

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

**APPELLANT'S RESPONSE TO UNITED STATES'
AMICUS CURIAE BRIEF**

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INTRODUCTION

Recognizing the primary role Congress intended for the National Indian Gaming Commission (“NIGC”), the *amicus curiae* brief filed by the Department of Justice (“DOJ”) highlights that the NIGC was created under the Indian Gaming Regulatory Act (“IGRA”) to give the agency “broad regulatory powers to implement and enforce” the law governing a tribe’s right to “game” as a means of “promoting tribal economic development.” (United States’ *Amicus Curiae* Brief, filed July 9, 2013, “United States’ Brief.”) Under this regulatory scheme, all gaming tribes, including Appellant, the Shingle Springs Band of Miwok Indians, are strictly obligated to follow the NIGC’s legal determinations. This background underscores why this case is of “exceptional importance” to the United States. (United States’ Brief at 1.) Legal determinations made by the NIGC cannot and should not be circumvented or disregarded; and the Superior Court’s assumption of jurisdiction in this matter disrupts the “finely-tuned balance” that Congress intended in passing IGRA, adversely impacting federal authority and the supremacy of federal law. *United States v. Spokane Tribe of Indians* (9th Cir. 1998) 139 F.3d 1297, 1301. As the United States explains, it was legal error for the Superior Court to assume jurisdiction over this case by rejecting the NIGC’s finding that the gaming contracts between the Tribe and its former investor, Sharp Image Gaming, Inc., violated IGRA, and thus were void. (United States’ Brief at 1-2, 34-42.)

Analyzing what it calls the “threshold preemption question,” the United States concludes that the Superior Court erred in assuming subject matter jurisdiction over the Tribe because it (1) failed to defer to the NIGC’s legal determination, as expressed in *both* its 2007 advisory opinion letter, and later in the 2009 disapproval decision; and (2) failed to make a determination that Sharp’s gaming contract was outside the scope of IGRA

regulation. (United States' Brief at 2.) The United States also asserts that the Superior Court erred in assuming jurisdiction to reach the merits of the procedural violations Sharp alleged the NIGC committed when reaching its final legal determination (United States' Brief at 2.) Although the Tribe's briefing emphasizes this second aspect of legal error identified by the government, the Tribe's position is fully consistent with both arguments made by the government.

Relying on *American Vantage Companies v. Table Mountain Rancheria* (2002) 103 Cal. App. 4th 590, the Tribe and the United States agree that the Superior Court erred by exercising subject-matter jurisdiction over this matter. Based on the NIGC's legal determination that Sharp's gaming contracts were unapproved management contracts, and therefore "void" under IGRA, the Superior Court should have found this case was properly dismissed under the doctrine of preemption. (Tribe's Opening Brief at 39-40; United States' Brief at 2, 29-33.) The United States' *amicus* brief demonstrates that the NIGC's reasonable interpretation of its own regulations is entitled to substantial deference, and urges this Court to defer to the interpretation advanced by the agency. (United States' Brief at 34-41, citing *Auer v. Robbins* (1997) 519 U.S. 452, 461.) The Tribe's preemption argument rests on law confirming that once the NIGC found that Sharp's contracts potentially (or actually) violated a completely preemptive federal statute, the Superior Court was compelled to recognize that Sharp's claims were subject to complete preemption under IGRA. *See Boisclair v. Superior Court* (1990) 51 Cal. 3d 1140, 1152 (holding state law claims completely preempted where "one possible outcome of the litigation is the determination" of an issue reserved for federal court resolution); (Tribe's Opening Brief, at 41.) Under the Tribe's and the United States' analyses, the result is the same.

The Tribe and the United States also both recognize that the Superior Court lacked jurisdiction to enforce a management contract that was unapproved by the NIGC, and therefore void under IGRA, because the entirety of the contract, including any alleged sovereign immunity, was invalidated. In addition, the Tribe and the United further agree that this case is properly dismissed because a management contract under IGRA falls within the statute's preemptive scope, meaning there can be no state court jurisdiction. *American Vantage*, 103 Cal. App. 4th at 595.

In sum, and as further discussed below, because the United States' arguments are consistent with the Tribe's position, and because the *amicus* brief itself reflects the interpretation of the United States that is owed *Auer* deference, this Court (if it reaches the preemption issue) should remand this case with instructions that it be dismissed for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENTS ON APPEAL

The Tribe's Opening Brief asserts two separate jurisdictional grounds for dismissal based on the NIGC's legal determination that Sharp's Equipment Lease Agreement ("ELA") was an unapproved management contract in violation of IGRA, and therefore "void" and unenforceable. For purposes of clarity, those grounds are summarized below and discussed in relation to the United States' preemption argument. Importantly, although the United States' *amicus curiae* brief frames its preemption analysis differently, the agreement between the Tribe and government is substantial and dispositive: This Court and the Superior Court lack jurisdiction.

1. The Agreements And Their Sovereign Immunity Waivers Are Void Because The Superior Court Lacked Jurisdiction To Entertain Sharp's Collateral Challenge To The NIGC's Final Agency Action.

