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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA; RUMSEY GOVERNMENT PROPERTY FUND I, LLC; RUMSEY DEVELOPMENT CORPORATION; RUMSEY TRIBAL DEVELOPMENT CORPORATION; RUMSEY MANAGEMENT GROUP; AND RUMSEY AUTOMOTIVE GROUP,

Plaintiffs,

v.

HOWARD DICKSTEIN; JANE G. ZERBI; DICKSTEIN & ZERBI; DICKSTEIN & MERIN; ARLEN OPPER; OPPER DEVELOPMENT, LLC; METRO V PROPERTY MANAGEMENT COMPANY; CAPITAL CASINO PARTNERS I; MARK FRIEDMAN; FULCRUM MANAGEMENT GROUP LLC; FULCRUM FRIEDMAN MANAGEMENT GROUP LLC, DBA FULCRUM MANAGEMENT GROUP LLC; ILLINOIS PROPERTY FUND I CORPORATION, ILLINOIS PROPERTY FUND II CORPORATION, ILLINOIS PROPERTY FUND III CORPORATION; 4330 WATT AVENUE, LLC; and DOES 1-100,

Defendants.

Case No. 2:07-CV-02412-GEB-EFB

DEFENDANTS HOWARD DICKSTEIN; JANE G. ZERBI; DICKSTEIN & ZERBI AND DICKSTEIN & MERIN's OPPOSITION TO MOTION TO REMAND

DATE: January 28, 2008
TIME: 9:00 a.m.
COURTROOM: 10
HON. GARLAND E. BURRELL, JR.

[28 U.S.C. §§ 1331, 1441, 1446 – Federal Question]

Yolo County Superior Court
Case No. CV 07-2200

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MISCELLANEOUS

I. INTRODUCTION

Federal courts possess exclusive jurisdiction to resolve an issue of federal Indian gaming policy, presented squarely by Plaintiffs' Complaint in this action. Defendants properly removed this action based upon the complete federal preemption of claims implicating Indian gaming governance and the presence of a substantial federal question regarding the meaning of "management" under the Indian Gaming Regulatory Act ("IGRA"). In the Motion to Remand, the Rumsey Indian Rancheria of Wintun Indians and related organizations (collectively, "the Tribe") seek to construe and characterize their complaint in many ways calculated to highlight aspects of the case that do not implicate IGRA. The Tribe, however, largely ignores its own pleading language, which incorporated IGRA into every single cause of action, as well as its prayer for a remedy, disgorgement, available to it under IGRA. Most significantly, the Tribe disregards the established principle that questions involving the interpretation, construction or application of IGRA must be exclusively resolved in the federal courts. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996).

The issue before the Court is narrow and straightforward. Does resolution of this dispute require the interpretation, construction, or application of IGRA? While the Tribe's remand motion discusses many other issues that are allegedly presented by this lawsuit, the simple fact is that the complaint squarely raises and presents a question under IGRA. The Tribe could have drafted and filed a different complaint, steering clear of IGRA violation allegations, if it wanted to litigate this case in state court. But the complaint the Tribe drafted and filed presents a straightforward claim that Opper's alleged management contract violates IGRA. The presence of this claim in the Tribe's complaint mandates federal jurisdiction. The Tribe's remand motion, therefore, must be denied.

The Tribe's remand motion fails both due to complete federal preemption and the presence of a substantial federal question. IGRA preempts state law claims involving the governance of tribal gaming on Indian land. The Tribe alleges that "Opper's agreement was void, since federal law requires all contractors who *manage Indian-owned casinos* to be approved by the NIGC." Compl., ¶ 16 (emphasis added). The dispute over whether Opper

managed the casino, and therefore needed NIGC approval for the agreement, rests on the question of how tightly federal regulatory power should constrain Indian sovereignty. Such claims are completely preempted because they directly place at issue the Tribe's authority to govern certain gaming-related activity without federal oversight. Similarly, many of the Tribe's claims depend upon the resolution of a substantial federal question. IGRA requires management contracts to be approved by the NIGC but leaves the term "management" undefined. To invalidate Opper's agreement with the Tribe as an illegal management contract, the Court must reach the question of what "management" means. Although the Tribe argues that alternative state theories preclude the Court from reaching this question, the outcome of claims for breach of contract, breach of fiduciary duties, and unjust enrichment depend upon how the Court defines "management."

