IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

SHARP IMAGE GAMING, INC., A CALIFORNIA CORPORATION **Plaintiff,** **vs.** **SHINGLE SPRINGS BAND OF MIWOK INDIANS** **Defendants.**	**CASE NO: PC20070154** **RULING ON MOTIONS TO DISMISS/QUASH BASED UPON PREEMPTION AND SOVEREIGNTY**

On September 11, 2009, the Court heard oral argument upon the Defendant Shingle Springs Band of Miwok Indians' (hereinafter referred to as "Band") motions to quash /dismiss the Complaint herein for lack of jurisdiction on the basis of preemption and sovereign immunity. It should be noted that tribe filed separate motions to quash/dismiss on the basis of lack of jurisdiction on July 7, 2007 and September 22, 2008, an amended motion to dismiss/quash on April17, 2009, and a second amended motion to quash/ dismiss on May 6, 2009. With the exception of the July 7, 2007 motion, each was accompanied by separate motions to quash/dismiss on the grounds of preemption and sovereign immunity. The Court will hear all motions as one on the basis of preemption and sovereignty. The ruling will first address preemption and then sovereignty. Plaintiff, Sharp Image Gaming, Inc., a California Corporation (hereinafter referred to as Sharp), disputed that the motions should be granted. The Court authorized limited discovery by each party (*Goehring vs. Superior Court* (1998)

62 Cal.App.4th 894, 910; the *18809 Corporation vs. Superior Court* (1962) 57 Cal.2d 840, 843 and *Milhlon vs. Superior Court* (1985) 169 Cal.App.3d 703, 710). After considerable disagreement, discovery was completed with the help of a referee.

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

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

RULING ON PREEMPTION

In order to address the issues presented, it is appropriate to set forth the chronology of events from the inception of contact between the parties until the most recent event, the issuance of the Chairman of the National Indian Gaming Commission, Philip N. Hogan's ("Chairman") decision regarding agreements between the Shingle Springs Band of Miwok

Indians (Band) and Sharp Image Gaming, Inc. (Sharp), under date of April 23, 2009)[1] which was filed with the court as an attachment to the Shingle Springs Band of Miwok Indians' Request For Judicial Notice In Support Of Amended Motion To Quash/Dismiss filed May 5, 2009.

ANALYSIS PROCEDURE

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

CHRONOLOGY OF MAJOR EVENTS

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

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

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

3. May 8, 1996 AE 84-89 NIGC[3] acknowledgement of receipt of Gaming Ordinance Exhibit D to J. Murray Declaration, Exhibit 9 to Joint Appendix filed by Defendant on September 22, 2008.

4. May 21, 1996 AE 160 Band Resolution 96-12 adopted authorizing officers to sign any necessary Agreements, Contracts or Promissory Notes Exhibit 9-E of Joint Appendix of Defendant filed on September 22, 2008.

5. May 24, 1996 SSR 0023 & AE 84-89 GMA[4] signed, Exhibit 1, sub exhibit B to Declaration of S. Kimball filed June 4, 2009.

6. May 24, 1996 SSR 0113 Promissory Note for $200,000.00 Exhibit H to S. Kimball Declaration filed May 15, 2009.

7. July 6, 1996 AE 158-159 NIGC approval of Gaming Ordinance by NIGC – on July 6, 1996, Exhibit 9 – D of Defendant's Joint Appendix filed September 22, 2008.

8. August 21, 1996 AE 161 Band Resolution 96-18 authorizing Creation of Gaming Commission Exhibit F to Exhibit 9 of Band's Joint Appendix filed September 22, 2008.

9. August 26, 1996 AE 163-164 Gaming Commission appointed by Resolution of Band 96-19, Exhibit 9 –G of Defendant's Joint Appendix filed September 22, 2008.

10. October 30, 1996 AE 165-169 Band adopts Resolution 96-24, Environmental Requirements, Exhibit H to Exhibit 9 to Band's Joint Appendix filed September 22, 2008.

11. November 2, 1996 SSR 3713-17 NIGC Notice of health violation, Exhibit X to S, Kimball Declaration, filed May 15, 2009.

12. November 5, 1996 AE 165-169 M. Cox letter to William D. Murray stating GMA is void, Exhibit C to Declaration of S. Kimball filed June 4, 2009.

13. December 18, 1996 SSR 1400 Minutes of Band, December 18, 1996, Sharp will continue to fund Band, Exhibit k to Declaration of S. Kimball filed May 15, 2009.

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[3] National Indian Gaming Commission

[4] Gaming Machine Agreement

14. November 15, 1997 SSR 209-210 Band note payable to Sharp for $3,167,692.86, Exhibit 14 to Defendant's Joint Appendix filed September 22, 2008.