In support of its appeal, the Tribe first asserts that once the NIGC Chairman's 2009 formal determination became final agency action, the Superior Court had no jurisdiction to entertain Sharp's challenge to the NIGC's findings (either substantive or procedural), because jurisdiction to hear that challenge is within the exclusive jurisdiction of a federal district court under the Administrative Procedure Act ("APA"). 25 U.S.C. § 2714.; *see AT&T v. Coeur D'Alene* (9th Cir. 2002) 295 F.3d 907, 908, 909, 910 (only a federal district court has authority to overturn final action by a federal agency, which is binding unless and until it is overturned); *St. Regis Mohawk Tribe v. President R.C.* (2d Cir. 2006) 451 F.3d 44, 51 (NIGC decision to approve or disapprove a management contract is a "final agency decision [] for purposes of appeal to the appropriate Federal district court").¹ For that reason, the Tribe contended that the Superior Court was bound by the NIGC's unappealed final agency action, irrespective of whether IGRA completely preempted Sharp's claims. (Tribe's Opening Brief at 24-26; Tribe's Reply Brief at 9-10.) That meant the ELA, and its collateral Promissory Note, were void under federal law and unenforceable in this action. (Tribe's Opening Brief at 26-29.) Because the only proffered basis for the Superior Court to assert subject matter jurisdiction over the sovereign Tribe was through alleged waivers in those agreements,

¹ Importantly, it is uncontroverted that the NIGC promulgated its determination regarding Sharp's gaming contracts as final agency action. (Tribe's Reply Brief at 1 n.1.)

Sharp's failure to obtain approval of those agreements deprived the Superior Court, and this Court, of subject matter jurisdiction. (*Id.*)²

2. The Binding Nature Of The NIGC's Legal Determination Establishes IGRA Completely Preempts Sharp's Claims.

The Tribe also raised a separate jurisdictional defense on the ground of complete preemption. (Tribe's Opening Brief, at 41-44; Tribe's Reply Brief at 32-34.) It is the Tribe's position, and indeed there is no dispute, that IGRA is a completely preemptive federal statute that applies to preclude a state court from assuming subject matter jurisdiction where a claim "concerns the regulation of Indian gaming." *American Vantage*, 103 Cal. App. 4th at 596; *Gaming Corporation v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 544. Ignoring the actual preemption question before it — i.e., whether Sharp's gaming contracts potentially (or actually) violated IGRA — the Superior Court ruled that the NIGC had no regulatory authority over the contracts, and ruled further that even if it had such authority, the NIGC had not taken "final agency action." (Tribe's Opening Brief at 30, 41.) As the United States points out, the Superior Court's ruling is a side-stepping "*non sequitur*." (United States' Brief at 2, 28.) The preemption issue the Superior Court avoided was whether Sharp's claims fall within IGRA's completely preemptive scope. *American Vantage*, 103 Cal. App 4th at 596 (state courts lack subject matter jurisdiction to adjudicate claims involving

² Put differently, the Tribe contends that even if the Superior Court had properly ruled on the Tribe's preemption motion and had properly asserted subject matter jurisdiction over the Tribe, the Superior Court was without authority to disregard the binding effect of the NIGC's final agency action, and its inescapable jurisdictional implications, in the Tribe's subsequent dispositive motions (involving summary judgment and judgment on the pleadings) (Tribe's Opening Brief at 22-23; Tribe's Reply Brief at 8-10.)

agreements “subject to IGRA” because such claims affect a tribe’s governance of gaming).

The Tribe asserts that the evidence before the Superior Court (a binding, final agency determination by the NIGC) conclusively and necessarily established that Sharp’s gaming contracts were “within the preemptive scope of the IGRA.” *American Vantage*, 103 Cal. App. 4th at 596; (Tribe’s Reply Brief at 33.) In addition, the Tribe defended against Sharp’s attack on the NIGC by reference to a long and unbroken line of authority establishing that any challenge to an agency’s final action can only be litigated in federal district court under the APA, where the agency is named as a party. (Tribe’s Opening Brief at 23-24, 30-32.)

3. The United States Confirms The Agreements Are Unapproved Management Contracts Under Principles Of Deference Owed The NIGC’s Legal Determination.

The *amicus* brief filed by the United States provides support for both of the Tribe’s above jurisdictional arguments. Specifically, the United States brief confirms (1) that Sharp’s claims fail because any immunity waiver in a management contract requiring NIGC approval is void and (2) that Sharp’s claims are completely preempted because claims for breach of such a management contract are necessarily subject to IGRA.

Like the Tribe, the United States asserts that the Superior Court erred by assuming subject matter jurisdiction notwithstanding the NIGC’s legal determination that Sharp’s contracts violate IGRA. However, rather than focusing on the binding effect of the NIGC’s final agency action to compel the Superior Court to dismiss for lack of jurisdiction (under *AT&T*, 295 F.3d at 906, 909-10), the United States contends that the Superior Court erred in failing to defer to the NIGC’s 2007 Advisory Opinion, and the Chairman’s 2009 Disapproval decision. (United States’ Brief at 34-39.)

The United States finds further error with the Superior Court's preemption analysis because the ruling on the motion to dismiss failed to address the issue before the Court. (United States' Brief at 2, 28.) Expanding this argument, the government recognizes that the Superior Court never made an actual finding that the Sharp's contracts were outside the preemptive scope of IGRA, and this failure is dispositive because an unapproved management contract is "void" and unenforceable, depriving the court of subject matter jurisdiction under principles of federal preemption. (United States' Brief at 2, 33.)

