

5-1-1981

Doing Business on an Indian Reservation: Can The Non-Indian Enforce His Contract With the Tribe?

Richard M. Grimsrud

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Contracts Commons](#), [Indian and Aboriginal Law Commons](#), [Jurisdiction Commons](#), and the [Legal Remedies Commons](#)

Recommended Citation

Richard M. Grimsrud, *Doing Business on an Indian Reservation: Can The Non-Indian Enforce His Contract With the Tribe?*, 1981 BYU L. Rev. 319 (1981).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1981/iss2/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract with the Tribe?

*Richard M. Grimsrud**

I. INTRODUCTION

With the advent of modern technology, which makes the Indian reservation far less remote, and with the growing shortage of domestic energy sources, which makes the reservation's natural resources far more attractive, the growth of non-Indian commercial involvement on the reservation is all but inevitable. This is so notwithstanding new federal legislation designed to further the tribe's own, internal economic development.¹ One factor inhibiting this outside investment, however, is the residuum of tribal sovereignty in the form of the tribal-immunity doctrine.² This doctrine has been interpreted to forbid any suit against the tribe—the logical party with which the outside investor would contract—in either federal or state courts. The logic of the tribal-immunity doctrine also forecloses a suit against the tribe in tribal court. Accordingly, the non-Indian businessman is understandably wary of the possibility that, should the tribe breach the contract, he would have no forum in which to enforce the agreement.

II. THE SCOPE OF THE TRIBAL-IMMUNITY DOCTRINE

It has uniformly been determined that the doctrine of tribal immunity bars suits against Indian tribes in state courts³ and

* B.A., 1965, Ripon College; J.D., 1971, Harvard University.

1. See, e.g., Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1976).

2. The tribal-immunity doctrine derives from the limited sovereignty of the Indian tribes recognized by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). See *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) for a detailed discussion of the doctrine. While its continuing vitality has been recently doubted, it is still a formidable barrier to suit against a tribe. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 259-60 (1979).

3. See, e.g., *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427-28, 443 P.2d 421, 423-24 (1968); *Bennett v. Fink Constr. Co.*, 47 Misc. 2d 283, 285, 262 N.Y.S.2d 331,

similarly prohibits actions against subordinate tribal economic organizations,⁴ unless the tribe or Congress has consented to suit and waived the immunity.⁵ The doctrine has also been held to bar suits against tribal officials for actions taken within the scope of their official duties.⁶ Although the U.S. Supreme Court in *Puyallup Tribe, Inc. v. Washington Dep't of Game*⁷ held that "tribal immunity" does not protect a tribal officer from suit, some courts have continued to hold, in spite of *Puyallup*, that tribal immunity forbids suits against tribal officers as well as tribes.⁸

In *Lomayaktewa v. Hathaway*,⁹ the Ninth Circuit held that the tribal-immunity doctrine proscribes a suit against an Indian tribe in federal court unless Congress has unequivocally waived the immunity or the tribe has consented to the suit. In that case, the Hopi traditionalist faction was suing to nullify the Black Mesa lease into which the tribe had entered. The plaintiffs had not even named the Hopi tribe as a defendant, but the court

333 (Sup. Ct. 1965).

4. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 6-7, 480 P.2d 654, 656-57 (1971).

5. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 428, 443 P.2d 421, 424 (1968). There is a serious question whether a tribe alone, without congressional approval, could waive its tribal immunity and consent to suit. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), has been interpreted to require congressional approval of a tribal waiver of its immunity, and this congressional action will not be implied if not unequivocally expressed. *Long v. Chemehuevi Indian Reservation*, 171 Cal. Rptr. 733, 735 (1981).

The most recent court of appeals decision to consider the question, however, held that an ordinance consenting to suit against the tribe in state court, which was passed by a tribal council and approved by a delegate of the Secretary of Interior, was an effective waiver of tribal immunity. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980). The finality of this determination will be uncertain for some time, since the Supreme Court granted certiorari on October 6th of 1980. 101 S. Ct. 71. It should be noted further that such a tribal ordinance need be approved by the Secretary only if the tribal constitution explicitly reserves to him such power of approval or disapproval, *see, e.g., State v. District Court*, 609 P.2d 290, 291 (Mont. 1980), but it is certainly far from clear that the tribe alone could waive its immunity under these circumstances.

6. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 7-8, 480 P.2d 654, 657-58 (1971).

7. 433 U.S. 165, 168 n.3, 171-72 (1977). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Of course, this amenability to suit will most likely exist only in tribal court and only for activities of tribal officers which are ultra vires of their official duties. *Cf. Barr v. Matteo*, 360 U.S. 564 (1959) (finding absolute privilege for government official in libel action); and F. COHEN, *FEDERAL INDIAN LAW* 284 (1958).

8. *See, e.g., Graves v. White Mountain Apache Tribe*, 117 Ariz. 32, 570 P.2d 803 (Ct. App. 1977).

9. 520 F.2d 1324, 1326 (9th Cir. 1975).

held that the tribe, as the lessor, was an indispensable party.¹⁰ The court reasoned that because of the doctrine of tribal immunity, "the plaintiff thus does not have any forum to which it can resort."¹¹

The various tribes' nonamenability to suit has become increasingly problematical as they attempt to attract the investment of capital from outside the reservation. Monroe Price poses the following question: If an entrepreneur seeks to do business on an Indian reservation, what guarantee does he have that the tribal organization will keep to its promises?"¹² "None" appears to be the answer, although Price proposes a more sensible solution than the absolute bar of tribal immunity:

Judicial power should be withheld from cases involving Indian tribes or individual Indians only because intervention would violate a federal statute or some clearly defined congressional policy.

The courts should replace the doctrine of residual sovereignty with a new doctrine based on Congress' present policies, beginning with the Indian Reorganization Act of 1934. . . . Those policies require that the courts and the protections of the Federal Constitution be available to non-Indians who enter into commercial relations with Indian tribes.¹³

While Price's approach may appeal to reason, it is not the law. Just recently the U.S. Supreme Court forcefully reiterated the doctrine of tribal immunity¹⁴ to bar a suit against a tribe in federal court for alleged violations of the Indian Civil Rights Act.¹⁵ More recent federal court interpretations of the immunity doctrine have applied it even more extensively to frustrate the exercise of federal court jurisdiction over tribes.¹⁶

10. *Id.* at 1325-27.

11. *Id.*

12. M. PRICE, *LAW AND THE AMERICAN INDIAN* 635 (1973).

13. *Id.* at 636 (quoting from Schaab, *Indian Industrial Development and the Courts*, 8 NAT. RESOURCES J. 303, 309 (1968)).

14. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (holding that only a cause in habeas corpus lies under the Act in federal court).

15. 25 U.S.C. §§ 1301-1341 (1976).

16. See e.g., *Gold v. Confederated Tribes*, 478 F. Supp. 190, 196 (D. Or. 1979), holding that a tribe's participation in the formulation of a distribution plan for an Indian Claims Commission award did not waive its immunity to subject it to suit by members challenging the plan; *United States v. Karlen*, 476 F. Supp. 306, 310 (D.S.D. 1979), where the district court declined to take jurisdiction over a counterclaim filed by a rancher for trespasses of a tribe's cattle on his land against the United States which had sued the rancher on behalf of the tribe for trespass by his cattle and breaches of his lease with the

III. A FEDERAL FORUM WHEN NO OTHER REMEDY IS AVAILABLE

A departure from this trend of limiting federal court jurisdiction over tribes occurred in *Sturdevant v. Wilber*,¹⁷ in which tribal members were contesting a proposed governmental action by their own tribe. There the federal court decided to exercise jurisdiction primarily because the tribe did not have a tribal court to hear the controversy.¹⁸ The absence of a tribal court apparently would not have changed the result in the Ninth Circuit case of *Lomayaktewa*,¹⁹ and, since most tribes today have their own tribal courts, the precise *Sturdevant* factual situation is not ordinarily presented.