15. November 15, 1997 AE 84-89 & SSR 2009 Equipment Lease Agreement[5] Exhibit D to S Kimball Declaration of June 4, 2009.

16. December 15, 1997 SSR 0015 Band minutes, 12/15/97 – negotiations discussion, Exhibit M to Declaration of S. Kimball filed May 15, 2009.

17. December 17, 1999 AE 175 Band Resolution 99- 67 rescinding Resolution 92-12 re gaming agreements authority, Defendant's Joint Appendix filed September 22, 2008, Exhibit E to Exhibit 9 thereof.

18. May 5, 2000 AE 176-178 Department of Interior approval of State Compact -June 16, 2000 AE 176 SSR 2399, Exhibit L to Exhibit 9 of Defendant's Joint Appendix of Evidence filed September 22, 2008.

19. June 16, 2000 SSR 2399 Band Gaming Commission Summary Suggested Cash Owed Sharp - Exhibit 125, N. Fonseca deposition, Exhibit T, S. Kimball Declaration filed May 15, 2009.

20. August 25, 2000 SSR 2970 Band Resolution 2000-42, Workout Instructions to attorneys re Sharp Proposed settlement – Exhibit 126,11/21/08 deposition of N. Fonseca, Declaration of S. Kimball filed May 15, 2009, Exhibit V.

21. September 16, 2002 AE 066& SSR 1387 September 16, 2002 letter to Cal Trans stating Sharp Agreement terminated by Tribe, Defendant's Joint Appendix filed September 22, 2008, Exhibit D to Exhibit 6.

22. June 14, 2007 AE 070-075 Advisory Opinion of Ms. Coleman, NIGC attorney, Exhibit L to S. Kimball Declaration filed June 4, 2009.

23. January 24, 2008 Letter NICHOLAS Fonseca to Chairman Hogan requesting review of GMA and ELA, enclosing Coleman Opinion of June 14, 2007 and advising available for meeting, Exhibit EE Declaration of S. Kimball, filed June 4, 2009.

Spring of 2008 Meeting by Band Chairman and attorney with NIGC Chairman and his attorney, Deposition of Nicholas Fonseca, taken November 21, 2008, portions of which are set forth in Declarations of S. Kimball filed as follows: Exhibit U to May 15, 2009, Exhibit J to Supplemental Declaration and Exhibit S to Exhibit 1 to August 17, 2009.

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

24. April 23, 2009 Chairman Hogan's Opinion, Exhibit A to Declaration of S. Kimball filed June 4, 2009 and Exhibit Z to Declaration of S. Kimball filed May 15, 2009.

STATEMENT OF FACTS

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

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

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

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

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

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

By letter under date of May 5, 2000, the Department of the Interior, Office of the Secretary, approved the Compact between the Band and the State of California which authorized Class III gambling machines (Chron- 18). With a date of June 16, 2000, on Band Gaming Commission letterhead, a statement was written that the suggested total owed by the Band to Sharp was $3,162,453.73 (Chron-19). By Band Resolution 2000-42 adopted August 25, 2000, the Band Council authorized and directed its attorneys immediately to begin to prepare "the Workout Agreement" and initial documentation to sue Sharp if it is rejected or expires subject to their prior approval of any action (Chron-20).

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

Sometime after 1997, the Band signed a contract with Keane-Argovitz (Deposition of Jim Adams taken on November 4, 2008, Exhibit D to Declaration of S. Kimball filed May 15, 2009, page 147, lines 7-9.) The Band then moved ahead with Keane-Argovitz (Adams deposition, page 148 lines 11-12). Thereafter the Band "all of a sudden was working with Lakes Gaming" (Deposition of Jim Adams, Page 149, lines 1-3). By December 31, 2002, the Band had incurred $25,124,750.00 of indebtedness to Lakes Kean Argovitz Resorts for sums expended on the casino project (Audit Report of Shingle Springs Rancheria by Goodell, Porter & Fredericks, LL, C.P.A.s Dated December 31, 2002, Exhibit W, page 17, SSR 2557 to Declaration of S. Kimball filed May 15, 2009).

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

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

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

Ms. Penny J. Coleman, Acting General Counsel of the NIGC, sent a letter to Kent Richey, an attorney for the Band under date of June 14, 2007 which opined that the GMA and ELA and collateral agreements, i.e., the Promissory note (Chron-14) were management agreements and not in compliance with the NIGA (Chron -22). This followed a number of communications between the NIGC attorneys and Kent Richey as set forth as attachments to the Declaration of S. Kimball filed June 4, 2009 as exhibits F, G, H, I, J, K and L (Advisory

