Case No. C070512

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

SHARP IMAGE GAMING, INC.,
Plaintiff-Respondent,

v.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,
Defendant-Appellant.

Appeal from a Judgment of the Superior Court of the State of California
for El Dorado County (No. PC 20070154)
The Honorable Nelson Keith Brooks, Judge

UNITED STATES' COMBINED APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME AND BRIEF AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF APPELLANT

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APPLICATION FOR PERMISSION TO FILE *AMICUS* BRIEF

Pursuant to California Rule of Court 8.200(c), the United States of America respectfully requests permission to file this brief as *amicus curiae* on matters of exceptional importance to the United States. This appeal arises from a judgment following jury trial against the Appellant Shingle Springs Band of Miwok Indians, a federally-recognized tribe (the "Tribe"), on breach-of-contract claims. A Superior Court in El Dorado County permitted the contract claims to go the jury, despite a legal determination by the National Indian Gaming Commission ("NIGC") that the disputed "Equipment Lease Agreement" ("ELA") was a management contract requiring the Commission's approval. Under IGRA, the NIGC has exclusive jurisdiction to approve management contracts for Class II and Class III gaming operations. 25 U.S.C. §§ 2710(d)(9), 2711(a)(1). Management contracts that have not been approved by the Chairman are "void" and unenforceable. 25 C.F.R. §§ 533.1(a), 533.7. Under federal preemption principles, the Superior Court lacks subject-matter jurisdiction to enforce contracts that are void absent federal approval.

This *amicus* brief will assist the Court in resolving two issues. First, the Superior Court determined that IGRA did not preempt the court's jurisdiction to enforce the ELA, because the Tribe repudiated the ELA before the NIGC determined that the ELA was an IGRA management

contract and because, in the Superior Court's view, the NIGC's 2009 decision disapproving the ELA did not constitute legally-binding "final agency action." This is a *non sequitur*. Although final agency action by the NIGC is necessary to bring an unapproved management contract into effect, it is not necessary to render an unapproved management contract void. Rather an unapproved management contract is void unless and until the NIGC takes final agency action granting approval. 25 C.F.R. §§ 533.1(a), 533.7. The Superior Court could exercise jurisdiction over Sharp's contract claim only upon a determination that the unapproved ELA was not a management contract, a legal determination that the Superior Court never made. This *amicus* brief explains that the Superior Court had jurisdiction to resolve this threshold preemption question – giving proper deference to the NIGC's legal interpretations – and that the Superior Court erred as a matter of law in failing to reach this question.

Second, the Superior Court rejected the NIGC's determination on the ELA due to alleged procedural violations in the NIGC's 2009 disapproval decision. This determination also is in error. Sharp's contract enforcement action is not an action against the NIGC or an action to set aside the final disapproval action. Nor did the Superior Court have jurisdiction to review the procedural regularity of the NIGC's final agency action. At issue here was the NIGC's threshold legal determination, based

on an interpretation and application of the NIGC's own regulations, that the ELA is a management contract. That legal determination was expressed not only in the 2009 disapproval decision but also in an earlier 2007 opinion letter and is confirmed in this *amicus* brief. Under the Supreme Court's holding in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), Courts must defer to an agency's interpretation of its own regulations, even when such interpretation is expressed in an informal opinion or brief. This *amicus* brief explains that the alleged procedural violations are irrelevant to the deference question and that deference is owed to the NIGC's determination under the standard established by the Supreme Court in *Auer*.

The United States respectfully requests leave to file this amicus brief out of time.[1] The federal preemption question addressed herein is significant and the United States' position on this issue is not reflected in the briefs of either party. Because the preemption issue implicates the Superior Court's subject-matter jurisdiction, this Court has a duty to address the issue *sua sponte* and the waiver doctrine does not apply. This *amicus* brief will assist the Court in understanding and resolving the issue and will not unduly delay resolution of the case.

[1]Under California Rule of Court 8.200(c)(1), amicus briefs were due on March 1, 2013.

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

BACKGROUND

A. Indian Gaming Regulatory Act

1. Statutory Framework

"For nearly two centuries," federal law has "recognized Indian tribes as 'distinct, independent political communities,'" *Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)), "qualified to exercise many of the powers and prerogatives of self-government." *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)). Because tribes operate within and subject to the sovereignty of the United States, "tribal sovereignty . . . is of a unique and limited character." *Wheeler*, 435 U.S. at 323. Nevertheless, tribes retain all attributes of sovereignty that have not been "divested . . . by federal law" or by "necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980); see also *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 951, 17 Cal. Rptr. 3d 517, 520 (Cal. App. 3d Dist. 2004).

Under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress has "plenary power to legislate in the field of Indian affairs." *Gila River Indian Community v. United States*, 697 F.3d 886, 899 (9th Cir.

2012) (quoting *Cotton Petroleum Corp. v. New Mexic*o, 490 U.S. 163, 192 (1989). As a general rule, States may regulate activities on Indian reservations only "where Congress has expressly intended that State laws shall apply." *Gobin v. Snohomish County*, 304 F.3d 909, 914 (9th Cir. 2002) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973)). In 1953, via Public Law 280, Congress granted California and other States criminal jurisdiction over activities on specified Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-8 (1987). The Supreme Court held, however, that Public Law 280 did not permit California to apply its gaming ordinances within Indian country, because the ordinances were regulatory (as opposed to "prohibitory") and because the States' regulatory interests were preempted by federal law. *Id.* at 208-223.

Cabazon prompted Congress in 1988 to enact the Indian Gaming Regulatory Act ("IGRA") (25 U.S.C. § 2701 *et seq.*). *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095-97 (9th Cir. 2003) (describing legislative history). When enacting IGRA, Congress recognized that "numerous Indian tribes [had] become engaged in . . . gaming activities . . . as a means of generating tribal governmental revenue," 25 U.S.C. § 2701(1), and that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically

prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *Id.* § 2701(5). Congress enacted IGRA to "provide a statutory basis for the operation of [Indian] gaming" as a means to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," *id.* § 2702(1), but also to "shield [tribes] from organized crime and other corrupting influences," "to ensure that [tribes are] the primary beneficiary of . . . gaming operation[s]," and "to assure that gaming is conducted fairly and honestly by both the operator and the players." *Id.*, §§ 2702(1)-(2).

IGRA divides Indian gaming into three classes. *See In re Indian Gaming*, 331 F.3d at 1096-97. Class III gaming includes "banked card games, electronic games of chance, [and] slot machines," and all other forms of gaming that are not Class I gaming ("social games solely for prizes of minimal value" or traditional games associated with tribal ceremonies) or Class II gaming (bingo and specified card games). 25 U.S.C. §§ 2703(6)-(8). IGRA permits class III gaming only where three conditions are met: (1) the gaming is conducted under a tribal ordinance that meets specified statutory requirements and that has been approved by the Chairman of the NIGC, *id.* § 2710(d)(1)(A); (2) the gaming is located in a State that otherwise permits such gaming, *id.* § 2710(d)(1)(B); and (3) the gaming is conducted in "conformance" with a "Tribal-state compact"

between the tribe and the State where the gaming will occur. *Id.*, § 2710(d)(1)(C).

IGRA created the National Indian Gaming Commission ("NIGC") within the Department of the Interior, *id.*, § 2704(a), and granted the NIGC broad regulatory powers to implement and enforce IGRA, *id.*, §§ 2706(a)-(b), including the power to promulgate "appropriate" regulations. *Id.* § 2706(b)(10).

