Case No. A142560

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

ROBERT FINDLETON, dba Terre Construction,
also dba On-Site Equipment,
Plaintiff/Appellant,

v.

COYOTE VALLEY BAND OF POMO INDIANS,
also known as the Shodakai Casino, and Does 1-50,
Defendants/Respondents.

Appeal from the Superior Court of the State of California
County of Mendocino
The Honorable Jeanine Nadel, Judge
Superior Court Case No. SCUK CVG 12-59929

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO COURT'S APRIL 14, 2016 ORDER

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INTRODUCTION

The Court, in its order of April 14, 2016, requested supplemental briefing regarding whether, assuming the General Council of the Coyote Valley Band of Pomo Indians ("Tribe") validly delegated its authority to waive the Tribe's sovereign immunity, the Tribal Council waived the Tribe's sovereign immunity for purposes of appellant Robert Findleton's ("Findleton") state court petition to compel mediation and arbitration.[1] In answering that question, the Court directed the parties to address the following questions, brief answers to which are provided below:

1. *Did entering into the 2007 contracts containing arbitration provisions waive the Tribe's sovereign immunity?* No, because the 2007 contracts expressly state that the arbitration clauses shall not be interpreted as waivers of sovereign immunity and the parties agreed that the Tribe's sovereign immunity was not waived for disputes or other matters related to the contracts.

2. *Did adopting Resolution No. CV-02-08-03 waive the Tribe's sovereign immunity for purposes of this action?* No, because Resolution No. CV-02-08-03 states that the limited waiver of sovereign immunity does not encompass an action in state court.

3. *Did approving the Third Amendment waive the Tribe's immunity?* No, because the Third Amendment incorporates by reference the provision set forth in the construction contract, which states that the arbitration clauses shall not be interpreted as sovereign immunity waivers

[1] Determining whether the Tribal Council waived the Tribe's sovereign immunity is, however, unnecessary in this case because, for all of the reasons set forth Respondent's Brief, the General Council never validly delegated the authority to waive sovereign immunity in accordance with the Tribe's Constitution. Because the petition and election processes were not used to produce a valid delegation, no Tribal Council action in this case could properly effect a waiver.

and that the parties agreed that the Tribe's sovereign immunity was not waived for disputes or other matters related to the contracts.

4. *Did adopting Findleton's 2008 proposal waive the Tribe's immunity for purposes of the instant state court action?* No, because the proposal references a request for a waiver within the federal court system, not the state court system.

ARGUMENT

I. THE ARBITRATION CLAUSES DO NOT WAIVE IMMUNITY BECAUSE THE PARTIES EXPRESSLY AGREED THAT THE CLAUSES WERE NOT TO BE CONSTRUED AS WAIVERS AND THAT IMMUNITY "SHALL NOT BE WAIVED."

The arbitration clauses set forth in the construction contract and rental contract do not effectuate a waiver of sovereign immunity under *C & L Enterprises Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.* (2001) 532 U.S. 411 ("*C & L*"), because the parties, in each contract, agreed that tribal sovereign immunity "shall not be waived for disputes or other matters" related to the contracts, Clerk's Transcript ("CT") 123, 129, and the purposeful inclusion of such provisions, therefore, prevents the arbitration clauses from treatment as a waiver. To treat the arbitration clauses as a waiver would, moreover, fail to give force and effect to contract provisions that patently prohibit a waiver of sovereign immunity and, to do so, would defy the rules of contract interpretation. Finally, the arbitration clauses do not, and cannot, waive the Tribe's sovereign immunity from suit because the clauses, taken together with other contractual provisions expressly forbidding a waiver, do not surrender sovereign immunity in express and unequivocal terms.

A. The Parties Specifically Agreed that the Arbitration Clauses "Shall" Not Constitute Waivers of the Tribe's Sovereign Immunity.

The 2007 contracts both contain the following identical provision:

> No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the Coyote Valley Band of Pomo Indians. The Parties specifically agree that the sovereign immunity of the Coyote Valley Band of Pomo Indians shall not be waived for disputes or other matters related to this Agreement. CT 123, 129.

Thus, in Section 9.10.8 of the construction contract ("Section 9.10.8"), CT 123, and Section 22, D of the rental contract ("Section 22, D"), CT 129, Findleton explicitly agreed that the Tribe had reserved the right to assert its sovereign immunity from suit where, as here, a dispute arises regarding the contracts.

