LETTER OPINION
2006-L-25

August 28, 2006

Mr. Wade G. Enget
Mountrail County State's Attorney
PO Box 369
Stanley, ND 58784-0369

Dear Mr. Enget:

Thank you for your letter asking about the scope of state court jurisdiction on Indian reservations. It is my opinion that, at least for foreclosures involving fee land owned by a tribal member, it is likely that state courts have jurisdiction and can require the sale of the land.

ANALYSIS

You ask whether a 2000 opinion from this office concerning on-reservation garnishment procedures governs on-reservation foreclosures. The 2000 opinion addressed whether a creditor holding a state court judgment against an enrolled member of an Indian tribe could garnish, under a state court judgment, the debtor's wages from an on-reservation employer.[1] The opinion suggested that the creditor ask the tribal court to recognize the state court judgment and then enforce it through judgment-execution procedures provided by tribal law and otherwise under tribal court oversight.

Jurisdiction on Indian reservations is rarely simple.[2] As Justice VandeWalle said: "[I]t is plain to me that in matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is."[3] Further, resolving jurisdictional issues often requires balancing the tribal, state, and federal interests at stake; thus, the presence or absence of state jurisdiction sometimes rests on subtle factual distinctions. Consequently, an opinion or court decision on garnishment does not necessarily apply to other causes of actions or judgment-enforcement methods.

Your inquiry arises out of a foreclosure action filed in state court by the Bank of North Dakota ("BND"). A tribal member borrowed money and secured the loan with a mortgage on a residential lot in New Town that the tribal member owned in fee. BND

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[1] N.D.A.G. 2000-L-25.
[2] Winer v. Penny Enterprises, Inc., 674 N.W.2d 9 (N.D. 2004) (VandeWalle, J., concurring).
[3] Id.

obtained a judgment from the state court, which then directed the sheriff to sell the land to satisfy the debt.

Significantly, the land mortgaged is fee land, not trust land. Further, foreclosures are *in rem* actions. These factors diminish the tribe's self-government interests, and to such a degree that the state court had jurisdiction over the foreclosure.

The fact that mortgaged land is within a reservation and owned by a tribal member does not preclude state court jurisdiction. In cases involving Indians and their on-reservation activities, restrictions on state court jurisdiction "are not total."[4] Rather, an "infringement" analysis is typically employed to assess state court jurisdiction.[5] This requires that state, federal, and tribal interests be identified, examined, and balanced to determine whether state court jurisdiction would unlawfully infringe on tribal sovereignty. The North Dakota Supreme Court regularly applies the test.[6] The court describes its 1986 McKenzie County v. V.G. and its 1995 M.L.M. decisions as turning on the weight of tribal interests at stake -- a balancing analysis.[7] Thus, "'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'"[8]

The infringement test is not subject to uniform rules but depends on balancing facts in individual cases. Two significant facts here facilitate the analysis. The first is the land's

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[4] Rolette County v. Eltobgi, 221 N.W.2d 645, 648 (N.D. 1974). See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) ("Long ago" the Court departed from the view that state laws have no force within reservations.).

[5] Conf. Western Attorneys General, American Indian Law Deskbook 212-17 (3d ed. 2004).

[6] Roe v. Doe, 649 N.W.2d 566 (N.D. 2002); McKenzie County Soc. Servs. Bd. v. C.G., 633 N.W.2d 157 (N.D. 2001); In re M.L.M., 529 N.W.2d 184, 186 (N.D. 1995); Byzewski v. Byzewski, 429 N.W.2d 394, 397-99 (N.D. 1988); McKenzie County Soc. Servs. Bd. v. V.G., 392 N.W.2d 399, 402 (N.D. 1986).

[7] McKenzie County v. C.G., 633 N.W.2d at 161.

[8] Rolette County, 221 N.W.2d at 648 (quoting Williams v. Lee, 358 U.S. 217 (1959)). Questions have been raised whether New Town is within the Fort Berthold Reservation. It is within what is known as the reservation's Northeast Quadrant, that is, land to the north and east of the Missouri River, or what is today Lake Sakakawea. There has been litigation over whether the reservation still includes the Northeast Quadrant. The question arises because in 1910 Congress opened the reservation, and primarily the Northeast Quadrant, to non-Indian homesteaders. Act of June 1, 1910, 36 Stat. 455. Similar acts have been construed as removing from the reservation the areas opened to homesteaders. E.g., American Indian Law Deskbook at 71-77. The 1910 Act was litigated in New Town v. U.S., 454 F.2d 121 (8th Cir. 1972). The court found that Congress did not intend to diminish the reservation. The issue has arisen in other cases, but the courts, relying on New Town, reject the diminishment claim. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994); U.S. v. Standish, 3 F.3d 1207 (8th Cir. 1993). The state was not a party to New Town or the other cases and is not bound by them. Nonetheless, for the purposes of this opinion, it is assumed that the mortgaged land is within the reservation.

status. According to BND, when the mortgage was given the land was fee land, that is, it was owned by the mortgagor in fee simple and not subject to any restrictions on alienation. The land was not trust land, that is, it was not owned by the United States for the benefit of the tribe or a tribal member. As fee land, its owner could manage it independent of federal oversight. Fee land status opens the door to some measure of state authority, even if it is owned by a tribal member.

