3RD CIVIL NO. 070512

In the Court of Appeal of the State of California
Third Appellate District

Sharp Image Gaming, Inc.,
Plaintiff and Respondent

v.

Shingle Springs Band of Miwok Indians,
Defendant and Appellant

On Appeal From A Judgment Of The Superior Court
For The County Of El Dorado, Case No. PC20070154
The Hon. Nelson Brooks, Judge

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INTRODUCTION[1]

Facts are stubborn things. It is a fact that on June 20, 2009, the National Indian Gaming Commission ("NIGC") took final agency action voiding the gaming contracts at issue in this lawsuit. Respondent, Sharp Image Gaming, Inc. ("Sharp"), may not like the fact that this happened, and clearly it disagrees with the determination, but the NIGC's finding that Sharp's gaming contracts violate the Indian Gaming Regulatory Act ("IGRA") remains a fact of this case. (AA/Vol.IV/pp. 915-929; AA/Vol.VI/p. 1630; AA/Vol.XXIII/pp. 5919-5920.)[2]

It is also a fact that once the NIGC voided the gaming contract, Sharp had only one legally viable avenue of redress: It was required to appeal the agency's finding to a federal district court, the exclusive forum that can review and reverse final agency action under federal law. 5 U.S.C. §§ 701 *et seq.*; 25 U.S.C. § 2714; *see also United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co.* (2nd Cir. 2006) 451 F.3d 44, 51. Having chosen not to appeal the NIGC's action (at least not yet), that finding is entitled to binding and preclusive legal effect unless and until it is successfully challenged in federal court. *AT&T Corp. v. Coeur D'Alene Tribe* (9th Cir. 2002) 295 F.3d 899, 906, 909-10.

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[1] Throughout this brief, the Reporter's Transcript is abbreviated as "RT," Appellant's Appendix as "AA," Appellant's Opening Brief as "OB," Respondent's Brief as "RB," and Appellant's Reply Appendix as "ARA."

[2] One of the documents evidencing the NIGC's final agency action, AA/Vol.XXIII/pp. 5919-5920, is titled "Commission Final Decisions." It lists final agency action taken by the NIGC, beginning in 1994 and continuing to the most recent action (as of October 5, 2011), which is the final determination involving Sharp's contract. Since 1994, the NIGC has taken final agency action on Management Contracts on only 13 other occasions.

Not liking the facts *or* the law, Sharp tries to change reality by claiming "there was no 'final agency action' here." (RB 31-32.) But, the *fact* that the NIGC acted is beyond dispute, and Sharp's assertion is in direct contravention of the NIGC's conclusion that it *did* take final action. (AA/Vol.IV/pp. 915-929; AA/Vol.VI/p. 1630; AA/Vol.XXIII/pp. 5919-5920.) Moreover, rather than explaining why it never filed a federal lawsuit appealing the NIGC's final determination, Sharp advances the circular argument that it did not have to challenge the agency's action in federal court because *Sharp* believed that it was procedurally and substantively improper, and therefore deserved no deference. (RB 31.) But neither Sharp nor the Superior Court is the arbiter of whether the NIGC erred. The issue before this Court turns on jurisdiction, not deference. In that regard, it is notable that the cases cited by Sharp to support its "deference" theory are *federal cases* where a *federal reviewing court* reached the merits of a lawsuit properly brought in *federal court* as required by *federal law*.

In short, because Sharp's $30 million judgment rests untenably on an unenforceable contract, and because it is both a legal and linguistic impossibility for an unenforceable contract to be enforced, the judgment cannot stand.

Reversal is also separately justified because the Superior Court improperly assumed subject matter jurisdiction over the Tribe (the Shingle Springs Band of Miwok Indians), and did so *after* finding the contractual waivers of sovereign immunity at issue to be ambiguous in scope. Specifically, the court found the waivers could be reasonably construed to exclude Sharp's claims, which deprived the Superior Court of jurisdiction under controlling law. Sharp does not, and cannot, dispute that the

Superior Court found the reach of the waivers' scope was ambiguous. Nor does Sharp counter, with applicable law, the Tribe's showing that the Superior Court's finding of ambiguity necessitated dismissal under controlling law. Nonetheless, Sharp urges this Court to ignore the lower court's factual finding, as well as its subsequent legal error, and rule that the question of the Court's own jurisdiction was properly presented to the jury. It was not. *See Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1418 (where the case presents "competing claims" as to the existence or scope of immunity, the court "must" resolve any "conflict" in the evidence).

Finally, in the event the Court reaches the non-jurisdictional issues raised on appeal, the record likewise supports dismissal of this case because, *inter alia:* Sharp's decade-old breach of contract claims were time-barred, and Sharp could not perform the contract in any event because it had been deemed "unsuitable" by the California Department of Justice.

SHARP'S DISTORTION OF THE FACTUAL RECORD

Sharp's Statement of Facts and Procedural History (RB 5-22) contains numerous false and misleading statements designed to cast the Tribe as a bad actor and suggest that the equities favor Sharp. The record is to the contrary.

Sharp's assertion that the Tribe asked the NIGC "for help in defending th[is] lawsuit" (RB 13-14) not only misrepresents the record, but omits so much of what actually happened that a summary of the NIGC's long-standing involvement in the Tribe's gaming effort appears below. Similarly, Sharp's accusation that the NIGC is a corrupt government agency that improperly and capriciously acted at the behest of the Tribe is

such an egregious distortion of the record (and baseless aspersion of a federal agency) that a separate discussion of this issue is also warranted. (*See also infra* ARGUMENT, section I.D.4.)[3]

A. The NIGC's Long-Standing Involvement In The Tribe's Effort To Develop A Casino.

Consistent with its congressionally mandated obligation to implement and enforce IGRA (*see* 25 U.S.C. §§ 2702(3), 2706), the NIGC was involved with the Tribe's efforts to establish gaming on its Reservation from the outset. A representative of the NIGC attended the opening of Crystal Mountain in October 1996, and the immediate closure of the tent casino was due to health and safety concerns identified by the agency. (RT/Vol.V/pp. 1194:1-3, 1194:25-1195:27, 1399:22-1400:24, RT/Vol.XIII/pp. 3422:5-3423:18; AA/Vol.II/pp. 312-316.) Thereafter, the NIGC reviewed the gaming contract under which Crystal Mountain was then operating (the Gaming Machine Agreement), and found that it violated IGRA and was "void." (AA/Vol.I/pp. 246-247.)

Although the subsequent gaming contract, the Equipment Lease Agreement ("ELA"), was not formally reviewed by the NIGC, the Tribe was told by federal agency representatives in 1999 that the ELA would not meet the requirements of federal law. (RT/Vol.XIII/pp. 3439:16-3442:23; AA/Vol.XXI/p. 5271.) This information was conveyed to Sharp and expressly set forth as one of the bases upon which the Tribe cancelled the ELA in June 1999. (AA/Vol.XIV/pp. 3358-3362; AA/XVII/p. 4086:13-14; AA/Vol.XIX/pp. 4617-4618.)

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[3] Further clarification of the record appears throughout the Argument section of this brief.

Four years later, when the NIGC was in the process of reviewing and approving the Tribe's gaming contract with its current investor, Lakes Entertainment, Sharp wrote to the NIGC (in November 2002) about its cancelled gaming contract. (RT/Vol.X/pp. 2716:25-2717:15; ARA/Vol.I/p.1.) Referencing review of the Lakes contract, Mr. Anderson informed Phil Hogen, Chairman of the NIGC, that Sharp already had "a contractual interest in the gaming revenues from the Shingle Springs Rancheria"; *i.e.*, that Sharp claimed entitlement to 30% of revenue from the anticipated casino.[4] *Id.* In addition, Mr. Anderson testified at trial that the purpose of the letter he sent to the NIGC in 2002 was to make sure that the NIGC knew about his contract. (RT/Vol.X/pp. 2716:19-2718:20.)

The facts show that, while the NIGC knew of Sharp's claimed "contractual interest" in the Tribe's proposed casino in 2002, the agency approved the Lakes contract under IGRA in July 2004, entitling *Lakes*, not Sharp, to federally-approved revenue from Red Hawk.[5] Against this backdrop, Sharp's suggestion that the Tribe "secretly" communicated with the NIGC after Sharp's lawsuit was filed in 2007 as part of a sinister effort to influence the agency is nothing more than after-the-fact lawyer-created spin. The NIGC was aware of Sharp's contracts and contentions from the

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[4] As discussed in the Tribe's Opening Brief (p. 14), and *infra* ARGUMENT, section I.D.1, the ELA's definition of "net revenue" purported to give Sharp the right to 30% of "gross revenue," by defining "net revenue" to exclude operating costs and expenses, in violation of the "net revenue" definition provided under IGRA.

[5] Approval of the Lakes' contract is a public record appearing on the NIGC's website. NIGC Approved Management Contracts (July 19, 2004), http://www.nigc.gov/Reading_Room/Management_Contracts/Approved_Management_Contracts.aspx (attached at Tab 1).

outset, and had considered Sharp's claim years before this litigation was commenced.

B. The Tribe's Communication With The NIGC Was Proper Under The APA.

After Sharp filed its lawsuit—ultimately seeking $240 million in damages from a casino for which it had no involvement, and for which it claimed an "exclusive" right to future revenue in exchange for doing nothing (OB 2)—the Tribe properly contacted the NIGC. Despite Sharp's inflammatory assertion of impermissible *ex parte* communications, there was nothing remotely improper about the Tribe's contact. The Tribe had *no* obligation to advise Sharp of its request for a formal written opinion, and no such requirement exists under the governing Administrative Procedure Act. *American Airlines, Inc. v. Dep't of Transp.* (5th Cir. 2000) 202 F.3d 788, 798 (communications with federal agency seeking formal review is not *ex parte* contact under the APA).

In sum, nothing was untoward or unusual about the Tribe's communication with the NIGC, particularly under these facts, where (1) the Tribe regularly and necessarily communicates with the NIGC as part of its ongoing gaming operations; (2) the Tribe and Sharp had *both* been in contact with the agency about Sharp's contracts over the prior decade; and (3) the NIGC reviewed Sharp's contracts in the 1990s, and was aware of the claims at issue in this lawsuit as early as 2002. The only thing the agency did not know was that Sharp was belatedly seeking to enforce its decade-old contracts outside the established federal regulatory system.

ARGUMENT

I. THE NIGC'S FINAL AGENCY ACTION VOIDING THE CONTRACT IS BINDING ABSENT REVERSAL BY A FEDERAL DISTRICT COURT.

On June 20, 2009, the federal agency Congress charged with oversight of Indian gaming issued final agency action voiding the ELA. The controlling federal statute, IGRA, provides only one way to overrule the NIGC and make the contract enforceable: an Administrative Procedure Act appeal in federal district court. 25 U.S.C. § 2714. Every federal circuit court to reach the issue has held that any challenge to NIGC final action outside an IGRA-prescribed APA appeal is invalid. *See City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa* (8th Cir. 2013) 702 F.3d 1147, 1153; *St. Regis Mohawk Tribe*, 451 F.3d at 50-51; *AT&T*, 295 F.3d at 906, 909-10. Rather than challenging that ruling through the sole remedy Congress has mandated, Sharp continues to seek to enforce the voided contract.

Sharp's failure to pursue the mandated form of review is especially significant given the serious infirmities the NIGC identified in Sharp's agreements. Among numerous statutory deficiencies, Sharp's agreements purport to make Sharp the primary beneficiary of the Tribe's gaming operation, giving Sharp an unlawful 30-percent share of the Tribe's gaming revenue, taken off the top, so that Sharp would be paid before the Tribe, its employees and the lenders who made the casino possible. To do so contravenes the explicit text of IGRA, which was designed to "ensure that the Indian tribe is the primary beneficiary of the gaming operation[.]" 25 U.S.C. §§ 2702(2), 2703(9), 2711(c). This is not a mere technicality: the federal government established IGRA's statutory scheme, knowing that absent strict regulation Indian gaming would become nothing more than a

conduit for the exploitation of gaming by private interests who use tribes to avoid state law gambling prohibitions. *Id.*

Rather than address this glaring defect directly, Sharp deliberately distorts the Tribe's appeal, failing to address the Tribe's showing that the NIGC's final action controls the Superior Court's summary judgment and judgment on the pleadings rulings. Sharp argues those claims of error merely restate the complete preemption argument. Sharp's position amounts to an unfounded assertion that, if the Superior Court has subject matter jurisdiction over Sharp's claims, it need not follow applicable federal law governing the Tribe's defenses. Sharp cites no authority for this radical proposition, because none exists.

As explained below, the remainder of Sharp's attempts to escape the fact that the ELA, and the contemporaneously-executed Promissory Note, are void and unenforceable amount to mere distraction and distortion. Ultimately, having assumed the risk of entering illegal contracts without submitting them to the NIGC for review, Sharp should not be surprised to find its contract claims barred by federal law. *See United States ex. rel. Maynard Bernard v. Casino Magic Corp.* (8th Cir. 2002) 293 F.3d 419, 425 (a party that fails to properly submit its gaming contracts to the NIGC "assume[s] the risk of proceeding without" agency approval). But that does not mean Sharp is without an avenue of redress. Sharp can, and always could, advance its arguments in a proper federal district court appeal under the APA. Its stubborn refusal to do so only further highlights the weakness of its position.

A. Sharp Conflates Enforceability Of The Contract With Jurisdiction.

In its Opening Brief, the Tribe sought two discrete categories of relief based on the NIGC's final agency action: (1) reversal of the denial of the Tribe's motions for summary judgment and judgment on the pleadings

on the ground that the contract was voided by the NIGC and therefore unenforceable; and (2) reversal of the denial of the Tribe's motion to dismiss based on complete preemption, on the ground that the trial court lacked subject matter jurisdiction. (OB 22-23, 39-40.)

Sharp conflates these two distinct arguments, essentially pretending the Tribe did not appeal the denial of its motions for summary judgment and judgment on the pleadings based on the contract's invalidity under IGRA. Sharp nonsensically argues the NIGC's final agency action did not render the agreements void and unenforceable because (according to Sharp) that is a "complete preemption" issue. (RB 22-23.) Sharp is wrong. Sharp deliberately blurs the crucial difference between the legal effect of final agency action and the law governing subject matter jurisdiction. Even in a case where a federal court lacks exclusive jurisdiction over a claim, the state court must still adjudicate such claims, including any federal defenses, under applicable federal law. Simply put, Sharp cannot convert a ruling on *where* its breach of contract claims can be litigated into a dispositive ruling on the *merits* of those claims.

Complete preemption is a doctrine which provides that a federal statute may so thoroughly occupy a particular field that it "converts an ordinary state common-law complaint into one stating a federal claim." *American Vantage Cos. v. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 595. In such cases "the state court does not have jurisdiction over the action." *Id.* Complete preemption is a question of a court's jurisdiction to hear a case, not a question of what law applies, or whether a court is bound by the prior decisions of other courts or, as here, a federal agency.

