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ARTICLE

REAL ESTATE TRANSACTIONS WITH NATIVE AMERICAN TRIBES

By Adam M. Starr*

INTRODUCTION

Commercial contracting with Native American tribes presents a number of complicated and unsettled questions of federal and state law. The increasing visibility of tribal entities in California real estate and business transactions highlights the need for clarity and predictability, both for the tribes and for persons contracting with them. In just the last year, two published California decisions have provided some additional direction for the creation of enforceable sovereign immunity waivers. But the developing case law does not always provide clear guidance, and in important areas, such as jurisdiction, dispute resolution, and exercise of remedies, uncertainty reigns. This article examines recent developments pertaining to contracts with Native American tribes, and briefly identifies some open questions—with a particular emphasis on loan contracts encumbering Indian lands—that remain as a consequence of contracting with non-private parties.

BACKGROUND

Tribal rights to Indian lands are the exclusive province of federal law.[1] Exclusive federal authority over Indian affairs is based on three provisions of the United States Constitution: the Indian commerce

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clause,[2] which gives Congress the exclusive power to control Indian commerce; the treaty clause;[3] and the supremacy clause,[4] which, together with extensive congressional legislation on Indian affairs, has broadly preempted state law.[5]

Fee title to Indian lands is vested in the United States, with a right of occupancy vested in the Indian tribes.[6] That right of occupancy can only be extinguished by the United States.[7] "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."[8]

Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories.[9] Indian tribes are not subject to suit in state or federal courts unless an enforceable sovereign immunity waiver or a federal law authorizes suit in another forum.[10] Absent such a waiver, suits subject against a tribe must be brought in the appropriate tribal court.

SOVEREIGN IMMUNITY WAIVERS IN CALIFORNIA

The existence and enforceability of a valid waiver of sovereign immunity is essential if a contracting party wishes to avail itself of an arbitral or adjudicatory process other than a tribal court. As a matter of federal law, an Indian tribe is subject to suit in state or federal courts only where Congress has authorized the suit or the tribe has expressly waived its sovereign immunity.[11] This immunity extends to a tribe's commercial activities.[12] Waivers must be clear. They are strictly construed, and there is a strong presumption against them.[13] Absent an effective immunity waiver, the tribal court may be the only appropriate venue for pursuing the action.

There are generally two requirements for a valid immunity waiver: (1) the express language of the contract must clearly evidence the intent to waive; and (2) the tribe must have vested its agent with authority to waive immunity. Three recent court of appeal decisions in California have examined each of these aspects when evaluating immunity waivers.

1. In *Smith v. Hopland Band of Pomo Indians,*[14] the First District Court of Appeal in 2002 held that an arbitration clause in a contract between a tribe and an architect constituted a valid waiver of sovereign immunity.[15] First, the court considered the language of the agreement. The contract's arbitration clause provided that "the award rendered by the arbitrator…

shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." It also provided that the agreement "shall be specifically enforceable in any court having jurisdiction" and that the agreement was to be governed by the law of the principal place of the architect's business, in California.[16] Following recent United States Supreme Court precedent,[17] the court rejected the tribe's argument that the waiver was implied (and therefore ineffective) or somehow ambiguous because it did not contain the words "sovereign immunity," or expressly state that it was waived.[18]

The Court in *Smith* next considered whether the tribe had vested its agent with authority to waive its immunity. A tribal ordinance provided that absent a duly enacted ordinance of the tribal council or a resolution of the council explicitly waiving tribal immunity, the tribe "does not consent to be sued and is not subject to suit in any administrative or court proceeding."[19] Because the tribal council had authorized the tribe's agent to negotiate and execute the contract (which included the arbitration clause and choice of law provisions), and thereafter approved the final contract by resolution, the Court held that the tribe's agent could validly waive its sovereign immunity.[20] The court was not persuaded by the fact that the tribal counsel subjectively believed that it was not waiving immunity by approving the contract.[21]