Opinion Letter). It appears Sharp's attorneys were not made aware of these contacts until after this action was filed. On January 24, 2008, Chairman Fonseca of Band sent a letter to Phil Hogan, Chairman of NIGC submitting copies of the GMA and ELA and submitted such for review for the first time pursuant to Section 533.2, Code of Federal Regulations, Title 25 (Chron-23). No documents required by 25 FCR section 533.3 were submitted with said request for review although it states a copy of the June 14, 2007 Advisory letter (Chron-22) was included which had been sent to Mr. Mr. Richey as well as other documents supporting the Band's position. On July 18, 2008, John Hay for Penny Coleman, Acting General Counsel, advised Chairman Fonseca and Mr. Jacobs, Sharp's attorney that ".. due to the age of the Agreements, the OGC did not request they be submitted" as required by section 533.3 FCR (Exhibit K to Supplemental Declaration of S. Kimball filed on August 17, 2009). Insofar as the record reflects, the Band never took action to formally submit the GMA to the NIGC and request approval until 2008. It appears that the letter of January 24, 2008 by Chairman Fonseca (Chron - 23) requesting opinion confirmation is asserted to be the request for formal disapproval. Insofar as the record reflects, the Band never took action to formally submit the GMA to the NIGC with documents required to be included under CFR 533.3. and request approval. In his letter of January 24, 2008, (Chron-23) Chairman Fonseca stated he would be available to meet with Chairman Hogan. In that letter, Tribal Chairman Fonseca made it clear that he would like to discuss the matter with Chairman Hogan, preferably before February 22, 2008. As is evident from communications hereinafter described, Band's attorneys urged such a meeting and extensive e-mails were exchanged among them and the NIGC with regard thereto. The Court has reviewed the e-mails above referred to attached as exhibits to the declaration of S. Kimball filed May 15,

2009 as exhibits AA, BB, CC and DD. As a result of the above e-mails, Chairman Hogan met with Band Chairman Fonseca, Band Administrator Ms. Delgado, Band Attorney Ms. Lacey, and Penny Coleman, Counsel for the NIGC. The meeting took place at a hotel in Seattle, Washington 4 or 5 months before Fonseca's November deposition hereinafter referenced. Sharp representatives were not given notice as Mr. Fonseca wished to talk to the NIGC himself without interruption, which he in fact did for about 45 minutes (Deposition of Nicholas Fonseca November 21, 2008, Exhibit S to the Declaration of S. Kimball filed June 4, 2009, Pages 107- 109).

CONCLUSIONS

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

The Band had made it clear by the statement of it's Chairman that the contract had been terminated and Mr. Anderson of Sharp had the same understanding as above stated. Since the contract was not viable and had been terminated or cancelled according to the parties, it obviously was not a contract which dealt with gaming. By the time this action was filed, as stated above, Lakes had advanced considerable funds and the EIR process for the overpass funded by Lakes assistance and bonds was in progress at least since 2002. The evidence is clear that the Band considered Sharp and its agreements no longer viable and had replaced Sharp by Lakes. The purpose of The Indian Gaming Regulatory Act (S. Rep. 100-446 U.S.C. A. N. 3071) was to provide for joint regulation by the tribes and the Federal Government of Class II gaming on Indian Lands and to create a gaming commission which would have a regulatory role for Class II gaming and an oversight role with respect to Class III. (Senate Report No. 100-446, August 3, 1988). The Findings set forth in 25 USCA sec. 2701 and the Declaration of Policy in Sec. 2702, 2703, 2704 and 2705 USCA clearly

establish that the powers of the NGIC with regard to management contracts are limited to gaming on Indian Land. Since the Band asserts the GMAC, ELA and Note herein are terminated and/or cancelled, there is no jurisdiction in the NGIC with regard to said instruments, either to review, regulate, approve or disapprove them. Absent such regulatory authority in the NIGC, the dispute regarding damages from any alleged breach such as is set forth in the Complaint in this action rests with the State of California courts. Although factually distinguishable, the Court of Appeals in *American Vantage Companies vs. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 597 held that the claim must intrude on the tribe's control of its gaming enterprise and that is the context in which a case must be analyzed. The *American Vantage* case held that the law was correctly stated in Gaming Corp. of *America vs. Dorsey & Whitney* (1996) 88 Fed.3d 536, 550: potentially valid state claims are those that would not interfere with the nation's governing of gaming. The Band's position that the agreement was terminated by the tribe as stated by Band Chairman Fonseca on September 16, 2002 in his letter to the California Transportation Commission (Chron-21) as well as the existence of a contractual relationship with Lakes Entertainment, Inc. for the development of a gaming enterprise on the Rancheria which predated his election to the tribal council in 1999 (Declaration of Nicholas Fonseca September 22, 2008).

