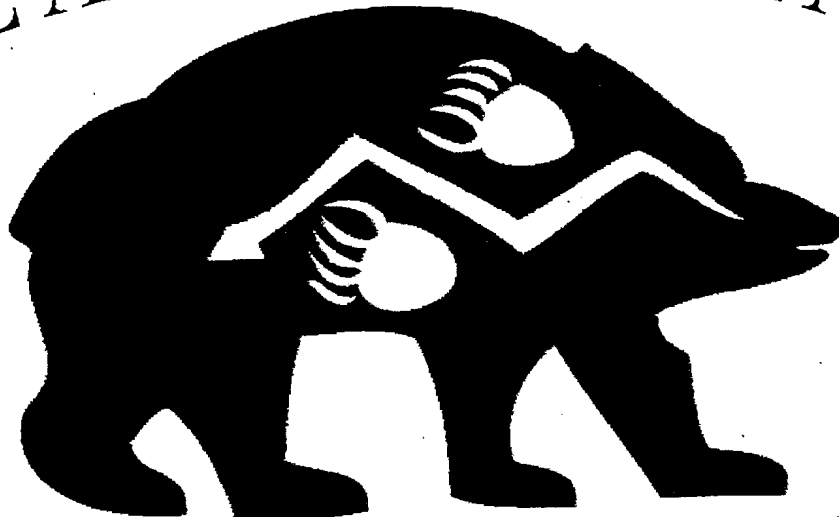


# BEAR RIVER BAND



# OF THE ROHNERVILLE RANCHERIA

## TELEFAX TRANSMITTAL SHEET

To: ABC Appeals Board

From: M. Acosta

Fax Number: (916) 323-2760

Date: 5/3/10

Name: Allan Reriche

Total No. Of Pages Including Cover: 8

Phone Number:

Re: AB-9047

- URGENT
- FOR REVIEW
- COMMENT
- PLEASE REPLY
- RECYCLE

### NOTES / COMMENTS:

Opening brief for AB-9047.



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BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION )	FILE, 47-423392
AGAINST, )	
Bear River Casino )	REG, 08070211
11 Bear Paws Way )	
Loleta, CA 95551-9684 )	OPENING BRIEF
ON-SALE GENERAL PUBLIC EATING )	
PLACE )	
LICENSE )	

NOW COMES Appellant/Licensee, Bear River Casino, and submits this Opening Brief in the above-referenced matter. The grounds for the appeal, as stated in the Notice of Appeal, and their respective argument and citations are as follows:

1) The Licensee complied with Condition #8 of the Licensee's Type 47

At the heart of this appeal is the language in Condition #8 of the Appellant/Licensee's original Type 47 liquor license which reads:

"The licensee shall modify the entrance from Singley Road to Bear River Drive so that public vehicular ingress and egress is available only to and from the south on Singley Road. The modified entrance or a separate entrance shall provide access to the premises from the north on Singley Raod for emergency vehicles only." [Emphasis added.]

The ALJ construed the term "shall" as being in the present-tense so as to place the Licensee/Appellant immediately in

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1 violation of Condition #8 from the date of issuance of its Type  
2 47 license. More specifically the Administrative Law Judge  
3 found in paragraph 12 of the decision that Respondent is "not  
4 now, nor have they ever been, in compliance with Condition #8."  
5 Thus according to the ALJ's construction, the ABC issued a Type  
6 47 license to the Licensee/Appellant with at least one condition  
7 that placed the Licensee/Appellant in violation of the license's  
8 terms immediately. Of course, this construction, if true, would  
9 violate due process and would likely be illegal for the ABC  
10 itself.  
11

12  
13 The original parties, including the ABC, intended that the  
14 term "shall" in Condition #8 be constructed not to place the  
15 Licensee in immediate violation, but to give a reasonable time  
16 to complete this condition. In fact, the Petitioner himself did  
17 not allege that a similar condition (requiring the completion of  
18 road widening) had been violated, as it was completed within a  
19 reasonable time period. The Petitioner himself did not make this  
20 argument and most of the testimony by the Petitioner's own  
21 witnesses dwelled on the timeframe for implementation of the  
22 license conditions related to construction. Furthermore, the  
23 ABC's lawyers, which declined to file the accusation, thus  
24 resulting in a private party accusation, would have been  
25 obligated to file the accusation if the ALJ's construction of  
26 law was correct.  
27  
28

1 At the same time, the Judge made a finding of fact, in  
2 paragraph number 7, that modifications to the road were made "to  
3 comply with Condition #8." Thus, the ALJ found that the Tribe  
4 did comply, but that the United States Bureau of Indian Affairs  
5 "ordered" that the modifications be undone. (Findings of Fact,  
6 paragraph #7). This being found as fact, the  
7 Licensee/Appellant's condition was in fact met, but through  
8 order of its trustee, the United States of America, the  
9 modification was undone. (The Licensee/Appellant is a wholly-  
10 owned entity of a federally-recognized Indian Tribe, see Federal  
11 Register.)

12  
13  
14 2) The ALJ's finding of "legal impossibility" renders the ruling  
15 of violation an abuse of discretion.

