Case No. **B188413**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SIX

Case No.

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SANTA YNEZ BAND OF MISSION INDIANS,

Plaintiff and Appellant,

vs.

VINCE TORRES, et al.,

Defendants and Respondents,

APPEAL FROM THE SUPERIOR COURT FOR SANTA BARBARA COUNTY,
HON. ZEL CANTER, JUDGE, CASE NO. 1039213.

APPELLANT'S OPENING BRIEF

FRED J. HIESTAND
State Bar No. 44241
1121 L Street
Suite 404
Sacramento, CA 95814
Tel.: (916) 448-5100
Fax.: (916) 442-8644
Fhiestand@aol.com

Counsel for *Plaintiff and Appellant*
Santa Ynez Band of Mission Indians

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Dated: January 29, 2007

Fred J. Hiestand
Counsel for Appellant
Santa Ynez Band of Mission Indians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Codes, Constitutions, Regulations and Rules

Treatises and Articles

Miscellaneous

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SECOND APPELLATE DISTRICT
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SANTA YNEZ BAND OF MISSION INDIANS,

Plaintiff and Appellant,

vs.

VINCE TORRES, et al.,

Defendants and Respondents,

QUESTION PRESENTED

Does the abrogation and waiver of sovereign immunity in 11 U.S.C. §106 of the Bankruptcy Act for "governmental units" deny a federally recognized Indian tribe the defense of sovereign immunity to a debtor's cross-complaint?

STANDARD OF REVIEW

Whether a statute abrogates tribal sovereign immunity or provides for its waiver when a tribe participates in bankruptcy proceedings is a question of statutory interpretation subject to *de novo* appellate review. (*Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 805; *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1354; *Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74.)

STATUTORY PROVISIONS

11 U.S.C. § 106(a) provides, in relevant part:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . ..:

11 U.S.C § 106(b) provides that the filing of a proof of claim in federal bankruptcy court by

> [a] governmental unit . . . is deemed [to be a] waiv[er of] sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 101(27) defines "governmental unit" as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . ., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic governments . . ..

STATEMENT OF FACTS

The Santa Ynez Band of Mission Indians ("Santa Ynez" or "Tribe"), a federally recognized Indian Tribe,[1] and Vince Torres (dba Vince Torres Construction, et. al.; "Torres") entered into two oral contracts in 1999 for construction and related

[1] 65 Fed. Reg. 13298 (March 13, 2000).

services to be performed by Torres on tribal land.[2] There were no waivers of tribal sovereign immunity in these contracts nor agreements to arbitrate disputes that may arise between them.

Dissatisfied with Torres' performance under the contracts, the Tribe filed suit in 2000 in the Superior Court (Santa Barbara) seeking damages against him for, *inter alia*, breach of contract, fraud and negligence.[3]

Torres answered the complaint[4] and cross-complained against the Tribe for monies allegedly owed him under the contracts.[5] The Tribe moved to quash service of process on the cross-complaint on the ground that it was immune as a sovereign.[6] Though the court declined to quash the summons,[7] it apparently indicated at one time during oral argument that it was inclined to agree that the Tribe's sovereign immunity protected it from Torres' cross-complaint.[8] The Tribe answered the cross-complaint,[9] denying most of the factual allegations and raising numerous affirmative

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[2] Clerk's Transcript, Vol I., p. 11, lines 19-28, hereinafter referred to in the abbreviated format – "C.T. I:11:19-28."

[3] C.T. I:1-16.

[4] C.T. I:19.

[5] C.T. I:28-31.

[6] C.T. I:35, 38-42.

[7] C.T. I:68.

[8] Reporter's Transcript, p. 33, lines 2-6, hereinafter cited as "R.T. 33:2-6."

[9] C.T. I:70.

defenses, including that of "sovereign immunity" as to each of Torres's "purported causes of action."[10] After unsuccessful attempts to resolve the case by court supervised mediation, it was deemed a "complex case."[11] Santa Ynez filed a "second amended complaint"[12] which Torres answered.[13]

Torres then filed for bankruptcy under Chapter 11 (11 U.S.C. §100 *et. seq.*)[14], which automatically stays all creditor actions including the Tribe's state court lawsuit against him.[15] The Tribe filed a "proof of claim" for $3 million with the bankruptcy court, which effectively submits it (as a "creditor") to the jurisdiction of the bankruptcy court for (unless the creditor enjoys immunity) determination of any counterclaim that can properly be raised against it by the debtor or trustee, even if the counterclaim is based purely on state law.[16] Thereafter the Tribe asked the bankruptcy court to lift the stay and permit it to determine the contract claim in state court, which was conditionally granted on the ground that the "debtor may pursue

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[10] C.T. I:72:6-8.

[11] C.T. I:90-92.

