

SEP 28 2006

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1
2
3
4
5
6 In re:) BAP No. NC-06-1101-MaMeRy
7 GEORGE G. BROWN; LISA BROWN,)
8 Debtors.)
9 GEORGE G. BROWN; LISA BROWN,)
10 Appellants,)
11 v.) **MEMORANDUM**¹
12 JEFFRY G. LOCKE, Trustee,)
13 Appellee.)

Submitted Without Argument² on July 14, 2006

Filed - September 28, 2006

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding.

Before: MARLAR, MEYERS³ and RYAN,⁴ Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² At the request of the parties, and with the panel's approval, this appeal was submitted without oral argument. See BAP Rule 8012-1.

³ Hon. James W. Meyers, United States Bankruptcy Judge for the Southern District of California, sitting by designation.

⁴ Hon. John E. Ryan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 **INTRODUCTION**

2
3 Debtor Lisa Brown ("Mrs. Brown") is a Native American who
4 receives quarterly per capita distributions ("Payments") of a
5 percentage of the net revenue from her tribe's casino gaming
6 enterprise. She and her husband ("Debtors") filed a chapter 7⁵
7 bankruptcy petition and sought an order of abandonment for Mrs.
8 Brown's interest in the Payments, asserting that it was not
9 property of the estate. The bankruptcy trustee ("Trustee")
10 countered with a motion for turnover. The bankruptcy court,
11 relying on case law from other circuits, determined that the
12 Payments were property of the estate which could be transferred.
13 It then denied abandonment and ordered turnover of the present and
14 future Payments to Trustee.

15 In this appeal, Debtors have again raised the issue of
16 whether the Payments are property of the estate. We hold that the
17 bankruptcy court correctly determined that Mrs. Brown's interest
18 in the Payments is property of the estate, and AFFIRM that ruling.
19 However, we conclude that the bankruptcy court erred in
20 determining that the terms of the tribal ordinance allowed Mrs.
21 Brown's entitlement to be transferred or assigned. More
22 importantly, the bankruptcy court did not make the necessary
23 findings for abandonment as to whether future, contingent Payments
24 would be of any value or benefit to the estate. We therefore

25 _____
26 ⁵ Unless otherwise indicated, all Code, chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 prior to its amendment by the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Oct.
17, 2005).

1 VACATE and REMAND, in part, for further proceedings consistent
2 with this memorandum decision.

3
4 **FACTS**

5
6 Mrs. Brown is an enrolled "Tribal Member"⁶ of the Pomo
7 Indians of the Sherwood Valley Rancheria ("Tribe") in Willits,
8 California. The Tribe owns and operates the "Sherwood Valley
9 Rancheria Gaming Enterprise," also known as the "Black Bart
10 Casino."

11 As a Tribal Member, Mrs. Brown is eligible to receive
12 Payments consisting of quarterly per capita and other revenue-
13 sharing distributions⁷, provided for and distributed in accordance
14 with a tribal ordinance entitled "Ordinance Governing the
15 Allocation and Disbursement of Net Revenue from Tribal Gaming
16 Sherwood Valley Rancheria" ("Ordinance").

17 Debtors filed a voluntary chapter 7 petition on October 13,
18 2005. By November, 2005, Mrs. Brown had received approximately
19 \$8,000 in Payments for that year. On their bankruptcy schedules,
20 Debtors listed, as personal property, a Payment in the amount of
21 \$1,100, and also claimed it as exempt. Debtors did not include
22

23 ⁶ "'Tribal member' means any living enrolled member of the
24 Tribe who is in good standing, and has not forfeited or waived his
25 or her right to receive Per Capita Payments from the Tribe's Net
26 Gaming Revenues, and who is not excluded by this Tribal Ordinance
from receiving such payments." Tribal Ordinance, art. II, sec.
1001(b).

27 ⁷ The parties have not presented any legal distinction
28 between the "per capita" and "revenue-sharing" payments which Mrs.
Brown receives. For purposes of this appeal, therefore, we will
denominate and treat all as per capita payments.

1 the Payments as monthly "income," on their Schedule I.⁸ However,
2 on their Statement of Financial Affairs, they disclosed them as
3 "income other than from employment or operation of business."