Indisputably, the Tribe's summary judgment and judgment on the pleadings motions did *not* contain any argument about complete preemption jurisdiction. Instead, the Tribe demonstrated that the relevant

contracts were unenforceable because the NIGC had invalidated them in final agency action. (AA/Vol.XII/pp. 3078:6-3080:6; AA/Vol.XXIII/pp. 5861:13-5862:23.) *Bernard*, 293 F.3d at 421.[6]

Rather than confronting this argument, Sharp relies upon complete preemption cases that in no way call into question the binding effect of the NIGC's action. Indeed, as Sharp's own authorities confirm (and as Sharp itself appears to concede (RB 24-25)), even if there is not exclusive federal jurisdiction over a contract claim predicated on an unapproved management contract, such a claim fails on the merits in any event. *American Vantage*, 103 Cal.App.4th at 596-97 (holding that, even where claims were not completely preempted, "IGRA may play a role in the resolution of this matter" if it rendered the contract void); *Gallegos v. San Juan Pueblo Business Dev. Bd., Inc.* (D.N.M. 1997) 955 F.Supp. 1348, 1350 ("[I]f the Agreement is void because it is a management contract that was not approved in advance by the Chairman of the NIGC as required by 25 U.S.C. § 2710(d)(9) *it never was a valid written contract*, but was only an attempt at forming a management contract . . . ." (emphasis added)); *Rumsey Indian Rancheria of Wintun Indians of California v. Dickstein* (E.D. Cal. Mar. 5, 2008, No. 2:07-cv-02412-GEB-EFB) 2008 WL 648451, at **3-4 (same). None of these cases purport to address the effect the NIGC's final action voiding the agreements has *on the merits*, because each of those decisions involved dismissal for lack of jurisdiction before any litigation on the merits and, *unlike the instant action, none of these cases involved final agency action.*

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[6] That the agreements are void also deprives the Superior Court of jurisdiction for lack of a contractual sovereign immunity waiver (OB 26-27, 29), but this is a distinct jurisdictional issue from whether IGRA completely preempts Sharp's claims, such that only a federal court can hear them (and evaluate the Tribe's IGRA-based defenses).

Conversely, as Sharp must concede, there is *no case*, state or federal, that stands for the proposition advanced by Sharp: that where the NIGC has made a final determination that a party's contract is an unenforceable management contract under IGRA, the state court can allow a lawsuit seeking to enforce the disputed contract to proceed. Indeed, the *American Vantage* case upon which Sharp relies (RB 24-26) nowhere suggests that where complete preemption does not apply, a state court that has jurisdiction can disregard applicable federal law.[7] Yet this is precisely what Sharp is asserting when it contends that, if this Court finds that federal law does not completely preempt this lawsuit, it means the NIGC decision does not bind the Superior Court under *AT&T*. That assertion is nonsense, and appears to rest on Sharp's failure to recognize that the complete preemption inquiry focuses solely on which court—federal or state—is the proper forum for hearing the case. Of course, no matter what court is the proper forum, all courts—federal and state—are required to follow federal law if that law controls the substantive questions before them.

Finally, and contrary to Sharp's assertion (RB 23), the federal district court in *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.* (E.D. Cal. Oct. 15, 2010, No. 2:10-cv-01396 FCD GGH) 2010 WL 4054232 ("*SSBMI*"), did not opine that a decision that Sharp's claims were not completely preempted would end the inquiry into the effect of the NIGC's final agency action on the validity of Sharp's agreements. In fact, the *SSBMI* district court did not purport to address whether the NIGC's decision actually bound the Superior Court, let alone suggest that the NIGC's ruling on the contracts' validity only bound the Superior Court if the federal courts had exclusive subject matter jurisdiction over the contract claims themselves. *SSBMI*, 2010 WL 4054232, at **11, 18.

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[7] Moreover, *American Vantage* ultimately requires judgment for the Tribe on the independent ground of complete preemption. *See infra* Section II.

Instead, the federal district court addressed only the federal issue before it: whether the federal court could direct the state court to follow binding federal law, or whether the federal Anti-Injunction Act (28 U.S.C. § 2283) barred that requested relief. *SSBMI,* 2010 WL 4054232 at *1. Focusing on the specific abstention question before it, the court explained that the Tribe would have to make its argument that the NIGC's action barred Sharp's breach of contract claim in the state court action (*i.e., this* appeal), because the federal court could not intervene to force the state court to follow federal law. *Id.* at *10 ("the appropriate avenue for relief is appeal through the state court system and, potentially, the United States Supreme Court"). It was to *that* point the Court's comments were directed (comments that Sharp quotes out of context). (*See* RB 23.) The district court in no way addressed the merits of the state court claims or suggested that the binding effect federal law assigns to NIGC decisions evaporates when a state court has jurisdiction. *See Laufman v. Hall-Mack Co.* (1963) 215 Cal.App.2d 87, 89. Indeed, to so hold would directly contravene the district court's reasoning that the Tribe needed to challenge the Superior Court's conclusions in this very appeal. *SSBMI,* 2010 WL 4054232, at *10.[8]

B. The ELA Is Void And Unenforceable.

IGRA vests the NIGC with the authority to review management contracts to ensure they comply with federal requirements for Indian gaming. 25 U.S.C. § 2711. The NIGC has "broad power to determine what does and does not require approval." *St. Regis Mohawk Tribe,* 451 F.3d at 51. For a management contract to be binding and enforceable, it

[8] In contrast to Sharp's assertion, the prior proceedings in the district court change nothing here. Indisputably, that case was not an administrative appeal—which is Sharp's exclusive remedy to challenge the NIGC's final action. 25 U.S.C. § 2714.

must be approved by the NIGC; absent approval the agreement is void. 25 C.F.R. § 533.7; *Bernard*, 293 F.3d at 421. Once the NIGC takes final agency action regarding a management contract, the only mechanism for challenging such action is through an action filed in federal district court in which the NIGC is named as a party. 25 U.S.C. § 2714.

1. Federal Courts Unanimously Mandate Compliance With IGRA Express Remedies.

Not surprisingly, every federal circuit court to have reached the issue has concluded that the APA review procedure mandated by IGRA is the exclusive means to challenge the NIGC's actions and that courts lack jurisdiction to order any form of relief outside of those mandatory, statutorily prescribed remedies.

In *St. Regis Mohawk Tribe*, 451 F.3d 44, the Tribe brought a court action to obtain a declaration that a contract was void as an unapproved collateral management contract under IGRA. The Second Circuit held that there was no jurisdiction to grant such relief because "the Tribe impermissibly sought a determination outside the administrative review scheme crafted by Congress," *i.e.*, submission to the NIGC for review followed by an appeal under the APA. *Id.* at 50-51. As the court explained: "[t]hat Congress outlined specific circumstances in which district courts have original jurisdiction strongly suggests its intent to channel all other matters through the normal process of judicial review of final agency action under the [APA]." *Id.* at 51.

In *AT&T*, 259 F.3d 899, the NIGC had, in final agency action, approved a management contract permitting a tribe to create a telephone gambling operation. *Id.* at 905-06. After several states threatened AT&T with criminal prosecution for participating in the lottery, AT&T brought suit in federal court seeking a determination regarding the legality of the lottery. The Ninth Circuit held that AT&T's suit was unnecessary because

"[t]he NIGC's final agency actions approving both the management contract and the Tribe's resolution indicated that the Lottery is legal until and unless the NIGC's decision is overturned" in an APA appeal under 25 U.S.C. § 2714. *Id.* at 906. The court explained that Congress's assignment of power to the NIGC to determine the legality of management contracts meant that state governments and private parties like AT&T were bound by the NIGC's final action unless overturned in an APA appeal. *Id.* at 907-08. In language echoing the reasoning of *St. Regis Mohawk Tribe*, the court criticized the trial court for "fail[ing] to grasp . . . that the IGRA lays out a specific regulatory scheme whereby the NIGC's approval of a management contract is a final agency decision that may be appealed *only* directly and in an action initiated by a proper party in federal district court." *Id.* at 908 (emphasis added).

Finally, and most recently, in *City of Duluth*, the Eighth Circuit considered a case in which a city was attempting to enforce a consent degree with respect to an agreement that raised concerns regarding IGRA's requirement "that an Indian tribe have the 'sole proprietary interest' in any Indian gaming activity." 702 F.3d at 1150. Just as here, the plaintiff "criticize[d] the process by which the NIGC came to its . . . decision, implying that that decision was the result of inappropriate political pressure." *Id.* at 1153. The Eighth Circuit correctly refused to consider that argument: "While the City may question the validity of the NIGC's current position, such challenges are properly made under the [APA]." *Id.* The court concluded that the mandatory APA appeal procedures "established by Congress" could not be circumvented, and further recognized the impropriety of the City's argument by observing that the

NIGC was not a party to the litigation in which the challenge was being made. *Id.*[9]

These courts' holdings—that IGRA's specific review procedures foreclose all other challenges—is a necessary application of the bedrock principle that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers* (1974) 414 U.S. 453, 458. Indeed, the Second, Eighth and Ninth Circuits are not alone in holding that IGRA forecloses relief outside its comprehensive regulatory scheme. *See also Tamiami Partners v. Miccosukee Tribe of Indians* (11th Cir. 1995) 63 F.3d 1030, 1049 (recognizing established principle of statutory construction that courts should not expand coverage of an express right of action provided under statute); *Hartman v. Kickapoo Tribe Gaming Comm'n* (10th Cir. 2003) 319 F.3d 1230, 1232-33.

It is not merely by happenstance that Congress dedicated the NIGC's final determinations solely to APA review. IGRA's explicit purpose is to protect Indian tribes from unscrupulous contractors and ensure that tribes are the primary beneficiaries of their own gaming operations. 25 U.S.C. §§ 2701(4), 2702(2). These purposes are irreconcilable with Sharp's position that the Tribe owes it tens of millions of dollars under a contract the NIGC deemed void because, *inter alia,* it gave so much money to Sharp that the Tribe was not the primary beneficiary of its own casino. In light of this reality, Sharp's argument that its claims are "outside the purview" of IGRA is meritless. (RB 28.)

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[9] As emphasized in the Tribe's Opening Brief at page 26, it makes eminent sense for the agency whose final decision is being challenged to defend its decision in the context of the entire administrative record. 5 U.S.C. §§ 551(13), 704, 706.

2. Sharp's Attempt To Distinguish *AT&T* Is Incorrect And Irrelevant.

As set forth above, at least five federal circuits have held that IGRA's specified remedies, including an APA appeal of NIGC final agency action, are exclusive. Although federal law controls the effect of federal decisions in California court (*Martin v. Martin* (1970) 2 Cal.3d 752, 761), California law is also in accord with the principle that administrative action is binding unless reversed in a proper appeal. *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243-44 ("Unless the administrative decision is challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action."); *Logan v. So. Cal. Rapid Transit Dist.* (1982) 136 Cal.App.3d 116, 123-24 (finding that, where a statutory writ of mandate is available to challenge agency action, "[a] plaintiff may not ignore the administrative decision by filing a separate action at law"). Against this overwhelming and unanimous authority, Sharp seeks to distinguish only one of these cases—*AT&T*. The effort is wasted, as *AT&T* is both directly applicable and rests on sound and well-settled legal principles.

Sharp's contention that "*AT&T* does not stand for the proposition that the federal court has exclusive jurisdiction over a 'garden variety' breach of contract claim" (RB 29) is a straw man. Once again, the critical point is not federal question jurisdiction; it is the binding impact of the NIGC's action voiding the contract. The contract is void "until and unless" the NIGC's action is reversed in an APA appeal, regardless of whether there is state court jurisdiction over Sharp's "garden variety" breach of contract claims. (OB 24-26.)

Further, as a matter of public policy, any other rule of law would create the very problem presented here. Allowing Sharp to bypass the regulatory scheme expressly established by Congress and mandated under

federal law allows, in effect, dueling judgments. The Tribe is required to follow federal law in the operation of its casino and give legal effect to the NIGC's binding, final agency action; yet, at the same time it has been subject to a state court judgment where contracts voided and deemed unenforceable by the federal government are purportedly enforceable in state court. It would be a Hobson's choice indeed to expect the Tribe to decide which law to follow, and *AT&T* confirms the Tribe cannot be placed in such a position. Federal law controls Sharp's challenge of the NIGC's final determination, and Sharp's failure to follow the law and properly challenge the substantive and procedural merits of the NIGC's determination forecloses its sidestepping efforts to collect tens of millions of dollars on a contract that has been found to violate IGRA.

Sharp also errs in trying to limit Congress' intent to foreclose litigation outside IGRA's regulatory scheme to situations involving state prosecution of gaming law violations on Indian reservations under 18 U.S.C. § 1166(d), incorrectly stating that its application was "at the heart of" that case.[10] (RB 29.) That provision was in no way central to the *AT&T* holding—the court reached its key holding as to the binding effect of the NIGC's decision on IGRA's detailed regulatory scheme without even referencing 18 U.S.C. § 1166(d). *See AT&T*, 295 F.3d at 905-07 & nn.10-11. Indeed, the Ninth Circuit discussed 18 U.S.C. § 1166(d) only peripherally, not as a *cause* of the binding force of the NIGC's final agency action, but to demonstrate one particular *effect* of the NIGC's binding determination that IGRA governed the tribal lottery. *Id.* at 909 ("Unless and until the NIGC's decision is overturned by means of a proper challenge

[10] To manufacture support for this proposition, Sharp quotes language from *SSBMI* discussing an entirely different case (having nothing to do with final agency action) and falsely represents that the passage was discussing *AT&T*. (RB 29.) *See SSBMI*, 2010 WL 4054232, at *11 (citing *Sycuan Band of Mission Indians v. Roache* (9th Cir. 1994) 54 F.3d 535).

and appeal, the IGRA governs the Lottery. [¶] Since IGRA applies, so too does 18 U.S.C. § 1166(d) . . . .").[11] Indeed, cases that do not involve section 1166(d) still reach the same substantive holding as *AT&T* based on the same reasoning. *St. Regis Mohawk Tribe*, 451 F.3d at 50-51; *City of Duluth*, 702 F.3d at 1153.

C. Sharp May Not Sidestep Mandatory APA Review Under A "Deference" Rationale.

Absent from IGRA or the cases interpreting it is any suggestion that a lower court may refuse to "defer" to NIGC final agency action by evaluating the substantive or procedural merits of the NIGC's decision outside of congressionally mandated APA review. As the Ninth Circuit explained in *AT&T*, a lower court errs when it "discount[s] the NIGC's approval of the Tribe's management contract" outside of "the detailed regulatory scheme Congress provided when it enacted the IGRA." *AT&T*, 295 F.3d at 906. Courts in this state are in accord. *See Holder v. Cal. Paralyzed Veterans Assn.* (1980) 114 Cal.App.3d 155, 161-64 (despite "allegations of procedural deficiencies constituting denial of fundamental due process," unappealed administrative decision was binding until challenged in the mandamus proceeding provided by statute); *Logan*, 136 Cal.App.3d at 123-24 (same). In any event, even if IGRA's mandate of proper APA review is ignored, each of Sharp's challenges to the NIGC's decision fails on the merits.

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[11] Also of no help to Sharp is *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999). (RB 28 n.10.) That case solely addressed whether the federal court had subject matter jurisdiction and did not purport to address the merits of the state's claims that the National Indian Lottery violated IGRA, or discuss the effect of any final agency action of the NIGC. *Id.* at 1109. Thus, it cannot conceivably undermine the Ninth Circuit's decision, three years later, that unappealed NIGC final agency action is binding. *AT&T*, 295 F.3d at 906, 909-10.

