CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SOUTHWEST FOREST INDUSTRIES, Pacific Northwest Division, Plaintiff and Respondent, vs. HUPA (HOOPA) TIMBER CORPORATION, Defendant and Appellant.	A015598 (Humboldt County Super. Ct. No. 65154)

Plaintiff Southwest Forest Industries, Pacific Northwest Division (SW Forest Industries), commenced an action seeking a judicial declaration that defendant Hupa Timber Corporation was obligated to indemnify it against imposition of a "timber yield tax" by the State of California on logs it had purchased from Hupa Timber Corporation.

The superior court granted judgment as prayed and Hupa Timber Corporation has appealed.

The facts of the case are stipulated, and thus uncontroverted. We narrate them, as found material.

Hoopa Valley Indian Tribe occupies Hoopa Valley Indian Reservation in northern California. Its members are, generally, all persons of Hoopa Indian blood living on the reservation. It is a self-governing Indian tribe with a Constitution and Bylaws approved by the Bureau of Indian Affairs according to an act of Congress. Its elected governing body is termed Hoopa Valley Business Council.

Hoopa Valley Indian Tribe is empowered by its Constitution and Bylaws, and thus by the Bureau of Indian Affairs and Congress, to "create subordinate bodies for the operation of economic enterprises to benefit the tribe."

Pursuant to the power conferred upon it by the Bureau of Indian Affairs and by Congress, the Hoopa Valley Business Council "chartered" Hupa Timber Corporation, among other things, for the purpose and under the conditions as follow (the emphasis is ours):

"The purpose for which this Corporation is formed is to engage in commercial, industrial or other enterprise, having as its object the development and disposition of assets of the Corporation which they have acquired, including but not limited to, the propagation, processing, and sale of timber within the boundaries of the Hoopa Valley Reservation. In pursuit of this end, the Corporation shall have the power to assign, transfer or otherwise dispose of, trade, deal in and with goods, wares, and merchandise of every class and description.

"The Board of Directors may authorize any officer or agent to the Corporation to enter into any contracts or execute and deliver any instrument in the name of or on behalf of the Corporation and such authority may be general, or confined to specific instances."

The charter also provided:

"The Hoopa Valley Business Council may from time to time declare net earnings of the Corporation and authorize payment of said net earnings into the general fund of the Hoopa Valley Tribe. Net earnings shall be defined as Net Profits after payment of all currently due obligations of the Corporation and an allowance for the maintenance of adequate reserve funds for the Corporation. The Tribal Business Council shall make such disposition of net earnings as it may authorize for the benefit of members of the Hoopa Valley Tribe."

Hupa Timber Corporation had lawfully acquired stands of timber on the reservation from the Bureau of Indian Affairs, which timber it had felled and reduced to logs.

Hupa Timber Corporation's general manager then contacted SW Forest Industries, offering to sell the logs. The parties reached an understanding and entered into a written contract.

The written contract, among other things, provided (the emphasis is ours):

"Seller holds all right, title and interest in and

to the Logs and is duly authorized and empowered to convey such right, title and interest to Purchaser free and clear of any and all liens, mortgages, security interests or encumbrances, of any nature whatsoever.

"Seller does hereby covenant and agree that it will indemnify and save Purchaser harmless from and against any and all liability, claims, losses, damages, fees, penalties or expenses of any nature whatsoever which may be assessed or imposed against Purchaser as a result of its purchase or use of the Logs.

"The purchase price . . . includes all fees, charges, and expenses, and all transaction privilege, severance or other taxes which relate to the cutting, removal or sale of the Logs. Seller shall pay all such obligations without any further claim or demand on Purchaser for any sums whatsoever.

"Seller is an independent contractor. . . .

"This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of California."

In accordance with the contract, the logs were delivered by Hupa Timber Corporation to SW Forest Industries' log yard. They were paid for, and the transaction seemed closed.

But thereafter, California's State Board of Equalization advised SW Forest Industries of its ruling that a "timber yield tax" was payable where "felled timber or logs from Indian reservations are purchased from Indians." Such a tax of

$18,559.02 was levied upon SW Forest Industries and, after an adverse administrative hearing and decision, was paid under protest. (A lawsuit to recover back such payment is pending.)