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

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

In further support of the Court's conclusion that the agreements of the Band and Sharp were terminated before the NIGC took final action and as a separate and independent basis for determining the character of the action of the Chairman as set forth in his "final decision," the Court finds the decision of the Chairman of the NIGC was not final action and must be disregarded because it was fatally flawed. In support of this conclusion, and as a separate basis for denying the motion to quash and dismiss, the Court makes the following findings:

1. The decision violated the due process rights of Sharp. Although there was not a formal hearing by the Chairman of the NIGC and thus reasonable ex parte contacts may be made by a party thereto, the extensive nature of the contacts, the expressed friendship of the participants, and in particular, the 45-minute meeting by the Chairman with his attorney and the Band's Chairman and his attorney was so egregious a violation of the due process requirement as to require this Court to disregard the finding (*Home Box Office, Inc. vs. Federal Communications Commission* (1976) 567 F.2d 9, 57) which discusses the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits which undergirds all of our administrative law.

Cited in the *Home Box Office* case, supra, is the case of *Sangamon Valley Television Corporation vs. United States* (1959) 269 F.2d 221.224 in which the court said:

"Interested attempts 'to influence any member of the commission***except by the recognized and public

Processes go to the very core of the Commission's quasi-judicial powers**. . . ."

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

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

submission of a request for approval of a management contract; rather, it was another request for an expression of opinion by the Chairman of the NCIG with regard to the G. M. A. and E.L.A. As such it is, in the Court's opinion, not entitled to any deference.

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

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

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

SOVEREIGN IMMUNITY

A contemporaneous motion was made by the Defendant to quash/dismiss the complaint on the grounds that the Band's sovereign immunity prevents it from being sued in

this court or at all. The Chronology and factual statements set forth under the Preemption portion of the ruling are incorporated in this portion by reference fully as set forth at length herein.

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

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

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

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

encompasses the main issues of payment and source addressed by the complaint. With regard to interpretation of the intent of the parties as to contracts, if there is no conflicting extrinsic evidence, the question is one of law for the judge (*Paralift Inc. vs. Superior Court* (1993) 23 Cal.App.4th 748, 754 and *Lange vs. TIG Insurance Co.* (1998) 68 Cal.App.4th 1179, 1185. On the other hand, if there is to be extrinsic, relevant evidence to be presented, the judge must determine if one or both constructions of intent are reasonable and if both are, the jury must decide the intent issue (*Lange vs. TIG*, supra, *Wolf vs. Superior Court* (2004)114 Cal.App.4th 1343, 1550-1551). In the latter case, the jury must determine the mutual intent of the parties (*Morey vs. Vannucci* (1998) 64 Cal.App.4th 904, 913; *Vine vs. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 590). In light of the fact that the limited discovery and the declarations indicate that there are crucial areas as to the contracts and their intended source of payment, which casino is involved, and whether certain machines are capable of being configured easily to handle Class II or Class III type gambling which would affect any judgment, it is the ruling of the Court that there is sufficient evidence to establish that either interpretation is reasonable and judicial economy dictates that a jury will be necessary. It is further the Court's conclusion that judicial economy mandates that the issue of intent will in all probability require a jury which will determine the correct interpretation of payment issues and source of payment issues and related sub issues, that those issues should be reserved for a jury and the motion to quash/dismiss should be denied without prejudice to the interpretation issue be tried at the trial in chief since neither party should be forced to elect or decline jury at this stage.

RULING

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

Dated: November 17, 2009

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

SHARP IMAGE GAMING, INC. **Plaintiff** **vs.** **SHINGLE SPRINGS BAND OF MIWOK INDIANS** **Defendants.**	**CASE NO: PC20070154** **CERTIFICATE OF MAILING**

I, Holly Warren, Judicial Secretary of the Superior Courts of the County of El Dorado, State of California, do hereby certify that I am a citizen of the United States and employed in the County of El Dorado. I am over the age of eighteen years and not a party to the within action. My business address is Superior Court of the State of California, County of El Dorado, 495 Main Street, Placerville, CA 95667. I mailed the attached **RULING ON MOTIONS TO DISMISS/QUASH BASED UPON PREEMPTION AND SOVEREIGNTY** on the parties as indicated below:

Steve Kimball, Esq. & Matthew Jacobs, Esq., 400 Capital Mall, Ste. 1400, Sacramento, CA 95814

Mary Kay Lacey, Esq. & Matt Marostica, Esq., 525 Market Street, 26th Floor, San Francisco, CA 94105

Steve Keller, Dispute Resolution Pro Tem Judge, 3321 Cameron Park Drive, Cameron Park, CA 95682

Mike Verzatt, Sr. Research Attorney, 1354 Johnson Blvd., South Lake Tahoe, CA 96150

I am familiar with the business practice of El Dorado County Superior Court with regard to collection and processing of documents for mailing. The documents described above were placed for collection and mailing in Placerville, CA through the United States Post Office.

Executed on November 17, 2009 in Placerville, California.

EL DORADO COUNTY SUPERIOR COURT

By Holly Warren

HOLLY WARREN
Judicial Secretary