To retain jurisdiction, the Court need only find that one of the Tribe's claims is subject to complete preemption or raises a substantial federal question. For the reasons explained below, both grounds for jurisdiction are present.

II. BACKGROUND FACTS

The Tribe filed this action against Defendants in Yolo County Superior Court, alleging a laundry list of state law claims regarding services performed by Defendants over the course of the last decade. Defendants removed based upon complete preemption and the presence of a substantial federal question. In the remand motion, the Tribe provides a detailed explanation of the allegations in the Complaint, with the exception of those that actually matter for jurisdiction. The Tribe attempts to dismiss its jurisdictionally significant allegations involving the Indian Gaming Regulatory Act as "one paragraph of the Complaint." Mot., 3. The text of the Complaint discredits this assertion. *See* Compl., ¶¶ 7, 14-16, 41-42, 44, 159, 205. "[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments." *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998). The well-pleaded complaint rule requires that the Court accept as true for jurisdictional purposes the Tribe's allegations that Opper's

compensation agreement involved casino management.[1]

Despite the Tribe's efforts to portray its claims as only concerning "tribal finances and investments," Mot., 1, the Complaint contains extensive allegations concerning Opper's management of gaming activity. The Tribe alleges generally that "Dickstein and Opper attended nearly all meetings of the Tribal Council and the Casino Board of Directors and injected themselves into all aspects of the Tribe's affairs to assert full control." Compl., ¶ 5. "The Tribe now believes Opper's entire method and structure of compensation was an artifice created to avoid regulatory oversight of Opper's management of an Indian-owned gaming facility, which was illegal without the prior approval of the National Indian Gaming Commission." *Id.* ¶ 7. "Although Opper's agreements were carefully couched to state that he had no management duties at the Casino, by all accounts, Opper was actively involved in all facets of the Casino's operation and he viewed himself as a key part of the Casino's management." *Id.* ¶ 41. "Opper's authority at the Casino included supervising the table games and bingo managers, establishing the Casino budget, developing marketing strategy, approving hiring decisions and negotiating with machine vendors and unions. Indeed, Opper claims to have been responsible for much of the Casino's success, a theory wholly consistent with his assertion of managerial control." *Id.* ¶ 42.

The Complaint's state law claims, besides incorporating all of the above management allegations, inextricably tie the propriety of Opper's conduct and compensation to the scope of IGRA's regulation. The Tribe's claims repeatedly invoke Opper's compensation structure. *See, e.g., id.* ¶¶ 140 (Count 1), 143 (Count 2), 149 (Count 3), 159 (Count 4), 166 (Count Five), 172 (Count 6), 186-87 (Count 7), 197-98 (Count 9), 205 (Count 10), 211 (Count 11), 220 (Count 13), 226 (Count 14). The Tribe's IGRA allegations dispute the nature and validity of this structure. "Under IGRA, any person who 'manages' 'all or part' of an Indian-owned casino must be pre-approved by the NIGC or such management is illegal and any fees paid subject to recission. On information and belief, Opper never submitted any of his consulting agreements to the NIGC for

[1] Nothing in this pleading should be taken as an endorsement by Defendants of the Tribe's description of Opper's activity as managerial. Because the merits are not before the court on this

its consideration and approval." *Id.* ¶ 42. "Opper's agreement for 'managing' tribal investments was never reduced to writing and he and Dickstein periodically decided which of the Tribe's assets he would be paid to 'manage.'" *Id.* ¶ 15. "It appears the real motivation for restructuring Opper's gaming contract was a concern that it was an illegal 'management contract' under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq., requiring the approval of the agency charged with regulating Indian gaming, the National Indian Gaming Commission ('NIGC'). Without such approval, Opper's agreement was void . . . ." *Id.* ¶ 16.