SW Forest Industries thereupon made claim upon Hupa Timber Corporation for indemnification, under the written contract, for such taxes as it might finally become obligated to pay. The claim was rejected by Hupa Timber Corporation.

SW Forest Industries' instant action for a judicial determination of the rights and obligations of the parties, in respect of the contract's indemnity clause, followed.

Soon after the action's commencement its defendant, Hupa Timber Corporation, moved to dismiss it for lack of jurisdiction.

The motion was grounded upon the contention that, as a subordinate organization of an Indian tribe, it was not bound by its contract and it could not be sued in California's courts, because of its "sovereign immunity."

The motion was denied, the action proceeded to trial, and, as noted, judgment was entered for SW Forest Industries declaring that Hupa Timber Corporation was obliged under the contract to indemnify it for such of the subject taxes as it might be, or become, legally obligated to pay.

This appeal by Hupa Timber Corporation ensued.

The facts of the appeal being uncontroverted, and extrinsic evidence not having been introduced at the trial

in aid of the written contract's interpretation, we are not bound by the superior court's determination. (Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865-866.) We independently determine the respective rights of the parties.

Hupa Timber Corporation had concededly represented to SW Forest Industries that it was "independent of the Hoopa Valley Indian Tribe," a concession which at the trial and on this appeal it has insistently repudiated. It now argues that "as a subordinate entity of the Hoopa Valley Tribe" it has the same "sovereign immunity from suit" in California's courts as the tribe itself. (No contention is made that it otherwise has a defense to the action.) We find ourselves in agreement, at least arguendo, that Hupa Timber Corporation is here indistinguishable from its parent tribe. (See White Mountain Apache Tribe v. Shelley (Ariz. 1971) 480 P.2d 654, 656; Atkinson v. Haldane (Alaska 1977) 569 P.2d 151, 162-163.)

The issue thus, as we see it, is whether, treating Hupa Timber Corporation's written contract and acts and conduct as those of the Hoopa Valley Indian Tribe, it had sovereign immunity from being sued on the contract in this state's courts.

We are brought to a consideration of the history of the concept of Indian immunity.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (Rice v. Olson (1945) 324 U.S. 786, 789.) "Indian

tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government." (Namekagon Develop. Co. v. Bois Forte Res. Hous. Auth. (8th Cir. 1975) 517 F.2d 508, 510; and see United States v. U.S. Fidelity Co. (1940) 309 U.S. 506, passim.)

But nevertheless, such immunity is subject to the control and regulation of Congress, to which the Constitution (Art. I, § 8, clause 3) has confided the regulation of commerce "with the Indian Tribes."

This provision has been variously held as giving Congress "broad," "plenary," "exclusive," "paramount," and "explicit," authority over Indian affairs. (White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142; United States v. Wheeler (1978) 435 U.S. 313, 319; Norvell v. Sangre de Cristo Development Co., Inc. (10th Cir. 1975) 519 F.2d 370, 378; Wounded Head v. Tribal Council of Oglala Sioux Tribe (8th Cir. 1975) 507 F.2d 1079, 1084; Agua Caliente Band, etc. v. City of Palm Springs (Cal. 1972) 347 F.Supp. 42, 50.) The authority, however, may be specifically delegated to the states by Congress. (United States v. State of New Mexico (10th Cir. 1978) 590 F.2d 323, 328; Hamilton v. MacDonald (9th Cir. 1974) 503 F.2d 1138, 1149; Agua Caliente Band, etc. v. City of Palm Springs, supra, p. 52.) "It is clear that Congress alone must determine the extent to which immunities afforded tribal status are to be withdrawn." (Morgan v. Colorado River Indian Tribe

(Ariz. 1968) 443 P.2d 421, 424; and see Kake Village v. Egan (1962) 369 U.S. 60, passim.)

However, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction." (McClanahan v. Arizona State Tax Comm'n (1972) 411 U.S. 164, 172.) Instead, the public purpose is "to permit the Indians to become full and equal citizens of their respective states and to terminate the wardship of the federal government over their affairs." (Rincon Band of Mission Indians v. County of San Diego (Cal. 1971) 324 F.Supp. 371, 374.) And Congress has emphasized a duty "to promote Indian commercial activities." (Snohomish County v. Seattle Disposal Company (Wash. 1967) 425 P.2d 22, 27.)

Yet there remains the policy that Indian reservation land might not be sold or hypothecated by, or taxed to, its tribe or tribal members, and that the state and federal governments should not interfere with deeply rooted tribal government, law, or custom.

In implementation of the evolving policy Congress, in 1953, enacted the statute known as Public Law 280, section 4, which has been codified as Title 28, United States Code section 1360. (Before doing so, however, Congress had apparently considered and heeded the wishes of the affected states and territories, and Indian tribes and reservations.)

Public Law 280, section 4, provides as follows:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory (our emphasis):

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any

regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Public Law 280, section 4, has been broadly interpreted by the nation's high court in Bryan v. Itasca County, 426 U.S. 373 (q.v.), which concerned imposition of a state tax upon a reservation Indian.

The statute "was plainly not meant to effect total assimilation" of reservation Indians (p. 387). "[N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' . . . a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes

themselves, and § 4(c), 28 U. S. C. § 1360(c), providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State,' contemplates the continuing vitality of tribal government." (Pp. 388-389.)

And the Bryan v. Itasca County court further said: "Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State 'jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action.' With this as the primary focus of § 4(a), the wording that follows in § 4(a) 'and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State'--authorizes application by the state courts of their rules of decision to decide such disputes.[10/]" (426 U.S., pp. 383-384; our emphasis.)

The above footnote 10 of the Bryan v. Itasca County opinion (p. 384), by which the views of a respected legal commentator were adopted by the court, asserted:

"'[10/] A fair reading of these two clauses suggests that Congress never intended "civil laws" to mean the entire array of state noncriminal laws, but rather that Congress intended "civil laws" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchise, etc. These are not within the fair meaning of "private laws."'" (Emphasis added.)

It will thus be seen that "contractual" disputes such as that here at issue between SW Forest Industries and Hupa Timber Corporation are, as found by the superior court, subject to the jurisdiction of California's courts.

But Hupa Timber Corporation insists that the statute covers only individual Hoopa Indians, and not the Hoopa Valley Indian Tribe from which it is indistinguishable as its "subordinate entity."

We disagree.

Public Law 280, section 4, expressly relates to "Indians," any "Indian tribe, band, or community," and to "Indian

country." Bryan v. Itasca County, supra, 426 U.S. 373, 389-390, expressly holds, as to related Acts of Congress in pari materia with Public Law 280, section 4, that "the laws of the several States shall apply to the tribe and its members [our emphasis] in the same manner as they apply to other citizens or persons within their jurisdictions." And by definition the statute's term "Indian country" has been held to include "any unceded lands owned or occupied by an Indian nation or tribe of Indians." (United States v. Chavez (1933) 290 U.S. 357, 364.)

And: "[I]t is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right." (Namekagon Dev. Co., Inc. v. Bois Forte Res. Hous. Au. (Minn. 1974) 395 F.Supp. 23, 29.)

Moreover, and although not necessary to our determination of the appeal, it will reasonably be concluded from the uncontroverted evidence of the case that Hoopa Valley Indian Tribe, independently of Public Law 280, section 4, had waived its sovereign immunity and had consented to SW Forest Industries' action.

As noted, Hupa Timber Corporation's contract with SW Forest Industries expressly provided:

"This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of California."

It will be remembered that Congress, through the federal Bureau of Indian Affairs, had authorized "subordinate bodies for the operation of economic enterprises to benefit the tribe." The Hoopa Valley Indian Tribe, under its Constitution and Bylaws approved by the Bureau of Indian Affairs and thus by Congress, chartered Hupa Timber Corporation empowering it to enter into "contracts" for the sale of timber. Such a power to be meaningful, and under the presumption that contracts are "fair and regular" (see Civ. Code, § 3545; Levitt v. Glen L. Clark & Co. (1949) 91 Cal.App.2d 662, 663), would necessarily require an intent that valid contracts be entered into. "A valid contract is one which can be enforced so as to give the proponent thereof the . . . advantage for which he bargained." (Emphasis added; Heidt v. Miller Heating & Air Conditioning Co. (1969) 271 Cal.App.2d 135, 137.) And it will be recalled that the parties' written contract provided that it be "enforced in accordance with the laws of the State of California."