Like the United States, the Tribe has consistently argued that because Sharp's breach of contract claims necessarily "concern the regulation of Indian gaming" (*American Vantage*, 103 Cal. App. 4th at 596), and because the Superior Court failed to properly evaluate those claims in light of the evidence and the law, its decision to assume subject matter jurisdiction constitutes reversible error. (Tribe's Opening Brief at 41; *see also* Tribe's Petition for Writ of Mandate, *Shingle Springs Band of Miwok Indians v. Superior Court*, No. C063645 (3rd Dist. Filed December 15, 2009), at 12, 25-26 (challenging the Court's preemption ruling on the basis that the Superior Court erred in assuming subject matter jurisdiction over the Tribe without ever reaching the actual issue before it — *i.e.*, "whether the terms of Sharp's alleged contracts potentially (or actually) violate a statute falling within an area completely preempted by federal law".))

Finally, regarding Sharp's procedural challenge to the NIGC's legal determination, the United States concurs with the Tribe's position that those issues are properly raised only in federal district court under an APA challenge; and thus the Superior Court had no jurisdiction over Sharp's challenge to the final agency action. (United States' Brief at 2, 40.)

Each of the jurisdictional arguments discussed above provide this Court compelling and independent reasons to reverse the judgment against the Tribe. Indeed, as both the United States and the Tribe emphasize, the Superior Court erred by failing to recognize that the ELA and the concurrently executed promissory note are void for lack of NIGC approval. Further, but for that error, this case would have been dismissed long ago on the basis that there was no contract to enforce and no possible waiver of sovereign immunity.

ARGUMENT

I. The United States' Brief Confirms This Court Is Without Subject Matter Jurisdiction For Lack Of A Sovereign Immunity Waiver.

The United States' *amicus curiae* brief confirms that, as the Tribe maintained below and on appeal, the NIGC's position that the ELA is a management contract deprives the Superior Court and this Court of jurisdiction. (United States' Brief at 33, 40-42; Tribe's Opening Brief at 24-27; Tribe's Reply Brief at 10 n.6, 12-13; AA/Vol.XII/pp. 3078:6-3080:6; AA/Vol.XXIII/pp. 5858:22-5859:21.) Specifically, the United States agrees with the Tribe that IGRA renders the ELA a void management contract, depriving this Court of subject matter jurisdiction. (United States' Brief at 33; Tribe's Opening Brief at 24-26.) The United States recognizes that "whether the ELA was a management contract requiring federal approval — is 'fundamentally a question of law' that begins with an interpretation of IGRA and IGRA regulations." (United States' Brief at 28; Tribe's Opening Brief at 20-21, 26.)

The United States and the Tribe also agree the Superior Court was not free to disregard the NIGC's resolution of whether the ELA is a management Contract. (United States' Brief at 27; Tribe's Opening Brief at 24-26.) Moreover, the United States concurs in the Tribe's explanation

that Sharp misread *American Vantage*, which did not hold a state court can enforce an unapproved management contract. (United States' Brief at 31; Tribe's Reply at 10.)

The Tribe has consistently argued (below and on appeal) that the NIGC 2009 decision is "final agency action" binding on the state court until challenged in an APA appeal. (Tribe's Opening Brief at 24-26; Tribe's Reply Brief at 12-13; AA/Vol.XII/pp. 3078:6-3080:6; AA/Vol.XXIII/pp. 5858:22-5859:21.) The United States further agrees with the Tribe's position that the trial court erred in disregarding the NIGC's 2009 decision on the grounds that it was not "final agency action." (United States' Brief at 28; Tribe's Opening Brief at 30, 33-35.) However, rather than resting on the 2009 decision alone, the United States' position is that the state courts must defer to advisory opinions (such as the NIGC's 2007 decision), and formal determinations (such as the NIGC Chairman's 2009 decision), which establish that the ELA is a management contract. (United States' Brief at 40.)

In the end, the Tribe's "final agency action" reasoning and the United States' deference analysis each follow the same path to the inexorable conclusion that the state courts lacks jurisdiction for the following reasons:

1. As an unapproved management contract, the ELA is void. (United States' Brief at 33 (citing *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.* (7th Cir. 2011) 658 F.3d 684 at 699-700); Tribe's Opening Brief at 26.)
2. If the ELA is void, so is any immunity waiver in the ELA. (United States' Brief at 22, 33; Tribe's Opening Brief at 26 (citing *Wells Fargo, N.A.*, 658 F.3d at 702).)

3. Absent a waiver of sovereign immunity, state courts lack jurisdiction over Indian tribes. (United States' Brief at 22, 33; Tribe's Opening Brief at 26.)

This Court has a fundamental duty to evaluate whether it has subject matter jurisdiction. *Peery v. Superior Court* (1985) 174 Cal. App. 3d 1085, 1095 (“[I]n every proceeding, . . . the court rendering a decree must pass on and determine its own jurisdiction.”). The United States' brief confirms that, as the Tribe has shown, the ELA's status as a management contract deprived the Superior Court, and now deprives this Court, of jurisdiction over the Tribe.

II. The Superior Court Lacked Legal Basis To Assume Subject Matter Jurisdiction Over The Tribe On The Ground Of Preemption.