But the *Sturdevant* decision is a reasonable and flexible application of the tribal-immunity doctrine, and the rationale behind the decision might be extended to provide the basis for obtaining jurisdiction over an Indian tribe even where a tribal court exists. The argument can be developed as follows: Just as the district court in *Sturdevant* exercised jurisdiction based on the nonavailability of a remedy (because there was no forum), so should any other federal district court hear the complaint of a commercial enterprise which has no remedy against the tribe in either state or tribal court. This nonavailability of a remedy will nearly always be the case. In addition to barring suit against the tribe in state court, the tribal-immunity doctrine will likely prevent suit against the tribe in tribal court as well for two reasons: (1) There is rarely an explicit and unequivocal waiver of tribe's immunity in either its charter,²⁰ constitution and bylaws, or or-

tribe. Cf. *United States v. Jackson*, 600 F.2d 1283, 1286-87 (9th Cir. 1979) (Indian violator of tribal game ordinance could not be tried in federal court under a broader yet still applicable statute even though there was no tribal court in existence at the time of the offense). But see *United States ex rel. Crow Creek Sioux Tribe v. Tri-County Bank*, 415 F. Supp. 858 (D.S.D. 1976).

17. 456 F. Supp. 428 (E.D. Wis. 1978).

18. *Id.* at 431. This is the only convincing distinction between *Sturdevant* and *Martinez* made by the court.

19. 520 F.2d at 1326-27.

20. 25 U.S.C. § 477 (1976), authorizes the issuance of a federal charter of incorporation to petitioning tribes. Such charters usually include a clause under which the tribal corporation consents to suit in any court of competent jurisdiction in the United States. See e.g., *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 508, 374 P.2d 691, 693 (1962). While section 477 envisages that the tribes will conduct their commercial business with outsiders through these federal corporations, *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131 (D. Alaska 1978), the tribes with charters almost uniformly contract as tribes rather than in the names of these federal corporations. Tele-

dinances; and (2) by analogy to the principle that a federal court clearly cannot exercise jurisdiction over the United States without the latter's explicit waiver of its sovereign immunity,²¹ the tribal-immunity doctrine logically would also require a tribal court to decline jurisdiction over a claim against the tribe without such an explicit waiver. Consequently, under present law, there is no forum in which a tribe contracting in its own name can be made to live up to its contracts.²²

It must be recalled, however, that whatever the utilitarian common sense of this contention, *stare decisis* offers little support for its logic,²³ although some commentators have interpreted *Santa Clara Pueblo v. Martinez*, as permitting the federal court to assume jurisdiction in these circumstances.²⁴ Nevertheless, the latest circuit court opinion to consider this issue has clearly reaffirmed the tribal-immunity doctrine in a commercial setting,²⁵ as did the Tenth Circuit recently in a civil-rights context patently differing from *Sturdevant* only in that

phone interview with Robert Moeller, Attorney Adviser, Field Solicitor's Office, Dep't of the Interior, in Phoenix, Ariz. (Feb. 6, 1980).

Despite the *Martinez v. Southern Ute* holding, it is clear that a waiver of immunity in a federal charter extends only to the tribal corporation and not to the tribe. *See, e.g., Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. at 1131; *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 384 (Minn. 1979). Even if the waiver could be construed to extend to the tribe, however, it is doubtful that the issuance of the form charter by the Department of the Interior would amount to the consent of Congress arguably required for such waiver by *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

21. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 586-87 (1941).

22. The landmark decision of *Williams v. Lee*, 358 U.S. 217, 222 (1959), which promoted the non-Indian's use of the tribal courts to collect Indian debts, concerned a contract action against an individual Indian and, thus, did not involve the doctrine of tribal immunity.

²³ Just before the *Sturdevant* decision, the Supreme Court had vigorously reaffirmed the tribal-immunity doctrine in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and every circuit which had previously considered the issue had clearly adopted the doctrine much earlier. *See, e.g., Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1966); *Green v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *Dicke v. Cheyenne-Arapaho Tribes, Inc.*, 304 F.2d 113 (10th Cir. 1962); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957). *Cf. United States v. Forness*, 125 F.2d 928, 932 (2d Cir.), *cert. denied*, 316 U.S. 694 (1941) (denying tribal immunity from state laws).

24. *See, e.g., Comment, Tribal Sovereignty and the Supreme Court's 1977-1978 Term*, 1978 B.Y.U. L. REV. 205, 214-16; Note, *Constitutional Law: Santa Clara Pueblo v. Martinez: Tribal Membership and the Indian Civil Rights Act*, 6 AM. INDIAN L. REV. 205, 214-16 (1978); 14 LAND & WATER L. REV. 625, 633-34 (1979).