Sharp's citation to *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty. for the W. Dist. of Mich.* (W.D. Mich. 2002) 198 F.Supp.2d 920, 927 (RB 30-31), a case involving deference analysis of an Indian lands "letter opinion," in no way undermines the fundamental principle that *final agency action* is binding unless and until it is successfully challenged in a federal district court. An Indian lands letter opinion is not final agency action under IGRA. 25 U.S.C. § 2706(b)(1)-(4); 25 U.S.C. § 2714. Similarly, Sharp's cases holding that certain federal agency decisions are subject to review under *Chevron*—or APA-based standards (RB 30 n.11) do not remotely suggest a state court may purport to use a "deference" rationale to refuse to give effect to an agency decision Congress has made binding pending APA review, as here. *See Arent v. Shalala* (D.C. Cir. 1995) 70 F.3d 610, 614-616; *Shays v. FEC* (D.C. Cir. 2008) 528 F.3d 914, 919.

In sum, the issue before this Court is whether, consistent with the unanimous view of the federal courts, effect will be given to the NIGC's final action voiding the contract. The concept of "deference" simply has no place here. Crucially, Sharp admits that only federal courts, not state courts, have the authority to entertain a challenge to a federal agency's final determination. (OB 23-24; RB 30 n.11.) *See* 25 U.S.C. § 2714; 5 U.S.C. § 702; *Federal Nat'l Mortgage Ass'n v. LeCrone* (6th Cir. 1989) 868 F.2d 190, 193. Nevertheless, Sharp proceeded in state court without bringing a federal district court action to challenge the NIGC's decision, or any of its regulations. (AA/Vol.XV/p. 3472:1-3; AA/Vol.XXIII/pp. 5886:22-5887:5, 5868:25-5869:3, 5880-5882.) Sharp's deliberate failure to seek relief in the proper federal forum does not relieve Sharp of its affirmative obligation to follow the law.

Put simply, if Sharp wants to argue the NIGC's final agency action is not entitled to "deference," it needs to go to federal court to do so; and

the *federal* cases Sharp cites, which discuss the deference properly afforded by a *federal* reviewing court, only further underscore this fact. (*See* RB 30-31 & n.11, 34.)

D. Though Not Properly Before This Court, Sharp's Challenges To The Substantive And Procedural Merits Of The NIGC's Decision Fail In Any Event.

Sharp asks this Court to enforce a contract that is void. But no court other than a federal APA reviewing court has jurisdiction to adjudicate Sharp's claims that the NIGC erred in voiding the contract. For that reason, this Court should not reach the substantive and procedural issues raised in Sharp's challenge to the agency's final action, and should conclude instead that, if Sharp seeks to "question the validity of the NIGC's current position, such [a] challenge[] [is] properly made under the [APA]." *City of Duluth*, 702 F.3d at 1153.

However, because Sharp has made its collateral attack on the agency's action a centerpiece of its position on appeal, and because its arguments plainly lack merit, the Tribe is compelled to respond to Sharp's irrelevant arguments.

1. The NIGC's Recognition That Sharp's Gaming Contracts Violate IGRA Is Irrefutable.

As to the substance of the NIGC's action, Sharp fails to identify any cognizable error in the NIGC's finding that Sharp's agreements violate IGRA and its regulations. Instead, Sharp urges that if its argument that the NIGC's final action deserves no deference is accepted, then the contract is no longer void. This is more misdirection, as the issue is not deference, but whether the state court had authority reach the issue in the first place. Moreover, even if the Superior Court had the power to entertain Sharp's challenge (it did not), and even if *Chevron* deference were the applicable

standard (it was not), Sharp would still have to show that its gaming contract was valid under IGRA. It is not.

Sharp's gaming machine agreements[12] purport to grant Sharp 30 percent of the revenue of the Tribe's gaming facility off the top (AA/Vol.XXIII/pp. 5870, 5909-5913), before operating expenses. The NIGC was indisputably correct in concluding that such a revenue allocation violates IGRA's restriction on what may be collected as "net revenue" (*see* 25 U.S.C. §§ 2702(2), 2703(9), 2711(c)(1)-(2); 25 C.F.R. § 531.1), and Sharp has offered neither argument nor a single case citation to support a contrary conclusion. There is no question that enforcement of Sharp's contracts would render Sharp, not the Tribe, the primary beneficiary of the Tribe's gaming operation in violation of IGRA, by allowing Sharp to get paid even if the Tribe received nothing. 25 U.S.C. § 2702(2).

Sharp also fails to take issue with the bases upon which the NIGC concluded that Sharp's agreements are "management contracts" under IGRA. 25 C.F.R. § 502.15. The agreements give Sharp control over selection, promotion and placement of the Tribe's gaming machines, as well as substantial control over the day-to-day operation of those machines on the casino floor (AA/Vol.XXIII/pp. 5870, 5872, 5909), and therefore "provide[] for [] management of all or part of a gaming operation." 25 C.F.R. § 502.15. Because the NIGC never approved the management contracts, they are void and unenforceable. 25 C.F.R. § 533.7; *Casino Magic Corp.*, 293 F.3d at 421. Nor does Sharp claim the NIGC had any choice but to disapprove Sharp's agreements because they lacked numerous provisions federal law requires, such as terms regarding health and safety as well as accounting and audit procedures, to ensure that the Tribe and not

[12] The NIGC formally reviewed the GMA and the ELA.

Sharp is the primary beneficiary of the gaming operation. (AA/Vol.XXIII/pp. 5909-5911.)[13]

In sum, even if the substantive merits of the agency's action were properly before the Court, this record presents no basis to conclude the NIGC's final decision was anything other than correct.

2. IGRA And Its Regulations Confirm The NIGC's Decision Became Final Agency Action.

Ignoring the obvious merit of the NIGC's decision, Sharp focuses on farfetched procedural arguments. These, too, are unavailing.

Although Sharp apparently finds fault with regulations under which the NIGC operates (RB 33 n.14), it cites no authority holding or even suggesting, that contrary to the Tribe's authorities (OB 34-35), a state court can invalidate a federal regulation with which it disagrees, bypassing federal APA review. While Sharp insists the final agency action taken by the NIGC was not really final agency action even though the NIGC said it was (RB 31-32), the federal regulations in effect at the time of the Chairman's decision confirm otherwise. *See* Rule, Management Contract Requirements and Procedures Under the Indian Gaming Regulatory Act, 58

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[13] Instead Sharp offers the conclusory assertion that the ELA is simply a "garden variety" gaming contract, *not* a management contract, and therefore it never needed NIGC approval. (RB 23-24.) Sharp nowhere explains how a manager-developer (such as Lakes) can be limited to a percentage of "net revenue" as defined by IGRA, while a mere gaming supplier (as Sharp claims to be) is subject to *no* revenue limit whatsoever. Sharp made the same argument to the NIGC, and the Chairman responded that in reviewing and approving contracts, he was necessarily required to make a decision as to whether, as drafted, a contract was or was not a management contract; and in this instance, he found that "[d]espite what it calls itself, the 1997 ELA is a management contract." (AA/Vol.XXIII/p. 5913.) *See also* NIGC Bulletin 94-5 (Oct. 14, 1994), http://www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1994-5.aspx (advising tribes and contractors to submit for NIGC review all " leases or sales of gaming equipment") (attached at Tab 2).

Fed. Reg. 5818, 5832-5833 (Jan. 22, 1993) (formerly codified at 25 C.F.R. §§ 539.1, 539.2). Under 25 C.F.R. § 539.2, the full Commission then had up to 30 days to decide the appeal, unless the appellant had provided the Commission additional time (up to 30 days). *Id.* In order to "ensure a timely decision that may be appealed" (*Id.* at 5827),[14] the last sentence of § 539.2 states that *in the absence of a decision on the appeal within 30 days (and any extensions), "the Chairman's decision shall constitute the final decision of the Commission."* *Id.* at 5833 (emphasis added).

Here, the full Commission did not render a decision (given the absence a fully appointed Commission), so the Chairman's decision became final agency action on June 20, 2009, appealable to a federal district court under 25 U.S.C. § 2714. (AA/Vol.XVI/p. 3915; AA/Vol.XXIII/p. 5918.)

3. The NIGC's Inability To Act On Sharp's Appeal Rendered The Chairman's Decision Final Agency Action.

Contrary to Sharp's argument (RB 32-33), the NIGC's inability to review Sharp's appeal in no way affects the finality of the Chairman's decision under § 2714. *See AT&T*, 295 F.3d at 906 n.9 ("Section 2714 in no way differentiates between decisions made through a formal approval and those tacitly approved."). IGRA does not require any quorum of the Commission for the Chairman's decision on a management contract to become effective. Rather, the Chairman has statutory power to disapprove a management contract individually and with immediate legal effect. 25 U.S.C. §§ 2705(a)(4), 2711. IGRA also imposes no particular procedural

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[14] Sharp cites language on the next page of the final rule suggesting that permitting an appeal is "appropriate and necessary," ignoring the NIGC's own conclusion that protecting the appellant's right under IGRA to a timely district court appeal in the absence of a Commission decision required it to word § 539.2 as it did. 58 Fed. Reg. 5818, 5827-28.

requirements surrounding the appeal process, and contains no language mandating a review by the Commission before the Chairman's final determination can become final agency action. Indeed, IGRA specifically mandates the circumstances under which two members of the three-member Commission must act, which do *not* include appeals of the Chairman's decision approving or disapproving a management contract. 25 U.S.C. § 2706(a)(2)-(5).

That IGRA makes the Chairman's decision "subject to an appeal to the Commission" does not strip his decision of its effectiveness. 25 U.S.C. § 2705; *see Murphy Exploration & Prod. Co. v. United States DOI* (D.C. Cir. 2001) 252 F.3d 473, 481-82; *Coomes v. Adkinson* (D.S.D. 1976) 414 F.Supp. 975, 987. Sharp incorrectly reads the "subject to an appeal" language to mean the Chairman's decision is not final absent "completion of an administrative appeal process" (RB 32), but there is no authority for such a proposition. Rather, 25 C.F.R. § 539.2 is consistent with 25 U.S.C. § 2705(a)(4) and 5 U.S.C. § 704, making the Chairman's decision final and appealable to a district court, and binding in the absence of such an appeal. *AT&T*, 295 F.3d at 906-09.

Similarly, Sharp cites no case suggesting that an agency may not, by regulation, attach finality to a federal official's statutorily authorized act when the agency is unable to hear an appeal. (RB 33 nn.13-14.) And, Sharp's citation to *New Process Steel v. National Labor Relations Board* (2010) 130 S.Ct. 2635 changes nothing. That case involved a completely different federal statute that expressly provided that three members constituted a quorum of the agency, "at all times." *Id.* at 2639-40 (quoting 29 U.S.C. § 153(b).). Moreover, *New Process Steel* does not address the situation here, where an agency is unable to hear a potential appeal from an agency action that Congress has expressly authorized and given direct legal effect. *See* 25 U.S.C. §§ 2705(a)(4), 2711.

Finally, nothing in Sharp's federal case law countenances a state court attack on agency action under its duly enacted regulations, whether couched under a "deference" rubric or otherwise. Instead, Sharp's sole remedy is federal court APA review. 25 U.S.C. § 2714; 5 U.S.C. § 702; *St. Regis Mohawk Tribe*, 451 F.3d at 50-51; *see Coomes*, 414 F.Supp. at 987. Indeed, Sharp's assertion that it was denied an appeal to which it was entitled rings especially hollow given Sharp's stubborn and deliberate refusal to exhaust the federal court APA remedy that Congress expressly afforded.

4. The Tribe Complied With Federal Guidelines For Communications With A Federal Agency.

Ignoring the NIGC's involvement in regulating the Tribe's gaming operation, Sharp attempts to recast completely legal communications between the Tribe and its federal regulators as improper *ex parte* communications. This only underscores that these sorts of arguments should be evaluated by a federal reviewing court in an APA action in which the NIGC is a party.

The factual context of the NIGC's long-standing involvement in the issues before the Court also provides important context surrounding the Tribe's continued communications with the NIGC. The NIGC had been involved from the outset in the Tribe's efforts to establish gaming on its reservation, having already made certain determinations about how the Tribe's gaming operation would be conducted and the validity of Lakes' contract. (*See, supra,* "Sharp's Distortion of the Factual Record," Section A.) Sharp's sudden effort to belatedly enforce a contract that would purportedly give it "50% to 60%" of Red Hawk revenue (AA/Vol.XXIII/p. 5913) called into question the NIGC's prior decisions regarding the Tribe's operation of Red Hawk pursuant to a federally approved management contract with Lakes. Put differently, once the NIGC approved the Lakes

contract setting forth the legal parameters under which the Tribe was authorized to conduct its gaming operation, the Tribe was bound to follow those determinations. 25 U.S.C. § 2710(d)(9).[15]

Unable to seriously contend the NIGC should not have been told of a lawsuit asserting a proprietary interest in Red Hawk, Sharp incorrectly asserts that it should have been involved in the Tribe's communications. The law is to the contrary. Sharp nowhere disputes that the Tribe and its attorneys contacted the NIGC (without notice to Sharp) only *before* the NIGC decided to undertake formal review of Sharp's contracts. That contact was allowed under the APA. *See Professional Air Traffic Controllers Org. v. FLRA* (D.C. Cir. 1982) 685 F.2d 547, 571-72 (contacts with agency regarding merits only improper if an adjudication by the agency has been initiated). Moreover, Sharp does not dispute that it was Sharp, not the Tribe, that had *ex parte* communications with the NIGC *after* the agency decided to formally review the contracts for the purpose of taking final action. (OB 38 n.12.)

Finally, with regard to the meeting between the Tribe and the NIGC before the agency's formal review, Sharp is wrong in stating that the Tribe and its attorneys "met for about an hour" with the NIGC to discuss substantive legal issues involving Sharp's contracts. (RB 14-15.) The meeting covered multiple issues, not just Sharp's lawsuit; and the discussion related to Sharp did not involve the Tribe's (or Sharp's) substantive claims regarding the validity of the contracts, but rather, addressed why the Tribe sought formal agency review. (AA/Vol.VI/p. 1601:22-24; *see also* AA/Vol.I/pp. 49-50, 53; OB 38; *see* RB 34-35.)

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[15] The Tribe moved to stay this action on the basis of the NIGC's primary jurisdiction to review the gaming contracts Sharp belatedly sought to enforce, but the Superior Court denied the motion without written analysis. (AA/Vol.I/pp. 69-71; AA/Vol.II/p. 363:25-26; RT/Vol.I/pp. 45:9-47:6.)

Importantly, Sharp cannot dispute that such contact is permitted by the APA. *See American Airlines, Inc. v. Department of Transportation* (5th Cir. 2000) 202 F.3d 788, 798 (communications with federal agency seeking formal review is not *ex parte* contact under the APA). And most tellingly, Sharp fails to address the Tribe's authorities holding that a ban on *ex parte* communications fails to apply to this situation in any event, because the NIGC's formal decision to approve or disapprove a management contract does not involve a hearing. (OB 38.)[16]

In sum, federal law permitted the Tribe's request that the NIGC initiate formal agency review of Sharp's contract, and the NIGC's final agency action has the binding effect Congress intended.