Under certain circumstances, an arbitration clause within a contract executed by an Indian tribe can constitute a waiver of tribal sovereign immunity. In *C & L*, the Supreme Court found that the Potawatomi Tribe had waived its immunity with the requisite clarity when it entered into an off-reservation contract that contained a provision for arbitration and other related provisions for enforcement of an arbitration award. The Court stated that a tribe's waiver of sovereign immunity must be unambiguous and, in the contract at issue there, the arbitration clause and related provisions for the enforcement of an arbitration award were sufficiently clear to constitute a waiver of tribal sovereign immunity. The Court placed particular emphasis on the fact that the contract included a choice-of-law clause that stated: "The contract shall be governed by the law of the place where the Project is located."[2] *Id.* at 415. The Court found that "[b]y selecting

[2] Notably, the construction project at issue in *C & L* was located on off-reservation, non-trust land. *C & L*, 532 U.S. at 414. The construction

Oklahoma law…to govern the contract…the parties [had] effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act." *Id.* at 419. Because Oklahoma law applied to the contract, consenting to arbitration and to the enforcement of awards constituted a waiver of sovereign immunity. *Id.* at 423.

In the court below, Findleton cited to *C & L* for the proposition that the arbitration clauses in the contracts, by themselves, waived the Tribe's immunity from suit. The matter currently before this Court is distinguishable from *C & L* for two important reasons.

First, the 2007 contracts do not simply contain arbitration clauses like the contracts involved in *C & L*. The contracts at issue here contain arbitration clauses **in addition to** other provisions stating that nothing in the contracts is to be construed as a waiver of the Tribe's sovereign immunity from suit. CT 123, 129. Clauses like Section 9.10.8 and Section 22, D were not at issue in *C & L* and would have necessarily changed the result in that case. Whether an arbitration clause, alone, constitutes a sufficiently clear waiver of sovereign immunity is immaterial in a case such as this where the contracts expressly state that the arbitration clauses "shall not be construed as waiver[s]" of sovereign immunity and that the parties "specifically agree that the sovereign immunity of the [Tribe] shall not be waived for disputes" related to the contracts. CT 123, 129.

Second, the choice-of-law provisions in the contract at issue in *C & L* supported the Supreme Court's finding that the Potawatomi Tribe had waived its sovereign immunity. Here, however, Section 18.1.2 of the construction contract states that tribal law—not state law—governs the contract:

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project from which this dispute arose was located on-reservation, on tribal trust land. CT 792.

> The [contract] shall be governed by the law of the [Tribe]. If a particular issue is not covered by such law, federal law shall govern. The Contractor agrees to the jurisdiction of the [Tribe]. CT 124.

This provision makes clear that the laws of the Tribe or federal law, not state law, govern the contract. Thus, unlike the contract before the Supreme Court in *C & L*, the choice-of-law provision at issue here supports the conclusion that the arbitration provisions do not waive the Tribe's sovereign immunity from suit. The Court's holding in *C & L*, therefore, does not support a finding that the arbitration clauses waive the Tribe's immunity from suit. In fact, it supports the opposite conclusion.

Furthermore, even assuming that the arbitration clauses were waivers of immunity, they nevertheless do not provide a waiver of immunity for the purpose of state court jurisdiction to enforce the arbitration clauses. The choice-of-law provision in the construction contract, read in conjunction with the arbitration clauses, required that Findleton bring his petition to compel arbitration in a federal and/or tribal forum.

Both arbitration clauses state that the arbitration provisions "shall be specifically enforceable **in accordance with applicable law** in any court having jurisdiction thereof." CT 122, 129 (emphasis added). To be enforceable "in accordance with applicable law," the arbitration clauses are required to be enforced pursuant to the law the parties chose to apply—tribal and/or federal law. CT 124. Thus, reading the "in any court of competent jurisdiction" language in conjunction with the choice-of-law provision, and using each clause of the contracts to help interpret each other, Cal. Civ. Code § 1641, the contracts must be interpreted as contemplating jurisdiction in a federal court or a tribal forum. This action cannot, and should not, have been brought in state court because the

arbitration clauses do not contemplate a state court action. This argument is supported by the Tribal Council and General Council resolutions that, like the choice-of-law provisions in the contracts, indicate that the waiver does not contemplate an action in state court.

B. The Rules of Contract Interpretation Support the Conclusion that the Arbitration Clauses Do Not Waive the Tribe's Immunity.

The conclusion that the arbitration clauses do not waive the Tribe's sovereign immunity is bolstered by application of the general rules governing the construction of contractual language:

> A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the parties, to be collected from its terms, or would lead to some absurdity…and, furthermore, "must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect".... *Cole v. Low* (1927) 81 Cal. App. 633, 637, *citing* Cal. Civ. Code § 1643.