2. Regulation of Gaming Management Contracts

Under IGRA, "[a]n Indian tribe may enter into a management contract for the operation of class III [or class II] gaming activity [only] if such contract has been submitted to, and approved by, the Chairman." *Id.*, § 2710(d)(9); § 2711(a)(1)). The term "management contract" "includes all collateral agreements to [the management contract] that relate to the gaming activity." 25 U.S.C. § 2711(a)(3). Under IGRA regulations, "management contract" means, *inter alia*, "any contract . . . or collateral agreement between an Indian tribe and a contractor . . . [that] provides for the management of all *or part* of a gaming operation." 25 C.F.R. § 502.15 (emphasis added). The term "collateral agreement" means "any contract . . . that is related, either directly or indirectly, to a management contract . . . " 25 C.F.R. § 502.5. Management contracts "shall become effective upon

approval by the Chairman." *Id.*, § 533.1(a). "[M]anagement contracts . . . that have not been approved by the Chairman . . . are void." *Id.*, § 533.7.

Congress directed that the Chairman "may approve [a] management contract . . . only if he determines that [the contract] provides at least . . . (1) for adequate accounting procedures . . . (2) for access to the daily operations of the gaming to appropriate tribal officials . . . (3) for a minimum guaranteed payment to the Indian tribe . . . ; (4) for an agreed ceiling for the repayment of development and construction costs; (5) for a contract term not to exceed five years . . . [or no more than] seven years if . . . the capital investment . . . and . . . income projections [indicate that] the additional time [is required]; and (6) for grounds and mechanisms for terminating such contract." 25 U.S.C. §§ 2711(b)(1)-(6). In addition, if the parties negotiate "for a fee based upon a percentage of the net revenues of a tribal gaming activity," the Chairman may approve the management contract only if the fee does not exceed "30 percent of the net revenues" (or in some cases 40 percent) and the fee is determined by the Chairman to be "reasonable in light of surrounding circumstances." *Id.*, § 2711(c). By regulation, NIGC imposed additional substantive requirements for the content of management contracts, *see* 25 C.F.R. § 531.1, and procedural requirements for management-contract approval. *See* 25 C.F.R. §§ 533.2 and 533.3.

B. Disputed Agreements[2]

1. Initial Gaming Operations

In May 1996, Respondent Sharp Image Gaming, Inc., ("Sharp") approached the Tribe with a proposal to develop the "Crystal Mountain Casino" on the Tribe's Rancheria in El Dorado County. *Resp. Br.* at 5. In a "Gaming Machine Agreement" ("GMA") executed by the parties on May 24, 1996, Sharp agreed to advance "all funds necessary" for the "immediate construction" of a temporary "Sprung facility" casino, as well as all funds necessary for the "acquisition of all equipment" and furnishings "related to the interior or operation of the Casino." (AA/Vol.XXXIV/p.9151). In exchange, the Tribe agreed to repay all monies advanced by Sharp at an annual interest rate of 12 percent and the Tribe agreed to make lease payments to Sharp in "an amount equal to thirty percent (30%) of the net revenues derived . . . from the Equipment" supplied by Sharp. (AA/Vol.XXXIV/pp.9146, 9151). The GMA defined "net revenues" as "gross revenues . . . minus all jackpots or payouts." (AA/Vol.XXXIV/p.9146).

The Crystal Mountain Casino opened for one night in October 1996. *See App. Op. Br.* at 7; *Resp. Br.* at 6. The only access to the casino (and

[2] The facts set out herein are drawn from the parties' briefs and limited to those facts pertinent to the federal law issues under IGRA.

Rancheria) was a private road through a residential neighborhood. The neighborhood association objected to casino traffic and obtained a ruling prohibiting use of the road for commercial purposes. *Id.* In addition, in November 1996, the NIGC General Counsel advised the Tribe that the GMA was "null and void" because it contemplated Class III gaming in the absence of an approved compact between the Tribe and the State of California.[3] (AA/Vol.I/pp. 246-247). In early 1997, the Tribe reopened the Crystal Mountain Casino without gaming machines, but that venture was unsuccessful. *App. Op. Br.* at 7.

2. Equipment Lease Agreement and Promissory Note

On November 15, 1997, Sharp and the Tribe entered an "Equipment Lease Agreement" ("ELA") and Promissory Note to replace the GMA. The ELA stated a lease term of 60 months, to "commenc[e] on the date that 400 gaming devices" to be provided by Sharp "are installed and in operation at [the] Crystal Mountain Casino or any other gaming facility owned and operated by [the Tribe]." (AA/Vol.XXXVI/p.9154). The ELA also gave Sharp the "exclusive right to lease or otherwise supply additional gaming devices to [the Tribe] to be used at [the Tribe's] existing or any future

[3] The NIGC did not, at that time, review the GMA for purposes of manage-contract approval (under 25 U.S.C. § 2710(d)(9)), as no management contract could be approved in the absence of a Tribal-State Compact allowing Class III gaming.

gaming facility or facilities." *Id.* As under the GMA, Sharp agreed to furnish the gaming equipment for lease payments amounting to 30 percent of net revenues from the equipment, defined as "gross gaming revenues . . . less all prizes, jackpots, and payouts." *Id.* In the Promissory Note, the Tribe agreed to repay sums advanced by Sharp (per the GMA) to develop the Crystal Mountain Casino, and future sums advanced for casino development, at a reduced annual interest rate of 10 percent. *See Respondent's Br.* at 8.

The ELA and Promissory Note both contained clauses stating that the Tribe "waives its sovereign immunity from any suit, action or proceeding," in State or federal court, "to enforce [the Tribe's] obligations . . . for any claims arising out of" the agreements. (AA/Vol.XXXIV/p.9159). The ELA also stated that the Tribe was "solely responsible for the management of [its] gaming facility," that the parties did not intend the ELA "to constitute a management contract," and that "nothing in [the ELA] authorizes [Sharp] to manage all or part of [the Tribe's] gaming facility." (AA/Vol.XXXIV/p.9155).

3. Repudiation of ELA

At some point after the execution of the ELA, it became apparent that Sharp did not possess sufficient resources to solve the access problem (absence of means for commercial traffic to enter the Tribe's Rancheria)

and develop a viable casino. *See App. Op. Br.* at 9-10; *Resp. Br.* at 10-11. The parties then sought additional investors. *Id.* During such negotiations, Sharp asserted an exclusive right, under the ELA, to supply gaming equipment to any future facility. Sharp sought to sell this interest for $75 to $80 million, *see Resp. Br.* at 11, many times in excess of the approximately $3.2 million Sharp had invested in gaming on the Tribe's Rancheria. *See* (AA/Vol.II/p.1950). In June 1999, after receiving informal advice from the NIGC that the ELA was a management contract that required federal approval to take effect, the Tribe sent a letter to Sharp repudiating the ELA and Promissory Note on the grounds that they were "void" under federal law. *See App. Op. Br.* at 10, *Resp. Br.* at 11-12.

Thereafter, the Tribe reached a development agreement with Lakes Entertainment and Keane Argovitz Resorts ("Lakes KAR"). In May 2000, the Secretary of the Interior approved a tribal-State gaming compact between the Tribe and the State of California.[4] In July 2004, the NIGC approved a Class III gaming management contract between the Tribe and

[4]Tribal-state compacts, management contracts, NIGC Bulletins, and other Commission documents are posted in the "Reading Room" of the NIGC's Internet Site. *See* http://www.nigc.gov/Reading_Room.aspx. The current compact between the Tribe and California (amended 2008) is posted at: http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Shingle_Springs_Compact.pdf

Lakes KAR.[5] Lakes KAR and the Tribe began construction of the "Red Hawk Casino" in 2007 and the casino opened two years later. *App. Op. Br.* at 10. Sharp initiated this action in March 2007, when construction on the Red Hawk Casino began. *Resp. Br.* at 12. Sharp alleged, *inter alia*, that the Tribe breached the provision of the ELA that allegedly granted Sharp exclusive rights to supply gaming equipment to any future facility (without regard to Sharp's role in developing such facility).