5. The NIGC Followed IGRA And Its Regulations.

Lastly, Sharp challenges the NIGC's action voiding its contract by advancing untenable readings of the agency's regulations. Notwithstanding the NIGC's broad authority to disapprove management contracts submitted for its review (*St. Regis Mohawk Tribe*, 451 F.3d at 51), Sharp seeks to rewrite the then-operative version of 25 C.F.R § 533.2(a) to strip the NIGC

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[16] Sharp asserts (without citation) that the Tribe cannot demonstrate a meaningful distinction between a "formal adjudicatory proceeding" under the APA (which bans *ex parte* communications) and "final agency action" (which does not limit communications under the APA). (RB 35 n.15.) The distinction is straightforward. The Tribe could have communicated with the NIGC even after it undertook a formal review (although the Tribe did not), because that review does not involve a hearing, and it is the hearing that places restrictions on communications involving adjudications under the APA. 5 U.S.C. §§ 556, 557. This distinction also explains why Sharp's cases, which prohibit *ex parte* communications on the merits *after* an agency decides to take formal action *involving a hearing* (*see, e.g., Sangamon Valley Television Corp. v. United States* (D.C. Cir. 1959) 269 F.2d 221, 222-24) are irrelevant here. And Sharp concedes the case law on which it relies, at most, requires disclosure of communications that "form the basis of agency decision." (RB 35 n.16 (citing *Home Box Office v. Federal Communications Commission* (D.C. Cir. 1977) 567 F.2d 9, 57).)

of authority to disapprove management agreements not submitted within some unspecified time after the agreements' execution. (RB 35-36.) But in the same breath, Sharp admits the applicable version of § 533.2(a) contained no time limit, and was only amended to state a time limit *after* the NIGC took final agency action here. (*Id.*)

In any event, and contrary to Sharp's tenuous reading, courts unanimously hold the NIGC retains its statutory power to disapprove management agreements, even years after their execution. *See, e.g., St. Regis Mohawk Tribe*, 451 F.3d at 50-51 (directing tribe to submit eight-year-old unapproved management contract to the NIGC and rejecting argument that "IGRA and its implementing regulations provide no mechanism for the Commission to render decisions with respect to contracts that have not been approved"); *New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at **5-9, 33 (affirming NIGC's final decision voiding agreements where tribe requested final agency determination years after their execution).

Further, even if section 533.2(a) required Sharp and the Tribe to submit the agreements within a certain time limit after execution, the consequence of failing to present the agreement to the NIGC at the outset would not be to insulate an illegal contract from agency review. *See* Final Rule, Management Contract Requirements and Procedures Under the Indian Gaming Regulatory Act, 58 Fed. Reg. at 5829 (under related provision codified at § 533.2(b), failure to timely submit materials for approval means "the Chairman may deem the contract *disapproved*" (emphasis added)). Indeed, such a reading would reward Sharp for failing to seek NIGC approval in the first place, even though, under IGRA, Sharp "assumed the risk of proceeding without having submitted [its agreements] to the Chairman." *See Bernard*, 293 F.3d at 421, 425. A management agreement is void *unless* approved by the NIGC. 25 C.F.R. § 533.7.

Sharp's decision not to seek timely NIGC approval was at its own risk, and should, if anything, only further underscore that the agreement is invalid and unenforceable.

Nor has any court embraced Sharp's attempt to impose the requirements for management agreement *approval*, on the agency's *disapproval* of an illegal management contract. (RB 36-37.) *See New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at **5-9, 33 (affirming decision voiding agreement where tribe did not submit the documents specified under 25 C.F.R. § 533.3). Authorities Sharp cites regarding requirements for management contract *approval* are therefore inapposite. (RB 36, 37 n.17.)

Here, the Chairman found numerous IGRA violations on the face of Sharp's agreements, including that they made Sharp the primary beneficiary of the Tribe's gaming operation. *See* 25 U.S.C. §§ 2702(2), 2711(c)(1)-(2). The NIGC therefore had authority to disapprove the agreements without requesting any additional submissions. (AA/Vol.XVI/pp. 3926-3930; AA/Vol.XXIII/pp. 5909-5913.)

E. The Validity Of The Promissory Note Is Inextricably Linked To The ELA's Validity.

As the Tribe demonstrated before the Superior Court on its motion for judgment on the pleadings (AA/Vol.XXIII/pp. 5862:1-23),[17] under principles of California law that Sharp does not question, the Note is inextricably linked to the ELA, which the NIGC declared void in binding final agency action. (OB 28-29.) Nor does Sharp dispute that the Note, executed in the same transaction as the ELA, "becomes constructively a

[17] Consistent with its practice of distorting arguments it cannot defeat, Sharp now pretends this argument was only raised on the Tribe's "motion to dismiss" (RB 38), ignoring that it was raised and fully developed in the Tribe's motion for judgment on the pleadings, to which Sharp declined to file any substantive opposition. (AA/Vol.XXIV/pp. 6080-6086.)

part of the [ELA], and in that respect the two form a single instrument." *Williston on Contracts* § 30:25 (4th ed. 1999); Civ. Code § 1642. And Sharp does not dispute that the Note, executed with the ELA, contemplated Sharp's selection and delivery to the Tribe's gaming facility of the same 400 gaming machines that would trigger commencement of the ELA. (OB 28.) Crucially, the NIGC's final agency action established that the ELA's requirement that Sharp select and deliver 400 gaming devices to the Tribe "provide[s] Sharp with broad operational control," making the ELA a management contract under IGRA. (AA/Vol.XXIII/p. 5909.) The NIGC's ruling that the business relationship contemplated in the ELA violates IGRA establishes that the contemporaneously-executed Note, predicated on Sharp's identical performance, necessarily contemplates unlawful management under IGRA. (AA/Vol.XXIII/p. 5909.) It follows that the Note and the ELA, read together as "a single instrument," constitute a management agreement void without NIGC approval. *See Machal, Inc. v. Jena Band of Choctaw Indians* (W.D. La. 2005) 387 F.Supp.2d 659, 666 ("*Machal*") ("[C]ollateral agreements are subject to approval by the NIGC, but only if that agreement 'relate[s] to the gaming activity.'" (quoting 25 U.S.C. § 2711(a)(3))).

Rather than challenging these authorities, Sharp instead argues the Note, evaluated in a vacuum, does not provide for management of the Tribe's gaming operation. Importantly, the Note cannot be considered in a vacuum. (OB 28.) But even read on its own, the Note provides for management of the Tribe's gaming operation because it requires payment to Sharp out of the revenue from the Tribe's "Gaming Facility and Enterprise." (AA/Vol.XXIII/p. 5878.) As set forth in *Machal* (which Sharp fails to distinguish), an agreement assigns responsibility for management activities, and is void without NIGC approval, if it requires an Indian tribe to repay loans received for construction and other costs from

the net revenues of the gaming operation. 387 F.Supp.2d at 667-68 (citing 25 C.F.R. § 531.1).[18]

Because the Superior Court erred in evaluating the effect of the NIGC's decision on the ELA (AA/Vol.XXI/pp. 5123-5124, 5154:21-5155:8; RT/Vol.IV/p. 898:21-25; *see supra* sections I.A-D), neither the Court (nor the jury) had an opportunity to resolve the issue of whether the Note's sovereign immunity waiver was effective in the event the concurrently executed ELA was invalid. Contrary to Sharp's suggestion (RB 38), this Court need not resolve any factual dispute to reverse the Superior Court's erroneous denial of the Tribe's motion for judgment on the pleadings on the Note. Rather, this Court need only consider the complaint, the Tribe's unopposed request for judicial notice attaching the NIGC's decision and related agency documents (AA/XXIII/pp. 5883-5975; AA/XXIV/pp. 5976-6079), and the agreements themselves, incorporated by reference in Sharp's complaint and submitted in support of the motion without objection (AA/XXIII/pp. 5866-5882), to evaluate whether the Note, and its immunity waiver, are enforceable as a matter of law in light of the NIGC's decision. *O'Neil v. General Security Corp.* (1992) 4 Cal.App.4th 587, 594 n.1; *Lumbermens Mut. Cas. Co. v. Vaughn* (1988) 199 Cal.App.3d 171, 178.

If this Court nevertheless concludes this jurisdictional issue somehow requires a factual determination, despite Sharp's failure to substantively oppose the Tribe's motion, this Court should remand for the Superior Court to decide that issue in the first instance. *Great Western*

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[18] In response, Sharp can only cite a completely different opinion involving the same Tribe (RB 39 n.18), failing to mention the opinion it cites is discussing a completely different agreement with a different contractor. *Jena Band of Choctaw Indians v. Tri-Millennium Corp.* (W.D. La. 2005) 387 F.Supp.2d 671, 680 (discussing the "Tri-Millennium Settlement Agreement" not at issue in *Machal*).

Casinos, Inc., v. Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1418 (holding that resolution of legal and factual issues bearing on sovereign immunity waiver was the province of the trial court); *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 98 (remanding to permit trial court to make "sufficient pretrial factual and legal determinations to satisfy itself on its authority to hear case").

II. THE NIGC'S FINAL AGENCY ACTION ESTABLISHES SHARP'S CLAIMS ARE COMPLETELY PREEMPTED BY IGRA'S PROTECTIVE STRUCTURE.

This Court need not reach the Tribe's complete preemption arguments, as the NIGC's final agency action renders Sharp's agreements—and any sovereign immunity waivers therein—void, separately depriving the Superior Court of jurisdiction. (*See supra* section I; OB 26-27, 29.) *See Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364, 1368. However, if the Court reaches the complete preemption issue, "IGRA's protective structure" (*American Vantage*, 103 Cal.App.4th at 596), and well-established Supremacy Clause principles Sharp ignores, require complete federal preemption of contract claims predicated on a management agreement the NIGC has voided. (OB at 42-43.) The authorities Sharp cited do not discuss the effect of binding NIGC final agency action on the complete preemption analysis. (RB at 23-25.)[19] Specifically, *American Vantage* only confirms Sharp's claims were completely preempted.

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[19] Sharp's reliance on the *SSBMI* district court case to bolster its argument that final agency action has no bearing on preemption is unavailing. To the extent the district court understood the Tribe's position to be that federal question jurisdiction existed based on the Tribe's "assertion" that Sharp's contracts were "void as unapproved management contracts," the court misunderstood the Tribe's argument. 2010 WL 4054232, at **13-14. The Tribe was not making "assertions" (or, as Sharp phrased it, "allegations") about whether Sharp's contract violated IGRA. (RB 26.) The NIGC had

American Vantage concerned an advisory opinion finding the agreement was *not* a management contract, and noted dismissal would be required if the agency found the contracts were subject to IGRA regulation as management contracts. *See American Vantage,* 103 Cal.App.4th at 596-97 (recognizing that "even if the NIGC originally determines that a contract does not require its approval," the agency may "reconsider its decision"; but "based on the contracts' present status, *i.e.*, they have not been further interpreted by the NIGC, it must be concluded that the contracts fall outside the IGRA's protective structure").

Here, unlike in *American Vantage*, the NIGC took final action finding that the disputed contract *is* a management contract that *is* within IGRA's protective structure. As a result, and as *American Vantage* itself recognized, where a contract at issue in a state court action is "subject to IGRA regulation," the claim necessarily "fall[s] within the preemptive scope of the IGRA," mandating dismissal. *Id.* at 596; *see AT&T*, 295 F.3d at 906, 909-10.

On the unique facts here, where Sharp insists on prosecuting a state court claims foreclosed by final federal administrative action, only complete preemption can prevent the state courts from "usurp[ing] a function that Congress has assigned to a federal regulatory body." *Ark. La. Gas Co. v. Hall* (1981) 453 U.S. 571, 581-82; *Bethman v. City of Ukiah* (1989) 216 Cal.App.3d 1395, 1408. Thus, because Sharp's claims necessarily "concern the regulation of Indian gaming activities," based on the NIGC's legally binding final agency action, they are completely

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already made that determination in a final action entitled to binding and preclusive legal effect. Sharp and the *SSBMI* district court cite *American Vantage*, where the NIGC issued an advisory opinion that the disputed agreement was *not* a management contract (103 Cal.App.4th at 593), whereas Sharp's claims clearly implicate IGRA because the NIGC issued a final decision reaching the opposite conclusion about Sharp's contracts.

preempted. *American Vantage*, 103 Cal.App.4th at 596; *AT&T*, 295 F.3d at 906, 909-10.

III. SHARP'S DISTORTION OF THE RECORD AND LAW CANNOT CHANGE THE FINDINGS BELOW COMPELLING DISMISSAL FOR SOVEREIGN IMMUNITY.

Trying to avoid the result that controlling law compels, which is dismissal based on sovereign immunity, Sharp seriously distorts the record and the law.

A. Sharp Misrepresents Case Law Regarding The Court's Obligation To Resolve Questions Involving Its Own Jurisdiction.

Sharp claims evidentiary conflicts involving contractual waivers of sovereign immunity are properly resolved by a jury, not the judge, under "applicable law." (RB 41-42.) Sharp supports its argument with reference to two California contract cases having nothing to do with sovereign immunity, and a single state court case involving jurisdictional discovery, *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180, which fully supports dismissal. Contrary to Sharp's assertion, *Warburton* did not hold that resolution of sovereign immunity "may turn on extrinsic evidence admitted *at trial*" (RB 42 (emphasis added).) Rather, *Warburton* involved the "narrow issue" of whether a party could discover evidence relevant to sovereign immunity before *the court* decided a motion to dismiss, and held "procedural fairness" required it. *Id.* at 1181-82, 1189-90. In so holding, the Court acknowledged that tribal immunity was properly resolved by the court pre-trial—even in the face of conflicting evidence, noting the court must "engage in sufficient pretrial factual and

legal determinations to 'satisfy itself of its authority to hear the case' *before* trial." *Id.* at 1181 (emphasis added, quoted case omitted).[20]

Effectively conceding the court must decide sovereign immunity at the outset, Sharp distinguishes none of the Tribe's authorities (OB 46-47), and fails to cite a single case deferring sovereign immunity to a jury, as the court erroneously did below. In fact, the only other immunity case Sharp cites—*Yavapai-Apache Nation v Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190—only contradicts Sharp's argument. In *Yavapai-Apache,* the court resolved jurisdiction at the outset, in the face of conflicting evidence relevant to a contractual waiver, properly holding the plaintiff to its burden. *See id. at* 211 (plaintiff-opponent "must" prove jurisdiction in face of motion to quash/dismiss); *id.* at 217 ("YAN carried its burden of proving ... jurisdiction ... exists."). *See also Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1418 (court "must" resolve "conflict in evidence where a case presents "competing claims" as to immunity waiver).

Here, the Superior Court faced competing claims as to the waivers' scope in the subject contracts. Sharp asserted below, and contends now, that the contract language supported its reading of the waiver—*i.e.,* that the waiver extended to a suit for revenue from "any future casino," ever built on the Tribe's reservation, regardless of whether Sharp was involved in that future casino. (RB 48.) Conversely, based on evidence supporting the

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[20] The "jurisdictional" discovery that Sharp demanded and the court allowed was extensive. (*See, e.g.*, AA/Vol.IX/p. 2227.) The Tribe produced every document mentioning Sharp Image Gaming, its principal, Chris Anderson and/or Crystal Mountain. (AA/Vol.II/p. 381:9-13.) This discovery ended two years after Sharp filed suit. (AA/Vol.II/pp. 381:9-382:7.)