A. The Legal Error The Government Identifies In Its Amicus Brief Is Consistent With The Tribe's Position On Appeal.

Addressing the issue of preemption, the United States observes, “courts have jurisdiction to determine their jurisdiction,” meaning the Superior Court necessarily had jurisdiction to determine whether it possessed subject matter jurisdiction over Sharp's claims. (United States' Brief at 24.) The Tribe agrees. Specifically, and in response to a passage in the government's brief, the Tribe does not contend that the Superior Court “lost jurisdiction once the NIGC took final agency action disapproving the ELA”; nor does the Tribe assert that “Sharp's only remedy following the 2009 Disapproval was to challenge that decision in a federal court APA action.” (United States' Brief at 25.) Rather, the Tribe relied on the NIGC's legal determination and has consistently maintained that the Superior Court erred by failing to address whether Sharp's claims are “subject to the IGRA” and preempted because they potentially (or actually) “concern the regulation of Indian gaming activities.” *American*

Vantage, 103 Cal. App. 4th at 590; *Boisclair*, 51 Cal. 3d at 1152. (Tribe's Opening Brief at 41.)

In support of its Motion to Dismiss, the Tribe provided the Superior Court with the NIGC's 2007 Advisory Opinion (AA/Vol.I/pp. 0262-027), urging the court to apply the deference standard set forth in *Skidmore v. Swift & Co.* (1944) 323 U.S. 134. (AA/Vol.II/p. 400.) Relying on the Opinion, the Tribe argued that "because it is beyond reasonable dispute that advisory opinions of governmental agencies are admissible and properly reviewed for guidance by the Courts, there is no reason for this Court to ignore the analysis of the NIGC as to the legal effect of Sharp's contracts under IGRA." (AA/Vol.II/p. 400.) The Tribe later supplemented the record by submitting the 2009 "Disapproval" decision from the NIGC's Chairman to the Superior Court. (AA/Vol.V/pp. 1320-1334.) Relying on the Chairman's formal determination, the Tribe again asked the Superior Court to afford the NIGC's legal determination "considerable deference." *United States ex rel Maynard Bernard v. Casino Magic Corp.* (8th Cir. 2002) 293 F.3d 419, 425; (AA/Vol.IV/p. 1104.) The Tribe also argued that the NIGC Chairman's formal decision unequivocally established that "a possible outcome" of this case was a finding that Sharp's claims are "subject to IGRA regulation," and the case was properly dismissed for lack of subject matter jurisdiction on that basis. (*Id.*) Sharp argued otherwise. It contended that the Chairman's letter was "not entitled to any deference," citing purported problems with "authority" and "procedural irregularities." (AA/Vol.III/p. 0618.)

Thereafter, once the Chairman's 2009 Disapproval became final agency action, the Tribe *defended against Sharp's attack on the agency's legal determination* by arguing Sharp could not collaterally challenge the NIGC's final agency action by asking the Superior Court to purportedly "overrule" it. *AT&T*, 259 F.3d at 906, 908, 909. Yet, that was precisely

what Sharp asked the lower court to do. Importantly, however, the fact that the Superior Court assumed jurisdiction that it lacked to reach issues that should have been resolved by a federal district court under the APA does not mean the court was without jurisdiction to reach the preemption question before it. Quite clearly, the Superior Court had jurisdiction to decide the Tribe's preemption motion. The problem, as both the Tribe and the United States assert, is that the Superior Court erred when it denied the Tribe's Motion to Dismiss by focusing on Sharp's improper procedural challenge to the NIGC's determination — and thereby failing to address the actual preemption question presented.

In sum, while the Superior Court undeniably had jurisdiction to determine its own jurisdiction, it did not have jurisdiction to determine the procedural correctness of the federal agency's decision, let alone, the scope of the authority the agency exercised in its own discretion. As such, the Superior Court erred by denying the Tribe's Motion to Dismiss. on that basis.

B. The Superior Court Did Not Exercise Its Jurisdiction Consistent With IGRA.

Identifying the same problem with the Superior Court's ruling as the Tribe earlier advanced, the United States asserts the Superior Court erred by assuming subject matter jurisdiction and making a finding that "the Chairman's 2009 Disapproval was not 'final agency action' binding on the state court." (United States' Brief at 28.) But, as the United States explains: "This is a *non sequitur*." (*Id.*) Patently, the Superior Court's ruling that the NIGC's "final agency action" was not "final agency action" does not begin to answer the question of whether Sharp's contracts fell within IGRA's preemptive scope. Put differently, and as stated in the Tribe's Writ Petition before this Court, the Superior Court's "apparent belief that issuing a ruling rejecting the NIGC's 'final determinative action'

would resolve the Tribe's preemption defense, only further underscores that it did not understand the issue before it." (Writ Petition, at 12.) Instead, the issue, as the Tribe has consistently maintained, is "whether the terms of Sharp's alleged contracts potentially (or actually) violate a statute falling within an area completely preempted by federal law (i.e., IGRA)." (*Id.* at 12-13; 25-26; Tribe's Opening Brief at 41.)