C. Proceedings and Decision Below

1. Administrative Decisions

After the suit was filed, the Tribe wrote the NIGC asking the Commission to review the GMA and ELA to determine the status of the agreements under federal law. On June 14, 2007, the NIGC Acting General Counsel issued a letter (hereinafter: the "2007 Opinion Letter" or "Opinion Letter") confirming that the GMA and ELA both were management contracts and void in the absence of approval by the NIGC's chairman. (AA/Vol.V/pp.1445-1452). The Opinion Letter cited *NIGC Bulletin No. 94-5*,[6] which states, *inter alia*, that "management encompasses many activities," including "planning, organizing, directing, coordinating, and

[5] Available at: http://www.nigc.gov/Portals/0/NIGC%20Uploads/apprvdmgmtcont/shinglesprings-lakesandamends.pdf.

[6] Available at: http://www.nigc.gov/LinkClick.aspx?link=181&tabid=117&mid=942.

controlling," and that the "performance of any one of such activities with respect to all or part of a gaming operation constitutes management." The Opinion Letter determined that the GMA and ELA gave Sharp exclusive control over the gaming equipment to be provided at the Tribe's casino and a high rate of compensation, both factors being "indicative of a management agreement." (AA/Vol.V/p.1452).

Citing the Opinion Letter, the Tribe moved to dismiss Sharp's complaint, arguing that any State-law proceedings were preempted by IGRA and the rule of federal law that unapproved management contracts are void. Sharp challenged the Opinion Letter's admissibility. The Superior Court held that the letter was not "official agency action," and therefore lacked "legal effect." (AA/Vol.I/pp.49-50, 53).

In response, the Tribe went back to the NIGC and asked the Chairman to make a "final agency determination" on the status of the GMA and ELA under federal law. *See App. Op. Br.* at 12-13. The Chairman invited and received multiple submissions from both parties. (AA/Vol.XVI/pp.3919-3921). On March 25, 2009, the Chairman issued a letter (hereinafter, the "2009 Disapproval") again determining that both the GMA and ELA are management contracts. (AA/Vol.XVI/pp.3918-3932). While acknowledging the statement in the ELA that the parties did not intend to enter a management contract, the Chairman observed that what

the ELA "calls itself" is not dispositive. (AA/Vol.XVI/p.3930). The ELA and GMA, the Chairman noted, gave Sharp "the exclusive right to provide gaming machines for all of the . . . floor space" at the Tribe's casino. (AA/Vol.XVI/p. 3926). Because the "freedom to configure the gaming floor" is the "essence of managing a casino," the Chairman concluded that the ELA and GMA provided Sharp "broad operational control sufficient to make them management contracts." *Id.*

The Chairman then proceeded to review the GMA and ELA for compliance with IGRA requirements. (AA/Vol.XVI/pp.3928-3930). Finding the contracts to be inconsistent with numerous statutory and regulatory requirements, *id.*, the Chairman declared them "disapprove[d]." (AA/Vol.XVI/p.3929). The Tribe again moved to dismiss, arguing that the NIGC's legal determination regarding the status of the ELA was binding on the Superior Court and that the NIGC's "final agency action" was subject to challenge only in an action in federal district court. *App. Op. Br.* at 15.

2. Superior Court's Decision

On November 30, 2009, the Superior Court issued an opinion denying the Tribe's motion to dismiss. (AA/Vol.VII/pp.1944-1961). The Superior Court held that, since the GMA and ELA were "terminated and/or cancelled," the NIGC lacked jurisdiction to "review, regulate, approve, or disapprove them." (AA/Vol.VII/pp.1954:4). The Court further held that

the Chairman's decision did not constitute "final agency action" binding on the Court, because the Chairman's action allegedly violated Sharp's due process rights and contravened various IGRA procedural requirements. (AA/Vol.VII/pp1956:7-1958:17). The Superior Court did not itself determine, as a matter of law, whether the GMA and ELA were management contracts. [7]

Sharp subsequently dropped all claims under the GMA and the case went to trial on the breach-of-contract claims under the ELA and Promissory Note. The jury determined that the Tribe had breached both contracts and returned a verdict in favor of Sharp of approximately $20.4 million on the ELA and approximately $10 million on the Promissory Note.

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[7] In addition to alleging that the Tribe breached express terms of the ELA and Promissory Note, Sharp alleged that the Tribe breached the implied covenant of good faith and fair dealing. As a defense to the latter claim, the Tribe presented evidence that it repudiated the ELA and Promissory Note on the good faith belief that the agreements were void under IGRA. At the Tribe's request, the Superior Court gave a supporting instruction that defined the term management contract and advised the jury that unapproved management contracts are void. *See Resp. Br.* at 39-40 (quoting RT/Vol. XV/pp. 4116:26-4117:18)). The Superior Court did not, however, instruct the jury to determine whether the ELA and Promissory Notes were management contracts. Nor was that legal issue a matter for the jury. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699-700 (7th Cir. 2011) (status of contract under IGRA is "fundamentally" a question of law). Thus, Sharp is not correct to contend (*Resp. Br.* at 40, n. 19) that the "verdict . . . established that neither the ELA nor the Promissory Note were gaming management contracts."

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FAILING TO DETERMINE THE LEGAL STATUS OF THE ELA AND PROMISSORY NOTE UNDER IGRA

A. Synopsis and Standard of Review

Under the plain language of IGRA and IGRA regulations, management contracts are void and unenforceable unless and until approved by the NIGC in accordance with specified administrative procedure. The ELA and Promissory Note were never so approved. Consequently, under federal supremacy and preemption principles, the present action could proceed to judgment only upon a legal determination that the ELA and Promissory Note were *not* management contracts. The Superior Court never made such a determination, holding, in effect, that the status of the agreements under IGRA was irrelevant to their enforcement. This was legal error. Whether and to what extent IGRA preempts State contract-enforcement actions is a question of law reviewed *de novo*. *In re Farm Raised Salmon Cases*, 42 Cal.4th 1077, 1089 n. 10, 175 P.3d 1170, 1177 n. 10 (Cal. 2008).

B. Unapproved Management Contracts Are Void and Unenforceable In Any Court

Under IGRA, "an Indian tribe may enter into a management contract" for class III gaming only "if such contract has been submitted to, and approved, by the Chairman." 25 U.S.C. § 2710(d)(9). Reflecting this

rule, IGRA regulations provide that management contracts "become effective upon [the Chairman's] approval," 25 C.F.R. § 533.1(a), and are "void" if "not approved" by the Chairman under IGRA administrative procedures. *Id.*, § 533.7.

In accordance with the plain language of the statute and regulations, federal and State courts uniformly have recognized that management contracts not approved by the Chairman under IGRA administrative procedures are void and unenforceable. *See, e.g., Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699-700 (7th Cir. 2011); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115, 125-130 (2d Cir. 2008); *First American Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005); *Outsource Services Management LLC v. Nooksack Business Corp*., 292 P.3d 147, 160 (Wash. App. Div. 1 2013); *see also U.S. ex. rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424-27 (8th Cir. 2002) (requiring return of management fees paid under void contract).