Tribe's motion to quash/dismiss, the Tribe showed its waiver was limited to claims for revenue from Crystal Mountain and any permanent, successor operation built from Crystal Mountain. (OB 46-47.) Reviewing this evidence, the Court made factual findings confirming it lacked power to proceed under clear and controlling law.

Specifically, the Court found the scope of the immunity waivers could be reasonably construed in the manner supported by the Tribe's evidence. (AA/Vol.VII/pp. 1959:21-24, 1960:15-17) (finding "there is sufficient evidence to establish that either interpretation is reasonable," and that the waiver could be "restricted to income from the sprung tent or from a later larger casino to be built.").) The legal significance of the court's factual finding—that the waiver's application was ambiguous in scope because it could be reasonably construed to support either parties' contention, required dismissal, *not* a jury trial. That is because, under controlling law, to "relinquish [tribal] immunity," a waiver must be "clear" (*C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe* (2001) 532 U.S. 411, 418, 420), and, its scope "may ' not [be] enlarged beyond what the language requires.' " *Lummi Tribe of the Lummi Reservation v. United States* (2011) 99 Fed.Cl. 584, 606-07. In effect here, the Superior Court found the waiver's scope <u>not</u> "clear," but "ambiguous," and then erroneously deferred the matter to the jury to allow it to effectively extend the waiver "beyond what the language requires." *Compare C&L, supra,* 532 U.S. at 420 (finding effective waiver in arbitration provision where there was " 'nothing ambiguous' " in provision through which tribe consented to arbitration process and judicial enforcement of same).[21]

[21] Sharp argues Judge Riley rightly submitted the jurisdictional issue to the jury out of principles of judicial economy. (RB 42.) Even if true (which is

Put simply, Sharp's representation of "applicable law" is *contrary* to law. Whether the Tribe waived its sovereign immunity as to Sharp's claims was a question for the Superior Court, and once it found the waivers were reasonably construed in the manner established by the Tribe's evidence, this case was properly dismissed, as there was nothing left to resolve.

B. Sharp Incorrectly Asserts The Superior Court Erred By Reviewing The Evidence Before It.

1. The Contract's Provisions Plainly Do Not State The Tribe's Waiver Applies To Revenue From Any Future Casino.

Because controlling law confirms the Tribe's sovereign immunity defense never should have reached the jury, and because Sharp did not address, let alone dispute, that law, the Tribe has established this case should have been dismissed. Nonetheless, Sharp asks the Court to find the Superior Court erred by considering extrinsic evidence in the first place. According to Sharp, "the trial court should have ruled, based on the plain language of the contracts, that the Tribe waived sovereign immunity with respect to Crystal Mountain Casino *or* any other 'gaming facility or facilities' operated by the Tribe." (RB 48.) Notably, Sharp fails to quote the actual waiver provisions it contends are so clear. The omission is both telling and devastating.

Nowhere in the waiver provision of either the ELA or the Note is there any reference to a waiver of immunity related to Crystal Mountain "*or* any other 'gaming facility or facilities' operated by the Tribe," as Sharp

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hardly apparent given the order), no principle of judicial economy allows a court to defer the question of its own jurisdiction to a jury—and certainly not *after* it had reached a dispositive factual conclusion.

pretends. (RB 48.) Instead, the ELA's waiver is "*specifically limited*" to damages or enforcement of "any obligation under this Lease," and further provides that "the court shall have *no authority or jurisdiction... except [regarding] the Lessee's share of the net gaming revenues*." (AA/Vol.I/p. 171 (emphases added).) Ignoring the actual waiver language, Sharp argues a provision contained elsewhere in the agreement, discussing delivery of the gaming equipment, controls the waiver's scope. (RB 47-48.) Sharp asserts the provision allowing it to provide "additional" gaming machines to Crystal Mountain "or any future gaming facility or facilities," but ignores the fact that the clause itself is contingent. Under the ELA, no "additional" machines will be delivered to "any future" casino" unless "400 video gaming devices" are *first* "delivered to *the* Crystal Mountain Casino." (AA/Vol.XXXIV/p. 9154 (emphasis added).) Nor does Sharp dispute that the waiver is limited to the Tribe's share of "*the* net gaming revenue." (AA/Vol.I/p. 171 (emphasis added).) Nonetheless, Sharp argues that a contingent provision, which only applies (if ever) after an initial delivery to "the" Crystal Mountain, "plainly" means the waiver provision is *not* limited to "the net revenue" from "the" casino, but broadly applies to "any net revenue" from "any" casino. These "plain" words plainly appear nowhere in the ELA.

Similarly, the Note contains no language "plainly" extending the Tribe's sovereign immunity to "any net revenue" from "any" casino. Under the Note, any right to sue the Tribe was limited to "enforce the terms of the Note." (AA/Vol.I/p. 284.) But absent from the Note is any discussion of "additional" machines to be delivered to "any" future casino. Rather, the Note refers *only* to the initial "400 video gaming devices," which must be "installed and in operation" to trigger its repayment.

(AA/Vol.I/p. 283.) Significantly, the Note also states the 400 machines must be installed and in operation at "Borrower's Gaming Facility and Enterprise." (*Id.*) The facility's description is singular, not plural, and certainly there is no reference whatsoever to "any future gaming facility or facilities" anywhere in the Note.

In short, Sharp cannot pretend the waivers contain language they do not, and then deem the language of the waivers to be clear. Sharp's contention that the provisions' plain language controlled the scope and extent of the Tribe's sovereign immunity waiver—requiring the Superior Court to find as a matter of law that the Tribe plainly waived sovereign immunity for Sharp's claim involving "any" revenue, from "any" casino"—must be rejected.

2. Extrinsic Evidence Supports The Tribe's Reasonable Reading Of Its Sovereign Immunity Waiver.

Given the ambiguity of the contract language, the Superior Court's review of the Tribe's evidence was not only proper, but it would have been a true waste of resources for the Superior Court to refuse to consider any of the extrinsic evidence it ordered the Tribe to produce in "jurisdictional discovery" under *Warburton, supra*. Supporting its motion to quash/dismiss, the Tribe presented evidence showing "*the* net gaming revenues" in the waiver meant revenue from "the Crystal Mountain Casino," or any "future gaming facility or facilities" the parties planned to build using revenue from the tent structure to build a permanent facility—not a future casino for which Sharp had no involvement. (AA/Vol.II/pp. 436:8-437:7; 441:4-11; 457:10-458:10; 472:18-473:25; 474:13-24; 475:11-476:11; 477:1-8; 482:5-14; 483:5-10; 486:18-487:25; 488:7-18; 492:4-15;

511:11-21; 512:4-17; 520:25-521:5; 524:11-525:13.)[22] The evidence showed this was the "two step plan" envisioned to bring gaming to the reservation, through a temporary tent casino, and if successful, a brick and mortar operation built with its revenues. (OB 47-48.) The Tribe also submitted minutes from the meeting at which Sharp and the 1997 Tribal Council discussed the ELA and the Note, which consistently and repeatedly reference "the casino," and explicitly state that "[a]ny suit would be against the proceeds of *the* Casino." (AA/Vol.I/p. 121.) Every witness (including Sharp's principal) testified that when the parties entered the ELA and Note, the only casino contemplated was Crystal Mountain. (AA/Vol.II/pp. 563:12-564:7.)[23]

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[22] Sharp incorrectly argues the Tribal witnesses were impeached at trial with respect to this testimony. (RB 49.) The evidence Sharp cites references the fact that the parties did not discuss their differing respective understanding of the waiver's scope. But, as to *that* understanding, each 1997 Tribal Council member testified, without contradiction, that the waiver was limited to a suit involving revenue from Crystal Mountain—whether the temporary tent casino, or the hoped-for brick-and-mortar operation built with its revenue. (RT/Vol.V/pp. 1413:14-1415:11, 1489:20-1493:1, 1524:8-20, 1550:6-1552:5, 1686:6-1689:18.)

[23] Sharp's Statement of Facts also confuses these issues. For example, Sharp suggests the GMA's purpose was to "advance funds to construct and open the Tribe's casino, in a temporary structure to be called Crystal Mountain Casino" (RB 6); in fact, the GMA also contemplated a "larger" permanent facility, to be built from the tent's revenues. (AA/Vol.XXXIV/pp. 9151/RT/Vol.V/pp.1230:7-1231:9, 1233:14-1234:6, 1395:14-20, 1404:18-1405:10.) Similarly, with respect to whether the ELA, like the GMA, contemplated a future facility developed by Sharp, Sharp omits mentioning that it submitted the ELA and the Note to the Tribe with a letter stating: the enclosed contracts "*incorporate the points of the original [GMA] agreement*, but further address some points that benefit both parties in having formalized." (AA/Vol.XXXIV/p. 9215 (emphasis added).)

In effect, the Superior Court was presented with the "historical facts" of the transaction (*Yavapai-Apache*, *supra*), and after reviewing and weighing the evidence in the context in which the agreements were made, concluded the Tribe had demonstrated a "reasonable" reading of the waivers, which was "restricted to income from the sprung tent or from a later larger casino to be built." (AA/Vol.VII/pp. 1959:21-24, 1960:15-17.) Under governing law, the Superior Court's finding mandates dismissal.

3. The Superior Court's Finding Follows The Law.

Sharp's final attack on the Superior Court's finding appears to rest on the notion that the only evidence before the court turned on the Tribal witnesses' "subjective" intent (RB 50), and therefore was improperly considered as a matter of law. As shown above, this assertion seriously misstates the nature and substance of the Tribe's evidence, and as shown below, it misrepresents the law. On the latter issue, the Court's finding of ambiguity is, in fact, entirely consistent with any fair reading of the contractual waiver provisions at issue here, and certainly the only permissible finding under governing law.

Unquestionably, federal law, not state law, governs an Indian tribe's effective waiver of sovereign immunity. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.* (11th Cir. 2012) 692 F.3d 1200, 1207 ("[T]ribal immunity is a matter of purely federal law"); *compare* RB 41-52 (with two exceptions, citing only state contract cases). Because effective waivers require the Tribe's consent (*United States v. United States Fidelity & Guar. Co.* (1940) 309 U.S. 506, 514), they must be clear and explicit, and may never implied. *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59. Therefore, in construing a contractual waiver, the proper focus

is whether the language is sufficiently clear and explicit to manifest the consent of the Tribe to relinquish its immunity. *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Okla.* (2001) 532 U.S. 411, 420 ("the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures.").[24]

Furthermore, while California courts may use an "objective standard" when construing waiver provisions (RB 51, citing *Warburton, supra*), this is simply consistent with the foregoing federal law that contractual waivers will only be upheld where they are "clear" and "explicit." The Tribe's subjective intent may not be "determinative" (*id.* at 1991), but it is undoubtedly relevant, and matters in a way that is of import to this unique area of law. *See id.* at 1181-82 ("trial court was justified in considering the tribal council members' affidavits in ruling on the jurisdictional question"); *and see Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 9 (considering Tribal officials' understanding of transaction in construing effectiveness of contractual waiver).

Faced with competing claims as to the differing reach and effect of the waiver provisions in the ELA and the Note, it was incumbent upon the Superior Court to consider extrinsic evidence relevant to their scope. Indeed, to resolve the conflict, "the trial court *necessarily had to go beyond the pleadings and contract language* to consider the testimonial and documentary evidence submitted with defendants' motion to

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[24] Sharp argues a choice-of-law provision renders state contract law controlling. (RB 51). That is false. *See California Parking Services,* 197 Cal.App.4th at 819 ("Despite the choice-of-law provision, federal law governs whether a federally-recognized Indian tribe has waived its sovereign immunity....")

stay/quash/dismiss and [defendant's] opposition to those motions." *Great Western Casinos*, 74 Cal.App.4th at 1418. Sharp's citations are in accord. *See Warburton*, 103 Cal.App.4th at 1181 ("a court considering a jurisdictional question regarding sovereign immunity may go beyond the pleadings and contract language to consider testimonial and documentary evidence"); *Yavapai-Apache*, 201 Cal.App.4th at 207 ("testimonial and documentary evidence relevant to jurisdictional questions on sovereign immunity may be considered, as well as the pleadings and contract language"); *id.* (considering parties' "course of dealing" in evaluating contractual waiver of immunity, and stating "it may be necessary to determine the historical facts of a transaction in order to apply the pertinent legal principles.").

Finally, while Sharp argues the Superior Court erred by considering extrinsic evidence beyond the four corners of the ELA and the Note, Sharp would have the Court read select contract terms (terms outside the waiver provision) in a vacuum, without regard to surrounding context (or the waiver provisions themselves), and without considering the circumstances or purpose for which the contracts were entered. This is contrary to basic common sense, not to mention, the ordinary principles of contract interpretation Sharp insists apply here. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 (properly construed, meaning of words in a contract are construed in context as a whole, with reference to surrounding provisions); *In re Marriage of Williams* (1972) 29 Cal.App.3d 368, 378 (contract's purpose and object, and surrounding circumstances under which entered, is relevant to its meaning); Cal. Civ. Code. § 1647.

In sum, the Superior Court's consideration of extrinsic evidence relevant to the meaning of the ELA and the Note was not only permissible,

but legally compelled. By the same token, its conclusion that the waiver provisions in the ELA and the Note could be reasonably construed in a manner that left the Tribe's immunity intact is a result soundly supported by the evidence—including the contract language, the witnesses' testimony about the history and circumstances surrounding the contracts, as well as the very purpose and object of their business deal (to establish a tent casino and successor structure pursuant to a two step plan). Indeed, in light of federal principles requiring waiver provisions to be strictly and narrowly construed in favor of immunity, with a "heavy presumption" against them (*California Parking Services, Inc. v. Soboba Band of Luiseno Indians* (2011) 197 Cal.App.4th 814, 819), it would have been error for the Court to reach any other conclusion.

C. The Jury's Confusion Underscores Why Courts Must Decide Complicated Issues Involving Their Own Jurisdiction.

Finally, Sharp argues that even if the Superior Court had to decide jurisdiction at the outset (which it did), and even if the Court correctly concluded the contracts did not clearly state the Tribe waived immunity for any future casino (which they did not), the Tribe was *not* prejudiced by the fact that the jury made this determination. Sharp cites *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830 for this remarkable assertion, arguing "established California law" does not require reversal on matters relating to "pleadings, procedures, or other preliminary matters," after trial absent prejudice. (RB 44.) But *Waller* did not involve jurisdiction, and the question of a court's power is not a mere matter relating to "pleadings, procedure or other preliminary matter." Sovereign immunity is a substantive jurisdictional right under controlling federal law (*Kiowa Tribe*

v. Mfg. Techs. (1998) 523 U.S. 751, 759), and the Tribe was (and remains) entitled to dismissal where the court found the evidence reasonably supported a construction depriving it of jurisdiction. *See Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 812-13, 815. This federally-protected right of tribal immunity—which is a "protection from suit and not merely a defense to liability" (*Great Western,* 74 Cal.App.4th at 1418 (federal citation omitted))—is not "subject to diminution by the States" (*Kiowa,* 523 U.S. at 759), whether by procedural or substantive law. In short, *Waller* lacks force here.