4 In bankruptcy, Debtors moved for an order to compel Trustee
5 to abandon Mrs. Brown's interest in the Payments, arguing that
6 Mrs. Brown was the beneficiary of a valid spendthrift trust
7 provision in the Ordinance and, therefore, that the Payments were
8 excluded from the bankruptcy estate. See 11 U.S.C. § 541(c)(2).

9 Trustee objected, arguing there was no spendthrift trust
10 provision for Mrs. Brown in the Tribal Ordinance.⁹ He contended
11 that the asset was property of the estate and requested that the
12 court order Debtors to turn over both present and future Payments.

13 Debtors then filed a supplemental brief, contending that the
14 Ordinance neither designated such Payments as the Tribal Member's
15 "property" nor conferred upon Tribal Members any "right" to
16 receive them. In addition, Debtors argued that a characteristic
17 of a property interest, e.g., the right to assign or transfer the
18 asset, was missing from the Ordinance language.

19 Following a hearing, the bankruptcy court issued its
20 memorandum decision, concluding that the Ordinance did not contain
21 language creating a trust concerning Mrs. Brown's interest, nor
22 did it contain any restrictions on transfer of the interest, which

23
24 ⁸ We may take judicial notice of the papers which have not
25 been provided in the excerpts of record. Q'Rourke v. Seaboard
26 Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1989) (panel did not err by taking judicial notice of the
underlying bankruptcy court records).

27 ⁹ The Tribal Ordinance contains trust language concerning
28 payments for minors and legally incompetent adults, but Debtors
did not maintain that Mrs. Brown fell into either category.

1 would be evidence of a spendthrift trust.¹⁰ It then ruled that it
2 would follow the holdings of two published opinions from other
3 jurisdictions that tribal gaming distributions are property of the
4 bankruptcy estate. See Johnson v. Cottonport Bank, 259 B.R. 125,
5 130 (W.D. La. 2000) and In re Kedrowski, 284 B.R. 439, 451-52
6 (Bankr. W.D. Wis. 2002). It denied Debtors' motion to compel
7 abandonment and granted Trustee's motion for turnover. Debtors
8 timely appealed.

9 10 ISSUES

- 11
- 12 1. Whether the bankruptcy court correctly determined that
13 the Payments were property of the estate.
 - 14
 - 15 2. Whether the bankruptcy court erred in determining that
16 Mrs. Brown's entitlement to any future Payments was a
17 transferable property interest.
 - 18
 - 19 3. Whether the bankruptcy court abused its discretion in
20 denying Debtors' motion to compel abandonment.
- 21

22
23 ¹⁰ Debtors have not argued, in their Opening Brief, that the
24 Tribal Ordinance contained a provision for a spendthrift trust or
25 that the Payments were excluded from the estate under § 541(c)(2).
Therefore, they have abandoned the "trust" theory, and we will not
consider it. See Law Offices of Neil Vincent Wake v. Sedona Inst.
(In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998).

26 Compare the situation where a tribal member's funds are
27 placed into an Individual Indian Money ("IIM") account, which is
held in trust by the United States Department of Interior and is
subject to anti-alienation regulations. See Warfield v. Frank-
Hill (In re Frank-Hill), 300 B.R. 25, 30-31 (Bankr. D. Ariz. 2003)
28 (IIM account was an interest within the scope of § 541(c)(2)).

1 Debtors' combined income, including the gaming revenues,
2 would support a 100% payout to unsecured creditors in a chapter 13
3 plan, without suffering the potential loss—at a chapter 7
4 trustee's sale—of future tribal payouts.

5 Debtors' ages are not set forth in the schedules, but they
6 must be in their 30's or early 40's because their children are
7 only three and ten. Their combined annual income, exclusive of
8 the gaming revenue, is \$47,400. The panel notes (from the record
9 at tab F) that in the year the bankruptcy was filed, the tribe
10 paid Mrs. Brown \$8,220.13. Debtors scheduled their unsecured
11 debts of only \$10,198, but the unsecured claims now on file,
12 according to the claims register, total \$16,511.22.

13 This panel takes a larger view of the Tribe's intentions and
14 the underlying purposes in the revenue-sharing aspects of gaming
15 revenues, as they concern a Tribal Member's stream of future
16 income. Theoretically, if Mrs. Brown is 40 years old, with a life
17 expectancy of 80 years, that income (assuming it never increases
18 or decreases from \$8,220 per year), is potentially worth a gross,
19 non-discounted value of \$328,800. This panel must conclude, as a
20 matter of tribal policy, that the Tribe did not intend for such
21 valuable rights to be sold to an outside, non-tribal member, for
22 satisfaction of only \$16,511 of a Tribal Member's unsecured debts.
23 Yet that may very well be the result in this case.