[12] C.T. I:114, 116-117, 119-128.

[13] C.T. I:206-213.

[14] C.T. I:216-218.

[15] 11 U.S.C. §362; *Wekell v. United States* (9th Cir. 1994) 14 F.3d 32, 33.

[16] See *In re PNP Holdings Corp.* (9th Cir. BAP 1995) 184 BR 805, 807; *Katchen v. Landy* (1966) 382 U.S. 323, 330-331.

any cross-complaint arising out of the State Court action referenced herein."[17]

Torres next moved in superior court for an order clarifying his right to affirmative relief based on his cross-complaint.[18] Torres' s motion, apparently made in the belief the court had ruled in favor of the tribe on its immunity defense against his cross-complaint, asked the court to strike or amend its "previous order made after hearing on 11 April 2001 in which the court granted [Santa Ynez's] motion to quash [Torres'] summons and cross-complaint on the grounds, asserted, that . . . tribal sovereign immunity deprived this State Court of jurisdiction to hear that cross-action . . .."[19] Santa Ynez opposed, asserting its sovereign immunity with respect to the cross-complaint.[20] Both sides cited and relied upon much of the same federal statutory and case law in support of their differing positions. At the hearing, the judge summed up his understanding of the law:

> I got it. My ruling is we are going to hear the Torres claim as if there has been a waiver of sovereign immunity and the Bankruptcy Court has allowed the claim to be litigated in State Court.
>
> [If you] don't like it, you can hop down to Bankruptcy Court and get a stay order for that portion of it or clarify the

[17] C.T. II:303.

[18] C.T. I:239.

[19] C.T. I:240.

[20] C.T. II:323-330.

> bankruptcy order. But my reading of it is . . . that it was a direction from the Bankruptcy Court essentially to act as an auxiliary arm of the Bankruptcy Court. If I'm wrong, the Bankruptcy Court can stay it.[21]

The court's order, filed January 10, 2005, states:

> Defendant/Cross-Complainant Torres' motion seeking affirmative relief is granted. Pursuant to 11 USC 106(b) and 11 USC 106(a), and pursuant to the order of the Bankruptcy Court made in pending Chapter 11 Bankruptcy Case of Torres . . . granting relief from stay to resolve all issues in this case including Torres' cross-complaint, the sovereign immunity of the [Tribe] has been waived and abrogated as to all matters arising out of its proof of claim filed in said bankruptcy case.[22]

Santa Ynez then moved the bankruptcy court to clarify it's order for relief from stay with respect to its sovereign immunity from Torres' cross-complaint; and, on March 23, 2005, the court ruled on that motion, stating:

> The determination of waiver of sovereign immunity by the [Tribe] pursuant to 11 USC §106 is not a matter of exclusive Bankruptcy Court jurisdiction, and may be determined by the state court to whom the claim of the [Tribe] and the cross-

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[21] R.T. 40:7-17.

[22] C.T. II:555, 11-18.

complaint of debtor Torres was sent for complete resolution

. . ..[23]

After a more than month long trial, the superior court found against the Tribe and in favor of Torres, and on defendant's cross-complaint found the Tribe liable to Torres for $309,950.[24] The Tribe objected to the court's "statement of decision" on, among other grounds, it's failure "to address the legal authority for . . . abrogating the Tribe's sovereign immunity."[25] The court, in ruling on motions for new trial and the Tribe's objections to the "statement of decision," responded, "Legal authority to abrogate the Tribe's sovereign immunity – not an issue at trial;" and, with respect to the Tribe's objection over allowing Torres to pursue his cross-complaint against it, the court found legal authority for doing so from the "ruling" of "Bankruptcy Court."[26] By judgment, the court stated that it had, "pursuant to the . . . order of the U.S. Bankruptcy Court," proceeded "to try this case in its entirety including all claims arising out of or under the underlying contracts and transaction between the parties

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[23] Order Denying Motion for Clarification of Prior Order Lifting Stay, U.S. Bankruptcy Court, Central Dist., N. Div., Case No. ND 02-12791 RR, filed March 23, 2005, p. 1-2. Appellant has filed a request pursuant to CRC 8.54 (concurrently with the filing of this brief) asking the Court to "notice" this order under authority of Evid. C. § 452 (discretionary judicial notice) and *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1113 (court can notice pleadings and documents in record of related federal district court action).

[24] C.T. III: 605.

[25] C.T. III:621.

[26] C.T. III:651.

including Defendant's counter claim . . .."[27]

Notice of Entry of Judgment was filed on November 16, 2005.[28] Notice of appeal was timely filed on January 9, 2006;[29] and notice of the cross-appeal filed on February 1, 2006.[30]

SUMMARY OF ARGUMENT

The mere filing by an Indian Tribe of a "proof of claim" – along with assertion of the defense of tribal immunity against any cross-complaint by the debtor in Chapter 11 bankruptcy – does not operate to strip the tribe of its immunity and subject it to liability on the cross-complaint.