16  
17 The ALJ, in paragraph number 7, finds that "[I]t is  
18 unlikely that Respondent would have agree to the conditions had  
19 they known that it was impossible to comply with Condition #8."  
20 The finding of legal impossibility was requested in closing  
21 arguments by the Licensee/Appellant, as the testimony supported  
22 it. Having found both legal impossibility and no fault of the  
23 Licensee, the ALJ did not strike the condition, as requested by  
24 the Licensee/Appellant, but rather, despite these factual  
25 findings, goes on to legally conclude that the the  
26 Licensee/Appellant is in violation of the terms of its Type 47  
27 license.  
28

1 In order to reach this extraordinary conclusion, the ALJ  
2 opines in the decision that the protestants did not get what  
3 they bargained for in the original settlement agreement, namely  
4 Condition #8 of the license, and settled in lieu of a full blown  
5 evidentiary hearing. The ALJ did not memorialize in his ruling  
6 that the Appellant/Licensee also did not get what it bargained  
7 for, as it wouldn't have entered into agreed upon conditions of  
8 licensure that would unavoidably and immediately place it in  
9 violation of the terms of its license. The ALJ finds in  
10 paragraph 5 of the "Penalty Considerations" section of the  
11 decision that:  
12  
13

14  
15 "The problem here is the Bureau of Indian Affairs. The  
16 Department of Alcoholic Beverage Control has no authority over  
17 that entity. Nor does Humboldt County, Bear River Casino or the  
18 Singley Hill Homeowners Association."

19 Thus, the ALJ acknowledges that even if the original  
20 protest had been fully litigated by the protestants, it was  
21 beyond the jurisdiction of the ABC to order Condition #8 as  
22 worded, because the ABC lacks jurisdiction over the Bureau of  
23 Indian Affairs. Moreover, neither the County of Humboldt nor  
24 Caltrans was not a party to the original action, and if their  
25 cooperation had been withheld, this impossibility would have  
26 arisen with respect to those entities. Thankfully, only the BIA  
27 withheld its cooperation (whether reasonable or not), and so  
28 Condition #7 (regarding widening the road) was in fact

1 accomplished. But the testimony clearly demonstrated that the  
2 Licensee/Appellant's lack of control over the federal government  
3 became unresolvable. Similarly, the ABC's lack of jurisdiction  
4 remains true, regardless of whether Condition #8 of the license  
5 was achieved by order after hearing or by a settlement  
6 agreement. Furthermore, the ABC was a party to the original  
7 protest, and signed off on this impossible condition too. Thus  
8 it was no more or less unfair to the original protestants than  
9 to the applicant.  
10

11  
12 The ALJ ultimately decided to hold the Licensee/Applicant  
13 responsible and liable for the refusal of the federal government  
14 to cooperate, which is unfair and should be reversed and  
15 remanded. The ALJ admits that the ruling may seem harsh and  
16 unfair. The ALJ states in paragraph 7 that "it does not seem  
17 fair to punish the Respondent's license because of the inaction  
18 of the Bureau of Indian Affairs." Thus, the ALJ himself believes  
19 that this result is an abuse of his own discretion.  
20

21  
22 3.) The petitioner in the accusation lacked standing to  
23 represent the purported organization called the "Singley Hill  
24 Homeowner's Association.

25 The ALJ did not allow the Respondent to voir dire the  
26 Petitioner regarding his credentials as a representative of a  
27 purported organization. No documentation was provided as to the  
28 existence, bylaws, nor representative designation or resolution

1 of said purported organization. Instead the ALJ stated that he  
2 would simply take the Petitioner at his word, as it would be  
3 unwise to mislead the court. (Page 8 Line 6 through Page 9,  
4 Line 5). Respondent's concern was to clarify whether or not the  
5 purported organization had standing to file an accusation. The  
6 ruling on standing without allowing voi dire was unduly  
7 prejudicial and unfair, as the transcript contains no evidence  
8 that the party is actually a real entity. It also affected the  
9 ability of the Petitioner to potentially settle the matter  
10 before a ruling was made, as the Petitioner was unable to  
11 negotiate with a "ghost" entity. This is salient because the  
12 ALJ's ruling is premised on the "bargained for exchange" theory  
13 of the original protestants, yet there was no reconciliation of  
14 those original protestants offered by the petitioner. In fact,  
15 accuser, Mr. Krahforst, settled his original protest against the  
16 Appellant/Licensee's Type 47 license and dropped out of the case  
17 as a protestant  
18  
19  
20  
21

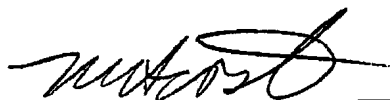
22 4.) Erroneous Ruling on Numerous Technical Hearsay, Relevance  
23 and Authentication Objections Deprived the Respondent of a Fair  
24 Hearing.

25 The Petitioner was a layman and was without counsel. No  
26 finding of indigence was requested or made. The ALJ early in  
27 the hearing stated that he did not intend to hold the Petitioner  
28 to the same standards as other litigants, such as the Respondent

1 or the ABC (which was not a party to the case). (Beginning Page  
2 31, line 3-11.) The Petitioner filed the accusation purportedly  
3 on behalf of an organization, however no documents were  
4 authenticated to prove the existence of the organization nor the  
5 Petitioner's capacity as an authorized representative. The  
6 Petitioner was allowed to testify in an unsworn manner. These  
7 "in pro per" allowances were unfairly prejudicial to the  
8 Licensee and colored the ALJ's ruling in equity.  
9

10  
11 Conclusion

12 In conclusion, the Licensee/Appellant prays that the  
13 appeals board either strike condition number 8 of its Type 47  
14 license, or remand this matter to the ALJ for a ruling  
15 consistent with his findings of fact regarding lack of fault by  
16 the Licensee/Appellant, lack of jurisdiction over the United  
17 States government, and legal impossibility.  
18

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22 Michael P. Acosta, Attorney #200443  
23 Bear River Band of Rohnerville Rancheria  
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