24 As a matter of bankruptcy policy, the payment to creditors,
25 of a debtor's available assets, is equally as important as
26 debtor's fresh start. In a chapter 13 proceeding, both of these
27 objectives may be achieved without any surrender, loss, or sale of
28 a debtor's assets. Here, for example, Debtors could propose a

1 chapter 13 plan which devotes regular future gaming revenues, as
2 and when paid, toward payment of filed claims, and the income
3 therefrom could pay off those creditors, in full, within a few
4 short years.¹¹ In doing so, Debtors could thereby reserve to
5 themselves the valuable future income stream beyond what is
6 necessary to repay their relatively minor outstanding debts. In
7 this way, the overarching policies of both the Indian Tribal
8 Gaming Ordinance and the bankruptcy laws are achieved, for the
9 mutual benefit of all concerned.

10 Alternatively, Debtors could simply stipulate with Trustee
11 that they would turn over so much of the future income stream as
12 would be necessary to repay all filed and valid claims, plus
13 administrative expenses, in return for retaining the future rights
14 to the tribal stream of income. Again, such a resolution would
15 practically solve all of the policy concerns of the competing
16 interests.

17 However, the parties may elect, instead, to further litigate
18 the complex and unpredictable outcome of the current case. In
19 that event, we must continue our analysis of the issues presented
20 to us, and resolve them.

21

22 **B. Analysis of the Issues**

23

24 The underlying motion is Debtors' request for an order
25 compelling Trustee to abandon property of the estate, viz, Mrs.
26 Brown's interest in Payments from the Tribe's net gaming revenues.

27

28 ¹¹ Chapter 13 plans may last from 36 to 60 months. 11 U.S.C.
§ 1322(d).

1 Section 554(b) provides:

2 On request of a party in interest and after notice
3 and a hearing, the court may order the trustee to abandon
4 any property of the estate that is burdensome to the
estate or that is of inconsequential value and benefit to
the estate.

5 11 U.S.C. § 554(b).

6 Trustee countered with a motion for turnover of estate
7 property, pursuant to § 542(a). A bankruptcy trustee has the
8 right to recover property of the subject bankruptcy estate, and
9 any entity in possession, custody or control of such property must
10 deliver it to the trustee "unless such property is of
11 inconsequential value or benefit to the estate." 11 U.S.C.
12 § 542(a); see also § 543(b); § 363(b)(1) (trustee may "use, sell,
13 or lease, other than in the ordinary course of business, property
14 of the estate").

15 In their bankruptcy schedules, Debtors listed the Payments as
16 personal property and claimed an exemption therein. They
17 therefore admitted that the asset was property of the estate.
18 Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610,
19 616 (9th Cir. 1988) (exempt property is initially regarded as
20 property of the estate and the debtor may then remove it by
21 claiming exemptions); Hon. Barry Russell, Bankr. Evid. Manual
22 § 301.94 (2006 ed.) (bankruptcy schedules signed under oath
23 constitute admissions). In addition, Debtors listed the Payments
24 as "other income" in their Statement of Financial Affairs.

25 Nevertheless, the reason given by Debtors to support their
26 motion to compel abandonment was that the Payments were not
27 property of the estate. Debtors' apparent argument was that the
28 Payments were of inconsequential value and benefit to the estate

1 because they were not "property of the estate." Thus, Debtors
2 mixed their legal theory with a factual dispute.

3 Trustee objected and moved for turnover of the asset. The
4 bankruptcy court focused on the turnover motion and the question
5 of whether the Payments were property of the estate. To the
6 extent that Debtors' inconsistent argument was a defense to
7 Trustee's turnover demand as well as a threshold requirement for
8 abandonment, we will therefore consider the merits. Then, we will
9 examine whether the bankruptcy court took into account whether the
10 Payments were of any value and benefit to the estate.