Stated differently, the federal rule of law – that unapproved management contracts are "void" – supplants and preempts state contract law that otherwise might render a management contract valid and enforceable. *Id.*.; *cf. Swissmex-Rapid S.A. de C.V. v. SP Systems,* LLC, 212 Cal.App.4th 539, 545, 151 Cal.Rptr.3d 229, 233 (Cal. App. 2d Dist. 2012)

(citing *Rosenthal v. Great Western Fin. Securities Corp.* , 14 Cal.4th 394, 405, 58 Cal.Rptr.2d 875, 926 P.2d 106 (Cal. 1996)) (noting that substantive provisions of the Federal Arbitration Act "preempt[] any contrary state law and[are] binding on state courts as well as federal.") Given the direct conflict between state-law enforcement and the federal law rendering unapproved management contracts void, the state law must yield. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

Requiring NIGC approval as a precondition of the enforceability of IGRA management contracts serves Congress's purpose of "ensur[ing] that . . . tribes retain control of gaming facilities . . . and of the revenue from those facilities." *Wells Fargo*, 658 F.3d at 700; *see also* 25 U.S.C. § 2702(2) (requiring tribes to be the "primary beneficiary" of gaming operations). The "prescreening" of management contracts is the "core of Congress's protection for Indian gaming establishments." *Id.* To permit the enforcement of contracts that have not been prescreened and approved by NIGC would undermine Congress's protective scheme. *Id.*

When adopting the pre-approval rule for IGRA management contracts, Congress referenced Section 81 of Title 25, an existing pre-approval requirement for contracts "relative to Indian land." *See* 25 U.S.C. § 81 (1988). Section 81 then provided that "[n]o agreement shall be made by any person with any tribe of Indians, . . . in consideration of services for

said Indians relative to their lands, . . . unless such contract or agreement be . . . approved" by the Secretary of the Interior.[8] *Id.* IGRA expressly transferred the Secretary's authority under Section 81 to the NIGC as "relating to [IGRA] management contracts." 25 U.S.C. § 2711(h). The courts have long held that federal approval of contracts falling under Section 81 is an "absolute prerequisite to enforceability." *A.K. Management Co. v. San Manuel Band*, 789 F.2d 785, 789 (9th Cir. 1986). A "void" contract under Section 81 "cannot be relied upon to give rise to any obligation by the [relevant tribe]." *Id.*; *accord Quantum Entertainment Ltd. v. U.S. Dept. of the Interior*, 714 F.3d 1338, 1343-44 (D.C. Cir. 2013). When enacting IGRA, Congress established the same rule for unapproved management contracts. *Catskill* Development, 547 F.3d at 127-130.

C. The Superior Court Had Jurisdiction to Determine Whether Sharp's Action Was Preempted by IGRA

After Sharp filed the present breach-of-contract action, the Tribe moved to dismiss, arguing, *inter alia*, that the contract-enforcement action was preempted by IGRA. "Not every contract," however, "between a tribe and a non-Indian contractor is subject to . . . IGRA." *American Vantage*

[8] Congress amended Section 81 in 2000 to narrow the subset of contracts to which it applies, *see Quantum Entertainment Ltd. v. U.S. Dept. of the Interior*, 714 F.3d 1338, 1339 (D.C. Cir. 2013) (describing legislative history); *see also* 25 U.S.C. § 81b (2000) (addressing contracts that "encumber" Indian land "for a period of 7 or more years").

Companies v. Table Mountain Rancheria, 103 Cal. App. 4th 590, 596 (Cal. Ct. App. 5 2002). As just explained, IGRA provides for federal review and approval of management contracts, 25 U.S.C. § 2710(d)(9), and renders unapproved management contracts void and unenforceable. 25 C.F.R. § 533.7. But IGRA does not regulate Indian gaming contracts that are not management contracts. Nor does IGRA contain dispute resolution procedures for the management contracts within its scope. This left the Superior Court with the obligation to determine the extent of federal preemption and whether Sharp's contract claim was preempted.

The touchstone of every preemption analysis is Congressional intent as expressed through the relevant statutory text. *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 875-76 (9th Cir. 2012) (citing *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Farm Raised Salmon*, 42 Cal. 4th at 1087-1088; 175 P.3d at 1176. In all preemption cases, particularly those involving traditional powers exercised by the States, courts begin with the presumption that Congress did not intend to supersede State laws and remedies, unless that intent is "clear and manifest." *Medtronic Inc.*, 518 U.S. at 485; *Farm Raised Salmon*, 42 Cal. 4th at 1087-1088; 175 P.3d at 1176. Although States have no traditional role in regulating the activities of Indian tribes, State courts are the traditional forum for common-law contract disputes. *See Ginsberg*, 695 F.3d at 878.

Because State courts may exercise jurisdiction over tribes where there is a clearly expressed waiver of sovereign immunity,[9] *see Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal.App.4th 190, 206-207, 135 Cal.Rptr.3d 42, 54-55 (Cal.App. 4th Dist. 2011); *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 172-173 (1977), the relevant question is whether or to what extent Congress intended to preclude tribes from contractually consenting to suit in State court. IGRA's objective of protecting tribes from "organized crime and corrupting influences" and ensuring that tribes are the "primary beneficiar[ies] of . . . gaming operation[s]," 25 U.S.C. § 2702(2), is counterbalanced by the federal policy goal of promoting tribal "self-sufficiency" and "strong tribal governments." *Id.*, §§ 2701(4), 2702(1). Accordingly, IGRA should be interpreted as precluding common-law contract claims expressly consented to by tribes, only where contract enforcement would be contrary to federal law or the exercise of federal regulatory authority. *Cf. Great Western Casinos, Inc. v. Morongo Band of*

[9] The Tribe contends that the sovereign immunity waivers in the ELA and Promissory Note cannot be read to apply to Sharp's breach-of-contract claims. *See App. Op. Br.* at 44-50; *App. R. Br.* at 34-46. Nothing herein should be construed as suggesting that the waivers applied.

Mission Indians, 74 Cal.App.4th 1407, 88 Cal.Rptr.2d 828 (Cal.App. 2 Dist.1999).[10]

Consistent with this view, courts have permitted breach-of-contract suits to proceed where the subject contracts are found to fall outside of IGRA's scope. *See, e.g.*, *Outsource Services Management*, 292 P.3d at 159-164 (contract found not to be management contract); *Wells Fargo Bank, N.A. v. Sokaogon Chippewa Community*, 787 F.Supp.2d 867, 878-881 (E.D. Wis. 2011) (same); *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455 (Cal.App. 1 Dist.,2002) (action to enforce architectural-services contract for gaming casino); *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal.App.4th 190, 135 Cal.Rptr.3d 42 (Cal. App. 4 Dist.,2011) (action to enforce non-gaming loan agreement).

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[10]In *Great Western Casinos*, the Court of Appeal for the Second District held that federal law "*completely* preempt[s] the field of Indian gaming" and thus preempted claims in that case alleging the wrongful termination of an NIGC-approved management contract. *See* 74 Cal.App.4th at 1424-1428, 88 Cal.Rptr.2d at 840-843 (emphasis added). There, the gaming company alleged that the tribe conspired with federal officials to bring false criminal charges against the gaming company, which the tribe ultimately cited as grounds for contract termination. 74 Cal.App.4th at 1413-1414, 88 Cal.Rptr.2d at 832-833. These claims directly implicated federal enforcement of gaming regulations. And the Court of Appeal separately determined that the contractual waiver of sovereign immunity did not apply. 74 Cal.App.4th at 1419-1424, 88 Cal.Rptr.2d at 836-840.