2. In *California Parking Services, Inc. v. Soboba Band of Luiseno Indians*,[22] the Fourth District Court of Appeal in 2011 determined there was not a waiver of sovereign immunity despite the existence of an arbitration clause. The case turned on the language of the arbitration provision in the agreement between a contractor and the tribe, which provided that an arbitration "shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association…*excluding Rule 48(c)*."[23] Rule 48(c) provides: "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."[24] The court concluded that the exclusion was a refusal of the tribe to accept the jurisdiction of state or federal courts, and that there was no immunity waiver.[25] Consequently, the tribe could not be compelled to arbitrate the dispute.[26] Despite the fact that the agreement to arbitrate was effectively rendered illusory, and that the court expressed sympathy with the contractor's plight, the strong presumption against immunity waivers compelled it to find in the tribe's favor.[27]

3. In *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*,[28] also decided in 2011, the Fourth District Court of Appeal closely examined the conduct of the tribal council before finally determining that the council authorized its agent to enter into a fourth amendment to a construction loan agreement, which contained an express waiver of sovereign immunity.[29]

In that case, the defendant Iipay Nation of Santa Ysabel ("Nation") entered into a loan agreement in 2005 to borrow money from JP Morgan Chase and another bank to finance Nation's construction of a casino.[30] Plaintiff Yavapai-Apache Nation ("YAN") was the successor-in-interest to the banks.[31] Beginning in December 2005, YAN and Nation entered into a number of amendments to the loan agreement.[32]

The loan agreement and the first three amendments included sovereign immunity waivers, whereby Nation waived its sovereign immunity from any suit, including any confirmation of arbitration awards.[33] Before entering into the loan agreement and each of the first three amendments, Nation enacted legislative resolutions authorizing its chairman to enter into the transaction on behalf of the Nation, and authorizing an "irrevocable waiver of its sovereign immunity."[34]

At issue in this case was the fourth amendment to the loan agreement. After a dispute with some of its contractors in 2007, on October 8, 2008 the tribal council enacted a resolution authorizing the tribal chairman to negotiate and execute amendments to the casino loan documents in the best interests of the Nation, by reason of the legal dispute between the Nation and its contractors.[35] Unlike the other amendments, which were quickly executed following each resolution, the fourth amendment was executed by the chairman on January 30, 2009, over three months after the passage of the resolution.[36] The fourth amendment contained a sovereign immunity waiver, although with slightly different language from the preceding amendments.[37] The Nation also warranted and represented in the fourth amendment that the execution and delivery of the amendment had been duly authorized, and that a formal resolution approving the fourth amendment had been adopted.[38]

The Nation defaulted on the construction loan, and in 2010 YAN filed suit against the Nation, alleging breach of contract, among other things.[39] Nation moved to quash on the grounds of lack of jurisdiction.[40] The Court of Appeal considered whether the tribe vested the chairman with authority to waive immunity. Analyzing the fourth

amendment in the context of the tribe's prior resolutions and the prior amendments, the court concluded that the chairman did in fact have authority to enter into the fourth amendment and waive sovereign immunity. The court reasoned that the Nation "irrevocably" waived its sovereign immunity in the loan agreement and first three amendments.[41] The purpose of the fourth amendment was to settle a dispute with its contractors, and not to retract "irrevocable" immunity waivers.[42] At the point of entering the fourth amendment, there were already existing sovereign immunity waivers in place from the previous amendments, and the fourth amendment merely continued them.[43]

Moreover, the court was not convinced that the three month delay between the final resolution and the fourth amendment, in contrast to the few weeks that passed between the first three resolutions and execution of their respective amendment, constituted a basis for holding that immunity was not waived.[44] The court was also not persuaded by the fact that the sovereign immunity waiver provision of the fourth amendment differed from the earlier agreements.[45] The fourth amendment introduced the California reference procedure under Code of Civil Procedure section 638 et seq. (adding protections of judicial review of a referee's decision), which the court concluded was not inconsistent with the earlier waivers, and in no way retracted the waivers already made.[46]

