribe's control of its gaming enterprise and that is the context in which a case must be analyzed. The *American Vantage*

case held that the law was correctly stated in Gaming Corp. of *America vs. Dorsey & Whitney* (1996) 88 Fed.3d 536, 550: potentially valid state claims are those that would not interfere with the nation's governing of gaming. The Band's position that the agreement was terminated by the tribe as stated by Band Chairman Fonseca on September 16, 2002 in his letter to the California Transportation Commission (Chron-21) well as the existence of a contractual relationship with Lakes Entertainment, Inc. for the development of a gaming enterprise on the Rancheria which predated his election to the tribal council in 1999 (Declaration of Nicholas Fonseca September 22, 2008).

Exhibit 6 to the Joint Appendix of Evidence filed September 22, 2008, the declaration of Nicholas Fonseca at page 1, Paragraph 3, lines 12 to 20, AE049, provides further evidence of the Sharp agreement being terminated as far as the Band was considered, as Mr. Fonseca stated the Band had asked the NIGC to approve a management contract with Lakes Entertainment, Inc., and the contract had been approved in July 2004 (Declaration page AE051, page 3, lines 13-15).

Based on this evidence, the Court finds the GMA and ELA were terminated by the Band prior to its January 23, 2008 request for ruling by the NIGC Chairman. For these reasons, the Court rules the motion quash and dismiss for lack of jurisdiction must be denied.

In further support of the Court's conclusion that the agreements of the Band and Sharp were terminated before the NIOC took final action and as a separate and independent basis for determining the character of the action of the Chairman as set forth in his "final decision," the Court finds the decision of the Chairman

of the NIGC was not final action and must be disregarded because it was fatally flawed. In support of this conclusion, and as a separate basis for denying the motion to quash and dismiss, the Court makes the following findings:

1. The decision violated the due process rights of Sharp. Although there was *not* a formal hearing by the Chairman of the NIGC and thus reasonable ex parte contacts may be made by a party thereto, the extensive nature of the contacts, the expressed friendship of the participants, and in particular, the 45-minute meeting by the Chairman with his attorney and the Band's Chairman and his attorney was so egregious a violation of the due process requirement as to require this Court to disregard the finding (*Home Box Office, Inc. vs. Federal Communications Commission* (1976) 567 F.2d 9.57) which discusses the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of .reasoned decision making on the merits which undergirds all of our administrative law.

Cited in the *Home Box Office* case, supra, is the case of *Sangamon Valley Television Corporation vs. United States* (1959) 269 F.2d 221,224 in which the court said:

> "interested attempts to influence any member of the
>
> commission***except by the recognized and public
>
> Processes go to the very core of the Commission's quasi-
>
> judicial powers**...."

The Court went on to say that where a valuable privilege is at stake with conflicting claims, basic

fairness requires such a proceeding to be carried on in the open. Although these two cases involved rule making and allocation of channels on television, respectively, this Court believes the basic rules of fairness apply as well in this situation, particularly with regard to the 45-minute private hearing afforded to the Band's representatives.

2. The NIGC did not require compliance with 25 C.F.R. 533.3 or 25 U.S.C.A. 2711 regarding items which must accompany a request for approval of a management contract, nor was the fee under subsection (i) required. in addition, the NIGC did not comply with the time limits for decision set forth in subsection (d) of the above referenced code section. Further, by letter dated July 18, 2008, Ms. Coleman waived compliance with 25 C.F.R. 533.3 "do to the age of the Agreements" (Exhibit K to Supplemental Declaration of S. Kimball filed August 17, 2009) without stating any authority permitting such waiver. The Court notes that not only does C.F.R. 533.3 set forth what is required to be filed, but 25 U.S.C.A. Sec 2711 sets forth a number of additional requirements without authorizing any method of waiving them, and restates the time limits for approval and extensions set forth in the regulation. The Court concludes that the letter of Ms. Coleman appears to have no authority to waive the statutory requirements. In addition, it is quite clear to the Court that the submission by Chairman Fonseca (Chron-25) was never intended to be a legitimate submission of a request for approval of a management contract; rather, it was another request for an expression of opinion by the Chairman of the NCIG with regard to the G.M.A. and E.L.A. As such it is, in the Courts opinion, not entitled to any deference.