25. *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980).

the plaintiff was a non-Indian.²⁶

IV. RECOVERY IN QUANTUM MERUIT

Another approach for the complaining non-Indian promisee, with no greater basis in logic but a somewhat firmer foundation in precedent, is a suit against the tribe in quantum meruit (rather than upon the express contract). The basis for this theory is the Supreme Court case of *Winton v. Amos*,²⁷ which involved the claim of an attorney for services rendered in securing the tribal enrollment and the consequent participation in federal monies for Choctaws who had removed to Oklahoma. Some of the lawyer's contracts with the Indians were held to be void because they were made in violation of a predecessor statute to 25 U.S.C. §§ 81-85 (1976).²⁸ Nevertheless, the Court permitted a recovery in quantum meruit:

The fact that . . . the services were rendered under contracts with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither *mala in se* nor *mala prohibita*, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value.²⁹

While *Winton v. Amos* is distinguishable from the situation in which a non-Indian is seeking recovery for the value of services which he has performed under a contract with a tribe,³⁰ its unjust enrichment rationale may well be the best theory upon which a commercial enterprise that has already entered into a contract with a tribe can rely.³¹

V. CONTRACTING WITH THE TRIBAL CORPORATION NOT THE TRIBE

For the businessman contemplating a contract with a tribe, surely the best protection he can secure for himself is to insist that the federally chartered tribal corporation (organized under

26. *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980).

27. 255 U.S. 373 (1921).

28. *Id.* at 391. These statutes generally inhibit Indians' capacity to contract only with regard to trust property. See F. COHEN, *supra* note 8, at 164.

29. 225 U.S. at 393. See also *Green v. Menominee Tribe*, 233 U.S. 558 (1914).

30. *Winton v. Amos* again concerned a suit against individual Indians.

31. For another quantum meruit recovery against Indians, see *Rollins v. United States*, 23 Ct. Cl. 106 (1888).

25 U.S.C. § 477) rather than the tribe (organized under 25 U.S.C. § 476) be the legal entity with which he contracts. This is because most tribal corporations have, in their charters, explicitly waived whatever immunity they might otherwise have possessed, though, even if they had not, it is doubtful today whether they could avail themselves of the tribal-immunity doctrine.³² Although most of the corporations chartered under the Indian Reorganization Act were intended to be the vehicles through which the reorganized tribes would contract with non-Indians, they have seldom been used.³³

The non-Indian is not always alone in his desire to contract with the corporation. A tribe may itself wish to contract through its corporation. It may understandably be apprehensive about its chances for obtaining jurisdiction over a contractual dispute with a non-Indian in tribal court³⁴ and about its likelihood for success on the merits in state court,³⁵ because there is some authority for the proposition that an Indian tribe cannot sue in federal court for a simple breach of contract any more than the non-Indian party to the contract can.³⁶ Hence, the tribe, as well as the non-Indian party to the contract, could well find itself without a forum which will afford an effective remedy in the event of a breach.³⁷

Moreover, nonamenability to suit in any forum is probably not something the tribes consciously wish to take advantage of;

32. See *In re Colegrove*, 9 B.R. 337 (Cal. Bankr. 1981).

33. See note 21 *supra*. It should be noted here that the Navajo tribe, easily the largest in the nation, did not opt to reorganize under the Act. This discussion is therefore generally inapplicable to it.

34. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209-12 (1978); F. COHEN, *supra* note 8, at 382 n.210.

35. See generally F. COHEN, *supra* note 8, at 164; *In re Liquor Election in Beltrami County*, 138 Minn. 42, 163 N.W. 988 (1917). For potential jurisdictional problems, see also *Northcross v. Joslyn Fruit Co.*, 439 F. Supp. 317 (D. Ariz. 1977); *Maloof v. Raper Sales, Inc.*, 113 Ariz. 485, 557 P.2d 522 (1976).

36. See *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). The Ninth Circuit also recently acceded to this view. *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980).