Because State courts, with clearly expressed tribal consent, potentially have jurisdiction to enforce Indian-gaming contracts that are not void under IGRA, State courts also possess inherent authority, in contract enforcement actions, to address whether a contract is "void" and unenforceable under IGRA regulations (25 C.F.R. § 533.7). This follows from the general rule that courts have jurisdiction to determine their own jurisdiction, *People v. Zarazua*, 179 Cal.App.4th 1054, 1062, 101 Cal.Rptr.3d 902, 907 (Cal. App. 3d Dist. 2009), and from the rule that State courts have authority to resolve questions of federal law, including questions of federal preemption, where Congress has not established an exclusive federal forum for the resolution of such issue. *Consolidated Management Group, LLC v. Department of Corporations*, 162 Cal.App.4th 598, 608, 75 Cal.Rptr.3d 795, 804 (Cal. App. 1st Dist. 2008).

As noted, IGRA creates exclusive administrative procedures for the *approval* of management contracts. 25 U.S.C. §§ 2705(a)(4); 2711. Congress did not, however, establish exclusive procedures or an exclusive federal forum for resolving contract disputes. Nor did Congress establish exclusive federal procedures for resolving whether contracts presented for enforcement are unapproved gaming management contracts and therefore void under IGRA. This leaves the threshold preemption question to be addressed in the courts – State, federal, or tribal – assuming other

jurisdictional requirements are met, and subject to deference principles. *See*, *e.g.*, *American Vantage*, 103 Cal. App. 4th at 596; *Outsource Services Management*, 292 P.3d at 159-164; *Wells Fargo*, 658 F.3d 694-700; *see also Mack v. Kuckenmeister*, 619 F.3d 1010, 1021-22 (9th Cir. 2010) (where "conflict preemption" under federal law is raised as a defense in a case that otherwise does not arise under federal law, "state courts retain jurisdiction over the case and over the preemption question").

The Tribe asserts that, even if the Superior Court had jurisdiction to determine the threshold preemption question whether the ELA was an unapproved management contract and void under federal law, the Superior Court lost such jurisdiction once the NIGC took final agency action disapproving the ELA. Because a decision on management-contract approval constitutes final agency action subject to review under the Administrative Procedure Act ("APA"), *see* 25 U.S.C. § 2714 (referencing 5 U.S.C. §§ 701-706), the Tribe reasons that Sharp's only remedy following the 2009 Disapproval was to challenge that decision in a federal-court APA action.

The Tribe correctly observes that the APA provides the proper mechanism for challenging the NIGC's final agency action. The APA constitutes a waiver of the United States' sovereign immunity and the waiver applies only to proceedings in federal district court. *In re*

Quantification Settlement Agreement Cases, 201 Cal.App.4th 758, 832-33, 134 Cal.Rptr.3d 274, 335 (Cal. App. 3d Dist. 2011). Nonetheless, Sharp's breach-of-contract suit is not an action against the NIGC; nor is it a challenge to the 2009 Disapproval *per se*. Sharp did not seek approval of the ELA, and approval in 2009 would not necessarily have provided Sharp relief with respect to the breach of contract that allegedly occurred in 1999 when the Tribe repudiated the ELA. If the ELA is a management contract, it was unapproved and void in 1999. 25 C.F.R. 533.7. Any subsequent agency action approving the ELA would have brought the agreement into effect from the point of approval. *Id.* § 533.1(a). For this reason, the NIGC could have declined to take approval action on the ELA.[11] In any event, because Sharp does not challenge the NIGC's 2009 Disapproval, Sharp is not limited to the Congressionally-prescribed procedures for challenging that final agency action.

This distinction preserves the Superior Court's jurisdiction over matters that Congress did not clearly reserve to the NIGC. For example, in the present proceedings, Sharp conceivably could have raised questions of contract interpretation (*e.g.*, as to whether the parties intended to give Sharp exclusive control over the gaming machines to be used at any tribal casino)

[11]Whether the NIGC properly exercised its approval authority is not before this Court. *See* p. 41, *infra*.

that do not implicate the NIGC's regulatory interpretation (that the control apparently granted in the ELA made the ELA a management contract). Contact approval proceedings under 25 U.S.C. §§ 2710(d)(9) and 2711 are not adjudicatory proceedings designed to resolve legal or factual disputes over contract interpretation.[12] Where parties present contracts for pre-approval as contemplated by IGRA and IGRA regulations, there ordinarily will be no dispute over the parties' intent to delegate management functions and the NIGC can resolve any relevant ambiguities in contract language by requiring modifications as a precondition of approval.

D. The Superior Court Failed to Determine the Status of the ELA

The existence of State-court jurisdiction over Sharp's contract claim – notwithstanding the 2009 Disapproval – does not mean, however, that the Superior Court was free to disregard the threshold legal question (whether the ELA is a management contract) or the NIGC's resolution of that question. Rather, the Superior Court was obliged to exercise its jurisdiction consistent with IGRA and IGRA's bar on the enforcement of

[12]This case does not involve an agency enforcement action. *Cf. City of Duluth v. Fond Du Lac Band*, 702 F.3d 1147, 1151 (8th Cir. 2013) (final action by NIGC ordering tribe to cease performance under contract); *see also* 25 U.S.C. § 2713 (authorizing civil penalties and closure orders). Nor does it involve agency action to void an approved contract. *See* 25 U.S.C. § 2711(f) *and* 25 C.F.R. § 535.3.

unapproved management contracts. Instead of acknowledging this bar and the need to resolve whether the ELA was an unapproved management contract (consistent with deference principles), the Superior Court simply denied the Tribe's motion to dismiss on the grounds that the Chairman's 2009 Disapproval was not "final agency action" binding on the state court. (AA/Vol.VII/pp.1956).

This is a *non sequitur*. A final disapproval decision by the NIGC is not necessary to render an unapproved management contract void. Such contract is and remains void unless and until the NIGC takes formal action to approve the contract. 25 C.F.R. §§ 533.1(a), 533.7. The NIGC's disapproval of the ELA merely preserved the legal *status quo*. Thus, even if the 2009 Disapproval was invalid due to procedural errors – a question over which the Superior Court had no jurisdiction (*see infra*) – a ruling setting aside the NIGC's decision would not resolve the preemption question.

Further, the relevant preemption question – 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.[13] *Wells Fargo*, 658 F.3d at 693; *Outsource Services*

[13]Interpretation of the ELA likewise is a question of law, absent a dispute over the credibility of extrinsic evidence. *Sierra Vista Regional Medical Center v. Bonta*, 107 Cal.App.4th 237, 245, 132 Cal.Rptr.2d 9, 13

Management, 292 P.3d at 159. As explained *infra*, the NIGC is owed deference to the application of its regulations (on matters of regulatory interpretation), whether or not the interpretation is advanced in a rulemaking or other final agency action. And even if the NIGC's position on the ELA is somehow owed no deference, the NIGC's regulations still govern and the legal question remains. Inexplicably, the Superior Court disregarded the legal question.

The Superior Court decided, apparently, that it need not determine the nature/status of the ELA under IGRA because the Tribe had repudiated the contract. Citing such repudiation, the Superior Court found that "there [was] no jurisdiction in the NGIC . . . to review, regulate, approve or disapprove" the ELA. (AA/Vol.VII/p.1955). And the Superior Court cited *American Vantage*, a case in which the Court of Appeal for the Fifth District found that an alleged IGRA management contract was "not subject to IGRA regulation" and that a contract-enforcement action, therefore, was not preempted. 103 Cal. App. 4th at 596.