11 12 **1. Section 541(a): Property of the Estate**

13 14 **(a) Applicable Law**

15
16 "Bankruptcy courts have exclusive [in rem] jurisdiction over
17 a debtor's property, wherever located, and over the estate."
18 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004).
19 The Ninth Circuit Court of Appeals has held that § 106(a)'s
20 abrogation of sovereign immunity of "governmental units" with
21 respect to various Code provisions, including a turnover
22 proceeding under § 542, applies to Indian tribes. Krystal Energy
23 Co. v. Navajo Nation, 357 F.3d 1055, 1060-61 (9th Cir. 2004),
24 cert. denied, 543 U.S. 871 (2004). Moreover, a tribe's common law
25 sovereign immunity does not impair jurisdiction over individual
26 tribal members who are not acting as tribal representatives or in
27 an official capacity. See Puyallup Tribe, Inc. v. Dept. of Game,
28 433 U.S. 165, 172 (1977); Stringer v. Chrysler (In re Stringer),

1 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (defendant tribe member
2 could be compelled to turn over estate property). See generally,
3 COHEN'S HANDBOOK OF FED. INDIAN LAW § 7.05 (2005).

4 What comprises "property of the estate" is determined by
5 federal law. Under the Bankruptcy Code, the commencement of a
6 bankruptcy case creates an estate "comprised of all the following
7 property, wherever located and by whomever held: . . . [A]ll legal
8 or equitable interests of the debtor in property as of the
9 commencement of the case." 11 U.S.C. § 541(a).

10 "Property" under § 541(a) "'has been construed most
11 generously and an interest is not outside its reach because it is
12 novel or contingent or because enjoyment must be postponed.'" United States v. Sims (In re Feiler), 218 F.3d 948, 955 (9th Cir.
13 2000) (quoting Segal v. Rochelle, 382 U.S. 375, 379 (1966)). This
14 definition is broad, and includes both tangible and intangible
15 property. United States v. Whiting Pools, Inc., 462 U.S. 198,
16 204-05 (1983).

17 Section 541(a), however, "'merely defines what interests of
18 the debtor are transferred to the estate. It does not address the
19 threshold questions of the existence and scope of the debtor's
20 interest in a given asset. . . . [W]e resolve these questions by
21 reference to nonbankruptcy law.'" Suncrest Healthcare Center LLC
22 v. Omega Healthcare Invs., Inc. (In re Raintree Healthcare Corp.),
23 431 F.3d 685, 688 (9th Cir. 2005) (applying federal Medicare and
24 state contract law) (alterations in original) (citation omitted).
25 Even when a property interest is conceived in federal statutory
26 law, whether or not such interest is alienable may be an issue
27 determined by state law. See Segal, 382 U.S. at 381 n.6 (holding
28

1 that whether an NOL carryback refund claim could have been
2 transferred was determined by state law, "save that on rare
3 occasions overriding federal law may control this determination or
4 bear upon it").

5 Here, the Payments were authorized by the tribe's Ordinance,
6 which was promulgated under federal law, but which was also
7 closely connected to a Tribal-State compact regarding the gaming
8 operation. Therefore, questions as to the existence and scope of
9 Mrs. Brown's interest in the Payments are to be resolved by
10 federal, state, and tribal law. See Butner v. United States, 440
11 U.S. 48, 55 (1979) (unless a federal purpose requires a different
12 result, property rights are determined by state law); Kedrowski,
13 284 B.R. at 441 (tribal gaming "features an uneasy mixture of
14 federal, state, and tribal rights and responsibilities").¹²

15 In the absence of Ninth Circuit precedent, the bankruptcy
16 court relied on two opinions from other circuits in reaching its
17 conclusion that Mrs. Brown's right to receive the Payments was
18 property of the estate and that future distributions should be
19 turned over to Trustee.

20 In Kedrowski, the first case cited by the bankruptcy court,
21 the chapter 7 trustee moved to compel turnover of future per

22 ¹² Courts generally recognize the imposition of traditional
23 federal and state property concepts in lieu of any tribal property
24 system. See Richard A. Monette, Governing Private Property in
25 Indian Country; The Double Edged Sword of the Trust Relationship
26 and Trust Responsibility Arising out of Early Supreme Court
27 Opinions and the General Allotment Act, 25 N.M. L. REV. 35, 50
28 (Winter, 1995). For a study of the Bankruptcy Code applied to
Indian tribes, see R. Spencer Clift, III, The Historical
Development of American Indian Tribes; Their Recent Dramatic
Commercial Advancement; and a Discussion of the Eligibility of
Indian Tribes under the Bankruptcy Code and Related Matters, 27
AM. INDIAN L. REV. 177, 208-212 (2002-03).