Because the Superior Court never addressed or made a finding on the preemption question actually before it, and because there was no "substantial evidence" to support the Superior Court's ruling that it had subject matter jurisdiction over the Tribe (Writ Petition at 22-34), the Tribe and the United States agree that the Superior Court's "ruling setting aside the NIGC's decision did not resolve the preemption question." (United States' Brief at 28.)³

C. The Superior Court Had No Jurisdiction To Review Sharp's Procedural Challenge To The NIGC's Final Agency Action.

The Tribe and the United States further agree that "the APA provides the proper mechanism for challenging the NIGC's final agency action." (United States' Brief at 25.) Specifically, with respect to Sharp's

³ Any suggestion that the jury answered whether the ELA or Promissory Note was a management contract, even if the Superior Court did not, is wrong. The record confirms the jury was never asked to make this determination. (*See* AA/Vol.XXVIII/pp.7311-7318; *see also* United States' Brief at 16 n.7; *id.* at 43 n.16.) During closing argument, Sharp's counsel confirmed that whether its agreements were management contracts was "not being claimed as a defense to the breach of contract." (RT/Vol.XV/p. 4055:5-15; 4054:20-27). The Tribe's counsel reiterated this same point in closing, emphasizing the issue was a legal one, and not for the jury. (*Id.*, p. 3975:8-20; 3975:21-3979:3.); *see Wells Fargo Bank, N.A.*, 658 F.3d at 699-700. Further, the only reason the issue was discussed in closing was because of a curative jury instruction proposed by the trial court in response to the Tribe's evidentiary objection related to improper testimony by Sharp's principal. (RT/Vol.XIII/pp. 3635:23-3636:9, 4057:9-4058:3.)

procedural challenge of the NIGC's legal determination, the government expressly concurs with the Tribe that the Superior Court had no "jurisdiction to review the procedural regularity of the NIGC's final agency action," because such a challenge is limited to "an APA action in federal district court." (United States' Brief at 2, 40.) As a result, and as the Tribe urges this Court to find, the Superior Court exceeded its jurisdictional authority in reaching the merits of Sharp's improper collateral challenge to the alleged procedural infirmities of the NIGC's final determination.

The agreement between the United States and the Tribe on this issue is significant, as virtually all of the issues raised by Sharp regarding the NIGC's action concern "alleged procedural flaws" that, in the words of the United States, "were not flaws and are irrelevant to the matters before the Court." (United States' Brief at 35.)

D. The Superior Court Was Either Bound By The NIGC's Substantive Findings Or Required To Defer To The Agency, And It Erred By Assuming Subject Matter Jurisdiction In Disregard Of The NIGC's Findings.

Where the preemption arguments advanced by the Tribe and the United States differ is on the focus of the analysis as applied to this case, but the result is the same under each analysis.

1. The Preemption Argument Advanced By The Tribe

As discussed above, it has been the Tribe's position from the outset that deference applies to advisory opinions and formal determinations of a government agency. Once final agency action occurred, however, the Tribe's asserted that the focus of the analysis necessarily changed, and that the dispute over deference was no longer the issue. Instead, as the Tribe argued and continues to believe, the Superior Court was required to appreciate the distinct legal significance associated with final agency action (as compared to an agency advisory opinion that demands deference),

because the only proper way for Sharp to challenge that former action was in a federal district court action. (Tribe's Opening Brief at 30-33.) That meant, as the Tribe continues to contend, that the Superior Court was obligated to recognize that, by virtue of that final agency action, there was no possibility this case could remain in state court, and the Tribe's Motion to Dismiss on preemption should have been granted. (Tribe's Opening Brief at 33-35.)

2. The Preemption Argument Advanced By The United States

Agreeing that the proper method to challenge final agency action is through a district court action under the APA (United States' Brief at 2, 25, 40-41), the United States asserts that the preemption analysis the Superior Court should have employed still appropriately focused on deference — notwithstanding Sharp's separate ability to challenge the NIGC's determination in federal district court. (United States' Brief at 35-41.) On that point, as discussed above, both the Tribe and the United States further agree (in contrast to Sharp), that determinations made by government agencies are properly afforded deference. However, recognizing, that "not every contract between a tribe and a non-Indian contract is subject to ...IGRA," the United States contends that the Superior Court should have analyzed the terms of the ELA, afforded deference to the NIGC, and as a result, concluded that enforcing Sharp's contract would have violated IGRA's protective purpose. (United States' Brief at 20-22, citing *American Vantage*, 103 Cal. App. 4th 596; United States' Brief at 35-41.) In addition, and as in *Auer*, the United States asserts that the NIGC's interpretation is owed deference. (United States' Brief at 36, 39-40.)

3. **The *American Vantage* Decision Controls The Preemption Question Before The Court And Supports Dismissal.**

Importantly, under either analysis discussed above, the result is the same. The NIGC made a legal determination that the Superior Court was wrong to disregard (let alone purport to overturn), and it was legal error for the Superior Court to assume subject matter jurisdiction where only one legal conclusion was possible: Sharp's gaming contracts violate IGRA, depriving the Superior Court of jurisdiction. Further, with respect to this Court's resolution of the legal error the Tribe and United States identify, the parties (Sharp and the Tribe), as well as the United States, agree that *American Vantage* is critical to the Court's analysis. *American Vantage* supports the Tribe's and the United States' positions, and confirms Sharp's misreading of the case.