Section 106(a) of the Bankruptcy Act does not abrogate tribal immunity to cross-complaints by debtors in bankruptcy. Neither does section 106(b) waive a tribe's immunity to the debtor's cross-complaint when the tribe files a "proof of claim" along with assertion of the sovereign immunity defense.

While section 106 expressly and clearly provides that abrogation and waiver

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[27] C.T. III:657.

[28] C.T. III:675.

[29] C.T. III:677.

[30] C.T. III:684. On October 26, 2006 plaintiff Torres filed a writ of execution on appellant's bank account; and "notice of turnover of assets of the estate" pursuant to Bankruptcy Code § 1115(a) was filed on that same date by the Tribe in the U.S. District Court, Cental District of California, Northern Division, Case No. ND 02-12791 RR. This involuntary satisfaction of the judgment does not render this appeal moot, however, for it cannot be said that "a party impliedly waives the right to appeal from a judgment" where its "satisfaction" is "compelled or coerced." *Selby Constructors v. McCarthy* (1979) Cal.App.3d 517, 521, citing *Reitano v. Yankwich* (1951) 38 Cal.2d 1, 3 and *Lee v. Brown* (1976) 18 Cal.3d 110, 116.

of immunity are the consequences when "governmental units," – which it defines as, *inter alia*, a "State" or subdivision thereof (including "foreign and domestic governments") – participate as "creditors" in bankruptcy proceedings; nowhere in that section or any other referenced provisions of the Bankruptcy Code are "Indian tribes" specifically mentioned.

It is well-settled that when Congress acts to abrogate or waive state or tribal immunity, it must do so expressly and unequivocally. General or ambiguous phrases like "persons," "municipalities," "recipients of federal funds" – and, as here, "governmental units" – do not suffice to abrogate tribal immunity unless they are specifically referenced in the statute to "Indian tribes." This is especially so when, as is the case here, the statutes at issue (§§ 101 and 106) abrogate sovereign immunity for "States" by express use of that term, but nowhere use the equivalent term of specificity, "Indian tribes."

The terms "governmental unit," further defined to include "foreign and domestic governments,"are expressly mentioned in the Bankruptcy Act as entities for whom immunity is abrogated or waived. These two phrases may or may not sweep within their ambits "Indian tribes," a conclusion underscored by judicial opinions that have considered the very issue and reached opposite conclusions. Consequently, this general language ("governmental units" and "foreign and domestic governments") in section 106 is too vague and ambiguous to abrogate or waive an "Indian tribe's" right to assert the defense of sovereign immunity against a cross-

complaint by a debtor in bankruptcy.

Appellant acknowledges that by participating in the bankruptcy proceeding, it consented to the court's determination as to whether Torres' alleged debt to it was entitled to be enforced and, if so, whether the debt was to be discharged. If the Tribe's claim was determined valid and discharged, appellant understands the court could require it to get in line with other creditors for distribution of the debtor's estate. With respect to the resolution of these issues, the Tribe waived its immunity; but the Tribe never consented to waive the defense of sovereign immunity to Torres's cross-complaint against it.

The court's refusal to recognize the defense of tribal immunity as a bar to Torres's cross-complaint is an error of law based upon a misreading of sections 101 and 106 of the Bankruptcy Code and judicial opinions.

ANALYSIS

I. SECTION 106 OF THE BANKRUPTCY ACT NEITHER ABROGATES THE SOVEREIGN IMMUNITY OF INDIAN TRIBES NOR WAIVES, WHENEVER A TRIBE FILES A "PROOF OF CLAIM," THE DEFENSE OF TRIBAL IMMUNITY TO CROSS-COMPLAINTS BY DEBTORS.

A. Appellant, a Federally Recognized Indian Tribe, Enjoys Sovereign Immunity From Suit Unless It is Clearly and Unequivocally Abrogated or Waived.

Appellant is a federally recognized Indian tribe.[31] As such, the Tribe possesses

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[31] Labeling an Indian tribe as federally recognized is a function of the executive branch. *United States v. John*, 437 U.S. 634, 652-653 (1978). Congress, in turn, has mandated that the (continued...)

sovereign immunity, including immunity from suit.