1 capita distributions to which the debtor was entitled as an
2 enrolled member of an Indian tribe. After a comprehensive
3 examination of tribal gaming, federal and Wisconsin law, the
4 bankruptcy court held that the debtor's right to receive
5 distributions from the tribe's gaming operations constituted a
6 "property right" within the meaning of § 541(a). 284 B.R. at 449.
7 It further held that the per capita payments were not immune
8 Indian trust funds, nor did the tribal ordinance contain any anti-
9 alienation language to prevent them from being made liable for the
10 tribal member's debts. Id. at 450-51.

11 In Johnson, the bankruptcy court's second case, the debtor
12 tribal member had given a security interest in his per capita
13 distributions to a bank to secure a loan. In bankruptcy, the
14 secured creditor sought to continue collecting its loan from the
15 per capita payments and the trustee sought turnover of any surplus
16 payments, and the bankruptcy court agreed with both.

17 On appeal to the district court, the debtor argued that the
18 payments were not property of the estate because they were
19 proceeds of postpetition "earnings." See § 541(a)(6). The
20 district court held that the payments were "income," but not
21 "earnings." Therefore it held that the right to the per capita
22 payments was a "general intangible" property interest pursuant to
23 Louisiana law, and thus was includable in the bankruptcy estate.
24 259 B.R. at 129-30.

25 The district court in Johnson further held that the tribal
26 ordinance did not restrict the member's ability to assign the
27 payments to another person, as long as he or she was living (no
28 provision for devise), and that other recipients of such payments

1 had also used them to secure debts. Id. at 131. Because the
2 debtor had granted a security interest in the stream of payments
3 to the creditor up to the amount of the debt, the district court
4 held that such security interest applied to future, postpetition
5 payments "as they were made," and that the balance of payments
6 belonged to the trustee. Id. at 130.

7 In this appeal, Debtors have attempted to distinguish these
8 cases, and so do we.

9
10 **(b) Mrs. Brown's "Right" to Payments**

11
12 The chapter 7 trustee and the estate succeed only to the
13 title and rights in property which the debtor had at the
14 commencement of the case: "[T]he broad scope of the estate under
15 the § 541(a) (1) definition does not enlarge a trustee's
16 substantive property rights beyond those existing at the
17 commencement of the case." Calvert v. Bongards Creameries (In re
18 Schauer), 62 B.R. 526, 529-30 (Bankr. D. Minn. 1986), aff'd, 835
19 F.2d 1222 (8th Cir. 1987) (emphasis in original).

20 Debtors maintain that the Payments were not property of the
21 estate because the Ordinance did not state that Tribal Members
22 have a "right" to the Payments or that such Payments are the
23 Tribal Member's "property."

24 The Ordinance defines per capita payments as "those payments
25 made or distributed to Tribal Members, which are paid directly
26 from the Tribe's Net Gaming Revenues of the Gaming Enterprise."
27 Ordinance, art. II, sec. 1001(g). With some inapplicable
28 exceptions, it further provides that "[e]very person who is an

1 enrolled member of the Sherwood Valley Rancheria on the date of
2 the Per Capita Distribution and is living on said date is eligible
3 to receive a full Per Capita Payment” Id., art. IV, sec.
4 1003(1).

5 Such per capita payments are ordinarily based on a constant
6 “[s]ixty-five percent (65%) of Net Gaming Revenues” Id.,
7 art. III, sec. 1002(4). While this percentage rate could not
8 decrease, it could be increased up to 75% if net revenues exceed
9 the Tribe’s annual operational budget. Id.. The “Payment Date”
10 is the 15th day of the month following the last day of the
11 preceding calendar quarter, and may precede the actual
12 disbursement date. See id., art. II, sec. 1001(p) and art. IV,
13 sec. 1003(2).

14 No services need be performed by individual Tribal Members in
15 order to receive the Payments. The Payments cannot be inherited
16 because they cease upon the Tribal Member’s death. However, any
17 Payment that has been determined, following a Payment Date, but
18 not yet disbursed at the time of the Tribal Member’s death, is an
19 asset of the Tribal Member’s probate estate. Id., art. IV, sec.
20 1003(2).

