TRIBAL LAND CLAIMS

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I. Introduction

The diversity of legal issues is one of the most challenging, and most interesting aspects of representing municipal entities. The practice of municipal law eventually intersects with every major aspect of law, from the Constitution to antitrust, from garbage collection contracts to traffic tickets. Few areas of law that may confront the municipal lawyer are more complex and arcane, or less familiar, than the law concerning Native American land claims. Winding through more than 200 years of jurisprudence, and an even longer period of factual development, these claims also carry the challenge of high stakes. They can call into question the very existence of a municipality, its land territory, tax base and the property of its citizens. Moreover, the development of Indian gaming has increased the already high incentives for certain claims to be brought (and backed by external financing) in the hope of a settlement that will result in tribal access to gambling revenues in metropolitan areas. This paper will highlight some of the central principles underlying Native American land claims, and briefly discuss an innovative case management solution that our municipal client has undertaken in connection with an ongoing case.

II. A Few Basic Concepts About Native American Land Claims

A. Some Legal History

From the early days of the United States, Native American tribes have occupied a hybrid legal status, described by Chief Justice Marshall in an early Supreme Court case as "domestic dependent nations," with a right of possession to their lands, but in a "state of pupilage" to the United States, "their relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The title to tribal land has been dealt with in the framework of a legal fiction acknowledged by the Supreme Court, known as the "doctrine of discovery." *See, e.g., Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 572-74 (1823). Under this doctrine, during European settlement of the North America "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Id*. at 573. The "rights of the original inhabitants . . . were necessarily impaired;" they were the "rightful occupants of the soil, with a legal as well as just claim to retain possession of it … but their rights to complete sovereignty . . . and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Id*. at 574. Thus, the discovering nations, then the United States, held fee title to Indian land, subject to the tribes' right of occupancy and use. *County of*

Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 234 (1985)("Oneida II"). As a result, no one could legitimately purchase Indian lands or otherwise terminate tribal possessory rights, without the consent of the sovereign, ultimately the United States. *Id*.

These concepts were reflected in the Indian Commerce Clause of the United States Constitution (art. I, § 8, cl. 3: "The Congress shall have Power . . .[t]o regulate Commerce with the Indian Tribes") and the Indian Trade and Intercourse Act (usually referred to as the "Nonintercourse Act"), the current version of which is codified at 25 U.S.C. § 177 ("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….)" Thus, in Oneida II, the Court explicitly recognized that Indian tribes have a federal common law right to sue for violation of their possessory interests, a right not pre-empted by the Nonintercourse Act, which it held simply codified the accepted rule that extinguishment of Indian title requires the approval or consent of the United States. 470 U.S. at 235-40.

B. Types of Tribal Land Interests and Claims

There are essentially two types of Native American land interests under United States law. The exclusive right to possession and use, subject to the sovereignty of the United States, and limitations on alienation discussed above, is known as aboriginal or Indian title. A tribe can also own property by recognized or treaty title, when the United States has recognized tribal ownership by treaty or statute. There are some key distinctions between these types of title for land claim purposes. Aboriginal title can be broader, and is established by proving "actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property. *E.g., Zuni Indian Tribe of New Mexico v. United States*, 16 Cl.Ct. 670, 671 (1989). It obviously does not require the establishment of physical title documents. However, aboriginal title may be extinguished by or with the consent of the United States by taking or agreement at any time without legal recourse. *See, United States v. Santa Fe Pac R. Co.*, 314 U.S. 339, 347 (1941)(the United States may extinguish Indian title based on aboriginal possession "by treaty, by the sword, by purchase, by exercise of complete dominion adverse to the right of occupancy, or otherwise, [and] its justness is not open to inquiry in the courts."). Extinguishment of aboriginal title by the United States does not give rise to a Fifth Amendment obligation to pay compensation for the taking. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 283-85 (1955). Aboriginal title may also be lost through physical abandonment by the tribe. *See Williams v. City of Chicago*, 242 U.S. 434, 437 (1917).

In contrast, recognized or treaty title does require proof that the United States had "definite intention" to reserve or recognize tribal right to specific land. *Tee-Hit-Ton*, 348 U.S. at 278-79. Recognized title need not have been a part of the aboriginal territory of the tribe. *See Seneca Nation v. State of New York*, 206 F.Supp.2d 448, 505 (W.D.N.Y. 2002). A taking of property held by recognized title is compensable under the Fifth Amendment. *United States v. Creek Nation*, 295 U.S. 103, 109-11 (1935).

Thus, although tribes may bring either aboriginal or recognized title land claims based upon ineffective attempts to alienate tribal lands (*e.g.*, because not approved by the United States) or other third-party taking of tribal lands, the proof of their claim will vary by type.