37. On the surface, however, courts have often been more generous in providing a forum to a tribe than to its litigational counterpart, notwithstanding the logical inconsistencies which may result. Compare, e.g., *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 492 F. Supp. 55 (N.D. Cal. 1979), which held that tribal immunity barred the assertion of a compulsory counterclaim by a state agency against a tribe which had commenced a declaratory judgment action against the agency in federal court, with *People v. Quechan Tribe*, 595 F.2d 1153, 1156 (9th Cir. 1979), which determined that the doctrine of tribal immunity foreclosed a state's maintenance of a declaratory judgment action against a tribe in federal court.

there is little doubt that tribal immunity has a chilling effect on any outside investment the tribes might wish to attract.³⁸ Consequently, the whole problem of tribal immunity can be circumvented if the potential investor is aware of the little-recognized difference between the tribe and the federally chartered tribal commercial corporation and insists upon doing business only with the latter.³⁹

VI. JURISDICTION OVER THE UNITED STATES AS GUARDIAN OF THE TRIBE

Of course, the distinction between the tribe and the tribal corporation will be of little consolation to the investor who has already contracted with the tribe and partially performed under the contract. However, there is arguably yet one more remedy for the non-Indian party to the contract with the tribe. This is available when, as is often the case with monies designated for tribal contracts with non-Indians,⁴⁰ the funds to be paid over by the tribe are in the form of loans or grants from the federal government, or are being held in trust and administered by the United States, and the contract has been approved by the federal government. Under these circumstances, the non-Indian can proceed against the United States, which has waived its sovereign immunity in a fairly extensive array of causes, on the basis of its guardianship over the tribe and its estate.

This approach has the obvious advantage of providing the federal court with another basis upon which to ground its jurisdiction. The United States has waived its immunity, in limited cases, from suits brought against it not only before the Court of Claims⁴¹ but also before the appropriate federal district court.⁴² The jurisdictional grant to the Court of Claims is for contract claims of any amount; the waiver for suits in the district courts is for both contract claims of less than \$10,000⁴³ and torts.⁴⁴ The tort claims, before suit may be filed upon them,⁴⁵ must first be

38. See *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. at 1131.

39. See *id.* at 1133 n.8.

40. See, e.g., 42 U.S.C. § 3161(a)(3) (1976), which specifically singles out Indian reservations as areas of likely eligibility for grants and loans under the Public Works and Economic Development Act, 42 U.S.C. §§ 3121-3246h (1976).

41. 28 U.S.C. § 1491 (1976).

42. *Id.* § 1346.

43. *Id.* § 1346(a)(2).

44. *Id.* § 1346(b).

45. *Id.* § 2675(a).

submitted to the appropriate governmental body with a written demand for a sum certain.⁴⁶

For smaller claims then, the best section under which to proceed is probably 28 U.S.C. § 1346(a)(2),⁴⁷ which authorizes the federal district courts to assume jurisdiction over any

civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.⁴⁸

This subsection presents several possible theories under which the Indian ward's estate might be reached by the non-Indian promisee obtaining jurisdiction over the guardian government.

First, if the federal funds have not been turned over to the tribe but remain in the hands of the disbursing government officer, mandamus against the officer compelling him to distribute the funds to the performing promisee might be sought under whatever "regulation of an executive department" controls the disbursement.⁴⁹ However, the writ will lie only when the govern-

46. *Molinar v. United States*, 515 F.2d 246, 249 (5th Cir. 1975). See also *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974) for the general validity of 28 C.F.R. §§ 14.1 to 14.11 (1980), the interpretative regulations promulgated by the Attorney General pursuant to 28 U.S.C. § 2672 (1976) which govern the administrative claims procedure.

47. Subsection (b) of 28 U.S.C. § 1346 (1976) waives federal immunity in damage actions

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Since the United States would not breach any clear duty by approving a tribe's contract with a non-Indian, it is hard to see how its tort liability could arise. See, e.g., *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.*, 353 F. Supp. 1098 (D. Ariz. 1972).

48. 28 U.S.C. § 1346(a)(2)(1976).