But in *American Vantage*, the NIGC determined that the subject contract was <u>*not*</u> a management contract requiring federal approval. *Id.* at 593-94. The Court of Appeal held that the contract enforcement action

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(Cal.App. 3 Dist.,2003); *Wolf v. Walt Disney Pictures and Television*, 162 Cal.App.4th 1107, 1134, 76 Cal.Rptr.3d 585, 609 (Cal. App. 2 Dist. 2008).

could proceed precisely because the contract "fell outside" of IGRA's "protective structure." *Id.* at 596. Here, the NIGC made the opposite determination: *viz.*, that the ELA <u>*is*</u> a management contract within the IGRA's protective structure. Therefore, the opposite conclusion – that the contract enforcement action is preempted – was warranted.

Moreover, *American Vantage* specifically recognized the trial court's obligation to resolve the IGRA status of an alleged management contract when the issue is raised as a contract "defense." *Id.* In *American Vantage*, the tribe continued to allege that the subject agreement was an unapproved management contract and void under IGRA even after the NIGC determined that federal approval was not required. *Id.* Accordingly, the Court of Appeal noted that the trial court would need to decide whether the subject contract was a mere "consulting agreement" (and thus enforceable in State court assuming jurisdiction over the Tribe) or a "void management agreement" (unenforceable in any court).[14] *Id.* at 596. This is precisely the task the Superior Court failed to undertake here.

To be sure, the *American Vantage* court went on to observe that the need to resolve the contract-status question did not suggest "complete preemption" of State court jurisdiction, because, in the court's words,

[14]The *American Vantage* court did not address the nature and extent of deference owed to the NIGC's opinion. *See* 34-37, *infra.*

neither outcome of the status review would leave the subject contract "subject to IGRA regulation." *Id.* Sharp now seizes on this statement for the proposition (*Sharp Ans. Br.* at 24) that "there can be no IGRA preemption no matter what the outcome of the [contract status] issue may be." But Sharp's reasoning does not hold. In rejecting complete preemption, *American Vantage* endorsed the view (*supra*) that State courts are competent to address the threshold preemption question; *i.e.*, whether Indian gaming agreements are unapproved management contracts and therefore void and unenforceable (absent NIGC approval). *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.

Moreover, strictly construed, the statement in *American Vantage* that a "void management agreement . . . is not subject to IGRA regulation," 103 Cal. App. 4th at 596, is an oxymoron. As *American Vantage* itself recognized, *id.*, 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. Among other things, the NIGC may review unapproved management contracts for purposes of providing approval, 25 U.S.C. § 2711, and may order the closure of gaming operations being conducted by a management contractor without an approved management contract. 25 C.F.R. § 573.4(a)(7).

When stating that a "void management agreement . . . is not subject to IGRA regulation," *American Vantage* cited a federal district court opinion that stands for a very different proposition. *See* 103 Cal. App. 4th at 596 (citing *Gallegos v. San Juan Pueblo Business Dev. Bd. Inc.*, 955 F. Supp. 1348, 1350 (D.N.M. 1997)). *Gallegos* involved a gaming company's suit to recover gaming equipment after a tribe repudiated an equipment lease agreement that the NIGC had found – as in this case – to be an unapproved management agreement and void. *Id.* at 1349. The tribe removed the suit to federal district court, alleging IGRA preemption. *Id.* at 1349. In remanding the action for lack of federal jurisdiction, the federal court reasoned that if the contract was a mere lease (and not a management contract) "IGRA would not be implicated," and, alternatively, that if the contract was an unapproved management contract and void, the State-court suit would "in no way interfere with the regulation of a management contract because none ever existed." *Id.* at 1350-51 & n. 5.

This was true in *Gallegos* only because of the nature of the suit. Specifically, *Gallegos* was an action for writ of replevin (return of equipment), not a suit to enforce the lease agreement. *Id.* at 1349. An equipment-owner's right to recover leased equipment after a lease is declared void does not depend on the validity of the agreement. *See, e.g.*, *American Tel. and Tel. Co. v. United States*, 124 F.3d 1471, 1480 (Fed. Cir.

1997), *vacated on other grounds*, 177 F.3d 1368 (Fed. Cir. 1999); *City and County of Denver v. Desert Truck Sales, Inc*., 837 P.2d 759, 764 (Co. 1992); *In re Harmony Theatre Co.*, 2 F.2d 376 (D. Mich. 1924). In contrast, in the present case, Sharp seeks money damages as remedy for the Tribe's alleged unlawful repudiation of the ELA, which allegedly deprived Sharp of the opportunity to perform under the ELA.

At bottom, Sharp's contract-enforcement action cannot be sustained if the ELA is a management contract and void absent NIGC approval. *Wells Fargo*, 658 F.3d at 699-700; *First American Kickapoo Operations*, 412 F.3d at 1176; *Casino Magic*, 293 F.3d at 426. Here, the NIGC determined that the ELA is a management contract. Because Sharp raised no grounds for disregarding the NIGC's legal determination, the Superior Court should have dismissed for lack of subject-matter jurisdiction.

Further, although the Tribe did not acknowledge the Superior Court's need to decide the preemption question – given the Tribe's argument (*supra*) that the Superior Court lost its jurisdiction over the contract action once the NIGC issued a final agency decision disapproving the ELA – the patent jurisdictional defect cannot be overlooked by this Court. "Subject matter jurisdiction can never be created by consent, waiver, or estoppel." *People ex rel. Sneddon v. Torch Energy Services, Inc.*, 102 Cal.App.4th 181, 188, 125 Cal.Rptr.2d 365, 369 (Cal. App. 2d

Dist 2002) (citation omitted). Thus, the "adequacy of the court's subject matter jurisdiction must be addressed whenever that issue comes to the court's attention." *Totten v. Hill*, 154 Cal. App. 4th 40, 46, 64 Cal. Rptr. 3d 357, 361 (Cal. App. 1st Dist. 2007) (citation omitted). Preemption arguments that concern a State court's ability to hear a claim implicate subject matter jurisdiction and cannot be waived.[15] *County of Amador v. El Dorado County Water Agency*, 76 Cal.App.4th 931, 956, 91 Cal.Rptr.2d 66, 82 (Cal. App. 3d Dist. 1999).

II. THE SUPERIOR COURT ERRED IN DECLINING TO DEFER TO NIGC'S DETERMINATION

A. Synopsis and Standards of Review

The NIGC is entitled to deference in the interpretation of its own regulations, including the application of those regulations to undisputed contractual terms. In declining to defer to the NIGC's determination that the ELA is an IGRA management contract, the Superior Court cited no flaw in the NIGC's regulatory determinations, nor any relevant dispute of

[15] Arguments that a State court should have applied federal as opposed to State decisional law are subject to waiver. *See Karlsson v. Ford Motor Co.*, 140 Ca1. App. 4th 1202, 1236, 45 Cal. Rptr. 3d 265, 293 (Cal. App. 2d Dist. 2006). Here, Congress provided an exclusive federal forum for the approval of management contracts, not simply federal substantive law for determining when management contracts become valid and can be enforced. *See Johnson v. Armored Transport of California*, 813 F.2d 1041, 1043 (9th Cir. 1987) (citing I*nternational Longshoremen's Association, AFL–CIO v. Davis*, 476 U.S. 380 (1986)).

contract interpretation. Instead, the Superior Court cited alleged procedural flaws in the NIGC's administrative review. The cited procedural flaws were not flaws and are irrelevant to the matters before the Court. This Court should defer to the NIGC's legal conclusions and remand for dismissal. Issues of regulatory interpretation, including the deference owed to federal agency's interpretation, are matters of law reviewed *de novo*. *Californians for Pesticide Reform v. California Dept. of Pesticide Regulation*, 184 Cal.App.4th 887, 899, 109 Cal.Rptr.3d 428, 435 (Cal.App. 3d Dist. 2010).