An analysis of the Decision (Chron-25) confirms that it was not the final act of the commission but at most another expression of an opinion on the validity of the agreements involved. Without belaboring the point, it should be noted that the "decision" does not mention or explain the propriety of the meeting between Chairman Fonseca and the attorneys, the extensive nature of the ex parte contacts, the disregard of statutory requirements for the contract submission, the failure of the Band to submit the contracts "upon execution" and the passage of over 11 years before submission rather than within the time limits as required by 25 FCR 533.2. While on page 5, paragraph one, the Chairman says the agreements were submitted for a legal opinion, he then goes on to say that there is no reason he cannot issue a conclusive determination without providing any basis for this conclusion. This again brings into question the due process problem. The Court concludes that, at most, the so-called "decision" is a legal opinion which was the result of an almost total disregard of mandated procedures and an obvious lack of due process.

RULING ON PREEMPTION AS A GROUND FOR DENIAL JURISDICTION IN THIS COURT

By a preponderance of the evidence, the Plaintiff has established insofar as preemption is a basis for the motion, that the motion to quash/dismiss should be and it is hereby denied.

SOVEREIGN IMMUNITY

A contemporaneous motion was made by the Defendant to quash/dismiss the complaint on the grounds that the Band's sovereign immunity prevents it from being sued in this court or at all. The Chronology and factual statements set forth under the

Preemption portion of the ruling are incorporated in this portion by reference fully as set forth at length herein.

On the issue of sovereign immunity, three distinct issues must be addressed regarding the GMA, ELA and $3,167,692.86 Promissory Note ("the Note"): first, does the necessary clear language of waiver appear; second, did the Band authorize the waiver; and third, what was the proper intent of the waiver's application?

As to the language used in each of the three documents, it is quite clear that there was a waiver of sovereignty. Waiver clearly appears in the GMA, ELA, and the Promissory Note, and each document includes the courts of the State of California as being appropriate for trial of any dispute thereon.

As to the consent of the tribe, the GMA was pre-approved with a blanket approval on May 21, 1996 (Chron-4). With regard to the ELA and the Promissory Note, they were circularized to the chairman, Mr. Murray, on the October 27, 1997 (Exhibit N to Declaration of S. Kimball, filed May 15, 2009) before the tribal meeting on November 15, 1997. After discussion, both documents were signed with changes approved by the Tribal Council. Having had an opportunity to read the waiver language in both documents, the council agreed at the meeting to the signing of both (Chron-16).

There appears to be a disagreement as to whether The Note as well as the GMA which was replaced by the ELA were to cover funds to be advanced other than for lease and similar expenses, as well as whether the funds were to be restricted to income from the sprung tent' or from the later larger casino to be built. The intent appears to be a strongly contested area and its

resolution directly involves the basis for liability of the note and encompasses the main issues of payment and source addressed by the complaint. With regard to interpretation of the intent of the parties as to contracts, if there is no conflicting extrinsic evidence, the question is one of law for the judge (*Paralift Inc. vs. Superior Court* (1993) 23 Cal.App.4th 748, 754 and *Lange vs. TIG insurance Co.* (1998) 68 Cal.App.4th 1179, 1185. On the other hand, if there is to be extrinsic, relevant evidence to be presented, the judge must determine if one or both constructions of intent are reasonable and if both are, the jury must decide the intent issue (*Lange vs. TIG, supra, Wolf vs. Superior Court* (2004)114 Cal.App.4th 1343, 1550-1551). In the latter case, the jury must determine the mutual intent of the parties (*Morey vs. Vannucci* (1998) 64 Cal.App.4th 904; 913; *Vine vs. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590). In light of the fact that the limited discovery and the declarations indicate that there are crucial areas as to the contracts and their intended source of payment, which casino is involved, and whether certain machines are capable of being configured easily to handle Class II or Class III type gambling which would affect any judgment, it is the ruling of the Court that there is sufficient evidence to establish that either interpretation is reasonable and judicial economy dictates that a jury will be necessary. It is further the Court's conclusion that judicial economy mandates that the issue of intent will in all probability require a jury which will determine the correct interpretation of payment issues and source of payment issues and related sub issues, that those issues should be reserved for a jury and the motion to quash/dismiss should be denied without prejudice to the interpretation issue be tried at the trial in chief

since neither party should be forced to elect or decline jury at this stage.