While the *YAN* decision upheld the validity of the waivers based on the terms of the documents and the process by which earlier amendments had been approved and executed by the tribal authorities, it is important to note what the court found *not* supportive of the waiver argument. Specifically, the court rejected YAN's argument that the fourth amendment's representations and warranties, which provided that the tribe had passed a resolution approving the amendment and that the chairman was duly authorized to enter into the amendment, constituted sufficient evidence of the chairman's authority.[47] "Such facial representations and warranties, without more, are not enough to show there was an adequate waiver of immunity, because they might not be true, and any such claims of authorization do not themselves supply adequate proof of compliance with tribal law."[48] The court also rejected YAN's attempt to apply corporate official authority rules to the chairman's conduct, correctly reasoning that sovereign immunity disputes instead must be analyzed under Indian tribal contracting requirements.[49]

4. *Summary*: As a result of the decisions in *Smith, CPS*, and *YAN*, it is now clear that an arbitration provision in a commercial contract

between an Indian tribe and a non-Indian business will constitute a waiver of sovereign immunity unless the contract provides otherwise (as in the case of *CPS*), or the tribe has failed to vest its agent with authority to waive immunity (i.e., appropriate triable ordinances are not complied with in connection with the execution of the contract). Verifying the existence of a valid waiver requires not only a careful review of the contractual language of the waiver, but also a careful review of tribal laws and tribal lines of authority.

SUBJECT MATTER JURISDICTION AFFECTING INDIAN LANDS: STATE, FEDERAL OR TRIBAL COURT

Even assuming a valid sovereign immunity waiver is executed, states do not have jurisdiction to adjudicate "the ownership or right to possession" of any Indian property that is "held in trust by the United States or is subject to a restriction against alienation imposed by the United States."[50] This rule applies where there is even a *possibility* that Indian land is affected.[51] However, such jurisdiction could possibly be conveyed to the state specifically in connection with loan transactions under 25 U.S.C.A. §483a, which provides that Indian land *used as collateral for a secured loan* is subject to foreclosure pursuant to the terms of the parties' agreement in accordance with the laws of the tribe, or, where there are no tribal foreclosure laws, in accordance with the laws of the state in which the land is located. Section 483a states in part:

> (a) The *individual* Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust *in accordance with the laws of the tribe* which has jurisdiction over such land *or, in the case where no tribal foreclosure law exists*, in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land….[52]

By its own terms, Section 483a appears to allow foreclosure of Indian lands under state law where there is no tribal foreclosure law.

There is no California decisional law on whether an action to judicially foreclose a deed of trust encumbering Indian land should be brought in state, federal or tribal court. Although at least one court has interpreted this statute as conveying jurisdiction to the state to conduct foreclosures,[53] not all courts have agreed. For instance, in *Crow Tribe of Indians v. Deernos*[54] a Montana court held that Section 483a "simply authorizes individual Indians to mortgage lands held in trust by the United States for their use and benefit" and "has nothing to do with granting jurisdiction to state courts in such mortgage foreclosure actions, and pointedly avoids the use of the term 'jurisdiction'".[55] In *Northwest South Dakota Production Credit Association v. Smith*[56] a federal circuit court held that Section 483a did not create a federal cause of action for foreclosure (and also did not convey jurisdiction to the state to conduct foreclosures of Indian land).[57] In that case, the court held that the tribal court appeared to be the only proper forum.[58]

Also unclear is whether the power of sale in a deed of trust can be invoked for a non-judicial trustee's sale. The statute refers to "foreclosure or sale" but it is unknown whether a California court would enforce a power of sale if, for example, a tribal court were to enjoin the foreclosure.

Further complicating the analysis, Section 483a refers to the "individual Indian owners." In commercial transactions with tribal organizations, this may not be sufficient to provide a private contracting party with effective remedies against Indian lands. It is unknown if a California court would construe a contract with the tribe itself, to fall within this statute. Should the tribe fall outside of the statute, the parties may run afoul of the prohibition against alienation of tribal lands, thereby prohibiting enforcement of the security interest.