Furthermore, this case brings to life why courts (not juries) must resolve complicated questions involving their own jurisdiction. The jury here was clearly confused about the issue it was being asked to decide, as reflected by the question it asked during deliberation:

> We disagree as to the meaning of both questions/answers regarding sovereign immunity. One of the answers says the Tribe waived sovereign immunity — both sides stipulate that it was waived (not just Sharp) so if the tribe did not waive it, does that mean it was only waived for the net revenues from the CMC tent and future Sharp-only casino?
> (AA/Vol.XXXIII/pp. 8820-21.)

The jury's confusion was understandable, particularly since Sharp likes to argue, as it argues here, that "the Tribe does not dispute that the text of the ELA and Promissory Note contained explicit and authorized waivers of sovereign immunity." (RB 47.) That is wrong, but it is easy to see how a jury could translate it to a "stipulation" the Tribe's immunity "was waived." Of course, the *existence* of a waiver provision was never the issue. The question always has been the scope of those waivers, and in particular, their application to Sharp's lawsuit. *See Ameriloan v. Superior Court*

(2008) 169 Cal.App.4th 81, 94 (waivers are strictly construed and confined to the conditions on which they were granted).

Anticipating potential jury confusion, and subject to its continuing objection that the issue was before the jury at all, the Tribe proposed special findings for the general verdict (RT/Vol.VII/pp. 1720:2-21-1723:18, 1749:16-1752:5)—to ensure the jury made the requisite factual finding required for its decision. *See Cembrook v. Sterling Drug, Inc.* (1964) 231 Cal.App.2d 52, 64. Sharp opposed any special findings, and the court declined them. (RT/Vol.VII/pp. 1720:2-21-1723:18, 1749:16-1752:5.) When the jury's confusion became apparent through its question, the Tribe *again* requested that its special findings be provided to make clear there was no stipulation that the Tribe had waived immunity to Sharp's lawsuit. (RT/Vol. VII/pp. 1937-1:1941:24, 1944:12-23, 1949:7-12.) Again, the Tribe's request was opposed, then denied (RT/Vol.VII/pp. 1937:1-1941:24, 1944:12-1949:12); and the answer provided the jury effectively dissuaded them from answering the question they raised, generically telling them determine whether the waiver was "broad enough." (AAVol.XXXIII/pp. 8822.) For Sharp to claim on this record that there was no prejudice is disingenuousness at best.

IV. THE TRIBE'S STATUTE OF LIMITATIONS DEFENSE WAS PRESERVED FOR APPEAL AND SHARP'S CLAIMS ARE TIME-BARRED.

The Tribe's motion for summary judgment raised the purely legal issue of whether the Tribe's alleged violation of the ELA's exclusivity provision in 1999 constituted an actual breach of contract, immediately triggering the running of the statute of limitations. (AA/Vol.XII/pp.

3067:1-3069:14.) Sharp contends the Tribe cannot appeal the adverse summary judgment ruling because it allegedly made a "strategic" decision to "abandon[] this defense" at trial. (RB 53.) Sharp is wrong. This defense was not presented to the jury because the underlying facts are undisputed, and the question of when the statute of limitations began to run is one of law, subject to independent review. *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388. Indeed, this has been the law since 1873. *Reed v. Swift* (1873) 45 Cal. 255, 256 ("When the facts are agreed upon or ascertained, it is a question of law and not of fact, whether or not the case is brought within the bar of the Statute of Limitations."); *see also Int'l Engine Parts, Inc. v. Pedersen & Co.* (1995) 9 Cal.4th 606, 611-12 ("Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law.").[25]

A. Sharp's Claims Under The ELA Are Time-Barred.

There is no dispute that the ELA was cancelled in 1999 after the Tribe entered an exclusive contract with KAR that was "inconsistent" with Sharp's right to exclusivity under the ELA. (OB 51-53.) This key fact has never been in dispute and Sharp concedes it on appeal. (RB 11-12, 56.) Because, *according to Sharp*, the Tribe's "agreement with Lakes" "denied" Sharp "its exclusive right to lease gaming equipment to the Tribe's gaming facilities" (OB 53), the legal question before this Court is straight-forward:

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[25] None of Sharp's cited authorities question this established principle. (RB 53-54.) Rather, they are inapposite because they address issues of fact or mixed questions of law and fact that could have been presented to the jury; or actually were presented to the jury as in *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.

Did the statute of limitations commence immediately following this alleged breach of the ELA's exclusivity provision? The law confirms it did.

The California Supreme Court resolved this issue in *Medico-Dental Bldg. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 424-27, holding a contract's exclusivity provision is breached the moment defendant executes an agreement with a third party that is inconsistent with plaintiff's contractual right of exclusivity. Rather than addressing this authority, Sharp all but ignores it, observing in a footnote that *Medico-Dental* contained "no discussion of anticipatory breach." (RB 61 n.36.) That is the point. *Medico-Dental* does not discuss anticipatory breach because breach of an exclusivity provision is *an actual breach* the moment an inconsistent exclusive contract is entered.

Sharp's effort to avoid the relevant law, by insisting that *only* the law of anticipatory breach governs its claims, is belied by the undisputed facts, including its principal's admissions. When Sharp entered its exclusive contract with the Tribe, the time for supplying gaming machines necessarily depended on the Tribe opening a viable casino; and the same was true after the Tribe cancelled the ELA and entered an "inconsistent" exclusive with Lakes. (OB 52-53.) But the contingent nature of the agreements does nothing to change *when* the alleged breached occurred. Mr. Anderson testified that after he received the Tribe's letter stating that his contracts were "void," "I knew they cancelled my contract," and "as far as I was concerned, I was done with the Tribe." (OB 52 n.17.) *See McWilliams v. Horton* (1967) 248 Cal.App.2d 447, 453 (where a party

"cancels" an agreement and makes performance infeasible, the non-breaching party's cause of action accrues at that moment).[26]

These facts underscore the futility of Sharp's effort to distinguish *Boon Rawd Trading Int'l Co., Ltd* (2010) 688 F.Supp.2d 940. As the court in *Boon Rawd* recognized, simply invoking the law of anticipatory breach does not mean it applies. Rather, here, as in *Boon Rawd*, where there is an alleged breach of a party's right to exclusivity as a result of a new agreement with a third party, there is no "empty threat of harm"—which is necessary to state an anticipatory breach claim—because "an actual and material breach of the . . . agreement's most important provision: exclusivity" occurs when the new contract is entered. *Id.* at 949. That Sharp understood the cancellation was immediate, and that the Tribe was proceeding under a new exclusive with a new partner, is confirmed by Mr. Anderson's testimony.

Sharp had four years to sue after the Tribe entered a new exclusive with Lakes. Code Civ. Proc. § 337. It waited eight years instead, because, according to Sharp, that is when it first appeared the Tribe would have money. (RT/Vol.X/p. 2554:7-16.) The statute of limitations does not turn on defendant's resources.[27] Moreover, and contrary to Sharp's assertion

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[26] While the testimony before the Superior Court controls, Mr. Anderson was even more clear at trial, explaining "my contract was cancelled"; I was "kicked out"; "I was told they weren't going to do business with me any longer." (RT/Vol.X/p. 2554:17-28.)

[27] The law is settled that "[a] cause of action for breach of contract ordinarily accrues at the time of breach, and the statute begins to run at that time regardless of whether any damage is apparent..." 3 Witkin, Cal. Proc. 5th (2008) Actions, § 520, p. 664; *see also Crawford v. Duncan* (1923) 61 Cal.App. 647, 650. There are few exceptions to this widely accepted rule, none of which apply to Sharp. *See* 3 Witkin, § 521, p. 666.

(RB 57-58), Sharp had a cognizable claim for damages the moment the new exclusive was entered, as confirmed by its claim to $41 million as the 1999 "buyout" value of the ELA. (RT/Vol.IX/pp. 2257:5-16, 2269:12-2271:26.)[28]

B. Sharp's Claims Under The Promissory Note Are Time-Barred.

As the Opening Brief demonstrates, Sharp's claims under the Note are likewise time-barred, because the Note could not be repaid absent Sharp's ability to deliver gaming machines under the ELA; and therefore, a breach of the ELA's exclusivity provision necessarily resulted in a breach of the Note's repayment obligation. On appeal, Sharp has abandoned the defense it asserted before the Superior Court—*i.e.*, that the Note was a "unilateral" agreement triggering repayment when anyone (not just Sharp) delivered gaming devices to the Tribe—essentially conceding the argument lacked merit. (OB 56-58.) Now Sharp concedes the Note was "bilateral," which means both parties agree *Sharp* was obligated to provide machines under the Note. (RB 61-62 n.37.) This admission is dispositive.

Both the ELA and the Note reference "400 video gaming devices." Under the ELA, those 400 machines had to be "delivered" to "Crystal Mountain Casino"; and under the Note, they had to be "installed and in

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[28] Sharp's "buyout" theory is also asserted on appeal, where it states that "all parties" understood a buyout of the ELA was necessary for a new partner to replace Sharp, and that Lakes "discussed buying out Sharp for $75-80 million." (RB 10-11.) Those assertions are wrong. Lakes' CEO, Lyle Berman, testified no such offer was made, nor would have been made, because Crystal Mountain was an entirely different (unsuccessful) project in which Lakes had no interest. *See also* Testimony of Lakes' CFO, Tim Cope (AA/Vol.XXIX/pp. 7446-7448); Testimony of Mark Nizdil, Anderson's associate, confirming he never heard of such an offer (AA/Vol.XXVI/pp. 6700:9-6701:10.)

operation" to trigger the "commencement date" for repayment of Sharp's investment in Crystal Mountain. (OB 57-58.) As a result, once the Tribe allegedly breached Sharp's right to exclusivity under the ELA, the condition for repayment under the Note was necessarily rendered infeasible in June 1999, when the Tribe entered an inconsistent exclusive contract with Lakes. Code Civ. Proc. § 337.

The undisputed evidence confirms Sharp's claims under the ELA and Note are time-barred, and the Superior Court erred in failing to so rule.[29]

C. Sharp Did Not State A Claim For Anticipatory Breach And Could Not Prove A Claim For Actual Breach.

1. Because Sharp Did Not Sue Immediately, It Did Not State A Claim For Anticipatory Breach.

If the Court finds Sharp's claims were *not* time-barred, dismissal is still mandated because Sharp failed to state a claim for anticipatory breach. Specifically, Sharp does not dispute that under the governing California Supreme Court precedent of *Romano v. Rockwell Int'l Inc.* (1996) 14 Cal.4th 479, 489, it had one of two options (1) "treat the repudiation as an anticipatory breach" and sue "immediately"; or "treat the repudiation as an empty threat" and sue "for actual breach if a breach does in fact occur." Nor does Sharp dispute that it is bound by its prior judicial admission that it

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[29] Sharp's assertion that the Superior Court analyzed the law and the facts on the Tribe's statute of limitations defense (RB 54 n.32) is also false. The "numerous motions and proceeding" referenced by Sharp did not address the issue in the context of an actual breach, and the Court provided no legal analysis for its ruling. (AA/Vol.XXI/p. 5152:19-21; RT/Vol.II/p. 578:23-25.)

elected *not* to sue "immediately" on an anticipatory breach theory, but to "wait and sue for actual breach." (AA/Vol.VIII/p. 2110:10-13.)

Accordingly, the only conceivable claim Sharp had was for an actual breach when the Tribe opened Red Hawk without Sharp's gaming machines. Indeed, the trial judge, Nelson Brooks, recognized this precise point, stating "I have a hard time seeing how repudiation even fits into this case," because "from the timing of the filing of the lawsuit, it appears that Sharp chose to treat the repudiation as an "idle threat." (OB 63 n.22.) Unfortunately, while Judge Brooks recognized that Sharp's only viable claim was for an actual breach, the case proceeded under an "anticipatory breach" theory, because Judge Brooks believed he was bound by Judge Riley's prior rulings. (*Id.*)

Notwithstanding the clarity of the law, Sharp argued below, and argues now, that it could elect to treat the repudiation as an empty threat for eight years and then sue for anticipatory breach in 2007, one year before Red Hawk opened and the alleged actual breach occurred. (RB 58.) Sharp cites no case standing for this proposition, and none exists. Instead, every California case cited by Sharp follows the law of *Romano,* which requires the plaintiff to choose between one of two remedies—sue immediately for anticipatory breach; or treat the repudiation as an empty threat and sue for actual breach if it occurs. Further, while no California case has defined "immediately" with temporal precision, there is no case suggesting "immediately" means eight years later. Sharp's contention that *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501 stands for such a proposition simply misrepresents the case. (RB 58 n.34.)[30]

[30] *Central Valley* addressed whether a non-repudiating party waives the right to bring a breach of contract claim by failing to file a lawsuit at the

In sum, as Judge Brooks recognized, because Sharp did not bring suit immediately, Sharp could not state a claim for anticipatory breach, and Judge Riley's order denying the Tribe's motion is properly reversed as a matter of law.

2. There Was No Actual Breach In 2008 Because Sharp Could Not Perform.

This left only *Romano's* second remedy as a viable option for Sharp. Assuming this Court finds there was no actual breach of exclusivity in 1999, then the parties agree the statute of limitations was tolled under *Romano*. As stated in *Romano*, tolling applies until the alleged actual breach occurs—here, when Red Hawk opened without Sharp's machines. *Romano,* 14 Cal.4th at 489. It is also undisputed that "[t]here can be no actual breach of contract until the time specified therein for performance has arrived." *Taylor v. Johnston* (1975) 15 Cal.3d 130, 136-37. Thus, to pursue a claim for actual breach in 2008, Sharp had to prove that "but for" the Tribe's breach, Sharp could and would have performed the ELA—which, according to Sharp, required delivery of gaming machines to Red Hawk. (OB 60-61.) But Sharp could not make this showing because, as Sharp concedes, the Tribe could not have accepted machines from Sharp due to findings by the Bureau of Gambling Control that Sharp lacked the moral and ethical integrity necessary to be licensed as a gaming machine supplier. (OB 61-62.)[31]

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first available moment. Reiterating the rule of *Romano*, the *Central Valley* court recognized that a plaintiff *"can"* elect to sue "immediately" or it can "wait until the time for performance arrives and exercise his remedies for actual breach. 162 Cal.App.4th at 515-17 (emphasis in original).

[31] Significantly, Sharp does not dispute that the Bureau made this finding, or that it was relevant to the Tribe's licensing requirements under its

Conceding these facts, Sharp continues to insist that it did not have to prove a claim for "actual" breach. The incongruity of Sharp's position is apparent. It simply makes no sense for Sharp to assert that it need only have shown an ability to perform at the time of the alleged repudiation (in 1999), when it admits it did not "sue immediately" for anticipatory breach, but chose "to wait and sue for actual breach." (AA/Vol.VIII/p. 2110:10-13.) Not surprisingly, the authorities Sharp cites, holding that the plaintiff's ability to perform is measured at the time of the repudiation, are cases where, unlike here, the plaintiff elected to sue immediately on an anticipatory breach theory. *See, e.g., Ersa Grae Corp v. Fluor Corp* (1991) 1 Cal.App.4th 613, 620; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1271; *Alderson v. Houston* (1908) 154 Cal. 1, 3-5. (RB 64-65.)[32]

Because Sharp did not elect to sue immediately on an anticipatory breach claim, and because it could not prove a claim for actual breach when the alleged time for performance arrived in 2008, the Superior Court erred

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Compact. That evidence is properly before this Court for review. (OB 64-68.)