RULING

The Motion to Quash/Dismiss is denied with the issue of the intention of the parties to be determined at the trial in chief. Defendant shall file a responsive pleading not later than 30 calendar days after formal notice of this ruling. Plaintiff shall prepare a formal order consistent with this ruling, submit it to the Court and cause it to be served on Defendant's attorneys together with formal notice thereof. The proposed order shall be prepared and submitted to this Court within fifteen days after the date of mailing of this ruling plus five days for mailing.

Dated: November 17, 2009

/s/ Patrick J. Riley
PATRICK J. RILEY
Judge of the Superior Court, Retired
and Assigned by the Chief Justice

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR THE
THIRD APPELLATE DISTRICT

[Filed 10/16/2017]

C070512
El Dorado County
No. PC20070154

SHARP IMAGE GAMING, INC.,

Plaintiff and Respondent,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Defendant and Appellant.

BY THE COURT:

Respondent's petition for rehearing is denied on the merits.

/s/ Nicholson
NICHOLSON, Acting P.J.

cc: See Mailing List

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians
C070512
El Dorado County No. PC20070154

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed Dec. 20, 2017]

S245024

SHARP IMAGE GAMING, INC.,
Plaintiff and Respondent,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Defendant and Appellant.

Court of Appeal, Third Appellate District -
No. C070512

The petition for review is denied.

/s/ CANTIL-SAKAUYE
Chief Justice

APPENDIX E

SHARP IMAGE

EQUIPMENT LEASE AGREEMENT

This Lease agreement dated Nov 15th, 1997, the "Lease" by and between SHARP IMAGE GAMING INC, a California corporation ("Lessor") and the SHINGLE SPRINGS BAND OF MIWOK INDIANS, a federally recognized Indian tribe having a place of business on the Shingle Springs Indian Reservation known as the Crystal Mountain Casino located in Placerville, California 95667 (Lessee").

1. Term. The term of this Lease shall be for sixty (60) months, commencing on the date that 400 gaming devices are installed and in operation at Lessor's Crystal Mountain Casino or any other gaming facility owned and operated by Lessee ("Commencement Date"), and terminating on midnight of the last day of the period ending sixty (60) months after the Commencement Date, unless otherwise terminated as provided herein.

2. Equipment Description. Lessor hereby leases to Lessee and Lessee hereby rents and leases from Lessor (1) four hundred (400) video gaming devices; (2) progressive hardware, software, and signage for the video gaming devices; and (3) fiber optic signs for placement throughout any gaming facility owned and operated by Lessee, as may be further described on Exhibit A (the "Equipment"), in accordance with the following terms and conditions. During the term of this Lease, Lessor shall have the exclusive right to lease or otherwise supply additional gaming devices to Lessee to be used at its existing or any future gaming facility or facilities. The Equipment will be delivered to the Crystal

Mountain Casino 5281 Honpie, Placerville, California 95667.

3. Lease Payments.

(a) Lessee agrees to pay Lessor, or its assignee, in legal tender of the United States of America, thirty percent (30%) of net gaming revenues weekly, together with (i) all amounts which may become due under the Lease and (ii) any costs and expenses, including reasonable attorneys' fees, incurred in the collection of any payments not made under this Lease. "Net revenues" means all gross gaming revenues from all gaming activities, which are solely related to the operation of Video Gaming/Pulltab devices and card games, less all prizes, jackpots and payouts. Payments (the "Lease Payments") shall be made as follows: Payments are due two days after the end of each week. An itemized statement of gross and net gaming revenues and all deductions for the preceding month shall accompany each payment. The Lease Payments shall be payable without demand or notice at the offices of the Lessor at 9164 Jordan Avenue, Chatsworth, California 91311, (or such other place as the Lessor (or its assignee may designate in writing.)

(b) Without Lessor's prior written consent any Lease Payment to Lessor of a smaller sum than due at any time under this Lease shall not constitute a release or an accord and satisfaction for any greater sum due or to become due.

4. Filing. Lessee, on request, agrees to execute any instrument necessary to the filing and recording of this Lease or the Lessor's interest in the Equipment. Lessee further appoints Lessor, its true and lawful attorney, to prepare, execute and sign any and all financing statements or otherwise in order to

effectuate a lien on the property subject to this Lease, and to sign the name of Lessee with the same force and effect as it signed by Lessee, and to file such instruments at the proper location or locations.