Federal and state law have long recognized Indian tribes as separate sovereigns. Indeed, "[a]t the time of European discovery of America, . . . tribes were sovereign by nature and necessity; they conducted their own affairs and depended on no outside source of power to legitimize their acts of government."[32] For all practical purposes, the European settlers and the British Crown treated the Indians as sovereigns possessing full ownership rights to the American lands.[33] "Early in [our] nation's history, the . . . United States . . . recognized [tribes] as separate sovereigns whose existence necessitated nation-to-nation diplomacy and treaty-making."[34] Thus, as self-governing peoples whose presence in America pre-existed the drafting of the Constitution, Indian tribes, including appellant, enjoy inherent sovereignty provided by their pre-constitutional establishment of self-government.

A necessary attribute of sovereignty is immunity from suit. "Indian tribes enjoy broad sovereign immunity from lawsuits . . .." (*Santa Clara Pueblo v. Martinez*,

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[31](...continued)
executive branch publish an official list of all federally recognized tribes in the Federal Register. 25 U.S.C. § 479a-1. Appearance on the list grants the tribes immunities and privileges, including immunity from unconsented suit, by virtue of their relationship with the United States. 67 Fed. Reg. 46,328 (July 12, 2002). "[Tribal] immunity extends to entities that are arms of the tribes . . .." Felix Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* (2005 ed.) § 7.05 [1][a], pp. 636.

[32] Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty* (2002) 37 *TULSA L. REV.* 661, 683.

[33] *Id.* at 684.

[34] *Id.*

436 U.S. 49, 59 (1978).) Indeed, courts have defined the nature of tribal sovereign immunity as immunity from *process*. (See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Turner v. United States*, 248 U.S. 354, 357-58 (1919).) It is well-settled that suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. (*Oklahoma Tax Comm'n v. Potawatomi Indian Tribe,* 498 U.S. 505, 508 (1991), citing *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831).)

To be effective, an Indian tribe's waiver of its sovereign immunity must be unequivocally expressed and may not be implied. (*Santa Clara Pueblo, supra,* 436 U.S. at 58-59; *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir.1985).) Even when a tribe brings, for instance, a suit for equitable relief against a state commission, it does not thereby waive its immunity to the commission's counterclaims against it. (*Potawatomi Indian Tribe, supra*, 498 U.S. at 508.) "[A] tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants in those actions." (*McClendon v. United States* (9th Cir. 1989) 885 F.2d 627, 630; *see also Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization,* 757 F.2d 1047, 1053 (9th Cir.1985), *rev'd in part on other grounds,* 474 U.S. 9 (1985).) Nor may a state condition an Indian tribe's access to court on waiver of any claim raised by a nonmember against the tribe. As *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.* (1986) 476 U.S. 877 makes clear:

> The perceived inequity of permitting the Tribe to recover from

> a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe must be accepted in view of the overwhelming federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or [a State] to sue in cases where they could not be sued as defendants because of their sovereign immunity must also be accepted.[35]

B. Section 106 Fails to Abrogate Tribal Sovereign Immunity Because It Does Not Explicitly Reference "Indian Tribes."

Section 106 of the Bankruptcy Act neither waives nor abrogates immunity for Santa Ynez or any other federally recognized Indian tribe against cross-complaints by bankruptcy debtors. It specifically identifies the "United States," "states" and other "governmental units" as those stripped of immunity in bankruptcy proceedings, but does not mention "Indian tribes."

Courts refuse to find abrogation of tribal immunity in the absence of a specific reference in the statute to "Indian tribes." This is particularly so when, as with section 106, abrogation of state sovereign immunity is accomplished by specifically referencing "states" but not "Indian tribes." An express listing of "states" but not "Indian tribes" in the abrogation provisions of the Bankruptcy Act, in other words, demonstrates that Congress did not intend to abrogate or waive tribal sovereign

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[35] 476 U.S. at 893.

immunity.[36]

Florida Paraplegic Ass'n., Inc. v. Miccosuke Tribe of Indians of Florida (11th Cir. 1999) 166 F.3d 1126 illustrates how courts protect tribes from abrogation or waiver of their immunity when statutory language broadly imposes liability on other sovereigns but does not specifically mention that "Indian tribes" are included within the statute's sweep. The plaintiff, an organization representing disabled persons, sued the Miccosuke Tribe alleging that its tribally owned businesses were not accessible to the disabled as required by the Americans with Disabilities Act ("ADA")[37]; and the Tribe responded by asserting the defense of sovereign immunity. In reversing the district court and finding in favor of the Tribe on the basis of sovereign immunity, *Florida Paraplelgic* acknowledged the *broad* scope of the ADA's prohibition against discrimination, which protects any individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation by *anyperson* who owns, leases (or leases to), or operates a place of public accommodation."[38] The opinion recognized that "Senate and House Reports

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[36] Greggory W. Dalton, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity* (2006) 81 *WASH. L. REV.* 645, 662-663 ("[C]ourts have found statutes that abrogate state sovereign immunity by specifically referencing *states* to not abrogate tribal sovereign immunity in the absence of an equivalent reference to *tribes*."). *Id.* at 663; emphasis added.