Every part of a contract should be given some effect. *Ogburn v. Travelers Ins. Co*. (1929) 207 Cal. 50.

Here, both contracts admittedly contain arbitration provisions. Yet, both also state that sovereign immunity is not waived. CT 123, 129. Interpreting the arbitration clauses as waivers of immunity renders Section 9.10.8 and Section 22, D meaningless and unenforceable. The Court must, therefore, interpret the contracts in a way that gives force and effect to every clause—including the provisions stating that the arbitration clauses are **not** waivers of sovereign immunity. This interpretation is bolstered by California Civil Code § 1650, which provides that particular clauses, are

subordinate to general intent: "No term or provision in this Agreement shall be construed as a waiver." CT 123, 129.[3]

C. A Waiver of the Tribe's Sovereign Immunity Has Not Been Unequivocally Expressed.

It is well settled that a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58-59; *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416, 419 ["[T]ribal sovereign immunity remains intact unless surrendered in express and unequivocal terms."]. Thus, "[a] voluntary waiver by a tribe must be 'unequivocally expressed.'" *White v. Univ. of Cal.* (9th Cir. 2014) 765 F.3d 1010, 1025-1026. "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 811.

The requirement that the waiver be "'unequivocally expressed' is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved…." *Ute Distribution Corp. v. Ute Indian Tribe* (10th Cir. 1998) 149 F.3d. 1260, 1267.

Here, the contracts contain arbitration clauses that, under certain circumstances, can constitute a waiver of sovereign immunity. In addition to the arbitration clauses, however, other contractual provisions expressly state that nothing in the contracts shall be construed as a waiver and that the Tribe's sovereign immunity shall not be waived. CT 123, 129. When the arbitration clauses are read in conjunction with Section 9.10.8 and Section 22, D, a waiver of the Tribe's sovereign immunity is not unequivocal. Considering the hurdle that exists with respect to whether a waiver has been

[3] Specific provisions in a contract, i.e., the specific agreement that sovereign immunity is not waived, also take precedent over general provisions, i.e., general agreement to arbitrate disputes. *See Scudder v. Perce* (1911) 159 Cal. 429, 433.

effectuated with the requisite clarity, the fact that the contracts contain arbitration clauses in addition to Section 9.10.8 and Section 22, D renders the waiver ambiguous. Ambiguous waivers of sovereign immunity are insufficient to effectuate a valid waiver.

II. TRIBAL COUNCIL RESOLUTION NO. CV-02-08-03 DOES NOT CONSTITUTE A WAIVER OF TRIBAL SOVEREIGN IMMUNITY FOR PURPOSES OF FINDLETON'S STATE COURT PETITION TO COMPEL MEDITATION AND ARBITRATION.

A. Tribal Council Resolution No. CV-02-08-03 Demonstrates the Parties' Intent to Avoid Dispute Resolution in State Courts and, Therefore, Cannot Constitute a Waiver of Sovereign Immunity for Purposes of the Petition.

Even assuming that the delegation of authority from the General Council to the Tribal Council was valid, Tribal Council Resolution No. CV-02-08-03, by its own language, limits a purported waiver of tribal sovereign immunity for the purpose of "avoid[ing] dispute resolution in state courts." CT 437. The desire to avoid state court dispute resolution is similarly set forth in the 2008 proposal of Robert Findleton, CT 134, and Resolution #07-01, invalidly adopted by the General Council. CT 436. Each actor upon which a waiver relied (i.e., the Tribal Council, the General Council) and Findleton agreed to avoid resort to state court. Notwithstanding this express limitation, Findleton, nevertheless, initiated dispute resolution in state court in contravention of the mutual agreement of the parties when he haled the Tribe into state court to defend against the petition and so too now to defend the trial court's decision in this appeal.

Findleton agreed that state court resolution of disputes arising out of the contracts and the amendment would be improper. Findleton, in his 2008 written proposal, requested that the Tribal Council issue a resolution and that such resolution "include the 'limited waiver of sovereign immunity'

wording" allowing "Terre Construction remedy within the U.S. Federal Court system." CT 134.

Findleton did not seek a remedy within the state court system, but rather he, in his request, sought a remedy within the federal court system. Significantly, neither the Superior Court of California nor the Court of Appeal for the State of California is "within the U.S. Federal Court system." CT 134. For this reason, Resolution No. CV-02-08-03, which was produced to carry out the 2008 proposal, did not effectuate a waiver of sovereign immunity for purposes of the state court petition.