5. Delivery, Use and Preservation of Property. From the time the Equipment is shipped from Lessor's facility, until it is returned to Lessor's designated facility, Lessee shall: (a) use the Equipment solely in the conduct of its business; (b) use and preserve the Equipment in a careful, proper and lawful manner; (c) keep the Equipment in good repair, condition and working order; (d) not make any material alterations to the Equipment; (e) promptly notify Lessor of any loss of or damage to the Equipment; and (f) assume the entire risk of loss of and damage to the Equipment, and injury or death to persons, from any cause whatsoever. The Lessee and its employees are solely responsible for the management of Lessee's gaming facility. It is the intent of the Parties that this Lease does not constitute a management contract, and that nothing in this Lease authorizes the Lessor to manage all or part of Lessee's gaming facility.

6. Equipment, Attachments, Accessories, Alterations and Repairs. Any alterations, modifications or repairs with respect to the Equipment that may at any time during the term of this agreement be required for any reason shall be at the expense of the Lessee. Lessor shall train at no cost to Lessee all technical personnel necessary to perform all necessary maintenance and repairs to the Equipment. Lessee agrees that all equipment, attachments, accessories, alterations and repairs made to or placed upon the Equipment shall immediately become the property of Lessor, and subject to the terms and conditions of this agreement as it originally rented hereunder.

7. Inspection. During the term of this Lessee and for two (2) years thereafter, Lessor or its authorized representatives, after reasonable notice to the Lessee, shall have the right, at Lessor's expense, to inspect and copy the books and records of the tribal gaming facility with respect to all gaming revenues and the Equipment. Lessee shall adopt adequate internal controls and procedures to enable the proper accounting for all gaming activities including gaming devices revenues and shall maintain appropriate records for the Equipment and the gaming facility and shall make such records available to Lessor. If Lessor determines that Lessee has underpaid Lessor its share of the net revenues, the books and records shall be audited by a certified public accountant (CPA) mutually agreeable to the parties, or if the parties cannot agree, by a CPA selected by Lessor from amount the ten (10) largest certified public accounting firms. If the CPA determines that Lessor was underpaid its share of net revenues. Lessee shall immediately pay Lessor the balance due. If the CPA determines that Lessor was overpaid, the amount of such overpayment shall be deducted from the next payment due Lessor or, if the lease has expired or is otherwise terminated. Lessor shall immediately pay Lessee the amount of the overpayment. If the amount of any underpayment exceeds three percent (3%) of the amount due, Lessee shall reimburse Lessor for the cost of the audit.

8. Fees, Assessments and Taxes. Lessee shall report and pay to the appropriate authority any and all license fees, registration fees, assessments, charges and taxes, including penalty and interest, assessed against said Equipment, due to rental or use thereof and reimburse Lessor upon request for any such amounts assessed against Lessor by reason of the rental or use

of said Equipment, except for taxes payable in respect to Lessor's income.

9. Advertising and Promotional Expenses. Lessor agrees to reimburse Lessee, on a monthly basis, thirty per cent (30%) of the costs incurred by Lessee for advertising and for promotions offered by Lessee to its patrons. Such advertising and promotions shall include, without limitations, billboards, vehicles to be offered as prizes to gaming facility patrons, and transportation for those patrons to the gaming facility. Lessor shall reimburse Lessee for advertising and promotional expenses promptly upon receipt of invoices of such expense incurred by Lessee.

10. Assignment. Lessee shall not assign or in any way dispose of all or any part of its rights or obligations under this Lease or enter into any sublease of all or any part of the equipment without the prior written consent of the Lessor. Lessor SHALL NOT assign or transfer this Lease or Lessor's interest in the Equipment without THE PRIOR CONSENT OF Lessee. Neither party shall unreasonably withhold or delay its consent. The rights and obligations of this shall inure to and be binding upon Lessor and Lessee and their respective successors and assigns. Notwithstanding the foregoing, a transfer of shares of Lessor's stock upon or following the death of Chris Anderson shall not constitute an assignment.

11. Personal Property. The Equipment shall at all times remain personal property of Lessor regardless of the degree of its annexation to any real property and shall not by reason of any annexation become a part thereof.

12. Insurance. Lessee will maintain all risk insurance coverage for the gaming facility and the Equipment for its full replacement value, and also such other insurance as Lessor may require, in amounts and under policies acceptable to Lessor, with loss payable to Lessee and Lessor as their respective interests may appear. Upon request of Lessor, Lessee shall furnish certificates of insurance evidencing such coverage. Each policy shall provide for thirty (30) days written notice to Lessor of the cancellation or material modification thereof.