[37] 42 U.S.C. § 12101 *et. seq.*

[38] 42 U.S.C. § 12182(a).

accompanying Title III of the ADA[39] emphasize Congress's intent that the statute apply *universally*."[40] Nonetheless the opinion found this *general language* (*i.e.*, "any person"), though intended for *universal* application, to be insufficient to confer a remedy upon the plaintiff against the Tribe:

> Despite its apparent broad applicability, . . . *no specific reference to Indians or Indian tribes exists anywhere in Title III.* Most significantly, the section of Title III pertaining to enforcement of its prohibition of discrimination in places of public accommodation simply states that the same remedies are available to aggrieved persons under this statute as are open to victims of discrimination in public accommodations under Title II of the Civil Rights Act of 1964: namely, "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. . .." Neither the enforcement provision of Title III of the ADA nor the parallel section of the Civil Rights Act *specifically authorizes suits against Indian tribes* who allegedly have violated the Acts' substantive requirements. In short, Congress declined to abrogate Indian tribes' sovereign immunity from suit *either by direct statement in*

[39] 42 U.S.C. § 12101 et. seq.

[40] 166 F.3d at 1128; emphasis added.

> *Title III itself or by reference to other statutes having that effect.* No support exists in the statute for a finding that Congress has waived tribal sovereign immunity under Title III of the ADA.[41]

An important feature of the ADA, one shared by sections 101 and 106 of the Bankruptcy Act, is abrogation of sovereign immunity for "States" by use of that term, but no equivalent mention in the subsections to "Indian tribes." As *Florida Paraplelgic* said about the consequence of this type of statutory expression when it comes to abrogation of tribal immunity:

> This . . . demonstrates Congress's full understanding of the need to express unambiguously its intent to abrogate sovereign immunity when it wishes its legislation to have that effect. This comprehension is underscored in the legislative history . . .. [¶] Thus, Congress has demonstrated in this very statute its ability to craft laws satisfying the . . . Court's mandate that courts may find that Congress has abrogated sovereign immunity from lawsuits only where it has expressed unequivocally its intent to do so. *That it chose not to similarly include an abolition of the immunity of Indian tribes is a telling indication that Congress did not intend to subject tribes to suit under the ADA.*[42]

Other statutes in which Congress directly addressed the amenability of tribes

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[41] 166 F.3d at 1131-1132; emphasis added.

[42] *Florida Paraplegic, supra*, 166 F.3d at 1133; emphasis added.

to suit strengthens the argument that section 106 does not infringe upon Indian tribes' sovereign rights. In the federal statute requiring the uniform transportation of hazardous materials,[43] for instance, "Indian tribes" are expressly mentioned as an example of "any person," defined to also include "a State or political subdivision thereof," to whom the statue applies. At least two federal appellate opinions found this language manifested Congress's intent to abrogate sovereign immunity from suits seeking a declaration of federal preemption under the statute of an Indian tribe's attempt to regulate the transportation of hazardous materials. (See *Public Service Co. v. Shoshone-Bennock Tribes* (9th Cir. 1994) 30 F.3d 1203; and *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community* (8th Cir. 1991) 991 F.2d 458.)[44]

Similarly, *Blue Legs v. United States Bureau of Indian Affairs* (8th Cir. 1989) 867 F.2d 1094 holds that the federal statute aimed at remedying pollution caused by improper disposal of hazardous and solid waste,[45] authorizes citizens to bring suits to force compliance with the statute against "any person," including an "Indian tribe." But the tribe is not subsumed within the phrase "any person" by means of the

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[43] 49 U.S.C. App. § 1801, Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA") (repealed 1994).

[44] Accord, *Bassett v. Mashantucket Pequot Tribe* (2nd Cir. 2000) 204 F.3d 343, 357-58 (finding that Congress did not abrogate tribal sovereign immunity in the Copyright Act, 17 U.S.C. §§ 101-1332 (2000), because the statute did not specifically reference tribes or suits against tribes) ("[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."); *United States v. Weddell* (D.S.D. 1998) 12 F. Supp. 2d 999, 1000 (finding that the Federal Debt Collection Procedure Act, 28 U.S.C. §§ 3001-3308 (2000), unequivocally expresses the abrogation of tribal sovereign immunity by defining a "person" subject to suit to include "an Indian tribe").

[45] Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(A).

deduction that a "person" is a sufficiently broad phrase that may encompass a "tribe." No, an "Indian tribe" is included in that abrogation provision because the statutory language defines a "person" as including a "municipality," which in turn encompasses "an Indian tribe" by express statutory delineation.[46] (See also *Washington Dep't. Of Ecology v. United States Envtl. Protection Agency* (9th Cir. 1985) 752 F.2d 1465, 1469.)[47]

C. The Legislative History of Section 106 Shows that it is Intended to Abrogate the Sovereign Immunity of States and the Federal Government, not Indian Tribes.