21 Debtors cite to the following provision, which states that a
22 Tribal Member does not have a “vested” interest in the revenues:

23 Nothing in this Ordinance is intended to vest or vests in
24 any Tribal Member or any other person any right or
25 interest in the Tribe’s Gaming Enterprise, the revenues
26 produced by or derived from said Enterprise, any other
27 Tribal income or assets, or the income produced by such
assets. The General Council reserves the right to amend
or repeal this Ordinance at any time, and any such
amendment or repeal shall not constitute or be construed
to be the taking of any vested property right.

28 Ordinance, art. IV, sec. 1003(4).

1 They contrast this language to the ordinance in Kedrowski
2 which specifically provided that "No tribal member, nor any
3 person claiming any right derived from a Tribal Member . . . shall
4 have any right, title, interest or entitlement in any Per Capita
5 Share unless and until Payment of the Per Capita Distribution to
6 which it relates occurs.'" Kedrowski, 284 B.R. at 450 (emphasis
7 added). In addition, the Kedrowski court referred to a decision
8 by the Ho-Chunk National Tribal Court, which had concluded that
9 "'the right to per capita [payments] exists so long as a member is
10 on the rolls of the Ho-Chunk Nation.'" Kedrowski, 284 B.R. at 448
11 (citation omitted) (emphasis and alteration added). In other
12 words, they contend that the ordinance in Kedrowski expressly
13 granted a "right" upon distribution.

14 This is a distinction without a difference. Here, the
15 Ordinance also uses the word "right," when it provides that a
16 Tribal Member who fails to either claim a per capita payment check
17 or to request a replacement check shall forfeit his or her "right
18 to receive that Per Capita Payment." Ordinance, art. V, sec.
19 1004(3).

20 It is helpful to briefly consider the statutory history, for
21 the genesis of the two tribal ordinances is the same Indian Gaming
22 Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721 and accompanying
23 federal regulations, 25 CFR § 290.1-290.26 (regulations governing
24 "Tribal Revenue Allocation Plans"). Enacted in 1988, the purpose
25 of the IGRA is to promote "tribal economic development, self-
26 sufficiency, and strong tribal government," shield the tribe's
27 enterprise from organized crime and corruption, and protect tribal
28 gaming as a means of generating tribal revenue. 25 U.S.C. § 2702.

1 Casino gaming is classified as Class III gaming under the
2 IGRA. See 25 U.S.C. § 2703(8). A tribe engaging in casino gaming
3 must negotiate a "compact" with its State, which must be approved
4 by the Secretary of the Interior. 25 U.S.C. § 2703(7)(E) and
5 (10); see also 25 U.S.C. § 2710(d) (1), (3); Cal. Const. Art. 4,
6 § 19.¹³ The tribal-state compact limits the state's jurisdiction
7 "in matters concerning Indian gaming," to "the extent provided in
8 the Compact." Campo Band of Mission Indians v. Super. Ct., 137
9 Cal. App. 4th 175, 182, 39 Cal. Rptr. 3d 875, 881 (2006).

10 The IGRA specifically addresses the matter of per capita
11 payments which are made out of the Tribe's gaming revenues.
12 Pursuant to the IGRA, a tribe is required to adopt an ordinance,
13 which, among other things, allocates its gaming revenues, and it
14 must obtain its approval by the Chairman of the National Indian
15 Gaming Commission.¹⁴ Here, the Ordinance complied with IGRA by
16 authorizing the use of net gaming revenues:

- 17 (i) to fund tribal government operations or programs;
- 18 (ii) to provide for the general welfare of the Indian
tribe and its members;
- 19 (iii) to promote tribal economic development;
- 20 (iv) to donate to charitable organizations; or
- 21 (v) to help fund operations of local government
agencies[.]

22 Ordinance, art. II, sec. 1000(2); 25 U.S.C. § 2710(b)(2); see also

23 ¹³ In March 2000, California voters adopted Proposition 1A,
24 which authorized the governor to negotiate tribal-state gaming
25 compacts with federally recognized Indian tribes for the operation
26 of slot machines and certain casino games on tribal lands in
California in accordance with federal law. See Historical Notes,
Cal. Const. Art. 4, § 19.

27 ¹⁴ The IGRA established the National Indian Gaming
28 Commission, which approved the Sherwood Valley Rancheria's Class
III tribal gaming Ordinance. See 67 Fed. Reg. 165, 54823-54825
(Aug. 26, 2002).