As forcefully argued in the United States' *amicus* brief, "*American Vantage* did not hold that a State court can enforce a contract that the court finds to be an unapproved management contract requiring NIGC approval." (United States' Brief at 31.) Rather, *American Vantage* endorses the view, articulated by the United States and the Tribe, that a state court first assumes jurisdiction to decide preemption, and then determines whether it has to subject matter jurisdiction over the case by reviewing evidence — including any legal decision by the NIGC — to determine whether the claims are "subject to the IGRA." *American Vantage*, 103 Cal. App. 4th at 596; (United States' Brief at 31; Tribe's Opening Brief, at 41.) Applying this standard to the facts in *American Vantage*, the Court of Appeal there concluded that because the NIGC had issued an opinion finding the disputed contracts were *not* unapproved management contracts, meaning they were not "subject to IGRA," and the plaintiff's claims could not possibly fall within IGRA's protective structure. (*Id.*) Of course, as both

the United States and the Tribe emphasize, precisely the opposite is true here. The NIGC issued a 2007 Advisory Opinion, as well as a 2009 Disapproval by the Chairman (which was later published as the agency's final action), confirming that Sharp's contracts were unapproved management contracts, and, therefore "void" under IGRA. Under these facts, as the United States' briefing confirms, the only fair reading and application of *American Vantage* compels an opposite result here — specifically, dismissal for lack of jurisdiction to enforce contracts the federal government found violated the federal statute's protections. (United States' Brief at 29-31.)

Moreover, as the United States further asserts, Sharp's reading of *American Vantage* to stand for the proposition that a contract which the NIGC has declared "void" and, therefore, unenforceable, can still be enforced in a state court action, is untenable. (United States' Brief at 31.) Indeed, to state Sharp's argument is to refute it. "As *American Vantage* itself recognized [at 596], an unapproved management agreement is void only *because* of IGRA regulation. 25 C.F.R. § 533.7. And the NIGC plainly has regulatory jurisdiction over unapproved management contracts." (United States' Brief at 31.)

In addition, it is a fundamental and undisputed principle of federal law that an unapproved management contract is "void and unenforceable unless and until approved by the NIGC," and for that reason, the Superior Court's decision to assume subject matter jurisdiction on the basis that "the status of the agreements under IGRA was irrelevant to their enforcement" constitutes reversible legal error. (United States' Brief at 17; *see also* United States' Brief at 18-20, citing cases confirming that unapproved management contracts are void and unenforceable; Tribe's Reply Brief at 8, 12-13.)

III. Subject Matter Jurisdiction Is Never Waived And Certainly Was Not Waived By The Tribe Here.

A. The Tribe Asserted The Superior Court Erred By Failing To Reach And Issue A Ruling Demonstrating It Had Subject Matter Jurisdiction Over The Tribe.

While the Tribe also consistently maintained that Sharp's collateral attack on the NIGC's findings was improper, it nevertheless analyzed Sharp's position in the event this Court determined those issues were properly presented. Importantly, the Tribe advanced the same argument asserted by the United States with respect to whether Sharp's contracts were subject to NIGC review, and therefore any argument by Sharp that the Tribe waived this issue necessarily fails.

Specifically, the Tribe, like the United States, asserted that the Superior Court erred by denying the Tribe's motion to dismiss because the court failed to recognize that "for a management agreement involving Indian land to become a binding legal document, it must be approved by the NIGC." (Tribe's Opening Brief, 35, citing *Casino Magic*, 293 F.3d at 421.) In addition, the Tribe asserted the NIGC correctly found the ELA violated IGRA by giving Sharp a proprietary interest in the Tribe's gaming operation, and was a "management contract" under IGRA because it gave Sharp control over the "day-to-day" operation, selection, control and placement of the casino's gaming machines. (Tribe's Reply Brief at 20-22.) The Tribe also argued the alleged procedural infirmities Sharp identified lacked any meaningful basis, as the NIGC had properly followed its regulations and federal guidelines (Tribe's Opening Brief at 36-39; Tribe's Reply Brief at 22-29.)

As a result, Sharp cannot credibly argue the Tribe waived its right to have this Court determine the legal inadequacy of the Superior Court's preemption ruling.

B. Subject Matter Jurisdiction Cannot Be Created By Consent Or Established Through Waiver.

Of course, even if the Court concludes the parties did not litigate the precise legal issue advanced by the United States, that would not mean this Court could disregard the government's preemption argument. The United States' position is properly before this Court because questions involving subject matter jurisdiction can never be waived, including on appeal, and even when raised for the first time by *amicus curiae*. *In re Marriage of Oddino* (1997) 16 Cal. 4th 67, 73 (Supreme Court must review objections on jurisdictional grounds raised for the first time in petition for review because, "[a]s a matter of fundamental jurisdiction affecting the power of the lower courts to act . . . the issue must be addressed"); *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal. 3d 497, 510-11 ("Although it is the general rule that an *amicus curiae* accepts the case as he finds it . . . , we believe that a consideration of the matter sought to be raised is incumbent upon us because . . . a question of jurisdictional dimension appears to be involved."); *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal. App. 4th 440, 473 ("[A]*micus curiae* may raise jurisdictional questions which cannot be waived even if not raised by the parties."); *see also Lavie v. Procter & Gamble Co.*, (2003) 105 Cal. App. 4th 496, 503-04 ("The Supreme Court has justified consideration of a new issue on appeal for the first time when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy.").⁴

⁴ Sharp's cases, cited in opposition to the United States' application to file its brief, are not to the contrary as the amici in those cases did not raise issues of the trial court's subject matter jurisdiction. *See Eggert v. Pac. Sav. & Loan Co.* (1943) 57 Cal. App. 2d 239, 251 (*amicus* sought to modify judgment); *Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am.* (2001) 90 Cal. App. 4th 1151, 1161 n.6 (*amicus* questions concerned

C. Sharp, Not The Tribe, Had To Prove Subject Matter Jurisdiction Existed And Its Failure To Do So Was And Remains Dispositive, Requiring Dismissal.