[32] Notwithstanding its admission that it did not sue "immediately," and its reliance on cases analyzing the law as if it had, Sharp simply claims it was entitled to sue in 2007. However, Sharp cannot (1) acknowledge the controlling requirements of *Romano,* and at the same time, (2) assert a right to sue in 2007, because the two positions are mutually exclusive. Once Sharp admitted its lawsuit rested on an "actual breach" theory (AA/Vol.VIII/p. 2110:10-13), its decision to file almost two years before the alleged actual breach occurred demonstrates it is Sharp, not the Tribe, that "fundamentally misunderstands the doctrine of anticipatory breach." (RB 56.) Further, Sharp's apparent confusion appears deliberate, as the record shows Sharp did not change its theory of the case—*i.e.*, it did not assert it need only show an ability to perform in 1999—until after the Tribe discovered the Bureau's finding, which established Sharp could not perform when Red Hawk opened. (OB 60-63.)

in refusing to consider the admissible, undisputed (post-1999) evidence mandating dismissal of Sharp's lawsuit. *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 348.

D. The Tribe Caused No Damage To Sharp.

Finally, assuming Sharp could have stated a claim for anticipatory breach without immediately filing its lawsuit, the law (and equity) confirms the Tribe was still entitled to defend itself against Sharp's claim by showing that, even if the Tribe had not "repudiated" the ELA, Sharp could not have delivered gaming machines to Red Hawk in 2008. *See* 15 Williston on Contracts § 43:32 (4th ed. 2012) (evidence of post-repudiation events is admissible by defendant to prove repudiation did not cause plaintiff's inability to perform); Restatement (Second) of Contracts § 254 (1981) (same). Here, under the undisputed facts before the Superior Court, the Tribe could not accept Sharp's machines—through no fault of its own—after Red Hawk opened, and therefore it was *not* the "but for" cause of Sharp's alleged damages as a matter of law. (OB 68-70.)[33]

In short, the Superior Court erred in ruling that the Tribe's post-repudiation evidence was inadmissible.

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[33] Sharp's effort to distinguish this law by relying on *Gherman v. Colburn* (1977) 72 Cal.App.3d 544 fails. Indeed, Williston warns about reading the holding of *Gherman* out of context, as Sharp reads it (RB 68), clarifying the narrow ruling in *Gherman* to be that certain post-repudiation evidence, like any other evidence, may be inadmissible (and in *Gherman* the evidence was specifically found to lack probative value), but confirming that the *Gherman* holding in no way undermines the basic rule. *See* Williston § 43:32 n.26.

V. THE JURY'S FINDING THAT THE ELA OMITTED AN ESSENTIAL TERM IS IRRECONCILABLE WITH A GENERAL VERDICT FOR SHARP.

As Sharp concedes, it is a fundamental principle of contract formation that, "if an *essential* element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement." *Ablett v. Clauson* (1954) 43 Cal.2d 280, 284-85 (quoting 1 Williston, Contracts (Rev. ed. 1936) 131, § 45 (emphasis added)); *accord Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1256 (citing *City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, 433).

Here, the jury answered "yes" to the following interrogatory: "Was any essential term of the contract left for future determination?" (AA/Vol.XXVIII/p. 7315.) If the ELA left for future determination a contract term that was essential, the parties could not have an enforceable contract. Thus, the jury could not have concluded that the ELA left for future determination an essential term, and at the same time conclude Sharp could recover for breach of the ELA.

The jury's factual finding makes sense given that Sharp's principal admitted he knew nothing about the equipment Sharp would provide in the future except that Sharp would supply it. (RT/Vol.X/pp. 2559:11-2565:17.) Mr. Anderson also admitted the ELA contemplated that the parties would have to reach a separate written agreement as to what machines Sharp would supply. (RT/Vol.X/pp. 2562:10-2565:17.) *Ablett*, 43 Cal.2d at 285 ("Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." (citing Williston, § 45)).

Unable to dispute that an essential term left for future determination precludes contract formation, Sharp changes the subject, invoking

inapplicable contract principles in no way contravening this dispositive rule. Specifically, Sharp suggests the jury could have found the ELA enforceable if it found that an "indefinite" "description of the subject matter" in the ELA was "capable of being identified and made certain in the course of the parties' performance." (RB 70-71; RT/Vol.XV/p. 4088:9-12.) But this is not a course of performance case, and there is no dispute that no gaming machines were ever provided to the Tribe under the ELA. *Bohman v. Berg* (1960) 54 Cal.2d 787, 794-95 (where an indefinite and uncertain contract was performed by one party and accepted by the other, the contract became certain through the performance).

Recognizing this problem, Sharp asserts that, "had the Tribe not committed an anticipatory breach of the ELA," the missing term "*would have been* determined" during the course of performance. (RB 71 (emphasis in original).) This argument lacks foundation, and ignores the ELA's integration clause that, as shown above, Mr. Anderson admitted required the parties to reach a written agreement in the future. *See Copeland,* 96 Cal.App.4th at 1255-56 ("where any of the essential elements of a promise are *reserved for the future agreement* of both parties, no legal obligation arises until such future agreement is made" (emphasis added; citations and quotations omitted)).

Sharp also asserts that "a contract *may* be reasonably certain" where it "empowers one or both parties to make a selection of terms in the course of performance." 1 Witkin, *Summary of Cal. Law, Contracts* (10th ed. 2005) § 139 (emphasis added). (RB 70.) But this principle is likewise irrelevant because, as the cases cited in Witkin confirm, it only applies to the enforceability of a contract leaving certain *unessential* terms or specifying objective criteria for defining an *essential* term. In contrast here, the jury found the specification of the machines required by the ELA to be an *essential* term.

Highlighting its confusion, Sharp argued to the jury that an agreement to later supply a missing term rendered the agreement enforceable. (RT/Vol.XIV/pp. 3905:7-3906:12 ("You'll be instructed on it that it's okay to leave a term like this blank if you know that you're going to fill it in later *and you know how you're going to fill it in* . . . .") (emphasis added).) But, as demonstrated above, that is not the law with respect to an essential term; and even it was, Sharp's principal admitted he had no idea how he was going to "fill in" the blank later. (RT/Vol.X/pp. 2559:11-2565:17.)[34]

Finally, Sharp's reliance on the jury's separate finding that "the contract terms [were] clear enough so that the parties could understand what each was required to do" (RT/Vol.XV/p. 4134:14-17; AA/Vol.XXVIII/p. 7314; RB 72), is completely consistent with the jury's finding that the ELA provided no means of objectively determining what "Equipment" Sharp would lease to the Tribe. (AA/Vol.XXXIV/p. 9161; RB 71.) The parties knew Sharp was required to deliver machines, but the jury found the ELA, which provided a "[d]escription of equipment . . . will be supplied upon opening of Casino" (AA/Vol.XXXIV/p. 9161), left the essential determination of what equipment would be delivered for the parties' future agreement. (AA/Vol.XXVIII/p. 7315.)

Sharp simply cannot ignore the jury's finding and can posit no theory of recovery upon which that finding could be reconciled with judgment for Sharp. *See Curtis v. State of Calif. ex rel. Dept. of Transp.* (1982) 128 Cal.App.3d 668, 689-91 (permitting recovery despite finding inconsistent with one theory of recovery, but consistent with an alternative

[34] None of Sharp's cases (RB 70) contradict the settled rule that an enforceable agreement does not result where the parties omit an essential term from an agreement and leave it for future determination.

theory of recovery supported by the record). The jury's finding that the ELA omitted an essential term requires judgment for the Tribe.

VI. THE NOTE'S PROVISIONS AND SHARP'S ADMISSIONS REQUIRE JUDGMENT FOR THE TRIBE.

All but ignoring the language of the Promissory Note, not to mention its own principal's binding admissions, Sharp asserts a favorable trial court verdict ends the inquiry into the Note's express meaning. Not so.

On an appeal from a motion for judgment notwithstanding the verdict, appellate courts independently interpret the written instrument where no conflict exists in extrinsic evidence. *Stevenson v. Oceanic Bank* (1990) 223 Cal.App.3d 306, 315; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-66 n.2. On such review, the Court applies the rules of contract interpretation, drawing its own inferences from the evidence. *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71.

Here, Sharp' effort to have the Court evaluate the Note under the deferential "substantial evidence" standard fails because the parties introduced no conflicting extrinsic evidence regarding the meaning of the key term "Borrower's Gaming Facility and Enterprise," and Sharp failed to identify a single issue of contract interpretation that turns on the credibility of extrinsic evidence. (RB 75, 77.)

A. Sharp Admitted The Note's Commencement Date Was Never Triggered.

Under the Note, the parties agreed the Tribe's repayment of Sharp's investment in the Tribe's Crystal Mountain Casino would only begin after "(400) video gaming devices . . . are installed and in operation at Borrower's Gaming Facility and Enterprise." (AA/Vol.XXXIV/p. 9152.) Unable to dispute that Sharp's failure to reopen Crystal Mountain Casino caused the failure of this condition (OB 77-79), Sharp contends on appeal

that "Borrower's Gaming Facility and Enterprise" meant Red Hawk Casino, a gaming facility not even contemplated when the Note was executed. (RB 75-76.) Sharp's testimony belies its theory.

At trial, Mr. Anderson testified "Borrower's Gaming Facility and Enterprise" referred only to Crystal Mountain, where 400 machines were never in operation after the Note was signed. (OB 76-77.) Further, despite Sharp's attempts to revise Mr. Anderson's testimony (RB 76 & n.44), he specifically confirmed that, based on his understanding of the Note's term, "the commencement date under the promissory note has not yet occurred[.]" (OB 76-77.)[35]

Nevertheless, Sharp attempts to cast Mr. Anderson's testimony as relevant only to the meaning of "Borrower's Gaming Facility and Enterprise" when the Note was executed. But, that admission alone confirms the parties' "mutual intention at the time of contracting," to which this Court must give effect. Civil Code § 1636.[36]

Sharp next tries to create a conflict in the testimony, asserting that Mr. Anderson "testified that the conditions in the Promissory Note referred to Red Hawk." (RB 76.) There is no conflict. Mr. Anderson's testimony regarding "conditions" refers to a separate paragraph discussing revenue of "the casino," not the requirement for triggering the "Commencement Date." (AA/Vol.XXXIV/p. 9152; RT/Vol.X/p. 2708:4-2709:22.)[37] In any event,

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[35] The testimony Sharp cites characterizing correspondence between the parties' lawyers regarding the Note (RB 76) does not define "Borrower's Gaming Facility and Enterprise," or contradict Sharp's admissions. *See* Civil Code §§ 1638, 1639.

[36] The 1997 Tribal Council members confirmed that all parties agreed when the Note was entered that the commencement date for repayment would be triggered when Crystal Mountain reopened with Sharp's machines. (OB 78-79.)

[37] Sharp further misrepresents the record when it cites Mr. Anderson's testimony at RT/Vol.V/pp. 1240:18-1241:8 as referring to the Note. The

Sharp does not, and cannot, dispute that evidence or testimony contradicting the party's own trial testimony does not qualify as substantial evidence. *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, 159-60.

Finally, reading the Note and ELA together, as Sharp suggests (RB 75), shows that both contracts contemplated 400 Sharp machines at Crystal Mountain. Under the ELA, "four hundred (400) video gaming devices" were to be "delivered to *the Crystal Mountain Casino*[,] 5281 Honpie, Placerville, California 95667." (AA/Vol.XXXIV/p. 9154 (emphasis added).) The ELA's "any future gaming facility" language Sharp cites out-of-context, refers only to "*additional* gaming devices," beyond the initial 400 machines to be "delivered to the Crystal Mountain Casino." (*Id.*) Then, under the Note, once those 400 machines were "installed and in operation," the commencement date for repayment of Sharp's investment in Crystal Mountain would be triggered. (AA/Vol.XXXIV/p. 9152, 9154.) Yet, as Sharp admitted, this never happened, and the commencement date of the Note was never triggered.

B. The Parties Expressly Capped The Note's Principal.

Alternatively, even assuming for argument's sake that the Note's commencement date was somehow triggered, the amount Sharp can recover is limited to the "not to exceed" amount expressly set forth in the Note, plus interest—totaling $7,580,350.05. (OB 80.)

Unable to seriously contend the Note is amenable to a reading that permits Sharp to recover principal beyond the "not to exceed" amount, Sharp eschews discussion of the agreement's language. However, this Court will independently review this provision to evaluate whether it is

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questions were directed to the terms of the ELA, and whether Crystal Mountain could be expanded to a larger facility if the tent succeeded. (RT/Vol.V/p. 1240:8-1241-28.)

"reasonably susceptible" to Sharp's proffered reading, and that inquiry in no way turns on the credibility of extrinsic evidence. *Stevenson*, 223 Cal.App.3d at 315; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.

Crucially, Sharp does not attempt to enunciate a meaning of the word "grant" by which an increase in the principal amount of the Note could be deemed to be a modification Sharp "granted" to the Tribe. (RB 78.)[38] Instead, Sharp simply asserts that the Tribe, by "consent[ing] to any . . . modifications granted," somehow agreed "that the principal amount of the [N]ote would increase *automatically*" at Sharp's sole discretion. (RB 77 (emphasis added).) Sharp's position is nonsensical and not surprisingly, lacks legal support; indeed, the only case cited, *Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1583-84, is inapposite. *Lennar* involved an "amendment" the parties executed to modify a note's principal; whereas here, Sharp is asserting it may impose additional debt under the *original* Note *without amendment*. Sharp does not dispute that the Tribe's government never took the requisite official action to increase the Note's principal, further confirming there was no amendment of the Note. (OB 84 n.31.)

Given Sharp's failure to show that the Note is "reasonably susceptible" to an interpretation where the word "grant" means "impose," this Court need not review the extrinsic evidence Sharp proffers. *See Wolf*, 114 Cal.App.4th at 1350. In any event, Sharp offered no evidence purporting to explain any language of the Note, much less that the parties assigned a meaning to the phrase "consents to any . . . modifications that may be granted by [Sharp]" that allowed Sharp to unilaterally increase the

[38] Nor does a provision of the Note linking the accrual of interest to the date of fund advancement in any way override the express cap on principal. (RB 77 n.46.) *See* Code Civ. Proc. § 1859.