13. Loss or Damage. Until the Equipment is returned to (and received by) the Lessor as provided in paragraph 16 of this Lease, Lessee shall bear the entire risk of loss, theft, damage to or destruction of the Equipment. ("Events of Loss") No Event of Loss shall relieve Lessee from its obligation to make Lease Payments. When any Event of Loss occurs, Lessee shall immediately notify Lessor and, at the option of Lessor, shall (a) replace such Equipment in good repair and working order, with clear title to the Equipment in Lessor: or (b) replace such Equipment with like Equipment purchased from Lessor. The proceeds of any insurance payable with respect to the Equipment shall be applied towards replacement or repair of the Equipment.

14. Disclaimer of Warranties. Lessee understands that (except for Lessor's express limited warranty on the Equipment set forth on Exhibit A) Lessor makes no representation or warranty of any kind, express or implied, with respect to the equipment, including warranties of merchantability or fitness for a particular purpose.

15. General Indemnity. Lessor shall be liable for any direct, indirect, special or consequential damages

or loss (a) resulting from the use or operation of the Equipment or (b) any other liability of any nature with respect to the Equipment or this Lease. Furthermore, Lessee shall indemnify and hold harmless Lessor, its directors, offices, employees, agents and representatives, from any and all claims, actions, suits, proceedings, cost, expenses, damages and liabilities, including attorneys' fees, arising out of, connected with, or resulting from, this Lease or the breach thereof.

16. Return of Equipment. Upon termination of this Lease, Lessee will, at its own cost and expense, promptly return the Equipment to Lessor in the same condition as received, reasonable wear and tear and normal depreciation excepted.

17. Events of Default. Lessee shall be in default if any of the following occur.

(a) Nonpayment. Lessee fails to pay when due any amount required to be paid to Lessor under the Lease and fails to cure such default with in thirty (30) days after the due date of such payment;

(b) Misrepresentation. Any representation or warranty made by Lessee in the Lease or in any other certificate, report, financial statement, instrument or other document furnished by or on behalf of Lessee in connection with the Lease proves to have been incorrect in any material respect when made or deemed made and such representation or warranty shall remain untrue in any such material respect for more than thirty (30) days written notice thereof from Lessor to Lessee;

(c) Covenants. The Lessee fails to perform or observe any term, covenant or agreement contained in the Lease or any other certificate, report, financial statement, instrument or other document furnished by

or on behalf of Lessee in connection with the Lease that proves to have been incorrect in any material respect when made or deemed made.

(d) Other Defaults. The Lessee fails to perform or observe any other term covenant or agreement contained in the Lease or any other certificate, report, financial statement, instrument or other document furnished by or on behalf of Lessee in connection with the Lease that proves to have been incorrect in any material respect when made or deemed made;

(e) Judgements. Entry by any court of a final judgement against Lessee which, in the reasonable judgement of Lessor, materially and adversely affects or will affect, Lessee's ability to perform its covenants under this Lease, or which does or would reasonably be expected to have a material adverse effect on the legality validity or enforceability of the Lease or any other document executed or to be executed in connection herewith or therewith;

(f) Insolvency and Bankruptcy. The Lessee, or any tribal entity established by Lessee to act on Lessee's behalf in respect to the gaming facility, becomes insolvent or bankrupt or generally fails to pay, or admits in writing its inability to pay, its debts when they become due, or shall make an assignment for the benefit of, or any composition or arrangement with, its creditors or shall apply for, consent to or acquiescence in the appointment of a trustee, receiver, liquidator or other custodian for Lessee, or its business, in the absence of such application, consent or acquiescence, a trustee, receiver, liquidator or other custodian shall be appointed for Lessee or its business and is not discharged in sixty (60) days;

(g) Insurance. Lessee fails at any time to maintain the insurance coverage required by the terms of the Lease;

(h) Repairs and Maintenance. Lessee fails to repair and maintain the Equipment as required by the terms of this Lease;

(i) Breach of Lease. Lessee violates any provision of this Lease;

18. Remedies.

(a) Upon the occurrence of any Event of Default and at any time thereafter, Lessor may, with or without terminating this Lease, in its sole discretion, do any one or more of the following;