III. ARGUMENT

District courts possess removal jurisdiction over any claim that originally could have been brought in federal court. 28 U.S.C. § 1441(a). "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). There are, however, "a handful of 'extraordinary' situations where even a well-pleaded state law complaint will be deemed to arise under federal law for jurisdictional purposes." *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993). The Tribe's complaint presents two such situations. First, the Tribe raises claims that are completely preempted by federal statute. *See, e.g., Hall v. North America Van Lines, Inc.*, 476 F.3d 683, 687-88 (9th Cir. 2007) (extending the complete preemption doctrine to claims falling under "a uniform national liability policy for interstate carriers"). Second, the Tribe raises claims that "turn on substantial questions of federal law." *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Ultimately, "the presence of even one federal claim gives the defendant the right to remove the entire case to federal court." *Gaming Corp.*, 88 F.3d at 543; *see also Jackson v. S. Cal. Gas Co.*, 881 F.2d 638, 644 (9th Cir. 1989).

A. IGRA Completely Preempts the Tribe's Claims Involving the Governance of Gaming on Indian Lands.

1. Congress intended IGRA to completely preempt claims involving the governance of gaming on Indian lands.

IGRA provides a textbook example of an exclusive federal regulatory regime, sufficient

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jurisdictional matter, Defendants' merely repeat the allegations of the Tribe's complaint.

to convert state claims, such as those advanced by the Tribe, into federal claims. *See Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1428 (1999) (finding no authority permitting the "resolution of Indian gaming and gaming contract disputes in state court -- even as against individual Indians" because "the federal IGRA completely preempts the field of litigation involving Indian gaming"). "Complete preemption can arise when Congress intends that a federal statute preempt a field of law so completely that state law claims are considered to be converted into federal causes of action." *Gaming Corp.*, 88 F.3d at 543.[2] "[T]he text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law." *Id.* at 544.[3] Congress' statement as to the preemptive force of IGRA could not be clearer: "S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 446, 100th Cong., 2nd Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Further, IGRA provides the statutory basis for gaming on tribal lands. "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

Additionally, IGRA creates an "independent Federal regulatory authority," *id.* § 2702(1)-(3), the National Indian Gaming Commission ("NIGC"), to monitor and investigate tribal gaming activity, *id.* § 2706. The NIGC Chairman is responsible for approving all Indian gaming management contracts pursuant to federal guidelines. *Id.* § 2711. If the Chairman fails to act in a timely manner or a tribe wishes to appeal the Chairman's decision, IGRA specifies the United States District Courts as the exclusive jurisdiction for relief. *Id.* §§ 2711(d); 2714. IGRA makes no mention of state courts. *Gaming Corp.*, 88 F.3d at 545 ("As in *Metropolitan Life* and *Avco*,

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[2] The Supreme Court has found three statutes to completely preempt state law claims. The Ninth Circuit and other lower courts, however, have found preemption in a broader range of cases. *See, e.g.*, *Hall*, 476 F.3d at 687-88 (Carmack Amendment, 49 U.S.C. §14706); *Holman*, 994 F.2d at 668 n.3 (challenges to possession of tribal land).

[3] "The term 'complete preemption' is somewhat misleading because even when it applies, all claims are not necessarily covered." *Gaming Corp.*, 88 F.3d at 543. Here, even under a narrow interpretation of IGRA's preemptive scope, the Tribe raises claims sufficiently involving the governance of Indian gaming to create federal jurisdiction. *See infra* Section III(A)(2).

Congress apparently intended that challenges to substantive decisions regarding the governance of Indian gaming would be made in federal courts.").