That Congress did *not* intend by section 106 to abrogate or waive *tribal* immunity is, as with the ADA, demonstrated in the legislative history of the amendments to section 106 that abrogate *state* and *federal* sovereign immunity. As the Court recently explained about section 106:

> The [current] version of § 106(a) is the product of revisions made in the wake of some of our precedents. The Bankruptcy Reform Act of 1978 . . . contained a provision indicating only that "governmental unit[s]," defined to include States, were deemed to have "waived sovereign immunity" with respect to certain proceedings in bankruptcy . . . "notwithstanding any

[46] 42 U.S.C. § 6903(13), (15).

[47] See also *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony* (2003) 538 U.S. 701, 704 (finding that a statute utilizing a generic phrase, like "any person," does not indicate an unequivocal expression of congressional intent to abrogate tribal sovereign immunity).

> assertion of sovereign immunity." This Court's decisions in *Hoffman v. Connecticut Dept. of Income Maintenance* (1989) 492 U.S. 96 and *United States v. Nordic Village, Inc.* (1992) 503 U.S. 30, which held that Congress had failed to make sufficiently clear in the predecessor to § 106 (a) its intent either to "abrogate" state sovereign immunity or to waive the Federal Government's immunity, prompted Congress in 1994 to enact the text of § 106(a) now in force.[48]

Central Virginia Community College referenced a law review article in support of its noteworthy explanation of the legislative history to section 106, a history which underscores the intent of Congress to abrogate the immunity of the federal government and states, but *not* Indian tribes:

> [¶] The effort to provide like treatment for governmental entities [in the 1978 Bankruptcy Reform Act provision of § 106] was partially thwarted by two Supreme Court decisions interpreting [it]. In *Hoffman v. Connecticut Department of Income Maintenance* and *United States v. Nordic Village, Inc.*, the Supreme Court held that Congress failed to speak with sufficient clarity in § 106(c) to overcome the *states' andfederal government's sovereign immunity* from suits for monetary relief. As a result, unless

[48] *Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 126 S. Ct. 990, 995, fn. 2; statutory and secondary source citations omitted.

> another basis for eliminating their immunity applied, trustees could not sue governmental units to recover money to which a bankruptcy estate was otherwise entitled, nor could bankruptcy courts impose monetary sanctions against governmental entities for violations of their orders.
>
> [¶] In the Bankruptcy Reform Act of 1994, Congress amended § 106 with the express purpose of overruling the *Hoffman* and *Nordic Village* decisions.[49]

Hoffman concerned the scope and application of § 106 to the sovereign immunity of *states*, and *Nordic Village* the immunity of the *federal government* in the face of § 106. Neither opinion concerned *tribal sovereign immunity* and there is no mention in the legislative history of the 1994 amendments to § 106 of "Indian tribes," though references abound in that history to the immunity of states and the federal government. As *Florida Paraplegic* emphasized about statutory language and legislative history of this nature:

> When we compare Title III of the ADA [or § 106] to the HMTUSA and the RCRA, the absence of any reference to Indian tribes in the former statute [or in § 106] stands out as a stark omission of any attempt by Congress to declare tribes subject to . . . suit [under the ADA or waiver of immunity

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[49] S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity* (1995) 69 *AMER. BANKR. L.J.* 311, ___.

under § 106].[50]

The correctness of the conclusion that the Bankruptcy Act does not intend to subsume "Indian tribes" within the phrase "government units" for whom immunity is abrogated or waived, is further underscored by Congress's use of similar phrases in other statues where Indian tribes are specifically identified as coming within that category. (See, e.g., 28 U.S.C. § 3701 (2000), providing a definition for the term "governmental entity" that includes Indian tribes.)

D. The Broad and Ambiguous Phrase "Foreign or Domestic Government" in § 106 Should Not Be Read to Abrogate or Waive a Tribe's Sovereign Immunity.

Courts are divided over whether § 106 abrogates or waives tribal immunity. *In re National Cattle Congress*[51] and *In re Mayes*[52] hold that the phrase "foreign or domestic government" does not suffice to unequivocally express Congressional intent to abrogate tribal sovereign immunity. *National Cattle Congress* concluded that since the Bankruptcy Code makes no specific mention of Indian tribes, a court would need to infer from the language that Congress intended to subject tribes to suit. The court deemed such an inference inappropriate and thus found the Tribe immune from suit.[53]

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[50] 166 F.3d at 1132.

[51] (Bankr. N.D. Iowa 2000) 247 B.R. 259.