(i) Upon notice to Lessee, cancel this Lease;

(ii) dispose of Equipment by sale or otherwise;

(iii) declare immediately due and payable all sums due and to become due hereunder for the full term of the Lease (including any renewal or purchase options that lessee has contracted to pay);

(iv) without notice to Lessee, repossess the Equipment wherever found, with or without legal process, and for this purpose Lessor and/or its agents may enter upon any premises of or under the control or jurisdiction of Lessee or any agent of Lessee, without liability for suit, action or other proceeding by Lessee (any damages occasioned by such repossession being hereby expressly waived by Lessee) and remove the Equipment therefrom; Lessee further agrees, on demand, to assemble the Equipment and make it available to Lessor at a place to be designated by Lessor which is reasonable convenient to Lessor and Lessee;

(v) exercise any other right or remedy which may be available to it under the Uniform Commercial Code, as adopted and in force in the State of Idaho ("UCC"), or any other applicable law;

(vi) a termination hereunder shall occur upon notice by Lessor and only as such items of Equipment as Lessor specifically elects to terminate and this Lease shall continue in full force and effect as to the remaining items, if any;

(b) If this Lease is deemed at any time to be one intended as security, Lessee agrees that the Equipment shall secure, in addition to the indebtedness set forth herein, any indebtedness at any time owing by Lessee to Lessor.

(c) No remedy referee to in this paragraph is intended to be exclusive, but shall be cumulative and in addition to any other remedy referred to above or otherwise available to Lessor at law or in equity. No express or implied waiver by Lessor of any default shall constitute a waiver of any other default by Lessee or a waiver of any of Lessor's rights.

19. Purchase Option. Provided that all amounts due hereunder have first been paid and that Lessee shall not otherwise be in default hereunder, Lessee shall have the option to purchase the Equipment on the termination date by paying to the Lessor the purchase option price contained in Exhibit B for each item of Equipment. Written notice of exercise of such option shall be given to Lessor no later than 90 days prior to termination date. Upon receipt of Lessee's payment pursuant to the exercise of the option granted in this paragraph, Lessor shall convey title to the Equipment, free from any liens, claims or encumbrances to Lessee. If Lessee does not exercise the purchase option, the

term of the Lease shall be extended an additional twenty-four (24) months. At the end of the twenty-four (24) month extended Term, Lessor shall transfer title to the Equipment, free from all liens, claims or encumbrances, to Lessee, at no additional cost.

20. Notices. All notices required to be given hereunder shall be in writing and shall become effective when delivered by hand or received by overnight carrier, telex, telecopier, telegram or registered or certified first class mail, postage prepaid at the address of such other party set forth in this Lease (in paragraph 2 or 3 as the case may be), or at such other place as either party may designate in writing to the other party.

21. Waiver of Immunity and Consent to Suit, and Governing Law.

(a) This Lease shall be binding when accepted in writing by the Lessor and shall be governed by the laws of the State of California

(b) Lessee hereby expressly waives its sovereign immunity from any suit, action or proceeding to enforce Lessee's obligations under this Lease or from any action or claim in arbitration and Lessee expressly consents to the exercise of jurisdiction by the courts of the State of California or the United States District Court for the Eastern District of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court for any claims by Lessor arising out of this lease. Lessee agrees that is shall not plead or raise as a defense the requirement of exhaustion of tribal court remedies, and Lessee hereby waives any claim or right to tribal court jurisdiction.

(c) Lessee's waiver of immunity from suit is specifically limited to the enforcement of an award of

monetary damages, or injunctive or declaratory relief to perform any obligation under this Lease or any other compelling arbitration; provided that the arbitrator(s) and/or the court shall have no authority or jurisdiction to execute against any assets of Lessee except the Lessee's share of the net gaming revenues.