IGRA's regulatory framework resembles other statutory regimes recently recognized as completely preempting state law claims. For example, in *Hall*, the Ninth Circuit held the Carmack Amendment to be "the exclusive cause of action for interstate-shipping contract claims alleging loss or damage to property." 476 F.3d at 688. That statute, with less decisive preemptive language and legislative history than IGRA, provides "a uniform national liability policy for interstate carriers" that is maintained by granting federal courts exclusive jurisdiction over claims alleging loss or property damage by such carriers. *Id.* at 687-88. Here, IGRA provides a similarly comprehensive regulatory system over an area of law traditionally recognized as exclusively federal in nature. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (holding that Indian commerce "is under the exclusive control of the Federal Government."). To deny the federal courts exclusive jurisdiction would be to jeopardize the NIGC's regulatory goals. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339-40 (1983) ("Permitting the state to enforce different restrictions simply because they have been determined to be appropriate for the State as a whole would impose on the Tribe the possibly insurmountable task of ensuring that the patchwork application of State and Tribal regulations remains consistent with sound management of the reservation's resources."). Moreover, in *Hall*, the Ninth Circuit held that courts should avoid "making finer distinctions" as to the applicability of complete preemption to claims within a statute's general scope. 476 F.3d at 688. Attempting to draw such distinctions "would 'defeat the purpose of the statute, which was to create uniformity out of disparity.'" *Id.* Likewise, the Court should reject the Tribe's arbitrary distinctions as to the types of claims that interfere with IGRA's federal regulation. Rather, it should apply IGRA's preemptive scope to claims that, by their express language, implicate the management of gaming activity on Indian lands.

The Tribe's generalizations against complete preemption do not outweigh Congress' clearly expressed intent that IGRA's comprehensive regulation completely preempt state claims. The Tribe's attack upon IGRA's preemptive force amounts to a vague warning that the Court

should be "reluctant" to recognize such jurisdiction, followed by a list of the non-IGRA areas the Supreme Court and Eighth Circuit have recognized as completely preempting state law. Mot., 5-6. The Tribe does not: (1) challenge Congress' express statement that it intended IGRA to preempt the field of Indian gaming governance; (2) suggest that the Eighth Circuit erred in finding IGRA to completely preempt state law claims in *Gaming Corp.*, 88 F.3d 536; or (3) present binding precedent suggesting that holding IGRA as completely preemptive of state law would be contrary to Ninth Circuit authority.[4] Indeed, the Tribe has failed to give the Court any specific reasons to reject *Gaming Corp.*'s sound holding. For the reasons explained by the Eighth Circuit in *Gaming Corp.*, the Court should retain jurisdiction over the Tribe's claims.

2. The Tribe's claims involving gaming "management" fall squarely within the preemptive scope of IGRA, sufficient to provide this court with jurisdiction.

Because the Tribe chose to raise the interpretation, construction, and application of IGRA in its claims against Opper and Dickstein, the Court must retain jurisdiction over this action. *See Gaming Corp.*, 88 F.3d at 547. The Tribe alleges that Dickstein and Opper disguised a casino management contract as a consulting agreement, Compl., ¶ 44, and seeks to have a state court invalidate it as an illegal contract under IGRA. *See* 25 U.S.C. § 2711(a)(1) (requiring NIGC approval of management contracts for gaming activity). In deciding the meaning of "management" -- and whether Opper's agreement required NIGC approval -- the state court would effectively decide the extent of the NIGC's regulatory reach. If the Court allows a state court to make such a decision, it will condone state interference with Tribe's governance of gaming activity and require "a determination outside the administrative review scheme crafted by Congress."[5] *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt.*

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[4] The Ninth Circuit has not decided whether IGRA completely preempts state law claims. In *Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, the court expressly avoided the issue because the claims did not involve the governance of gaming. 143 F.3d 481, 486 n.7 (9th Cir. 1998). Furthermore, in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 432-33 (9th Cir. 1994), neither the parties nor the court addressed complete preemption. Nor should they have addressed it, since complete preemption is a jurisdictional issue, *see Hall*, 476 F.3d at 689 n.8, and federal jurisdiction was undisputed in *Cabazon*.

[5] Because IGRA aims to promote "strong tribal governments," 25 U.S.C. 2702(1), not whatever interest may be raised by a tribe in a given case, the Court should not mistake the litigation-specific interests of the Rumsey Tribe for the interests of tribes in general. Allowing state courts

Co., 451 F.3d 44, 51 (2nd Cir. 2006). Remanding the Tribe's claims, therefore, would directly contradict Congress' stated purpose in creating IGRA's federal regulatory regime: to provide for exclusive oversight of Indian gaming. *See Gaming Corp.*, 88 F.3d at 545.