"not to exceed" sum. (*See* RB 77 n. 45, 78.) *See also* Code Civ. Proc. § 1859. Instead, Sharp's principal admitted that the Note nowhere "says that there can be an increase in the not-to-exceed amount." (AA/Vol.XXX/p. 7780:14-17; RT/Vol.V/p. 1288:14-17.) That admission is corroborated by the 1997 Tribal Council witnesses who approved the Note, and who testified the Note's principal repayment was limited to its "not to exceed" sum. (RT/Vol.V/pp. 1419:11-1420:14; RT/Vol.VI/pp. 1496:3-28, 1554:13-1556:4, 1693:6-13.)[39]

Sharp's final assertion that the Tribe must have understood the Note required it to repay additional funds, otherwise it would mean that Sharp "simply gifted all additional funds to the Tribe" (RB 78), highlights the disingenuousness of Sharp's claims throughout this lawsuit. Sharp's original and First Amended Complaints alleged a "series" of separate "later" oral agreements for repayment of amounts beyond the Note's "not to exceed" limit. (OB 10-11.) However, Sharp abandoned that theory once it ultimately conceded there was no sovereign immunity waiver for any alleged "later" oral contracts. (RT/Vol.V/pp. 1287:25-1288:2). During trial, Sharp filed a Second Amended Complaint, dismissing its oral contract allegations, in favor of its current reading of the Note. Sharp's attempt to repackage these alleged "oral agreements" as "substantial evidence" that the words of the Note mean something they plainly do not, must be

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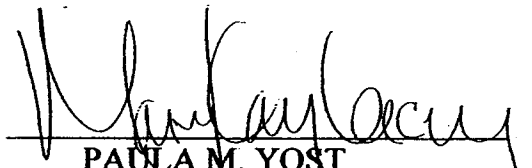
[39] Sharp falsely claims "the parties further understood that the Tribe was to repay any additional funds advanced by Sharp Image after November 15, 1997 under the terms of the Promissory Note." (RB 8.) The testimony Sharp cites to support this misrepresentation (*id.*. at 9) is from a *subsequent* Tribal Chairman, Jim Adams, who testified he was not on the Tribal Council when the ELA and Note were approved, and that he had no understanding of the Note's repayment terms. (RT/Vol.V/pp. 1370:4-1371:6, 1373:1-17.) Rather, Mr. Adams, like certain other Tribal members, held a general belief that the Tribe would or should repay Sharp its investment, notwithstanding Sharp's business failure. (RB 78.)

rejected. *See Wagner v. Columbia Pictures Industries, Inc.* (2007) 146 Cal.App.4th 586, 592 (proffered extrinsic evidence contradicting the contract's language must be disregarded).

CONCLUSION

The law is not designed to reward an unscrupulous company that does nothing, and then lies in the weeds for decades waiting to recover on a contract it could not perform. Sharp was not entitled to the $240 million dollars it sought at trial, and it is not entitled to the $30 million judgment it secured. There was no enforceable contract and there was no breach. There was only disdain for the federal system under which Sharp's business was properly regulated. This case should have been dismissed long ago, and the judgment below is now properly reversed with instructions to grant judgment for the Tribe.

By: 

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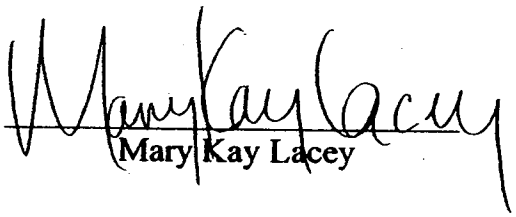
CERTIFICATION OF BRIEF LENGTH

I, Mary Kay Lacey, counsel for Defendant and Appellant, certify that this brief contains 18,805 words, including footnotes, but excluding the tables and this certification, as calculated by the word processing program used to prepare this brief.

Dated: February 15, 2013



Mary Kay Lacey

PROOF OF SERVICE

I, Diane Donner, hereby declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is SNR Denton US LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On February 15, 2013, I served the following documents:

1. APPELLANT'S REPLY BRIEF; and
2. APPELLANT'S REPLY APPENDIX

on the interested parties in this action by placing a true copy thereof, on the above date, following the ordinary business practice of SNR Denton US LLP, addressed as follows:

I caused such document to be served by Federal Express overnight delivery on the following:

Matthew G. Jacobs, Esq. Steven Kimball, Esq. DLA Piper LLP 400 Capitol Mall, Suite 2400 Sacramento, CA 95814 Telephone: 916-329-9111 Facsimile: 916-329-9110	***Attorneys for Plaintiff and Respondent*** **SHARP IMAGE GAMING, INC.**
El Dorado Superior Court 3321 Cameron Park Drive Cameron Park, CA 95682 Telephone: 530-621-5867 Facsimile: 530-672-2413	***Superior Court***

Nicolas Fonseca
Tribal Chairman
Shingle Springs Band of Miwok Indians
5281 Honpie Road
Placerville, CA

Client
SHINGLE SPRINGS BAND OF MIWOK INDIANS

(Served by mail)

Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

(via www.courts.ca.gov)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 15, 2013, at San Francisco, California.

Diane Donner

27401061

RULE OF COURT 8.204(d) AUTHORITIES

Pursuant to Rule of Court 8.204(d), Defendant and Appellant Shingle Springs Band of Miwok Indians attaches copies of the following authorities, cited in its Reply Brief:

27403345

TAB 1

1441 L. Street NW Suite 9100, Washington DC 20005 Tel.: (202) 632-7003 Fax: (202) 632-7066 Email: info@nigc.gov

Approved Management Contracts

Tribe Name	Contractor Name	Date Approved
Federated Indians of Graton Rancheria	SC Sonoma Management,LLC	10/1/2010
Spokane Tribe of the Spokane Reservation, Washington	WG-Washington,LLC (Chewelah Casino)	9/29/2010
Spokane Tribe of the Spokane Reservation, Washington	WG-Washington,LLC (Two Rivers Casino)	9/29/2010
Match-E-Be-Nash-She-Wish Band of Potawatomi Indians	MPM Enterprises, L.L.C.	7/15/2010
Match-E-Be-Nash-She-Wish Band of Potawatomi Indians	MPM Enterprises, L.L.C.	5/13/2010
Mescalero Apache Tribe of the Mescalero Reservation, NM	WG-IMG, LLC	1/7/2010
Tunica-Biloxi Indian Tribe of Louisiana	Exceptional Gaming & Entertainment, LLC	7/16/2009
Pauma Band of Luiseno Mission Indians of the Pauma-Yuima Reservation	Foxwoods Management Pauma, LLC	5/15/2008
Nottawaseppi Huron Band of Potawatomi	Gaming Entertainment (Michigan) LLC	4/21/2008
Nottawaseppi Huron Band of Potawatomi	Gaming Entertainment (Michigan) LLC	12/14/2007
Peoria Tribe of Indians of Oklahoma	Direct Development, LLC	10/1/2007
Tonkawa Tribe of Oklahoma	Gaughan Gaming–Tonkawa, LLC	9/11/2007
Tonkawa Tribe of Oklahoma	Gaughan Gaming–Native Lights, LLC	5/30/2007
Elk Valley Rancheria	Ellis Gaming Elk Valley Management, LLC	11/20/2006
Kickapoo Tribe of Oklahoma	Ellis Gaming Oklahoma Management, LLC	6/6/2006
Hopland Band of Pomo Indians of the Hopland Rancheria	Ellis Gaming Hopland Management, LLC	6/6/2006
Iowa Tribe of Oklahoma	Lakeslowa Management, LLC	4/28/2006
Pokagon Band of Potawatomi Indians of Michigan and Indiana	Great Lakes Gaming of Michigan, LLC	3/31/2006
Chitimacha Tribe of Louisiana	RAM Holdings, LLC	6/30/2005
Flandreau Santee Sioux Tribe	Bettor Racing, Inc.	3/17/2005
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria	Lakes - KAR Shingle Spring, LLC	7/19/2004
Eastern Band of Cherokee Indians of North Carolina	Harrah's NC Casino Company, L.L.C.	4/28/2004
San Pasqual Band of Diegueno Mission Indians of California	Siren Gaming, LLC	12/19/2003
Augustine Band of Cahuilla Mission Indians	Paragon Augustine LLC	11/5/2003
United Auburn Indian Community of the Auburn Rancheria	Station California, LLC	12/18/2002

Picayune Rancheria of Chukchansi Indians	Cascade Entertainment Group, LLC	7/25/2002
Lummi Tribe of the Lummi Reservation, Washington	Merit Washington, LLC	5/29/2002
Twenty Nine Palms Band of Mission Indians	THCR Management Services, LLC	4/15/2002
Standing Rock Sioux Tribe of North and South Dakota	Prairie Enterprises, LLC	3/25/2002
Little River Band of Ottawa Indians	Manistee Gaming LLC	1/23/2002
Ak-Chin Indian Community of the Maricopa (Ak-Chin) Indian Reservation, Arizona	Harrah's Arizona Corporation	1/23/2002
Rincon Band of Luiseno Mission Indians of the Rincon Reservation	HCAL Corporation	7/6/2001
Pala Band of Luiseno Mission Indians of the Pala Reservation	Anchor Pala Management, LLC	8/4/2000
Miami Tribe of Oklahoma	Butler National Service Corporation	1/7/2000
Pueblo of Laguna, New Mexico	Capital Gaming Management, Inc.	9/27/1999
Little River Band of Ottawa Indians	Manistee Gaming LLC	9/10/1999
Kootenai Tribe of Idaho	Hagadone Hospitality Co.	2/10/1998
Iowa Tribe of Kansas and Nebraska	Indian Gaming Company of Kansas, LLC	1/20/1998
St. Regis Band of Mohawk Indians of New York	President R.C.- St. Regis Management Co.	12/26/1997
Modoc Tribe of Oklahoma	Butler National Service Corporation	7/11/1997
Prairie Band of Potawatomi Nation, Kansas	Harrah's Kansas Casino Corporation	1/31/1997
Miami Tribe/Modoc Tribe	Butler National Service Corporation	1/14/1997
Eastern Band of Cherokee Indians of North Carolina	Harrah's NC Casino Company, LLC	6/28/1996
Kickapoo Traditional Tribe of Texas	Southwest Casino and Hotel Corp.	5/29/1996
Confederated Tribes of the Chehalis Reservation, Washington	Rochester Management, LP	12/8/1995
Oglala Sioux Tribe of the Pine Ridge Reservation	Oglala Turn Key Gaming, Inc.	12/7/1995
Mohegan Indian Tribe of Connecticut	Trading Cove Associates	9/30/1995
Yavapai Apache Nation of the CampVerde Indian Reservation, AZ	Fitzgeralds Arizona Management, Inc.	5/22/1995
Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington	Capital Gaming International, Inc.	4/28/1995
Upper Skagit Indian Tribe of Washington	Harrah's Washington Corporation	4/17/1995
Southern Ute Indian Tribe	GWC Gaming, Inc.	4/14/1995
Coeur d'Alene Tribe of the Coeur d'Alene Reservation, Idaho	Unistar Entertainment Inc.	1/31/1995
Tonto Apache Tribe of Arizona	Capital Gaming Management, Inc.	1/30/1995
Soboba Band of Luiseno Indians	Century Casinos Management, Inc.	10/28/1994
Ysleta Del Sur Pueblo of Texas	Seven Circle Resorts, Inc.	8/22/1994
Confederated Tribes of the Umatilla Reservation, Oregon	Capital Gaming Management, Inc.	8/16/1994
Ak-Chin Indian Community of the Maricopa (Ak-Chin) Indian Reservation, Arizona	Harrah's Arizona Corporation	8/12/1994
Twenty Nine Palms Band of Mission Indians	Palm Springs East, Limited Partnership	7/29/1994
Jamestown S'Klallam Tribe	Olympia Gaming Corporation	7/29/1994
Chitimacha Tribe of Louisiana	RAM Holdings, LLC	7/29/1994
Standing Rock Sioux Tribe of North and South Dakota	Seven Circle Resorts, Inc.	6/14/1994

Rosebud Sioux Tribe of the Rosebud Indian Reservation	B.B.C. Entertainment, Inc.	6/14/1994
Mississippi Band of Choctaw Indians	Boyd Mississippi	12/8/1993
Cheyenne and Arapaho Tribes of Oklahoma	Southwest Casino & Hotel Ventures	10/14/1993

TAB 2

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Bulletin No. 94-5

DATE: OCTOBER 14, 1994

Subject: Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)

One of the purposes of the Indian Gaming Regulatory Act (IGRA or Act) is:

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.

25 U.S.C. 2702(2). To carry out this purpose, the Act requires, among other things, the approval of management contracts for the operation and management of Indian gaming operations. 25 U.S.C. 2705(a)(4); 25 U.S.C. 2710 (d)(9); and 25 U.S.C. 2711.

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 Commission must see the entire document including any collateral agreements and referenced instruments.

The consequences are severe for a manager who mistakes his management agreement for a consulting agreement. Consequently, the Commission offers the following information and observations.

MANAGEMENT CONTRACTS AND OTHER GAMING RELATED CONTRACTS

"Management contract" is defined as:

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 the gaming operation.

25 CFR § 502.15

NIGC approval of management contracts is required by IGRA as a means of protecting the tribes. A requirement for including within the scope of audit of the gaming operation other contracts, including supply contracts, is similarly a means of protecting the gaming operations and ultimately the tribes from those deemed unsuitable for Indian gaming or on terms at variance with IGRA's requirements. Other gaming-related contracts not providing for management may require the approval of the Secretary of the Interior.

EFFECT OF NON-APPROVAL

A management contract that has not been approved by the Chairman is void. Furthermore, the management of a gaming operation under a "management" contract or agreement that has not been approved could result in the gaming operation being closed. The consequences to the parties are:

* The tribe would have to close down the operation or operate it on its own, and
* The management contractor would have to vacate the operation and could be subjected to legal action to return to the tribe any funds it received under the contract.

MANAGEMENT

Management 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.

Furthermore, the Congress and the Commission have determined that certain management activities can or should be present in 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 Commission approval. Such activities or requirements with respect to the gaming operation include, but are not limited to, the following:

- ★ Maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis;
- ★ Access to the gaming operation by appropriate tribal officials;
- ★ Payment of a minimum guaranteed amount to the tribe;
- ★ Development and construction costs incurred or financed by a party other than the tribe;
- ★ Term of contract that establishes an ongoing relationship;
- ★ Compensation based on percentage fee (performance); and
- ★ Provision for assignment or subcontracting of responsibilities.

It has been argued that if all of the ultimate decision-making is retained by the owner, the agreement should be construed as a consulting agreement. Some gaming operations are owned by individuals, some by corporations, some by partnerships, some by Indian tribes, etc. Regardless of the form of ownership, the owner always has the ultimate authority when it comes to decision-making. The exercise of such decision-making authority by the tribal council or the board of directors does not mean that an entity or individual reporting to such body is not "managing" all or part of the operation.

CONSULTING CONTRACT

What then is a consulting contract and what regulatory requirements would apply? The answers to such questions must be made on a case-by-case basis because they depend on the facts and circumstances of the individual situation and the actual day-to-day relationship between the tribe and the contractor.

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.

Regardless of the specifics of a consulting agreement, advance approval is not required but an advance determination under Bulletin No. 93-3 is strongly recommended to avoid a later decision by the Commission that the agreement is a management contract.

REQUIREMENT FOR DETERMINATION

The Commission recognized early the need to provide guidance on which contracts are subject to approval and therefore issued Bulletin No. 93-3 on July 1, 1993. It provides for the submission of gaming-related contracts and agreements to the NIGC for review. The Bulletin states:

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, they should submit those agreements to the NIGC.

The NIGC continues to make itself available to review all such gaming-related contracts and agreements.