49. For example, the disbursement of the funds for certain Economic Development Administration grants is regulated by 13 C.F.R. § 305.86 (1980). If all of the prerequisites of that section are met by the performing non-Indian promisee and still the funds are not disbursed to him upon his application for them, it is certainly arguable that a mandamus under 28 U.S.C. §§ 1346(a)(2), 1361 (1976) would lie in the United States district court against the government officer holding the funds. For a case where a Congressional appropriation was held to lay the basis for jurisdiction under the "Act of Congress" clause of 28 U.S.C. § 1346(a)(2) (1976), see *Benedict v. United States*, 270 F. 267 (Ct. Cl. 1928). See also *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500, 502 (Ct. Cl. 1977).

mental agent against whom it is sought owes a duty to the party seeking the writ.⁵⁰ Thus, some doubt exists whether a mandamus would be appropriate in this context since the government's duty to disburse probably runs only to the tribe.⁵¹

A second theory would be that, in the situation under discussion, there is an "implied contract" between the non-Indian promisee and the government that the promisee will be paid for any performance he actually renders under the contract approved by the government. The trouble with this theory is two-fold. The first problem occurred in the case of *In re Sanborn*,⁵² where an attorney had attached federal funds appropriated for the Sisseton and Wahpeton Tribes in an effort to secure payment for legal services already rendered under a contract approved by the government. There the Supreme Court said that statutes requiring government approval of such contracts "by no means create a legal obligation on the part of the United States to see that the Indians perform their part of such contracts."⁵³ Second, and more significantly, this "implied contract" theory has been authoritatively interpreted to encompass only contracts implied in fact and not those implied in law;⁵⁴ and there is no doubt that a recovery in quantum meruit is grounded in the theory of quasi-contract or a contract implied in law.⁵⁵

Consequently, the optimum clause in 28 U.S.C. § 1346(a)(2) upon which to base an action against the government for a quantum meruit recovery in federal court⁵⁶ is likely the clause

50. See, e.g., *Short v. Murphy*, 512 F.2d 374, 377 (6th Cir. 1975).

51. By analogy, *Gardiner Mfg. Co. v. United States*, 479 F.2d 39 (9th Cir. 1973), held that a subcontractor derives no contract rights exercisable against the United States under a contract between his prime contractor and the government.

But see *Porter v. United States*, 496 F.2d 583, 586-87 (Ct. Cl. 1974), holding that an instrumentality of the United States acting within its authority binds the United States as a principal to its contracts; and *U.S. v. Rickert*, 188 U.S. 432 (1903), holding that Indian tribes are such federal instrumentalities. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 603 (1943).

52. 148 U.S. 222 (1893).

53. *Id.* at 227.

54. *Goodyear Tire & Rubber Co. v. United States*, 276 U.S. 287, 293 (1928). However, for expansive interpretations of the "implied contract" clause, see *Bodek v. Department of the Treasury*, 532 F.2d 277 (2d Cir. 1976); *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975).

55. See, e.g., *Baltimore Mail S.S. Co. v. United States*, 76 F.2d 582, 584 (4th Cir.), cert. denied, 296 U.S. 595 (1933); 12 S. WILLISTON, *THE LAW OF CONTRACTS* §§ 1459-1459A (3d ed. 1970).

56. For claims over \$10,000, an action could be brought in the Court of Claims. 28 U.S.C. § 1491 (1976).

which authorizes actions for "liquidated or unliquidated damages in cases not sounding in tort." Under this clause, the promisee would proceed against the United States as guardian of its Indian ward's estate and seek recovery from that estate for the value of his performance under the contract with the Indian ward. By proceeding against the United States, the non-Indian would avoid the tribal-immunity problem, thus permitting the federal court to assume jurisdiction. The recovery would ultimately be from the tribe,⁵⁷ the other party to the partially performed contract.

This cause of action is well established in law. It has long been recognized that the United States is the "guardian"⁵⁸ of the Indian tribes and the "trustee"⁵⁹ of their property rights and that the Indian tribes are "wards"⁶⁰ of the federal government. Similarly, it is the undisputed general rule that

Although a [guardian] . . . is intrusted with the care and administration of his [ward's] estate, he cannot nullify an agreement made by such [ward] with an innocent third person, apparently with the consent of the [guardian], in regard to the disposition of such estate.