CONTRACTUAL APPROVAL REQUIREMENT FOR ENCUMBRANCE OF TRIBAL LANDS

Federal law expressly requires federal government approval of contracts that encumber Indian lands for a period greater than seven years.[59] "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."[60] On its face, this requirement only applies to contracts with "an Indian tribe." There is no California decisional law on whether this requirement also encompasses entities owned or controlled by the tribe. Out-of-state cases interpreting this

section have tested, among other things, its constitutionality,[61] construction,[62] and applicability to property held by tribe-owned businesses as distinguished from the tribe,[63] as well as the duty and liability of the United States.[64] The lesson to be gleaned from these cases is that the prior approval requirement is constitutional, and for the benefit of the tribe,[65] and that at least if the property is owned by the tribe, the party dealing with the tribe is at risk if the statutory approval requirement is not met.[66] Another regulation provides that "Any individual Indian owner of trust or restricted lands, may with the approval of the Secretary execute a mortgage or deed of trust to his land. Prior to approval of such mortgage or deed of trust, the Secretary shall secure appraisal information as he deems advisable. Such lands shall be subject to foreclosure or sale pursuant to the terms of the mortgage or deed of trust in accordance with the laws of the State in which the lands are located. For the purpose of foreclosure or sale proceedings under this section, the Indian owners shall be regarded as vested with unrestricted fee simple title to the lands (Act of March 29, 1956)."[67]

Where tribal land is to be *leased*, federal law requires that the Secretary approve any lease of Indian land owned by an individual or a tribe and held in trust or restricted by status by the United States.[68] The Bureau of Indian Affairs has opined that a failure to comply with this approval requirement renders the lease void.[69]

CONCLUSION

Many open questions remain concerning commercial contracts between Native American tribes and non-tribal businesses. For instance, California law still lacks clarity with regards to jurisdiction over judicial foreclosure actions where a non-Indian lender seeks to foreclose on Indian lands or where tribal authorities have established legal entities or joint ventures with non-Indian affiliates, although California courts often have found such entities entitled to sovereign immunity in other contexts.[70] Lacking more guidance from the courts, Indian tribes and non-Indian businesses share certain risks of uncertainty. The recently published decisions in California, however, should provide businesses and tribes with some guidance for creating (or avoiding) enforceable sovereign immunity waivers in California.

NOTES

1. *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1148, 276 Cal. Rptr. 62, 801 P.2d 305 (1990).
2. Art. I, §8, cl. 3.
3. Art. II, §2, cl. 2.

4. Art. VI, cl. 2.
5. *Ibid*.
6. See e.g., *Oneida Indian Nation of N.Y. State v. Oneida County, New York*, 414 U.S. 661, 667-668, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974).
7. *Boisclair v. Superior Court, supra*, 51 Cal.3d at 1148.
8. 25 U.S.C.A. §177.
9. *Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1182, 127 Cal. Rptr. 2d 706 (4th Dist. 2002).
10. *California Parking Services, Inc. v. Soboba Band of Luiseno Indians*, 197 Cal. App. 4th 814, 817, 128 Cal. Rptr. 3d 560 (4th Dist. 2011) ("*CPS*").
11. *Id.* at 817.
12. *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357, 23 I.E.R. Cas. (BNA) 1227 (1st Dist. 2005) ("*Big Valley*").
13. *Id.* at 1193.
14. *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (1st Dist. 2002), as modified on denial of reh'g, (Feb. 6, 2002) ("*Smith*").
15. *Smith, supra*, 95 Cal. App. 4th at 3.
16. *Id.* at 3.
17. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).
18. *Smith, supra*, 95 Cal. App. 4th at 6-7.
19. *Id.* at 4.
20. *Id.* at 7-8.
21. *Id.* at 7 and 9.
22. *CPS, supra*, 197 Cal. App. 4th at 814.
23. *Id.* at 816.
24. *Id.* at 817.
25. *Id.* at 819.
26. *Id.* at 816.
27. *Id.* at 820.
28. *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal. App. 4th 190, 135 Cal. Rptr. 3d 42 (4th Dist. 2011) ("*YAN*").
29. *YAN, supra*, 201 Cal.App.4th at 216-218.
30. *Id.* at 197.
31. *Ibid*.
32. *Ibid*.
33. *Id.* at 198.
34. *Id.* at 198-199.
35. *Id.* at 200.
36. *Id.* at 201.
37. *Ibid*.
38. *Ibid*.
39. *Id.* at 203.
40. *Ibid*.
41. *Id.* at 214.
42. *Ibid*.
43. *Id.* at 216.
44. *Id.* at 217.
45. *Id.* at 216.
46. *Ibid*.
47. *Id.* at 210.