Recognized title actions are essentially concerned with construction of treaties or statutes that purportedly grant the rights sued upon. Aboriginal title claims require proof of an historical period of "long time" exclusive tribal use (exclusive of both non-Indians and other tribes) of the subject land, without abandonment.

C. Availability of Common Law/State Law Defenses and Counterclaims

In *Oneida II*, the Supreme Court held that there was no federal statute of limitations governing the tribe's federal common law claim, and that it would be inconsistent with federal policy to follow the normal rule of borrowing a correlative state law limitations period. 470 U.S. 240-41. The Court noted that state-law time bar defenses such as adverse possession and laches would not apply of their own force to Indian land title claims because of the Supremacy Clause. *Id*. at n.13. The majority did not reach the question of whether a federal equitable doctrine of laches would apply, as urged by the dissent. *Id*. at 245, n.16. The availability of a federal defense of laches remains unsettled. *But see Canadian St. Regis Band of Mohawk Indians v. State of New York*, 2003 WL 21801656, * 9-10 (N.D.N.Y. July 28, 2003)(laches is not a defense to liability in land claims under the Nonintercourse Act, but may be a defense available on remedies questions). Generally, because Indian title is a creation of federal law, claims based on Indian title are not subject to state law defenses. *See, e.g., Catawba Indian Tribe v. State of South Carolina*, 865 F.2d 1444, 1148 (4th Cir. 1989). However, treaty or statutory language may subject the tribe and its claims to state law defenses. See, e.g., South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 507-08 (where Act subjected tribe to state law as part of land allocation, state statute of limitations applied to subsequent claim by tribe that lands were improperly alienated). The dimension of federal common law defenses correlative of those found in state law that may be available remain undefined.

D. Indispensible Party Issues

In *Navaho Tribe of Indians v. State of New Mexico*, 809 F.2d 1255 (10th Cir. 1988), the Tenth Circuit held that the Navahos, having failed to make a timely ICCA claim against the United States, held to be a necessary party, could not proceed with quiet title claims against other defendants to whom claimed land had been conveyed by the United States:

> We adopt the trial court's reasoning as dispositive:
>
> The Tribe's claims against the remaining defendant are, in reality, challenges to the validity of the transactions by which the United States assumed title to the subject land. Specifically, the Tribe seeks to cancel and set aside all patents, grants, assignments, leases, and other conveyances made or done . . . .
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> "It is a fundamental principle of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court." *Tewa Tesuque v. Morton*, 360 F.Supp. 452 (D.N.M. 1973), *aff'd*, 498 F.2d 240 (10th Cir. 1974). Moreover, "as a matter of federal law, it is well-established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1977). In addition, a tribe may

> not avoid the exclusivity bar of §70k of the Indian Claims Commission Act by seeking title, possession and damages from successors in interest of the United States, where suit against the federal government is barred. *Oglala II [v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983)]…

809 F.2d at 1471-72.

In contrast, in *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F.Supp.2d 1279, 1289-98 (D. Kan. 2002), Judge Murguia denied a motion to dismiss based on the failure to join the United States (which the tribe had voluntarily dismissed with prejudice), reciting, but distinguishing, the above language from the *Navajo* case. Judge Murguia held that the fact that the United States agreed to be dismissed made the case different. *Wyandotte Nation*, 200 F.Supp.2d at 1295-96. In addition, he stated that the rationale of *Raypath* relied upon in *Navajo* is not applicable, because the Wyandottes were the initial owner of the land [that is incorrect as a matter of fact], and in *Raypath* the challenge was by a third party. *Id.* at 1296. Judge Murguia does not distinguish *Oglala II* or the Tenth Circuit's reliance on it in *Navajo*, does not discuss parallels between *Navajo* and the Wyandotte case, and does not cite authority that the validity of patents issued by the federal government at issue (ironically, patents issued to every individual Wyandotte upon dissolution of the tribe by Treaty in the mid-1800's) are properly determined in the absence of the United States. This will be a continuing issue for presentation outside the context of a motion to dismiss as the factual record is developed in the case.

See also Aaron L. Pawlitz, *The United States' Indispensability in Indian Land Claims: The Proper Application of Provident Tradesmens*, 45 St. Louis U. L. J. 1349 (2001).

E. Eleventh Amendment Issues

In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), in a case by an Alaskan tribe against the State of Alaska challenging revenue sharing allocation, the Supreme Court held that the Eleventh Amendment bars suits against States without their consent. In *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the Court again applied the Eleventh Amendment, holding the *Ex parte Young* exception (that permits a federal forum in certain circumstances for claims against State officals for violation of federal rights) inapplicable. See also Note, *Removing the Eleventh Amendment Barrier: Defending Indian Land Title Against State Encroachment After Idaho v. Coeur d'Alene Tribe*, 78 Tex. L. Rev. 719 (1999).