A contract made by [a ward], under the power of a guardian and by his consent, is binding on the guardian but not otherwise.⁶¹

The guardian will be made to live up to his ward's contract "especially where the contract is not merely executory, but executed in the whole or in part . . . and the parties cannot be restored altogether to their original positions."⁶² Moreover, since it

57. Recovery would actually come from the funds of the tribe which are, in effect, being held for it by its guardian, the federal government. *Cf. Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (government has a duty to properly manage a tribe's funds held for it in trust by the government); *Hoop Valley Tribe v. United States*, 596 F.2d 435 (Ct. Cl. 1979).

58. The essential guardianship of the United States over the Indian tribes was first set forth by John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

59. *See, e.g., United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938); *Rainbow v. Young*, 161 F. 835, 836-37 (8th Cir. 1908).

60. *See, e.g., United States v. 7,405.3 Acres of Land*, 97 F.2d at 422; *Oklahoma Tax Comm'n v. United States*, 319 U.S. at 607.

61. 39 C.J.S. *Guardian and Ward* § 76(c), at 150 (1976) (footnotes omitted). *See also Stakes v. Jones*, 125 So. 197 (La. Ct. App. 1919); *Heffner v. Crowley Motor Co.*, 12 La. App. 451, 125 So. 198 (1929); *May v. Webb, Kirby*, 286 Conn. 11 (1787); *Camp v. Dill*, 27 Ala. 553 (1855).

62. 2 S. WILLISTON, *supra* note 55, § 254, at 87 (quoting *Molton v. Camroux*, 2 Ex. 487, 154 Eng. Rep. 548 (1848), *aff'd*, 4 Ex. 17, 154 Eng. Rep. 1107 (1849)). *See also* 2 S. WILLISTON, *supra* note 55, § 251, at 80.

is entirely possible that a guardian might be personally liable in these circumstances,⁶³ a fortiori, the ward's estate could be held responsible for the goods or services for which the ward contracted (and received) with the guardian's consent.⁶⁴

VII. JURISDICTION OVER THE UNITED STATES AS TRUSTEE OF THE TRIBE'S ESTATE

The trustee-beneficiary relationship of the United States and the tribe offers an even more promising theory upon which a district court may assume jurisdiction. The invasion of a trust established for the care and support of its beneficiary⁶⁵ has been upheld where the goods or services provided, for which payment is sought, were not voluntarily contracted for by either the trustees or the beneficiary.⁶⁶ Thus, the funds of the tribe held in trust for it by its "trustee" should be reachable here, where the goods or services rendered were specifically contracted for and received by the beneficiary tribe with the explicit approval of its trustee, the U.S. Government.

It is the general rule that, when a third person contracts with a trust beneficiary and, by providing goods or services to the beneficiary under the contract, assists "in the accomplishment of the purposes of the trust . . . , [the third person] may be permitted to recover from the trust estate the value of the goods furnished or services rendered by a suit in equity against the trustee as such."⁶⁷ Typically the only contracts which fall within this rule concern the rendition of "necessaries."⁶⁸ However, its logic should encompass any goods or services provided which benefit the trust estate⁶⁹ or "preserve or benefit the interest of the beneficiary,"⁷⁰— which, in a word, promote the "pur-

63. See, e.g., *Camp v. Dill*, 27 Ala. 553 (1855).

64. While a recovery from the estate of a ward cannot be had for the unauthorized contracts of his guardian, see, e.g., *McKee v. Hunt*, 142 Cal. 526, 77 P. 1103 (1904), the ward's estate should be reachable for his own contracts to which the guardian merely assented.

65. According to the Supreme Court in *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937), the federal trust is to "manage the property and affairs of Indians in good faith for their betterment and welfare"

66. See, e.g., *In re Estate of Johnson*, 198 Cal. App. 2d 503, 17 Cal. Rptr. 909 (1961); *Estate of Lackman v. Department of Mental Hygiene*, 165 Cal. App. 2d 674, 320 P.2d 186 (1958). See also *State ex rel. Conway v. Glenn*, 60 Ariz. 22, 131 P.2d 363 (1942).

67. 3 A. SCOTT, *THE LAW OF TRUSTS* § 269.3, at 2279 (3d ed. 1967).

68. 2 *id.* § 157.2, at 1216.