Although the Tribe challenges the propriety of Opper's compensation agreement in nearly all of its claims, those regarding Opper's alleged breach of contract (Count 2), Opper and Dickstein's breach of fiduciary duties (Counts 4 and 5), and Opper's violation of § 17200 (Count 10) demonstrate most clearly the need to determine the meaning of "management" under IGRA. These claims depend directly upon Opper's agreement with the Tribe.[6] Before the Court can decide whether Opper breached a contract with the Tribe, it must decide whether the contract is void, as the Tribe alleges. Compl., ¶ 143. In considering whether Opper or Dickstein breached their fiduciary duties, the court must determine the nature of Opper's relationship with the Tribe, potentially altering Dickstein's duties to both parties.[7] *Id.* ¶ 159. Finally, the Tribe alleges an IGRA violation as a predicate for a § 17200 claim. It claims that Opper, by "disguising illegal management of a gaming facility as management of the Tribe's assets," engaged in "unfair, unlawful and/or fraudulent acts." *Id.* ¶ 205. To answer the above questions, the Court must first decide whether Opper's agreement is subject to NIGC review as a management contract.

The meaning of "management" under IGRA implicates tribal control over gaming activity because it provides a standard for subjecting decisions to NIGC approval. Any court deciding whether an agreement with a tribe involves management will, in practice, decide

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to decide whether tribal agreements are illegal under IGRA threatens tribes' interests. While IGRA's federal regulatory regime considers the special interests of both Indian sovereignty and federal gaming policy, state courts are under no such obligation and must answer to a broader range of legal and policy concerns. *See Mescalero*, 462 U.S. at 339 ("State laws in contrast are based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation.").

[6] The Tribe's description of Opper's agreement as "merely peripheral" to tribal gaming, Mot., 8-9, is contradicted by the Complaint. The Tribe repeatedly alleges that Opper, working under the agreement, played a central role in tribal gaming management and took credit for the Tribe's gaming success. Compl., ¶¶ 7, 14-16, 41-42, 44, 159, 205. The Court must hold the Tribe to its complaint.

[7] The closer a party's relationship with a tribe, the more likely that a legal challenge to the relationship will intrude into the tribe's governance of gaming. "In *Gaming Corp.*, the fiduciary relationship between the tribe and law firm underpinned our conclusion [that IGRA completely preempted the claims]. 88 F.3d at 549." *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d

whether that agreement is subject to federal approval. A narrow interpretation of management would free more agreements from NIGC approval, increasing tribal autonomy in gaming matters at the expense of federal control. An expansive definition of the term would subject more agreements to NIGC approval, constraining Indian autonomy in favor of greater federal control. The federal government's exclusive authority to decide the scope of IGRA's regulatory reach is inherent within its implementing regulations. *See Mohawk*, 451 F.3d at 51. "If a state, through its civil laws, were able to regulate the tribal licensing process outside the parameters of its compact with the nation, it would bypass the balance struck by Congress. Any claim which would directly affect or interfere with a tribe's ability to conduct its own licensing process should fall within the scope of complete preemption." *Gaming Corp.*, 88 F.3 at 549; *see also Great W. Casinos*, 74 Cal. App. 4th at 1426 (holding that "all causes of action relat[ing] to the defendants' allegedly wrongful termination of its contract to manage the tribe's gaming operations . . . however styled, are preempted by federal law").

The Tribe's arguments regarding avoidance of substantial federal questions through reliance on alternative state law grounds do not apply in the complete preemption context. The doctrine of complete preemption seeks to ensure that only the federal government decides issues related to certain federal statutes. *Gaming Corp.*, 88 F.3d at 549 ("Any claim which would directly affect or interfere with a tribe's ability to conduct its own licensing process should fall within the scope of complete preemption."). Because the Court must accept the Tribe's allegations as true for purposes of this motion, it can only conclude that the Tribe intends to pursue its claims involving IGRA regulation in state court.