22. Meet and Confer: Arbitration.

(a) Without limiting other remedies expressly provided in this Lease, whenever during the term of the Lease, any disagreement or dispute arises between the parties as to the interpretation of this Lease or any rights or obligations arising thereunder such matters be resolved, whenever possible, by meeting and conferring. Any party may request such a meeting by giving notice to the other, in which case such other party shall make itself available within seven (7) days thereafter. If such matters cannot be resolved within ten (10) days, either party may seek a resolution by binding arbitration in accordance with the prevailing rules of the American Arbitration Association (or any successor thereto to the extent not inconsistent herewith), upon notice to the other party of its intention to do so. The parties agree that in any such arbitration each party shall be entitled to discovery as provided by tribal (lessee's) law, or if not tribal law exists, by the Federal Rules of Civil Procedure. The parties will select an arbitrator from a list of arbitrators agreed to by the parties in accordance with the rules of the Association. If the parties fail to select or agree upon the selection of an arbitrator within ten (10) days after being requested to do so, the Association shall appoint an arbitrator to resolve the dispute. All hearings shall be conducted in Los Angeles, California, within fifteen (15) days after the arbitrator is selected and shall be conducted in his or

her presence. The decision of the arbitrator shall be binding on the parties and non-appealable. The costs and expenses of the arbitration shall be advanced if and when required by the Association, each party to share equally in such advances.

(b) In rendering its decision and award, if any, the arbitrator shall not add to, subtract from, or otherwise modify the provisions of this lease.

(c) Either party may seek judicial enforcement of the arbitrator decision. The awards of any arbitration if brought in federal court shall be governed by the Federal Arbitration Act codified in Title 9 of the United States Code except as the same may be changed or limited by the provision of this lease. The appropriate court shall have the authority not only to confirm any order or decision of the arbitrator, but to issue all orders necessary, including, but not limited to, the issuance of temporary and permanent injunctions to prohibit the parties from engaging in conduct that violates the provisions access to the gaming facility and/or requiring the parties to pay over any income, rents or profits subject to attachment pursuant to the lease or any decision or order of the arbitrator.

23. Entire Agreement. This document and any attachments are solely hereto constitute the entire agreement of the parties with respect to the subject matter hereto. No variation or modification of this document and no waiver of any of its provisions or conditions shall be valid unless in writing and signed by both parties.

Acknowledged by Lessee: _____

24. Headings. Headings or titles to paragraphs of this Lease are solely for the convenience of the parties

and shall have no effect whatsoever on the interpretation of the provisions of this Lease.

SHARP IMAGE GAMING INC

By: [Illegible]
Name: C. Anderson
Title: Pres.

MIWOK INDIAN TRIBE

By: William D. Murray Sr.
Name:
Title: Chairperson

Exhibit A

Additional Description of Equipment

Description of equipment and buyout (Exhibit B) will be supplied upon opening of Casino.

Express written warranties (if any):

APPENDIX F

SHARP IMAGE

PROMISSORY NOTE

$3,167,692.86 November 15, 1997

For value received, the SHINGLE SPRINGS BAND OF MIWOK INDIANS, a federally recognized Indian Tribe ("Borrower"), with its principal place of business located at Placerville, California, promises to pay to Sharp Image Gaming, Inc., a California for-profit corporation, with its principal place of business located at 9164 Jordan Avenue, Chatsworth, California 91311. ("Note Holder"), or such other place as the Note Holder may designate in writing, the principal sum not to exceed THREE MILLION ONE HUNDRED SIXTY SEVEN THOUSAND SIX HUNDRED NINETY-TWO DOLLARS AND EIGHTY SIX CENTS ($3,167,692.86) in lawful money of the United States of America. Full documentation has been presented on the amount above and represents the full amount owed up to September 30, 1997.

The outstanding principle balance of this Note shall bear interest at a rate of interest (computed on the basis of a year of 365 or 366 days, as the case may be, for the actual number of days elapsed) equal to ten per cent (10%) per annum. Interest on the outstanding principle [sic] balance hereof shall accrue from the date all or any portion of the funds are first advanced by Note Holder to Borrower. Payment of principal and interest shall commence on the fifth day of the second month following the date that four hundred (400) video gaming devices (unless a reduced amount is put in operation and agreed upon by Sharp Image Gaming, Inc. and Borrower, or if mandated by the government) are installed and in operation at Borrower's Gaming

Facility and Enterprise ("Enterprise"), ("Commencement Date"), and shall continue thereafter on the fifth day of each and every month, as set forth below, until paid.

Principal and interest under this Note shall be fully amortized over twelve (12) months and shall be paid, in equal monthly installments of principal and interest, on the fifth day of each month after the Commencement Date. If the Borrower is not financially able to maintain the equal monthly installments and continues operating the casino without operating at a loss, the borrower shall then be allowed to make a minimum payment equal to 25% of the gross net revenues it receives from the operation of the video gaming devices described above until the note is paid in full. "Gross net revenues" are defined as all monies paid in by players, less jackpots and payouts (also known as "net gaming revenue").