48. *Ibid*.
49. *Id.* at 211.
50. *Inland Casino Corp. v. Superior Court*, 8 Cal. App. 4th 770, 776-777, 10 Cal. Rptr. 2d 497 (4th Dist. 1992), citing 28 U.S.C.A. §1360(b).
51. *Id.* at 777.
52. 25 U.S.C.A. §483a (emphasis added).
53. *Federal Land Bank of Wichita v. Burris*, 1990 OK 11, 790 P.2d 534 (Okla. 1990).
54. *Crow Tribe of Indians v. Deernose*, 158 Mont. 25, 487 P.2d 1133 (1971) ("*Crow Tribe of Indians*").
55. *Crow Tribe of Indians, supra*, 487 P.2d at 1136.
56. *Northwest South Dakota Production Credit Ass'n v. Smith*, 784 F.2d 323 (8th Cir. 1986).
57. *Id.* at 326.
58. *Id.* at 327.
59. 25 U.S.C.A. §81(b).
60. *Ibid*. The Secretary of Interior's process and standards for approval of such contracts are set forth at 25 C.F.R. §§84.001 to 84:008.
61. *U.S. ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200 (D. Minn. 1985), dismissed, 789 F.2d 632 (8th Cir. 1986).
62. *GasPlus, L.L.C. v. U.S. Department of Interior*, 510 F. Supp. 2d 18 (D.D.C. 2007) (management contract did not encumber Indian lands).
63. *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498, 32 Fed. R. Serv. 2d 507 (9th Cir. 1981, AZ) (Arizona farming corporation formed by Indian tribe did not fall within the protections of §81).
64. *In re Sanborn*, 148 U.S. 222, 13 S. Ct. 577, 37 L. Ed. 429 (1893) (§81 not intended create a legal obligation on the part of the United States to make sure that Indians perform under the contract).
65. *U.S. ex rel. Shakopee Mdewakanto Sioux Community, supra*, 616 F.Supp. at 1200 (§81 not unconstitutionally vague).
66. Green v. Menominee Tribe of Indians in Wisconsin, 47 Ct. Cl. 281, 1911 WL 1354 (1912), aff'd, 233 U.S. 558, 34 S. Ct. 706, 58 L. Ed. 1093 (1914) (agreement that did not comply with §81 could not be enforced); *Holderman v. Pond*, 45 Kan. 410, 25 P. 872 (1891) (where lease was not approved by Secretary, Kansas resident had no right to enforce it).
67. 25 CFR §152.34.
68. 25 U.S.C.A. §415(a). This statute contains detailed limitations on the restrictions on the term of the lease.
69. *Bulletproofing, Inc. v. Acting Phoenix Area Director, BIA, Interior Board of Appeals*, 20 IBIA 179, 179 (1991).
70. See *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 388-389, 105 Cal. Rptr. 2d 773 (3d Dist. 2001) (off-reservation casino owned and operated by tribe was one more of the tribes and entitled to sovereign immunity); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 642, 84 Cal. Rptr. 2d 65 (4th Dist. 1999) (recognizing sovereign immunity of for-profit corporation formed by tribe to operate the tribe's casino). The issue has been framed by the Ninth Circuit as "whether the entity acts as an arm of the tribe so that its actions are properly deemed to be those of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). See also *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009) (finding tribally-owned corporation vested with immunity from suit other than in tribal courts).

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