As the United States explains, the Superior Court's preemption ruling "found no flaw in the NIGC's substantive legal conclusion, either as to its interpretation of the term 'management contract' or its interpretation of the ELA." (United States' Brief at 41.) This failure, as the Tribe and the United States agree, was the result of the Superior Court's apparent misunderstanding of the actual preemption question before it. But that is a failure for which Sharp bears ultimate responsibility. Put simply, Sharp failed to establish a basis to proceed with its case, by itself failing to address the difficult dispositive jurisdictional question before the Court. *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal. App. 4th 190, 205 (plaintiff "bears the burden of proving by a preponderance of the evidence that jurisdiction of the court in fact exists" (citing *Lawrence*, 153 Cal.App.4th at 1369)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S. 375, 377. In particular, Sharp failed, *inter alia*, to demonstrate how a contract that purported to give it 30 percent of revenue off the top, for any casino ever developed by the Tribe, was somehow not a "management contract" under IGRA as the NIGC found.

As a result, Sharp received the ruling it sought from the Superior Court, but that ruling failed as a matter of law to establish the requisite

limitation on tort liability in workers' compensation claims); *Rieger v. Arnold* (2007) 104 Cal. App. 4th 809, 823 (amicus asked court to expand its interpretation of statute prohibiting the consideration of plaintiff's prior sexual conduct sexual harassment case); *Berg v. Traylor* (2007) 148 Cal. App. 4th 809, 823 & n.5 (amicus argument about defense to enforcement of arbitration award); *Great Western Sav. & Loan Assoc. v. City of Los Angeles* (1973) 31 Cal. App. 3d 403, 415 n.14 (silent as to issues amici raised).

subject matter jurisdiction to adjudicate its claims, and the Superior Court erred by failing to dismiss Sharp's lawsuit. *See Yavapai-Apache Nation*, 201 Cal. App. 4th at 205; *see also Kokkonen*, 511 U.S. at 377.

IV. The United States' Application Of NIGC Regulations To The Note — A Collateral Agreement To The ELA — Confirms The Lack Of Subject Matter Jurisdiction Over The Entire Suit.

The Tribe has also consistently argued that the Promissory Note executed with the ELA is void under IGRA as a collateral agreement to a management contract. (Tribe's Opening Brief at 27-30; Tribe's Reply Brief at 29-32; AA/Vol.XXIII/p. 5862.) The United States' brief confirms the correctness of that position by concluding that the Note is void under the NIGC's regulations. (United States' Brief at 42-47.)

While the Tribe argued the Note and its purported sovereign immunity waiver were void, Sharp tried to defeat the argument by claiming that a "collateral agreement" to a "management contract" is only void under IGRA and its implementing regulations if the collateral agreement itself provides for management of the gaming operation. (Sharp's Respondent's Brief at 38-40.)

The United States disagrees with that position. As the United States' *amicus curiae* brief recognizes, Sharp's interpretation of the NIGC's regulations is wrong. The significance of the government's conclusion in this regard cannot be overstated, as its reasonable interpretation of its regulations is due this Court's "wide deference." *Public Lands for the People, Inc. v. U.S. Dept. of Agriculture* (9th Cir. 2012) 697 F.3d 1192, 1199, *cert. denied* (2013) 133 S.Ct 1464; *see Env'tl. Protection Info. Ctr. v. Cal. Dep't of Forestry & Fire Protection* (2008) 44 Cal. 4th 459, 490 ("[W]e will not disturb the agency's [interpretation of its own regulations] without a demonstration that it is clearly unreasonable."). Because the agency's interpretation renders the Note and any sovereign immunity

waiver therein void, it deprives this Court of subject matter jurisdiction. *Wells Fargo Bank, N.A.*, 658 F.3d at 702.

The United States interprets the regulatory definition of “management contract” (25 C.F.R. § 502.15) with reference to IGRA’s requirement that the agency consider management contracts “to include all collateral agreements to such contract that relate to the gaming activity.” 25 U.S.C. § 2711(a)(3). As the United States explains, “all documents defining the rights and liabilities of the parties with respect to the gaming operation are jointly considered as comprising the relevant ‘management contract,’ notwithstanding the manner in which the parties choose to structure their agreements.” (United States’ Brief at 42.)

Sharp, on the other hand, would effectively interpret 25 C.F.R. § 502.15 to trump IGRA’s requirement that the NIGC review collateral agreements along with the management agreements to which they relate. The “management contract” definition of § 502.15 provides that a “collateral agreement” will be considered a management agreement, in its own right, if it “provides for the management of all or part of a gaming operation.” This rule makes sense, as a collateral agreement directly providing for actual management would not escape review merely because it happened to be “collateral” to another management contract.

As the United States explains (United States’ Brief at 44-45) — and Sharp fails to comprehend — an agreement collateral to a management contract *also* requires NIGC approval where it “relate[s] to the gaming activity,” even if it does not itself provide for management. 25 U.S.C. § 2711(a)(3); 25 C.F.R. § 502.5. In other words, that a collateral agreement “provides for the management of all or part of a gaming operation” is sufficient, but not necessary, to trigger NIGC review.