Because the Ninth Circuit has not addressed the meaning of "management" under IGRA, this issue will force the court deciding it to do more than merely apply existing law to facts. With only a non-binding policy statement as guidance, NIGC Bulletin 94-5, at 2, the court will be forced to define "management" for IGRA purposes. The Tribe's motion provides no justification for allowing a state court, rather than the NIGC, to make this decision.[8] In *Mohawk*,

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435, 440 (8th Cir. 2001).

[8] All cases relied upon by the Tribe in arguing that IGRA should not completely preempt its

the Second Circuit considered whether a construction contract allegedly collateral to a gaming management agreement could be found to be void prior to review by the NIGC. *Mohawk*, 451 F.3d at 51. The court held that by invoking "an alleged failure to comply with the regulatory regime set out in IGRA, the Tribe's case presents a threshold issue of exhaustion of administrative remedies available through the commission." *Id.* at 50. Plaintiffs could not seek to void the disputed contract in federal court because they had yet to present it to the NIGC for a determination of its status. *Id.* ("[T]his Court, like the district court below, is without jurisdiction to order any form of relief because the Tribe failed to comply with the mandatory, statutorily prescribed remedies that must be exhausted before proceeding to the federal courts."). Here, the assault upon IGRA's Indian gaming regulatory regime is even more severe because the Tribe seeks to bypass the federal system entirely for a state determination of "management." *See Gaming Corp.*, 88 F.3d at 549 ("Nothing in the structure created by IGRA or in the tribal-state compact here suggests that the management companies should have the right to use state law to challenge the outcome of an internal government decision by the nation.").

Two outcomes are possible if the Court remands this action. First, the state court could decide whether Opper's agreement is a management contract and, therefore, subject to NIGC

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claims are factually distinguishable from this action. The Eighth Circuit found no complete preemption in *Casino Resource* because the claims considered were "by one non-tribal entity against another," decreasing the "potential for interference with IGRA-apportioned responsibilities" of federally recognized Indian tribes. *Casino Res. Corp.*, 243 F.3d at 438, 440. In *Missouri ex rel Nixon v. Coeur D'Alene Tribe*, IGRA's complete preemption did not apply because the relevant gaming was not being conducted on Indian lands. 164 F.3d 1102, 1109 (8th Cir. 1999). The Eastern District decided in *County of Madera v. Picayune Rancheria of the Chukchansi Indians* that construction permits and related nuisance complaints were not within IGRA's preemptive scope because they did not implicate the governance of gaming activity. 467 F. Supp. 2d 993, 1002 (E.D. Cal. 2006). In *Sungold Gaming (U.S.A.) v. United Nation of Chippewa*, the claims did not fall under IGRA's preemptive scope because they involved only precursor agreements to a management contract, not the management agreement itself. No.1:99-CV-181, 1999 WL 33237035, at *4 (W.D. Mich. June 7, 1999). In *First Am. Casino Corp. v. E. Pequot Nation*, the court did not apply IGRA to the disputes because the federal government had not recognized the defendant tribe. 175 F. Supp. 2d 205, 208 (D. Conn. 2000). In *Bruce H. Lien Co. v. Three Affiliated Tribes*, the court based its jurisdictional decision in part on the presence of a collateral attack in tribal court upon the contract at issue. 93 F.3d 1412, 1420-21 (8th Cir. 1996). In *Gallegos v. San Juan Pueblo Bus. Dev. Bd. Inc.*, the court held that IGRA did not preempt a state replevin action because plaintiff never alleged claims involving gaming management or IGRA regulation. 955 F. Supp. 1348, 1350 (D.N.M. 1997). In *Am. Vantage Cos. v. Table Mountain Rancheria*, the court held that IGRA did not preempt claims based upon contracts already found by the NIGC not to require approval. 103 Cal. App. 4th 590, 596 (2002).