F. Indian Claims Commission Act

In 1946, Congress enacted the Indian Claims Commission Act ("ICCA"), creating a quasi-judicial body to hear and determine all tribal claims against the United States that accrued before August 13, 1946, and establishing a five year limitations period, after which such claims could not be heard. *See Navaho,* 809 F.2d at 1460-61. The Commission, which existed until 1978 (after which its then open cases were transferred to the Claims Court), held that valid tribal claims would only be paid in money, that there would be no return of land. *See id*. at 1461. The existence of the ICCA may create an available defense to land claims in certain circumstances. *See, e.g., Navaho,* discussed above.

G. Treaty Construction

Interpretation of treaty documents is of primary importance in dealing with "recognized title" claims. Generally, the interpretation of a treaty is a matter of law for the court, not a question of fact. *E.g.*, *Souix Tribe v. United States*, 500 F.2d 458, 470 (Ct.Cl. 1974). When construing a treaty, a court should "look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Ambiguous provisions are to be interpreted to the benefit of the tribe. *Oneida II*, 470 U.S. at 247. However, "even though ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language [in the treaty] that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). Treaties cannot be rewritten or expanded beyond their terms "to remedy an injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). Treaties must also be construed reasonably to avoid unconstitutionality. *Seneca Nation*, 206 F.Supp.2d at 507.

H. Equitable/Impossibility Defenses

In *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357-59 (1926), the Court held that the proper remedy for wrongful taking of tribal lands that were subsequently settled and developed was monetary damages, rather than repossession, based on the impracticability of uprooting current property owners. Subsequent cases have discussed this as the "impossibility" doctrine. *See, e.g.*, *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 157 (2d Cir. 2003).

III. Special Problems Facing Municipalities

Unique among governmental actors, municipalities generally had no role in creating the actual and perceived issues concerning tribal lands. Municipalities did not make or break treaties with Native Americans, and did not legislate the legal framework that has resulted in the current environment. Accordingly, they should generally be perceived as innocent or at least neutral parties in connection with these issues.

However, also unique among governmental actors, muncipalities lack the sovereign immunity and Eleventh Amendment protection from Native American land claims that the United States and the States routinely use to shelter themselves from the crosshairs of massive land claims.

Municipalities also face pressure in several ways. First, their own land for public facilities and utilities may well be at issue in the suit. Second, their tax base can be greatly implicated by the threatened loss of revenues from property, sales and other taxes that are the lifeblood of municipal revenues. Third, land claim cases can continue literally for decades, with the attendant burden of legal expense to all concerned. Finally, in the face of a land claim challenging individual landowners' rights, the municipality must also face the hue and cry of its citizens to find a solution to the problem. The political pressure can be enormous.

IV. An Example Case Management Strategy For A Municipality: The Case of the Unified Government of Wyandotte County/Kansas City, Kansas

All of the above concerns faced the Unified Government of Wyandotte County/Kansas City, Kansas in the Summer of 2002. The Wyandotte Nation, in an open bid to obtain political support for a casino, had filed an action approximately a year earlier, but had only served it on a handful of landowners, openly indicating that their goal was to enlist support to press legislation to authorize a casino. Then, in *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp.2d 1279 (D. Kan. 2002), the Court denied threshold motions to dismiss by certain parties, but ordered plaintiff tribe to serve the remaining defendants or face dismissal of those claims. The tribe then proceeded with efforts to serve approximately 1200 additional landowner defendants. These defendants encompassed a unique combination of large industrial entities and several hundred mostly low-income homeowners.

Thus, the Unified Government was immediately inundated with citizen demands, complaints, inquiries, and confusion, largely from defendants without the resources to defend themselves. But, also included in the challenged area is a major industrial area, a large part of the Unified Government's tax base, and utility, school and other public facilities. The Unified Government was faced with the prospect of defending itself, and trying to do something to defend its citizens incapable of defending themselves.

The solution chosen, and adopted through a series of negotiations with other major defendants and the plaintiff tribe, and substantial briefing with the Court, is a defendants' class action, represented by the Unified Government as class representative, but with the ability for individual defendants to have their own counsel appear and represent their interests individually. *See Wyandotte Nation v. City of Kansas*, 214 F.R.D. 656 (D. Kan. 2003) (Order certifying defendant class). This solution has enabled the Unified Government to defend the interests of all of its citizens affected (for the quiet title portion of the case) and to quiet the political and social upheaval caused by the filing of the claims against individual landowners, yet permit the major landowners and title insurers to defend their interests in what has become a joint effort. Case management has also become easier for the court and all parties. Rather than dealing with 1200 parties and however many lawyers they would engage, the landscape has been reduced to less than 20 active lawyers. While there are pros and cons to this approach (it has also benefited the tribe), the benefits to the Unified Government from a case management and citizen accountability standpoint have already paid dividends. In addition, the reduction of parties actually participating in the case has made coordination of strategies on the defense side a legitimate possibility as the case goes forward.