[52] (B.A.P. 10th Cir. 2003) 294 B.R. 145.

[53] 247 B.R. at 267.

In *In re Mayes*, a debtor filed a motion to avoid a judicial lien, claiming the judgment lien secured by the Cherokee nation against the debtor's homestead was void. Finding the avoidance motion to constitute a "suit," the appellate panel concluded that the Cherokee Nation was immune from suit because the court did not consider the phrase "other foreign or domestic government" to include Indian tribes.[54]

Other courts have reached the opposite conclusion, however, finding the phrase "foreign or domestic governments" sufficient to sweep within its boundary "Indian tribes."[55] *Krystal Energy Co. v. Navajo Nation*[56] seemingly states that § 106(a) abrogates tribal immunity in bankruptcy, and *White v. Confederated Tribes of the Colville Reservation Tribal Credit*[57] holds that a tribe's participation as a creditor in a bankruptcy proceeding under Chapter 11 waives its immunity from adjudication of its claim.[58]

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[54] 294 B.R. at 147.

[55] See, e.g., *In re Russell* (Bankr. D. Ariz. 2003) 293 B.R. 34, 40 ("[B]ecause [the Bankruptcy Code] expressly abrogates sovereign immunity as to all domestic governments, the statute applies to Indian tribes by deduction . . .."); *In re Vianese* (Bankr. N.D.N.Y. 1995) 195 B.R. 572, 576 ("Indian nations are considered 'domestic dependent nations' and as such comprise 'governmental units' within the meaning of Code § 101(27).").

[56] (9th Cir. 2004) 357 F.3d 1055.

[57] (9th Cir. 1998) 139 F.3d 1268

[58] *White* was decided on general waiver principles, not on construction of § 106(b). "White did not appeal the district court's alternative holding that § 106 of the Bankruptcy Code did not abrogate tribal immunity. Therefore, that issue is not before us and we express no view on whether an Indian Tribe is a 'governmental unit' for purposes of §§ 106(a) or (b)." 139 F.3d at 1270. Appellant argues that when, as here, a tribe consistently asserts its sovereign immunity against a cross-complaint in bankruptcy, neither general waiver principles nor § 106(b) should extinguish that immunity.

Both opinions are from the Ninth Circuit and ordinarily entitled to great weight in determining the substance of the law in California on Indian issues addressed. But both opinions neglect to consider principles of statutory interpretation that are critical to determining whether tribal immunity is abrogated or waived.

A cardinal principle courts must keep uppermost when parsing a statute arguably intended to abrogate tribal immunity is the "unique trust relationship between the United States and the Indians." (*Montana v. Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 766.) This trust relationship requires statutes that affect Indian tribes "to be liberally construed, doubtful expressions being resolved in favor of the Indians." (*Alaska Pacific Fisheries Co. v. United States* (1918) 248 U.S. 78, 89.) Thus "[a]mbiguities in federal law [are] construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 143-44). This rule requiring sympathetic construction of statutes that affect Indian tribes applies whether or not the statute was enacted to benefit Indians. (*Bryan v. Itasca County* (1976) 426 U.S. 373, 392-93.)

It is beyond cavil that the general phrases "governmental units" and "foreign and domestic governments" found in Bankruptcy Act sections 106 and 101 are sufficiently broad as to be "ambiguous" with respect to whether they include "Indian

tribes."[59] This is the obvious result of conflicting conclusions courts have reached when addressing the specific issue. If, as the high Court has made clear, "ambiguities" are to be construed to favor tribes, then section 106 cannot abrogate or waive tribal immunity. That is the lesson of the *canon of sympathetic construction*, which has more strength than the ordinary canons of statutory interpretation.[60] "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." (*Montana*, *supra*, 471 U.S. at 766.)

Neither *Krystal Energy* nor *White*, however, mention the "trust relationship" between the federal government and the tribes, or the canon of sympathetic construction which is based on that "trust relationship." Cases are not authority for propositions not considered. (*Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 730.) Indeed, cases that do not consider propositions are only *dicta* with respect to legal issues raised again with those propositions presented. No court is bound to follow the *dicta* of prior cases in which the point at issue was not fully debated. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a

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[59] Opposite conclusions reached by courts on the issue of whether the phrase "foreign and domestic governments" in section 101 of the Bankruptcy Act includes "Indian tribes" is a pristine example of "ambiguity," which is defined as "open to various interpretations; having several possible meanings or interpretations; equivocal." *WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* 46 (1989 ed.).

[60] William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 116 (4th ed. 2004).

subsequent suit when the very point is presented for decision." (*Cohens v. Virginia* (1821) 6 Wheat. 264, 399-400.)