approval. As discussed above, however, such a decision would be a direct usurpation of federal regulatory authority under IGRA. "[E]xclusive federal authority over Indian affairs is rooted in three different provisions of the United States Constitution (art. I, § 8, cl. 3; art. II, § 2, cl. 2 and art. VI, cl. 2), which, together with extensive congressional legislation on Indian affairs, has broadly preempted state law." *Great W. Casinos*, 74 Cal. App. 4th at 1426 (citation omitted). "The Senate felt that 'the plenary power of Congress over Indian affairs, and the extensive government regulation of gambling, provide [it with] authority to insist that certain minimum standards be met by non-Indians when dealing with Indians.'" *Casino Res.*, 243 F.3d at 439 n.3. The NIGC enforces those minimum standards. The Tribe provides no authority by which state courts may expand or contract the scope of IGRA's federal regulation. Alternatively, the state court could stay its proceeding to allow the Tribe to ask the NIGC to determine the status of Opper's agreement. Whatever the NIGC decides, the losing party is likely to appeal. The issue will then reappear before this Court for determination of the precise issue Defendants raise as the basis for preemption. *See* 25 U.S.C. § 2714. Faced with these outcomes, the wisdom of retaining jurisdiction over the action is clear. The Court should hold the Tribe's claims involving the interpretation, construction, and/or application of IGRA to be completely preempted.

B. The Tribe's claims involving the meaning of "management" under IGRA raise a substantial question of federal law sufficient to establish federal question jurisdiction.

The Tribe's complaint presents a straightforward question of federal law on which many of its claims depend: what does "management" mean for purposes of applying IGRA? Because the question is unresolved by the Ninth Circuit and implicates the consistent application of the federal Indian gaming regulations, the Court should retain jurisdiction to answer it. In the remand motion, the Tribe spends the better part of ten pages focusing on whether its claims against Dickstein involve a substantial federal question. Mot., 13-23. The Tribe, however, fails to address the clearest federal question in need of resolution prior to reaching its claims: was Opper bound to the Tribe by a valid contract? If the Tribe's agreement with Opper is void, as the Tribe alleges, the legal framework on which it bases state law claims fundamentally shifts. *See Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (quoting *Osborn v. Bank of*

United States, 22 U.S. (9 Wheat.) 738, 822 (1824)) (holding a claim to depend upon a federal question "if the right set up by [a] party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction"). To resolve the Tribe's claims, the Court first must decide what constitutes "management" under IGRA and whether Opper's agreement with the Tribe encompasses such activity. The meaning of "management," therefore, is a substantial federal question upon which the court may retain jurisdiction.

Federal courts possess jurisdiction over state law claims that "really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law." *Grable*, 545 U.S. at 313 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)). The federal question must be "a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Id.* at 313. "[T]he presence of a disputed federal issue and the ostensible importance of a federal form are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction." *Id.* at 314. The court needs only one federal question satisfying the above requirements to retain federal jurisdiction over the matter. *Id.* at 314.

By arguing that Opper's agreement should be voided as an unapproved management contract, the Tribe necessarily raises a federal question that must be resolved before the Court can decide state law claims for breach of contract (Count 2), breach of fiduciary duties by Opper and Dickstein (Counts 4 and 5), and unjust enrichment by Opper (Count 11).[9] The Tribe cannot recover for breach of contract without demonstrating the existence of a valid contract. *See Wisconsin Winnebago Bus. Comm v. Koberstein*, 762 F.2d 613, 621 (7th Cir. 1985) ("Ho-Chunk failed to obtain contract rights because of its failure to receive approval of the Bingo Management Agreement from the Department of Interior. Because Ho-Chunk's Bingo

[9] The Tribe argues that Defendants waived the right to invoke causes of action besides Counts 4 and 5 to support substantial federal question jurisdiction. The Notice of Removal, however, provides no support for the claim. Defendants stated in the Notice that the Tribe had incorporated the jurisdictionally relevant IGRA allegations "into every cause of action." Notice of Removal, ¶ 4. Defendants identified Counts 4 and 5 as "particularly prominent[]" examples of the IGRA determinations sought by the Tribe's claims, but did not limit their removal to those counts. *Id.* Therefore, the Tribe was on notice that the incorporation of its IGRA arguments could be raised with regard to any of the claims.