At any time, the privilege is reserved to Borrower to pay all or any portion of the principal and interest prior to the due date without penalty. Each payment shall be credited first on the interest then due; and the remainder on the principal sum; and interest shall thereupon cease upon the amount so credited on said principal sum.

If, as a direct result of any action or omission of Borrower, any installment or other payment required under this Note is not paid when due, and such default is not cured within thirty (30) days after the due date of such payment. Note Holder may declare all sums due under this Note to be immediately due and payable.

Upon the occurrence of an event of default and failure by Borrower to cure same within any applicable cure period. Note Holder shall have the right to bring

legal action against Borrower. Note Holder shall be entitled to reasonable expenses, including reasonable attorney's fees in obtaining or enforcing payment of any obligation hereunder or in exercising any of its rights against Borrower. Borrower hereby expressely [sic] waives its sovereign immunity from any suit, action or proceeding to enforce the terms of this Note. Borrower expressly consents to the exercise of jurisdiction by the courts of the State of California or the United States Court for the Eastern District of California, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court for any claims by Note Holder arising out of this Note. Borrower agrees that it will not plead or raise as a defense the requirement or exhaustion of tribal court remedies, and Borrower hereby waives any claim or right to tribal court jurisdiction. This Note shall be governed by the laws of the State of California.

In the event that any provision contained in this Note conflicts with applicable law, such conflict shall not affect the other provisions of this Note which can be given effect without the conflicting provisions. To this end, the provisions of this Note are declared to be severable. It is not the intent of the Note Holder to collect interest or other loan charges in excess of the maximum amount permitted by the laws of the United States of America, or the State of California. If any interest or other loan charges collected or to be collected by the Note Holder ever exceeds the applicable legal limits, then (1) any such interest or other loan charges shall be reduced to the interest or other loan charges permitted by law and (2) any sums already collected from Borrower which exceeded permitted limits shall be refunded to Borrower. The Note Holder may choose to make such refund by reducing the principal balance of the Note or by making a direct

payment to Borrower. If a refund is made by reducing the principal, the reduction shall be treated as a permitted partial prepayment without premium or penalty.

Borrower hereby waives presentment for payment, demand, notice of protest and protest of this Note, and hereby consents to any and all extensions of time, renewals, waivers or modifications that may be granted by Note Holder with respect to the payment or other provisions of this Note.

No failure or delay on the part of Note Holder in exercising any right, power or privilege under this Note and no course of dealing between Borrower and Note Holder shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise of any right, power or privilege that Note Holder would otherwise have. No notice to, or demand on, Borrower in any case shall entitle Borrower to any other or further notice or demand in similar or other circumstances or constitute a waiver of the right of Note Holder to any other or further action is any circumstances without notice or demand.

This Note shall be construed and enforced in accordance with the laws of the State of California.

SHINGLE SPRINGS BAND OF MIWOK INDIANS

DATED: Nov 15th, 1997

By: /s/ William D. Murray Sr.
Tribal Chairperson

ATTESTED:

/s/ Helen F. Fonseca
Secretary of the Shingle Springs Band
of Miwok Indians Tribal Council

APPENDIX G

United States Code
Title 25. Indians

Chapter 29— Indian Gaming Regulation

25 U.S.C. 2701. Findings

The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. 2702. Declaration of policy

The purpose of this chapter is—

(1) 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;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. 2703. Definitions

For purposes of this chapter—

* * *

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(**I**) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(**III**) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes,

during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

25 U.S.C. 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

25 U.S. Code § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund 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;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management

officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

* * *

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect

* * *

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

* * *

25 U.S.C. 2711. Management Contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman , an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its

stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

* * *

APPENDIX H

Code of Federal Regulations
Title 25. Indians

Chapter III— National Indian Gaming Commission, Department of the Interior
Subchapter A—General Provisions
Part 502—Definitions of this Chapter

25 C.F.R. 502.5. Collateral agreement.

Collateral agreement means any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).

25 C.F.R. 502.15. Management contract.

Management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

Subchapter C—Management Contract Provisions
Part 533—Approval of Management Contracts

25 C.F.R. 533.7. Void agreements.

Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Chairman in accordance with the requirements of part 531 of this chapter and this part, are void.