The Tribal Council agreed that state court resolution of disputes arising out of the contracts and the amendment would be improper. Consistent with the 2008 proposal, the Tribal Council convened to approve Resolution No. CV-02-08-03, the principal purpose of which was to permit Findleton to resume work on the project pursuant to mutually agreed-upon terms and conditions. The plain language of Resolution No. CV-02-08-03 expressly proscribes state court participation in dispute resolution:

> [T]he Tribe hereby consents to a limited waiver of Sovereign Immunity of the Tribe, which is limited to 1.) provide for arbitration of disputes; 2.) **avoid dispute resolution in state courts**; 3.) limit recourse solely to casino assets; and 4.) shall not allow recourse to assets owned by individual members of the Tribe. CT 437 (emphasis added).

Through Resolution No. CV-02-08-03, the Tribal Council unequivocally evidenced its intention to avoid state court proceedings and, therefore, this resolution cannot be construed as a waiver for purposes of this action.

In addition, where, as here, a conditional limitation is placed upon a waiver of sovereign immunity, the conditional limitation imposed thereon must be strictly construed and applied. *See Lawrence v. Barona Valley Ranch Resort and Casino* (2007) 153 Cal.App.4th 1364, 1369. Even

assuming that the Tribe agreed to waive its sovereign immunity and consented to suit in accordance with constitutional requirements—which it did not—it did so only in a narrowly defined situation in which state courts are to play no part. Therefore, because "the conditions under which the tribe agreed to waive its sovereign immunity and consent to arbitration and suit to resolve contract disputes were not satisfied, … sovereign immunity bar[s] this suit against the [Tribe]...." *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1421. *See Missouri River Services, Inc. v. Omaha Tribe of Nebraska* (8th Cir. 2001) 267 F.3d 848, 852 ["Because a waiver of immunity is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted."]; *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 183. Accordingly, Resolution No. CV-02-08-03 fails to effectuate a waiver of sovereign immunity for purposes of this state court action.

The General Council also considered state court involvement in the resolution of disputes related to a tribal economic development project to be improper. On June 2, 2007, members of the General Council attempted to adopt Resolution #07-01, which sought to, but did not, delegate to the Tribal Council the exclusive General Council authority to waive tribal sovereign immunity. It did so, however, by resolution—notably, not in accordance with the initiative and petition process pursuant to which the General Council must act. Resolution #07-01, like Resolution No. CV-02-08-03, prescribed four narrow conditions applicable to any limited waiver of sovereign immunity:

> [A]ny limited waiver of sovereign immunity shall: 1) provide for arbitration of disputes; 2) **avoid dispute resolution in state courts**; 3) limit recourse solely to casino assets; and 4)

> shall not allow recourse to assets owned by individual members of the Tribe. CT 436 (emphasis added).

The four enumerated conditions necessary to effect a limited waiver of sovereign immunity are thus present in both the Tribal Council and General Council resolutions—each of which succinctly states that any limited waiver of sovereign immunity shall "avoid dispute resolution in state courts...." CT 437, 436. The only way in which a waiver of the Tribe's sovereign immunity may be effective is if each and every condition required for a waiver is met: filing a petition to compel arbitration in state court is not among them. Thus, no such waiver has occurred.

B. Tribal Council Resolution No. CV-02-08-03, by Accepting and Approving the Third Amendment, Does Not Waive Tribal Sovereign Immunity from Suit since the Resolution Fails to Unequivocally Express Such a Waiver.

When it comes to analyzing Tribal Council Resolution No. CV-02-08-03, General Council Resolution #07-01, the contracts, the 2008 proposal, and the Third Amendment, **the only thing that is clear is that any effort to waive immunity is remarkably unclear**. Tribal Council Resolution No. CV-02-08-03, for example, is not a waiver of sovereign immunity because the operative provisions with respect to waiver are in direct conflict with one another. They cannot and do not, therefore, constitute a clear and unequivocal surrender of immunity, as required pursuant to the overwhelming weight of relevant case law. *See* Section I (C).