Management Agreement with the Business Committee is null and void, it may no longer argue that the Business Committee may possibly deprive it of its rights under the Agreement by refusing to grant it a bingo license."). Moreover, if the contract is void as alleged, quasi-contract recovery may not be available. *See* 1 Witkin, Summary 10th Contracts, § 436, p. 476 (2005). Similarly, the fiduciary duties owed by Opper to the Tribe will vary depending upon the nature and legal force of their agreement. *See A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) ("The plain words of section 81 simply render the contract void in the absence of BIA approval. Since it is void, it cannot be relied upon to give rise to *any* obligation to the Band, including an obligation of good faith and fair dealing." (emphasis in original)). Moreover, the availability of the Tribe's requested relief for the fiduciary claims -- disgorgement -- will depend upon how the Court characterizes Opper's agreement. Compl., ¶ 228. Finally, it is unclear that the Tribe can recover for unjust enrichment based upon a contract rendered illegal by the absence of NIGC approval. *See Palm Springs Paint Co. v. Arenas*, 242 Cal. App. 2d 682, 688 (1966) (discussing a contract previously found by a federal court to be invalid for failure to obtain approval required by federal law). For these claims, the Court must define "management" and determine whether Opper's activity falls within the term's meaning before it can reach the Tribe's state law theories.

The federal government has a serious interest in having a federal forum decide the meaning of "management" for IGRA purposes. *Grable*, 545 U.S. at 313. The meaning of "management" is "a nearly 'pure issue of law . . . that could be settled once and for all and thereafter would govern numerous . . . cases.'" *Empire Healthchoice Assurance, Inc. v. McVeigh*, -- U.S. --, 126 S. Ct. 2121, 2137 (2006) (internal quotation marks and citation omitted). In a situation analogous to this case, the Fourth Circuit considered whether a party was an "owner" for Clean Air Act purposes. The court held that "resolution of the dispute requires the interpretation and application of the Act to the contractual arrangement between the parties. This is undoubtedly a federal question and, we believe, sufficiently substantial to justify invocation of federal-question jurisdiction." *Ormet*, 98 F.3d at 807. Moreover, the Ninth Circuit has held that a federal question exists when (1) a party seeks relief based upon the violation of

regulatory rules and (2) the regulatory system vests jurisdiction in the district courts. *See Sparta*, 159 F.3d at 1211. In *Sparta*, despite advancing only state law claims, the plaintiff "specifically alleged violation of exchange rules, a matter committed exclusively to federal jurisdiction." *Id.* at 1213. The court concluded that "[w]hen a plaintiff chooses to plead 'what must be regarded as a federal claim,' then 'removal is at the defendant's option.'" *Id.* (quoting *Caterpillar Inc.*, 482 U.S. at 399). Here, federal jurisdiction is similarly appropriate because (1) the Tribe alleges that Opper managed casino operations under an agreement unapproved by the NIGC, in violation of IGRA, *see, e.g.*, Compl., ¶ 7, and (2) IGRA vests judicial review in the federal district court, 25 U.S.C. §§ 2711(d), 2714. Despite the Tribe's efforts to bury its IGRA allegations beneath state claims, the court possesses jurisdiction to consider the substantial federal question raised in the Complaint.

The Tribe vastly overstates the risk posed by retaining jurisdiction over claims regarding the meaning of "management" because state claims regarding IGRA's scope will be rare. The Court should not retain jurisdiction merely because the complaint references a federal statute, but because there is an unanswered question regarding the meaning of "management" under IGRA that is central to the regulatory regime's operation. The very fact that the term has yet to be defined by a federal court suggests that there is not, as the Tribe suggests, "a horde" of claims waiting to obtain federal jurisdiction based upon this issue. Mot., 23. Although it argues that retaining jurisdiction "would subject federal courts to endless professional misconduct and breach of fiduciary duty claims," *id.* at 22, the Tribe never address the jurisdictional hook -- the interpretation of IGRA -- relied upon by Defendants. IGRA covers highly specialized activity regarding federal regulation of Indian gaming, not "garden-variety" state law issues. *Id.* at 23. The federal interest in answering questions arising under IGRA greatly outweighs any additional burden retaining jurisdiction would impose upon the federal courts.

IV. CONCLUSION

For these reasons, the Court possesses federal question jurisdiction and should deny the Motion to Remand.

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