B. The Superior Court Erred In Declining to Defer to the NIGC's Legal Interpretation

1. The Standards for Deference Are Met

Congress charged the NIGC with broad authority to implement and enforce IGRA, including authority to "promulgate such regulations and guidelines as it deems appropriate" for such purposes. 25 U.S.C. § 2706(b)(10). Pursuant to this authority, the NIGC issued a regulation defining "management contract" to mean any agreement that "provides for the management of all *or part* of a gaming operation." 25 C.F.R. § 502.15 (emphasis added). The NIGC also issued a guideline stating that management includes "planning, organizing, directing, coordinating, and controlling," and that the "performance of any one of such activities with respect to all or part of a gaming operation constitutes management" for

purposes of the duty to obtain management contract approval. *NIGC Bulletin No. 94-5* (emphasis added).

Applying this regulation and guideline to the ELA, the NIGC determined that the right to select and supply any and all gaming machines to a casino is an essential part of casino management and thus that a contract granting such control to a contractor is a management contract. The NIGC also determined that contract clauses professing not to delegate management responsibilities are not dispositive for determining whether a contract is a management contract as defined by regulation, if the contract otherwise grants essential management functions.

Courts owe "wide deference to an agency's reasonable interpretation of its own regulations." *Public Lands for the People, Inc. v. U.S. Dept. of Agriculture*, 697 F.3d 1192, 1199 (9th Cir. 2012), *cert. denied* 133 S.Ct. 1464 (2013); *accord Environmental Protection Information Center v. California Dept.*, 44 Cal.4th 459, 490, 187 P.3d 888, 909 (Cal. 2008). This is true even when the interpretation is advanced through an informal process. *Public Lands*, 697 F.3d at 1199 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Indeed, in *Auer*, the Supreme Court held that deference was owed to an interpretation advanced by an agency in an *amicus* brief. 519 U.S. at 461. Under *Auer*, an agency's interpretation of its own

regulation is controlling unless "plainly erroneous or inconsistent with the regulation" at issue. *Id*.

The NIGC's regulatory determination regarding the ELA is not "plainly erroneous" or "inconsistent with" the Commission's regulations. *Id.* First, the NIGC's determination is consistent with the text of the regulation and guideline. Selecting and providing all gaming equipment to be used at a tribal casino is "planning, organizing, directing, coordinating and [or] controlling" an essential aspect of casino operations, within the plain meaning of those terms. *See NIGC Bulletin* 94-5. Thus, such activity constitutes "managing" casino operations in "part," per the NIGC regulation. *See* 25 C.F.R. § 502.15.

Second, the NIGC's determination is consistent with IGRA's purposes. Congress imposed management-contract review to ensure that tribes retain control of gaming facilities and revenue. *Wells Fargo*, 658 F.3d at 700. NIGC must ensure, *inter alia*, that a management contract provides a tribe a "minimum guaranteed payment" from casino operations, with a "preference over the retirement of development and construction costs," 25 U.S.C. § 2711(b)(3), and that contractor fees, when based on a percentage of net revenues, not exceed the statutory cap or what is "reasonable in light of surrounding circumstances." *Id.*, § 2711(c)(1). Any agreement that grants a management contractor exclusive control over the

gaming machines to be used at a casino and a guaranteed percentage of the revenue from such machines carries the risk of depriving a tribe of the benefits of the gaming operation and thus is squarely within the universe of contracts warranting NIGC review. *See* 25 U.S.C. § 2702(2) (tribes to be the "primary beneficiary of . . . gaming operation[s]"). Further, IGRA imposes NIGC review as a restriction on the contractual freedom of tribes and persons who would enter gaming management contracts with tribes. 25 U.S.C. § 2710(d)(9). If the parties could avoid this restriction merely by stating in their agreement that their contract is not a management contract, the statutory restriction would be rendered a nullity. *See Outsource Services Management*, 292 P.3d at 159 ("The existence of . . . such [contractual] disclaimers . . . is not, by itself, dispositive of legal questions arising from [the] transaction.")

Third, the NIGC determination regarding the ELA is in accord with the Commission's longstanding application of its regulations. Even before the parties in the present case executed the ELA, the NIGC was asked to review a similar equipment lease. *See, e.g.*, *Gallegos*, 995 F.Supp. at 1349. Like the ELA, the contract at issue in *Gallegos* granted the contractor exclusive rights to provide slot machines to a tribal casino and a fixed percentage of the gaming-machine revenues as "rent." *Id.* In an opinion letter issued in July 1996, the NIGC determined that the agreement was a

management contract requiring NIGC approval. *Id.* This demonstrates that the NIGC's position on the ELA is a "fair and considered judgment" and not a "*post hoc* rationalization" contrived to reach a desired end in the present case. *See Chase Bank USA, N.A. v. McCoy*, --- U.S. ---, 131 S.Ct. 871, 882 (2011). In short, because the NIGC's regulatory interpretation (that the ELA is a management contract) is consistent with regulatory text, statutory purpose, and longstanding administrative interpretations, it is entitled to deference from the courts. *Id.*

2. The Superior Court Identified No Grounds for Declining to Defer to the NIGC's Determination

As explained *supra*, the Superior Court did not expressly address whether the ELA is a management contract or expressly reject the NIGC's legal determination on this issue. Rather, the Superior Court determined that the NIGC's 2009 Disapproval was not binding "final agency action," due to alleged procedural errors in the administrative proceedings.
In particular, the Superior Court found that the NIGC violated Sharp's due process rights by allowing *ex parte* contacts by the Tribe, which the Court deemed excessive. (AA/Vol. VII/pp.1956-1958). The Superior Court also found that the NIGC violated certain of its own regulations, including the regulation that requires a tribe or would-be management contractor to submit a management contract for review "within sixty (60) days of execution by the parties" (25 C.F.R. § 533.2), and the regulation that

requires tribes to include specified information in any request for management contract approval (*id.*, § 533.3). (AA/Vol. VII/p.1957).

These alleged procedural violations were not properly before the Superior Court. As already explained, the NIGC's 2009 Disapproval is subject to challenge only in an APA action in federal district court. *In re Quantification Settlement Agreement Cases*, 201 Cal.App.4th at 832-33, 134 Cal.Rptr.3d at 335. If, in such action, a federal district court were to find that the NIGC failed to follow required process and that the alleged procedural errors materially impacted the outcome of the proceedings, the court could set aside the action and remand for further proceedings. *See* 5 U.S.C. § 706(2)(D) (authorizing federal court to set aside agency action taken "without observance of procedure required by law"). The present case, however, does not involve the NIGC's disapproval decision and is not a request that the 2009 Disapproval be set aside.

Instead, the present case involves the NIGC's determination on a threshold legal issue involving an interpretation and application of the NIGC regulation defining "management contract." The NIGC expressed its regulatory interpretation in the 2009 Disapproval and the 2007 Opinion Letter (as well as in the present amicus brief). The NIGC is entitled to deference in the interpretation of its own regulations, even when such interpretation is not rendered in a formal rulemaking or other final agency

action. *Public Lands*, 697 F.3d at 1199 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997))

Moreover, alleged procedural flaws are never sufficient grounds for rejecting an agency's legal interpretation where no reasonable contrary interpretation is provided. Significantly, the Superior Court found no flaw in the NIGC's substantive legal conclusions, either as to its interpretation of the term "management contract" or its interpretation of the ELA.