69. *RESTATEMENT (SECOND) OF TRUSTS* § 269 (1959).

70. *Id.* § 157(c).

poses of the trust."⁷¹ Those purposes are, in the governmental trust under consideration, to "manage the property and affairs of Indians in good faith for their betterment or welfare."⁷²

Hence, a persuasive argument that can be made is that the value of goods or services already provided under a contract with a tribe (which goods or services clearly better the tribe or promote its welfare) should be recoverable by the providing party from the tribe's estate via a suit in equity against the tribe's trustee, the United States of America. Inasmuch as this result follows even where the trustee has no notice of the transaction,⁷³ the same result should follow where the trustee has approved the contract.⁷⁴

VIII. CONCLUSION

The doctrine of tribal immunity, which now undeniably forecloses a suit against a tribe in either federal⁷⁵ or state court⁷⁶ and, if consistently applied, would do the same in tribal court,⁷⁷ is a barrier which probably inhibits the flow of much-needed private capital, goods, and services onto the reservation. Understandably, the outsider does not wish to invest money or deliver goods or services in reliance upon a contract for which there will be no forum for its enforcement.

For the non-Indian promisee who has already entered into and partially performed a contract with a tribe, there are several theories in which he might ground his action to recover in federal court. He might sue in quantum meruit, which approach is not absolutely unsupported by precedent,⁷⁸ rather than upon the express contract. Or, after he demonstrates the futility of a remedy in tribal court (which court should, under the doctrine of tribal immunity, dismiss the suit⁷⁹), he might bring an equity

71. 3 A. SCOTT, *supra* note 67, § 269.3, at 2279.

72. *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).

73. RESTATEMENT (SECOND) OF TRUSTS § 163 (1959); 3 A. SCOTT, *supra* note 67, §§ 269.3, 157.2.

74. The major theoretical obstacle to this approach is that, since an action resulting in a judgment which would expend itself upon the U.S. Treasury is considered an action against the United States, *Dugan v. Rank*, 372 U.S. 609, 620 (1963), an action which would result in a recovery against tribal funds held in trust by the United States might analogously be considered an action against the tribe.

75. *Lomayaktewa v. Hathaway*, 520 F.2d at 1326.

76. *White Mountain Apache Tribe v. Shelley*, 107 Ariz. at 6-8, 408 P.2d at 656-58.

77. See note 22 and accompanying text *supra*.

78. *Winton v. Amos*, 255 U.S. at 393.

79. It is doubtful that the tribal court could take jurisdiction over the non-Indian if

action in federal court, appealing to the conscience of the court because he cannot get a hearing on the merits anywhere else.⁸⁰ If the contract contemplated the disbursement of federal funds and has some form of federal sanction, the non-Indian's complaint against the tribe should be combined with one against the government (which has waived its sovereign immunity in 28 U.S.C. §§ 1346 and 1491) as the guardian⁸¹ or trustee⁸² of the tribe's estate.

The best solution, however, is to simply avoid the tribal-immunity problem. The non-Indian who has not yet entered into the contract with the tribe can accomplish this by simply insisting that the formal party with which he contracts be not the tribe, but rather the tribal corporation.⁸³ It was through this entity that the Indian Reorganization Act envisioned the tribe would do business, and it is this entity that, in its corporate charter, consented to suit in any court of otherwise competent jurisdiction.

the tribe brought the suit. However, if the non-Indian commenced the action in tribal court, he would of course, be submitting to its jurisdiction. If, then, the tribal court does not dismiss on tribal immunity but hears the case on the merits and decides in favor of the tribe on the basis of customary tribal law where an application of Anglo-American jurisprudence would clearly find tribal liability, an entirely different and possibly even more intriguing question involving tribal sovereignty is presented.

80. See *Sturdevant v. Wilber*, 456 F. Supp. at 431.

81. See notes 40 through 64 and accompanying text *supra*.

82. See notes 65 through 74 and accompanying text *supra*. But see *In re Sanborn*, 148 U.S. 222 (1893), where an attempt to reach tribal funds for a tribal debt in a suit against the United States was unsuccessful albeit on grounds not foreclosing the theory of recovery proposed here.

83. See *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. at 1131-33. See also *Manekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975).