The second significant factor is that this matter involves foreclosure, an *in rem* action.[9] *In rem* proceedings concern just the property and are not actions against persons with interests in the property.[10] In an *in rem* action, tribal considerations that might otherwise require close evaluation become less relevant. Thus, the role of tribal sovereignty differs between *in rem* and *in personam* proceedings.[11]

Both of these features -- fee land status and an *in rem* action -- influenced a finding of state court jurisdiction over a non-Indian's suit to partition and quiet title to on-reservation land in which a tribe held an interest.[12] The land was allotted land that the federal government later conveyed into fee status. The tribe's ownership interest did not deprive the state court of jurisdiction. Tribal title was "of no consequence" because the court's jurisdiction was *in rem*, not *in personam*.[13] Because the land was freely alienable, "'it should be subject to a state court *in rem* action which does nothing more than divide it among its legal owners according to their relative interests.'"[14]

This decision has added significance because the North Dakota Supreme Court relied on it extensively in Cass County Water Resource District.[15] In Cass County, the Turtle Mountain Band of Chippewa acquired a small tract far from its reservation and used tribal title to try to stop a flood control project, asserting that its sovereignty exempted the land from the state's eminent domain powers. In the court's rejection of the tribe's argument, the land's off-reservation location played a role, but the court also discussed the *in rem* nature of condemnation and the land's fee status. Condemnation "is purely *in rem,* and does not require . . . jurisdiction over the [land]owners," and as fee land it is "essentially private land."[16]

The alienable, fee status of land was the key in a Supreme Court decision allowing a county to tax on-reservation, Indian-owned and tribally owned land and to foreclose on the land for nonpayment of taxes.[17] Most of the land was originally allotted land to

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[9] E.g., First Int'l Bank of Portal v. Lee, 141 N.W. 716, 718 (N.D. 1913); 55 Am. Jur. 2d Mortgages § 630 (online database updated May 2006).
[10] Cass County Water Resource Dist. v. 1.43 Acres, 643 N.W.2d 685 (N.D. 2002).
[11] Id. at 691.
[12] Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996).
[13] Id. at 385.
[14] Id.
[15] 643 N.W.2d at 691-693, 696-697.
[16] Id. at 694.
[17] County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

which the government had later issued fee patents. Upon conveyance of fee title, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed."[18] While section 349 expressly allows state taxation, the Court stated that it is primarily the land's alienability -- not so much the statutory authorization to tax -- that subjects the land to state law.[19] Consequently, section 349 does not "describe the entire range of *in rem* jurisdiction States may exercise with respect to fee-patented reservation land."[20] And of note is the statute's reference to "incumbrances." Mortgages are a kind of encumbrance.

The Yakima Nation's argument that state jurisdiction is manifestly inconsistent with Indian self-determination was "a great exaggeration."[21] A similar point was made in U.S. v. American Horse.[22] The United States brought a federal action to foreclose on Indian-owned land located on the Standing Rock Sioux Reservation. A common challenge by Indian defendants to federal court jurisdiction is that the plaintiff must first exhaust tribal court remedies before invoking federal jurisdiction.[23] The court ruled that the United States was not obligated to exhaust tribal remedies because tribal interests were insufficiently implicated. The dispute was over a private debt in which the tribe had "no direct connection," and thus the action did not involve tribal-related activities requiring exhaustion of tribal remedies.[24] In addition, allowing state law to govern mortgages on Indian land may further tribal and federal interests in promoting Indian economic development. The applicability of familiar state law procedures may encourage lenders to invest in on-reservation projects.[25]

Yakima County was relied on by the court in Cass County Water Resource District.[26] Cass County makes the general statement that when restraints against alienating Indian land are removed, state law applies.[27] This accurately expresses Supreme Court jurisprudence.