To be sure, an ordinary equipment lease that merely grants a lessee the right to use specified equipment for a specified term at a specified rental rate is not a management contract. But the ELA is no ordinary equipment lease. As interpreted by Sharp, the ELA gave Sharp an exclusive right to supply any and all gaming machines to any casino to be developed by the Tribe however constructed or financed, along with a guaranteed substantial percentage of the revenue to be derived from any gaming machines so supplied. Such rights (had they been acknowledged as valid by the Tribe) plainly would have given Sharp a substantial place at the table in any casino development and planning. Indeed, Sharp has asserted that its contractual rights were worth approximately $75 million to any investor who wished to buy out Sharp's interest. *Resp. Br.* at 11. This assertion amply illustrates Sharp's own belief that its contract rights gave it substantial control over the Tribe's casino development. This is sufficient

to satisfy the regulatory definition of "management contract," as interpreted in NIGC Bulletin 94-5.

D. Agreements Collateral to Unapproved Management Contracts Are Void, Whether or Not They Would Constitute Management Agreements Standing Alone

The NIGC's 2007 Opinion Letter and 2009 Disapproval did not expressly address the Promissory Note executed contemporaneously with the ELA. However, the Promissory Note related to liabilities incurred under the GMA and/or to be incurred in connection with the ELA, both of which were determined to be management contracts by the NIGC.

When establishing the approval requirement for management contracts, Congress stated that the relevant instrument for approval "shall be considered to include all collateral agreements to [the management contract] that relate to the gaming activity." 25 U.SC. § 2711(a)(3). The manifest purpose of this provision is to ensure that 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. Otherwise, the statutory requirements could be circumvented by splintering relevant obligations onto separate instruments. For example, the NIGC could not readily ensure that the "payment guaranteed to the . . . tribe" in a management contract "has preference over the retirement of

development and construction costs" per 25 U.S.C. § 2711(b)(3), if contemporaneous collateral agreements between the parties relating to development and construction costs are not subject to NIGC review and approval. In the present case, the Promissory Note defines, in part, the financial relationship between the parties with respect to casino development and tribal gaming operations. Because the Promissory Note is thus "collateral" to the ELA (which replaced the GMA) and "relate[s] to the gaming activity," it is part of the relevant management contract for purposes of the statutory approval requirement. *Id.*

Sharp argues that the Promissory Note is not subject to IGRA's approval requirement because the Promissory Note does not itself provide for the management of all or part of the gaming operation.[16] *See Resp. Br.* at 38-39. In support of the proposition that management functions must be found within the four corners of a collateral agreement to make the agreement subject to IGRA, Sharp cites *Jena Band of Choctaw Indians v. Tri-Millenium*, 387 F.Supp.2d 671 (W.D. La. 2005), a federal district court case that articulated such a rule based on its interpretation of NIGC's

[16] Sharp also argues that the jury found the ELA and Promissory Note not to be management contracts. *Resp. Br.* at 40 & n. 19. Although the jury was instructed on the law of management contracts, the jury was not instructed to determine whether either agreement was a management contract. Nor is such determination an issue for the jury. *See* n. __, *supra.*

regulatory definition of "management contract." *Id.* at 678 (citing 25 C.F.R. § 502.15). That definition states that:

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

25 C.F.R. § 502.15 (emphasis added). Because the definition includes the term "collateral agreement," the district court reasoned that a collateral agreement is not subject to the statutory approval requirement (25 U.S.C. §§ 2710(d)(9), 2711(a)(1)) unless the collateral agreement itself meets the definition of management contract by "provid[ing] for the management of all or part of a gaming operation." *Jena Band*, 387 F.Supp. at 678.

This is not a correct interpretation of the regulation. If a collateral agreement must independently meet the definition of "management contract" (per 25 C.F.R. § 502.15) to fall within IGRA's pre-approval requirement, the statutory inclusion of "all collateral agreements . . . that relate to the gaming activity" (25 U.S.C. § 2711(a)(3)) would be rendered a nullity, as would the regulatory definition of "collateral agreement." *See* 25 C.F.R. § 502.5. In such case, the only consideration, as to any contract, would be whether the contract by itself "provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

The NIGC regulations need not and should not be read as rendering statutory and regulatory provisions surplusage. *See generally People v. Rodriguez*, 55 Cal.4th 1125, 1147, 290 P.3d 1143, 1147 (Cal. 2012) (citation omitted). To be sure, the regulatory definition utilizes the phrase "any contract, subcontract, *or* collateral agreement." *Id.* Use of the disjunctive "or" suggests that each type of instrument – contract, subcontract, or collateral agreement – is to be separately considered. However, such interpretation would ignore the regulatory context and the plain meaning of the term "collateral." In authorizing the NIGC to regulate management agreements *inclusive* of all collateral agreements, 25 U.S.C. § 2711(a)(3), Congress plainly intended to extend IGRA's reach to instruments that become subject to regulation not by themselves, but by virtue of their relationship to management contracts and when all relevant instruments are read together. *Id.* At bottom, the regulatory definition of "management contract" is simply that: a definition that reflects Congress's intent to include collateral agreements within IGRA's regulatory scope. The regulatory definition does not purport to narrow or otherwise alter the statutory approval requirement, which applies to the term "management contract" as meaning both the contract that provides for the management of gaming operations and "all collateral agreements . . . that relate to the gaming activity." *Id.*

Because the interpretation adopted by *Jena Band* cannot be squared with the statute and is not compelled by the regulatory text, it should not be followed by this Court. Sharp observes (*Resp. Br.* at 38) that two federal courts of appeals have purported to follow *Jena Band*. *See Wells Fargo*, 658 F.3d at 700-702 (7th Cir.); *Catskill Development*, 547 F.3d at 130 (2d Cir.). Neither court, however, found agreements to be outside of IGRA's scope per the ruling in *Jena Band* that "only collateral agreements that also provide for the management of all or part of a gaming operation are void without NIGC approval." *See Wells Fargo*, 658 F.3d at 701 (remanding for further consideration); *Catskill Development*, 547 F.3d at 131-132 (finding collateral agreements to be subject to IGRA approval requirements on other grounds). Indeed, the *Jena Band* regulatory interpretation did not figure into the result even of *Jena Band*, as the court there found the agreements at issue to be subject to IGRA, despite its narrow reading of the rule on collateral agreements. 387 F.Supp.2d at 680.

Rejecting the ruling in *Jena Band* would not mean that all agreements collateral to unapproved management contracts also are void. *See Catskills Development*, 547 F.3d at 130, n. 20 (rejecting such view). By statute, the term "management contract" includes, in addition to any contract providing for the management of gaming operations, only those agreements collateral to such agreement that "relate to the gaming activity."

25 U.S.C. § 2711(a)(3). Some collateral agreements will be too tangential to meet this test. Here, however, the Tribe contends that the ELA and Promissory Note are effectively one contract under common-law principles. *See Appellant's Reply Br.* at 29-30. Under such circumstances, all instruments are void under § 533.7, unless and until the management contract inclusive of the collateral agreements is approved.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Superior Court and remand for dismissal on grounds of preemption and lack of subject-matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the foregoing brief for the United States as *amicus curiae*, including the application for permission to file and all footnotes, contains 10,500 words. As permitted by rule, I have relied on a word-processing system (Microsoft Office Word 2007) to determine this count.

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PROOF OF SERVICE

I certify that I am at least 18 years of age and am not a party to this legal action. My business address is United States Department of Justice, 950 Constitution Ave., NW, Washington, DC 20004 (Post Office Box 23795, Washington, DC 20026-3795). On *June 19, 2013*, I mailed a copy of the foregoing

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

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