Here, the record plainly establishes, and Sharp does not dispute, that (1) the Note meets the definition “collateral agreement” because it “is

related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor” (25 C.F.R. § 502.5); and (2) the Note “relate[s] to the gaming activity.” 25 U.S.C. § 2711(a)(3). Specifically, the Tribe demonstrated (Tribe’s Opening Brief at 28), and Sharp did not dispute (Sharp’s Respondent’s Brief at 38-40), that the Note and ELA are not only “directly or indirectly” related, they constitute a single contract under California law. *See* Civ. Code § 1642. The parties entered the ELA and the Note contemporaneously on November 15, 1997, and the Note’s repayment date expressly references Sharp’s obligation under the ELA. (AA/Vol.XV/pp. 3490, 3503; AA/Vol.XXIII/pp. 5870, 5878.) Indeed, Sharp has admitted the ELA and the Note are so closely related that the provisions in the Note can be viewed as consideration for the ELA. (AA/Vol.XXIII/pp. 5973:17-5974:8; AA/Vol.XVI/pp. 3864:17-3865:8.)

Nor is there any dispute that the Note relates to the Tribe’s gaming activity. (Tribe’s Opening Brief at 28-29.) The Note requires payment to Sharp out of the revenue from the Tribe’s “Gaming Facility and Enterprise,” expressly contemplating, in certain scenarios, payment of up to “25% of the gross net revenues [the Tribe] receives from the operation of the video gaming devices.” (AA/Vol.XV/p. 3503; AA/Vol.XXIII/p. 5878.) Additionally, the Tribe’s repayment obligation under the Note is triggered when “four hundred (400) video gaming devices” are put in operation at the casino contemplated under the ELA. (AA/Vol.XXIII/p. 5878; AA/Vol.XV/p. 3503.) Moreover, the Note reflects money Sharp advanced to the Tribe for their failed Crystal Mountain Casino venture. (AA/Vol.XV/pp. 3503-3504; AA/Vol.XXIII/pp. 5878-5879.)

Importantly, on this record, the United States has confirmed that, in its view of the regulations, the Tribe’s showing was sufficient to trigger the

NIGC review requirement and render the Note void without NIGC approval. (United States' Brief at 47.) Affording deference to the government's position, required under *Auer*, 519 U.S. at 452, this Court should reach that same conclusion.

Finally, in the event Sharp asserts a waiver argument, claiming the United States' position on the Note differs in some way from the Tribe's, such an argument would be without basis. Indeed, the Tribe argued below in its motion for judgment on the pleadings, and on appeal, that the Note was void as a collateral agreement to the ELA. (Tribe's Opening Brief at 27-30; Tribe's Reply Brief at 29-32; AA/Vol.XXIII/p. 5862.) In any event, an argument that an Indian tribe has not waived its immunity goes to the Court's subject matter jurisdiction (*Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal. App. 4th 1364, 1368), and so "may be raised at any time — including on appeal." *Great W. Casinos v. Morongo Band of Mission Indians* (1999) 74 Cal. App. 4th 1407, 1418-19; *California ex rel. Cal. Dep't of Fish & Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1154.

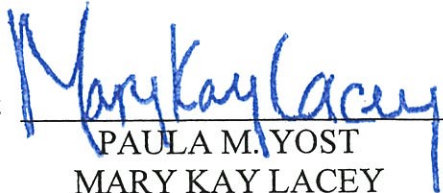
As a result, this Court should hold, as both the United States and the Tribe have demonstrated, that subject matter jurisdiction is lacking because the Note, along with its immunity waiver, is void as an unapproved management contract.⁵

CONCLUSION

This Court has a fundamental duty, as did the Superior Court, to evaluate whether it has subject matter jurisdiction over Sharp's claims. The

⁵ As discussed above, the United States correctly pointed out, and the record confirms, that the jury was not instructed or authorized to find the Note (or the ELA) to be a management contract. See footnote 3, *supra*. This makes sense because, as the Tribe urged the trial court (AA/Vol.XXIII/p. 5862), and as the United States confirms, this was a determination for the court. *Wells Fargo Bank, N.A.*, 658 F.3d at 699-700.

United States' brief provides an additional basis to dismiss, and further confirmation that the federal regulatory scheme established under IGRA deprived the Superior Court of subject matter jurisdiction over the Tribe.

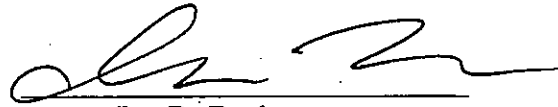
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CERTIFICATION OF BRIEF LENGTH

I, Ian R. Barker, counsel for Defendant and Appellant, certify that this brief contains 7,185 words, including footnotes, but excluding the tables and this certification, as calculated by the word processing program used to prepare this brief.

Dated: August 8, 2013

A handwritten signature in black ink, appearing to read 'Ian R. Barker', written over a horizontal line.

Ian R. Barker

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 Dentons US LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On August 8, 2013, I served the foregoing document, described as:

**APPELLANT'S RESPONSE TO UNITED STATES'
AMICUS CURIAE BRIEF**

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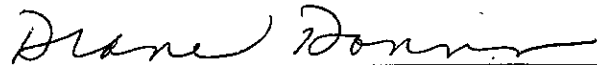
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