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[18] 25 U.S.C. § 349. Section 349 was part of the 1887 General Allotment Act that sought to further the government's Indian policy at the time, which was "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." County of Yakima, 502 U.S. at 254.
[19] Id. at 263. See also Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113 (1998); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1357 (9th Cir. 1993).
[20] County of Yakima, 502 U.S. at 268.
[21] Id. at 265.
[22] 352 F. Supp. 2d 984 (D. N.D. 2005).
[23] See generally American Indian Law Deskbook at 182-95.
[24] Id. at 990.
[25] Red Mountain Machinery Co. v. Grace Investment Co., 29 F.3d 1408, 1412 (9th Cir. 1994). See also Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (tribal courts can have unique characteristics and the law they apply may "be unusually difficult for an outsider to sort out").
[26] 643 N.W.2d at 691-692.
[27] Id. at 695-696.

> "With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction -- so that thereafter *all questions* pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there."[28]

This law was applied in Crow Tribe of Indians v. Campbell Farming Corp.[29] The tribe sought to recover land acquired decades earlier by non-Indians, asserting that the original acquisitions violated acreage-ownership caps in the 1920 Crow Allotment Act. The defendants argued that a five-year statute of limitations under Montana law applied.[30] The court agreed, citing 25 U.S.C. § 349.[31] Even though the section does not refer to state statutes of limitation, Yakima County makes clear that once a fee patent is issued the state has "jurisdiction over the *land*."[32] "State law controls in all cases when allotted lands have been conveyed to individual Indians by patent in fee."[33] The fee patent "'*altered the relationship of the land* and plaintiff (individual Indian) to the State of Montana.'"[34]

Wyoming has addressed the jurisdictional issue you inquire about. In Boller v. Key Bank of Wyoming,[35] a tribal member gave a mortgage covering on-reservation allotted land that had been converted to fee status. Applying in essence a balancing test, the court found state court jurisdiction after considering the following: the land was located in an area with a mix of Indian and non-Indian land; foreclosure would not have a demonstrably serious impact on the tribe and would not imperil its political integrity, economic security, or health and welfare; foreclosure would not change the land's character; the tribe itself had not indicated any concern over a change in ownership resulting from foreclosure; and execution of the note and mortgage took place off the reservation. Many of these factors appear applicable to the BND situation. The Wyoming court noted that other courts hold "that state courts have jurisdiction over ownership rights in fee patented lands on an Indian Reservation."[36]

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[28] South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 508 n.19 (1986) (quoting Larkin v. Paugh, 276 U.S. 431, 439 (1928) (emphasis added)). See also Dickson v. Luck Land Co., 242 U.S. 371, 375 (1917) ("With . . . the fee-simple patent issued, it would seem that . . . all questions pertaining to the disposal of the lands naturally would fall within . . . the laws of the state"); Price v. U.S., 7 F.3d 968, 970 (10th Cir. 1993) ("plaintiff's interest is governed by state law because it has been patented in fee").
[29] 828 F. Supp. 1468 (D. Mont. 1992).
[30] Id. at 1472.
[31] Id. at 1473.
[32] Id. at 1473-74.
[33] Id. at 1473.
[34] Id. (quoting Dillon v. Antler Land Co., 341 F. Supp. 734, 741 (D. Mont. 1972), aff'd, 507 F.2d 940 (9th Cir. 1974)).
[35] 829 P.2d 260, 261 (Wyo. 1992).
[36] Id. at 263.

In conclusion, the fee status of the mortgaged land, coupled with the *in rem* nature of the foreclosure, gave the state court jurisdiction over BND's suit. When a fee patent is issued, "questions pertaining to the title are subject to examination and determination pursuant to state law where the land rests."[37] Because the state court had jurisdiction, nothing prevents implementing procedures that flow from and that effectuate that jurisdiction.[38]

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[39]

[37] Crow Tribe v. Campbell Farming Corp., 828 F. Supp. at 1474.
[38] BND's file in this matter does not set forth the land's ownership history. It contains a 1974 "County Deed" stating that the county acquired title as a result of nonpayment of taxes from 1966 to 1971. The 1974 deed appears to be the foundation of the mortgagor's title. The land's pre-1974 history is unknown. It is unknown whether it was originally an allotment to a tribal member that was later transferred to fee status. Perhaps it was originally patented to a non-Indian homesteader, later reacquired by the government as a part of the Garrison Dam construction project, and then conveyed in fee with title ending up with the mortgagor. But the history is likely unimportant in light of the land's present fee status. Though much of the authority discussed in this opinion involved allotted land that had been converted to fee, even assuming that the land never was allotted, the analysis is unaffected. The land is still freely alienable and if, in fact, there are fewer "Indian features" in the title chain, such as no allotment, that would make state court jurisdiction over BND's foreclosure more likely.
[39] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).