1 25 U.S.C. § 2710(d)(2) (providing that Class III gaming is subject
2 to the provisions of § 2710(b) regarding the disposition of net
3 gaming revenues). The IGRA and Ordinance further provide that the
4 net gaming revenues may be used to make per capita payments to
5 Tribal Members, if certain conditions are met. These conditions
6 are:

- 7 (A) the Indian tribe has prepared a plan to allocate
8 revenues to uses authorized by paragraph (2)(B);
9 (B) the plan is approved by the Secretary as adequate,
10 particularly with respect to uses described in clause
11 (i) or (iii) of paragraph (2)(B);
12 (C) the interests of minors and other legally incompetent
13 persons who are entitled to receive any of the per
14 capita payments are protected and preserved and the
15 per capita payments are disbursed to the parents or
16 legal guardian of such minors or legal incompetents
17 in such amounts as may be necessary for the health,
18 education, or welfare, of the minor or other legally
19 incompetent person under a plan approved by the
20 Secretary and the governing body of the Indian tribe;
21 and
22 (D) the per capita payments are subject to Federal
23 taxation and tribes notify members of such tax
24 liability when payments are made.

25 25 U.S.C. § 2710 (b)(3); Ordinance, art. II, sec. 1000(3).

26 In Kedrowski, as in this case, the debtor argued that the
27 ordinance did not denominate the per capita payment as a property
28 "right." For all practical purposes, the language of the Ho-Chunk
29 ordinance, in Kedrowski, and this Ordinance are identical in that
30 they prohibited any vesting of ownership rights other than the
31 Tribe's in the gaming revenues before they were either determined
32 following a Payment Period (ours) or actually distributed
33 (Kedrowski). The Kedrowski bankruptcy court rejected the debtor's
34 argument, stating:

35 It is undisputed that the debtor is an enrolled member of
36 the Ho-Chunk Nation. Thus, if the tribe does decide to

1 make a distribution, the debtor has a "right" to receive
2 her share. Nothing in the IGRA, the federal regulations,
3 or the Ho-Chunk per capita distribution ordinance would
4 permit the tribe to exclude her from the distribution
5 process.

6 Kedrowski, 284 B.R. at 446.

7 Similarly, in Johnson, the district court found that the
8 debtor's right to receive monthly per capita payments was an
9 intangible property interest under Louisiana law, similar to a
10 right to receive an annuity, insurance proceeds, accounts
11 receivable, or federal program entitlements. 259 B.R. at 128-30
12 (citing cases).

13 In our case, Debtors had already received and possessed some
14 of the Payments for 2005. Using the petition date as a benchmark,
15 Mrs. Brown's property rights were divisible into two kinds. The
16 actual money received became Mrs. Brown's personal property and it
17 lost its identity as tribal funds. See Jacobsen v. Jacobsen (In
18 re Marriage of Jacobsen), 121 Cal. App. 4th 1187, 1192-93, 18 Cal.
19 Rptr. 3d 162, 166-67 (2004) (per capita distribution that was
20 deposited into bank account or securities account lost its
21 identity as immune Indian property); see also Ordinance, art. IV,
22 sec. 1003(2); 25 C.F.R. § 290.16 (providing that the Secretary of
23 the Interior "will not accept any deposits of payments or funds
24 derived from net gaming revenues to any account held by [the
25 Bureau of Indian Affairs] or [the Office of Trust Funds
26 Management]."). In the case at bar, it is clear that the Payments
27 that Mrs. Brown had already received as of the petition date were
28 property of the estate.

29 The second form of property right was Mrs. Brown's
30 entitlement to future Payments, which was created under the

1 Ordinance. This was a contingent, intangible property interest to
2 which Trustee succeeded. Feiler, 218 F.3d at 953 (a trustee
3 succeeds to the debtor's interest in property).

4 Section 541(a)(7) provides that property of the estate
5 includes "any interest in property that the estate acquires after
6 the commencement of the case." The legislative history of this
7 section states:

8 The addition of this provision by the House amendment
9 merely clarifies that section 541(a) is an all-embracing
10 definition which includes charges on property, such as
11 . . . beneficial rights and interests that the debtor may
12 have in property of another.

13 124 Cong. Rec. H11096 (daily ed. Sept. 28, 1978); S17413 (daily
14 ed. Oct. 6, 1978). Congress intended that "property of the
15 estate" be broadly construed. "Under [§ 541(a)(1)], the estate is
16 comprised of . . . tangible and intangible property, choses in
17 action, causes of action, rights such as copyrights, trade-marks,
18 patents, and processes, contingent interests and future interests,
19 whether or not transferable by the debtor." H.R. Rep. No. 95-595,
20 175-176, reprinted in 1978 U.S.C.C.A.N. 5963, 6136.