The magnitude of uncertainty and ambivalence regarding the alleged waiver set forth in Tribal Council Resolution No. CV-02-08-03 is evident from the interaction between provisions of Resolution No. CV-02-08-03, the Third Amendment, and the construction contract. In Findleton's 2008 proposal, Findleton requested issuance of a tribal resolution that "shall

include the 'limited waiver of sovereign immunity' wording which allows Terre Construction remedy within the U.S. Federal Court system." CT 134. The Tribal Council, in response to Findleton's proposal, convened to adopt Resolution No. CV-02-08-03. That resolution states, in part: "the Coyote Valley Tribal Council hereby approves the 'Third Amendment to Agreement' attached to this resolution and ... hereby consent[s] to a limited waiver of Sovereign Immunity of the Tribe...." CT 438. Resolution No. CV-02-08-03, therefore, approves of the terms set forth in the Third Amendment and purports to consent to a limited waiver of immunity.

To approve the Third Amendment **and** waive immunity, however, makes little sense. The Third Amendment, of which the Tribal Council sought to approve in Resolution No. CV-02-08-03, provides that "[a]ll terms and conditions of the original Agreement dated October 2, 2007 [i.e., the construction contract, *see* CT 119] shall apply to this Amendment and to the additional work...." CT 135. The construction contract, to which the Third Amendment refers, states: "No term or provision in this Agreement shall be construed as a waiver of the sovereign immunity of the [Tribe]. The Parties specifically agree that the sovereign immunity of the [Tribe] shall not be waived for disputes or other matters related to this Agreement." CT 123. Accordingly, the Third Amendment, by express inclusion of "[a]ll terms and conditions" of the construction contract, incorporates a provision that proclaims, with unqualified particularity, that sovereign immunity is not waived.

As a result, Resolution No. CV-02-08-03, which sought to approve the Third Amendment forbidding a waiver while also purporting to be a waiver is, at best, ambivalent and confusing. Such ambivalent waiver provisions do not amount to a clear and unequivocal surrender of immunity and, as a result, the Tribe's sovereign immunity remains intact.

III. NEITHER FINDLETON'S 2008 PROPOSAL NOR THE THIRD AMENDMENT CONSTITUTE WAIVERS OF THE TRIBE'S SOVEREIGN IMMUNITY.

The Tribal Council did not waive the Tribe's sovereign immunity for purposes of Findleton's petition by way of Findleton's 2008 proposal and the accompanying Third Amendment. First, with respect to the Third Amendment, no term included therein provides for a waiver of sovereign immunity. Neither is there any reference to dispute resolution. Rather, the Third Amendment states that "[**a]ll** terms and conditions of the [construction contract] shall apply to this Amendment …." CT 135 (emphasis added). As a result of this provision, Section 9.10.8 of the construction contract, CT 123, applies to the Third Amendment. Thus, by adopting the Third Amendment, the parties reaffirmed their agreement and commitment that the Tribe's sovereign immunity was not waived should a dispute arise. By executing the Third Amendment, the Tribal Council, therefore, did not waive the Tribe's sovereign immunity. Instead, the Third Amendment reestablished that sovereign immunity was not waived.

With regard to Findleton's 2008 proposal, such proposal, and the Tribal Council's attempted adoption thereof, do not constitute a waiver of sovereign immunity for purposes of Findleton's state court petition. While the proposals do reference Findleton's desire that the Tribal Council issue a resolution that includes a limited waiver of sovereign immunity, that request specifically references a remedy within the "U.S. Federal Court system." CT 134. This is consistent with the plain language of Tribal Council Resolution No. CV-02-08-03, which is designed to avoid dispute resolution in state court. Thus, nothing outlined in the 2008 proposal

constitutes a waiver of the Tribe's sovereign immunity for purposes of the state court petition.[4]

CONCLUSION

For all of the forgoing reasons, the Court should affirm the decision of the trial court.[5]

DATED: April 26, 2016 RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
LESTER J. MARSTON
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[4] It is worth recognizing the fact that both contracts contain merger clauses. *See* CT 124, 128. Because of these merger clauses, the 2008 proposal and requests outlined therein that are not included in the Third Amendment (e.g. a waiver of sovereign immunity) are not part of the contracts. The four corners of the contracts represent the entire agreement between the parties and any other agreements, whether written or oral, are superseded by the text of the Third Amendment. Pursuant to the Third Amendment, the parties agreed that immunity was not waived for disputes related to the contracts.

[5] The issue entertained by the trial court in this case was whether the Tribal Council **could** waive immunity—not whether it did waive immunity. If the Court is inclined to conclude that the delegation of authority to waive was valid, the Tribe requests that the Court remand for the trial court to make this determination in the first instance in order to allow for any discovery that may be necessary to create a more complete record.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 3,982 words as counted by the Microsoft Word word-processing program used to generate the brief.

DATED: April 26, 2016 RAPPORT AND MARSTON

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