Failure of an opinion to discuss the trust relationship of the federal government to tribes and apply the canon of sympathetic construction to ambiguous language in a purported abrogation statute are not mere bagatelles. These lacunae are critical because the inevitable result is, as with *Krystal Energy* and *White*, to turn well-settled principles of Indian law on their heads. While courts must be vigilant in protecting state and federal immunity from waiver and abrogation – requiring federal statutes that purport to do so to make their "intention unmistakably clear in the language of the statute, legislative history and "inferences from general statutory language"[61] – that vigilance must be even keener when it comes to tribal immunity.

The principal reason animating strict and sympathetic construction of statutes that affect Indians so as to favor non-abrogation and non-waiver of tribal immunity for bankruptcy is the Constitution itself. The Bankruptcy Clause of the Constitution[62], our high Court explains, "reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings."[63] "Congress may," in other words, "either treat States in

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[61] *Atascadero State Hosp. v. Scanlon* (1985) 473 U.S. 234, 242.

[62] U.S. Const., Art. I, § 8, cl. 4.

[63] *Central Virginia Community College, supra*, 546 U.S. at ___, 126 S. Ct. at 996.

the same way as other creditors insofar as concerns 'Laws on the subject of Bankruptcies' or exempt them from operation of such laws. Its power to do so arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of Convention, not by statute."[64] Tribes, however, in sharp contrast to States, "had no say in the making of the Constitution."[65] "[W]e distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. Tribes were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible."[66] Hence, when a court is confronted with determining whether §§ 101 and 106 of the Bankruptcy Act abrogate or waive a tribe's immunity from a debtor's cross-complaint, it must, consistent with the federal government's trust responsibility to tribes, read the statutes strictly, consistent with the sympathetic construction canon. Failure to do so, as happened with *Krystal Energy* and *White*, renders the opinions incomplete and mere dicta with respect to the issue presented herein.

CONCLUSION

Sections 106 and 101 of the Bankruptcy Act fail to effectively abrogate or waive the sovereign immunity of Indian tribes. The general phrase "other foreign or domestic government" in the Act does not constitute an unequivocal expression of

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[64] *Id.* at 1005.

[65] Theresa R. Wilson, *Nations Within A Nation: The Evolution of Tribal Immunity* (1999/2000) 24 *AM INDIAN L. REV.* 99, 123.

[66] *Kiowa Tribe v. Manufacturing Technologies, Inc.* (1988) 523 U.S. 751, 755-56; citations omitted.

congressional intent to do so for Indian tribes. The ambiguity of this phrase is shown by the conflicting decisions of courts that have determined wither it applies to Indian tribes. When there is ambiguity in a statute affecting Indian tribes, the canon of sympathetic construction (which arises from the "trust relationship" of the federal government and tribes), requires the statue be read in favor of tribal immunity.

The court's ruling that Santa Ynez could not assert its defense of sovereign immunity against Torres's cross-complaint is wrong because it misreads sections 101 and 106 in reliance on opinions that are not binding authority or properly reasoned. For all these reasons, the judgment against Sana Ynez in favor of Torres's cross-complaint should be reversed.

Respectfully submitted,

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Fred J. Hiestand
Counsel for Appellant
Santa Ynez Band of Mission Indians

Dated: January 29, 2007

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 6,500 words.

Date: January 29, 2007

Fred J. Hiestand
Counsel for Appellant
Santa Ynez Band of Mission Indians

PROOF OF SERVICE

I, **David Cooper**, declare as follows:

I am employed in the County of Sacramento, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by the Law Office of Fred J. Hiestand, and my business address is 1121 L Street, Suite 404, Sacramento, CA 95814. I am readily familiar with the practice of the Law Office of Fred J. Hiestand for collection and processing of correspondence for mailing with the United States Postal Service (USPS). On **January 29, 2007**, I served the within document entitled: **APPELLANT'S OPENING BRIEF in *Santa Ynez Band of Mission Indians v. Torres, et al.*, B188413** on the parties in this action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

Counsel	**Party(ies) Represented**
James E. Marino, Esq. 1026 Camino del Rio Santa Barbara, CA 93110 Tel./Fax: 805-967-5141	Counsel for Defendants and Respondents **Vince Torres, et al.**
Mark A. Radoff, Esq. Michael S. Pfeffer, Esq. California Indian Legal Services 510 16th Street, Fourth Floor Oakland, CA 94612 Tel.: 510-835-0284 Fax: 510-835-8045	Counsel for Plaintiff and Appellant **Santa Ynez Band of Mission Indians**
Hon. Zel Canter, Judge Santa Barbara Superior Court Cook Building (North County) 312-C East Cook Street Santa Maria, CA 93456	Trial Court
California Supreme Court 350 McAllister Street San Francisco, CA 94102	Four Copies

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **January 29, 2007**, at Sacramento, California.

David Cooper