"[Indian] immunity, however, is not absolute. Like other sovereign powers possessed by Indian tribes, it exists only at the sufferance of Congress and is subject to complete defeasance. . . . Some courts have expressed doubts on the

ability of Indian tribes to waive immunity, but the Supreme Court has expressed clearly its position. In Turner v. United States, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919), Mr. Justice Brandeis found tribal immunity, stating that '[w]ithout authorization from Congress, the [tribe] could not . . . have been sued in any court; at least [not] without its consent.' . . . If Indian tribes could not waive immunity, the italicized language above would be surplusage. We think it is more than that. We thus hold that Indian tribes may consent to suit without explicit Congressional authority." (Emphasis added; United States v. State of Or. (9th Cir. 1981) 657 F.2d 1009, 1013.)

In Namekagon Dev. Co., Inc. v. Bois Forte Res. Hous. Au., supra, 395 F.Supp. 23, 27, after stating that the subject Indian tribe had "power to create a legally responsible corporation," the court held that such authority included the "power to waive immunity," and that: "The power of the Tribe to waive immunity is no more 'reserved' than is the power of the United States to do the same; in both instances, the power to waive immunity is inherent in the power to assert it." On appeal the district court's judgment was affirmed, the reviewing court holding that an express contractual promise of an Indian tribe effected a waiver of immunity from a lawsuit seeking to enforce the promise. (Namekagon Deelopment Co. v. Bois Forte Res. Hous. Auth., supra, 517 F.2d 508, 510.)

To the same effect see: Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172; Turner v. United States (1918) 248 U.S. 354, 358; Merrion v. Jicarilla Apache Tribe (10th Cir. 1980) 617 F.2d 537, 540; Fontenelle v. Omaha Tribe of Nebraska (8th Cir. 1970) 430 F.2d 143, 147.

We need not determine whether an Indian tribe's rights, not to be taxed by the state, or to the inviolability of its reservation land, or to having its tribal government, laws, and traditions respected (see Pub. Law 280, § 4), may be waived. We are concerned here only with the question whether, under the circumstances of this case, an Indian tribe is lawfully obliged to honor its commercial contract to sell logs.

We have considered the case of Long v. Chemehuevi Indian Reservation (1981) 115 Cal.App.3d 853, upon which Hupa Timber Corporation heavily relies. As we read the opinion, the court concluded that the action, and its claimed tort, affected the "continuing vitality of tribal government," and thus did not preclude the tribe's "sovereign immunity." Nor, the court said, did the unsuccessful plaintiff "attempt to distinguish the tribe's immunity as a proprietor from its immunity as a government." Further, the court recognized the line of authority "that suits may be maintained against a proprietary corporation established by a sovereign [Indian] government where the incident in question does not involve the exercise of government powers." (Such is precisely the situation here.) And the court expressly noted the absence of a

contention "that the Chemehuevi Tribe gained an economic advantage by grace of its sovereign status." Manifestly the case is of no aid to Hupa Timber Corporation on its appeal. And were we, arguendo, to find therein a conclusion adverse to that which we reach, the ruling would patently be transcended by the higher authority we have here found controlling.

For the several reasons we have expressed, the superior court had jurisdiction over the instant action, and over its defendant, Hupa Timber Corporation.

Other contentions of the parties, and a resolution of the trial court's conclusion that Hupa Timber Corporation was a corporation by estoppel will not be considered by us; they have become unnecessary to our determination of the appeal.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Elkington, J.

WE CONCUR:

Racanelli, P.J.

Newsom, J.

Trial Court: Superior Court of Humboldt County

Trial Judge: Hon. Thomas M. Montgomery

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