21 California takes an expansive view of property, which is
22 defined as follows:

23 The ownership of a thing is the right of one or more
24 persons to possess and use it to the exclusion of others.
25 In this Code, the thing of which there may be ownership is
26 called property.

27 Cal. Civ. Code § 654.

28 "Property" is "all-embracing so as to include every
intangible benefit and prerogative susceptible of possession or
disposition . . ."; and signifying "any valuable right or
interest protected by law." People v. Kwok, 63 Cal. App. 4th

1 1236, 1251, 75 Cal. Rptr. 2d 40 (1998) (citations omitted). Every
2 kind of property that is not "real" property is "personal"
3 property. Cal. Civ. Code § 663. Personal property may be without
4 tangible substance, and it may be intangible in the sense that it
5 is a right rather than a physical object. Navistar Int'l Transp.
6 Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 875, 35 Cal.
7 Rptr. 2d 651, 653, 884 P.2d 108, 110 (1994).

8 California recognizes contingent property interests. See
9 State ex rel. Harris v. PricewaterhouseCoopers LLP, 23 Cal. Rptr.
10 3d 529, 566 (2005), rev'd in part on other grounds, 48 Cal. Rptr.
11 3d 144, 141 P.3d 256 (2006); Cal. Civ. Code §§ 688, 690, 697.¹⁵
12 Courts, in a variety of circumstances, consistently have concluded
13 that contingent interests are included within the bankruptcy
14 estate. See, e.g., DeNadai v. Preferred Capital Markets, Inc.,
15 272 B.R. 21, 29 & n.5 (D. Mass. 2001) (right to exercise a stock
16 option in the future was property of the estate); Rau v. Ryerson
17 (In re Ryerson), 739 F.2d 1423, 1425 (9th Cir. 1984) (holding that
18 postpetition termination payments were property of the estate);
19 Booth v. Vaughan (In re Booth), 260 B.R. 281, 285-87 (6th Cir. BAP
20 2001) (collecting cases holding that various contingent interests
21 are property of the estate).

22
23
24
25
26 ¹⁵ In California, "[p]ossession may be proved without proof
27 of ownership, and although ownership implies the right to possess
28 (Civ. Code, sec. 654), possession may exist entirely apart from
ownership and ownership may be had of a thing not in the owner's
possession." People v. McKinney, 9 Cal. App. 2d 523, 524, 50 P.2d
827, 828 (1935).

1 Mrs. Brown's interest is analogous to business or stock
2 dividends.¹⁶ She has a right to receive the distribution effective
3 on the declared per capita Payment Date. See Ordinance, art. IV,
4 sec. 1003(1) and (2). As long as she is an eligible Tribal
5 Member, and the same Ordinance is in effect, her share in the net
6 revenues cannot be excluded from the distribution process.

7 The interest in future Payments is contingent because the
8 Ordinance provides: a) that the tribe may amend or repeal the
9 Ordinance at any time at its discretion, see Ordinance, art. IV.,
10 sec. 1003(4); b) Mrs. Brown must be alive and eligible on the
11 Payment Date, see id., art. IV, sec. 1003(1) and (2); and c) there
12 must be net revenue available for distribution.

13 Thus, Debtors' contention that no "right" to further payments
14 "vested" in Mrs. Brown, does not precisely frame the issue. While
15 paragraph 4 prohibits the vesting in any Tribal Member, or other
16 person, of any interest in the gaming enterprise and its revenues,
17 the vesting of later, declared and individual Payments is
18 separately authorized in specific provisions of the Ordinance.

19
20 ¹⁶ The court in Kedrowski stated:

21 [T]ribal per capita distributions are far more
22 conceptually akin to an interest in a business enterprise
23 than they are a gift, a license, or some form of public
24 assistance. Someone who owns stock in a company, or holds
25 a limited partnership interest in a business, may never
26 receive a distribution on that interest. The business may
27 encounter a poor economic climate, may find expenses
outpacing revenues, and may even fail. But should the
company ever issue a dividend, all stockholders receive an
appropriate amount in relation to their interest. Clearly,
those who hold a "right" to receive payment from the
operation of a business hold some sort of intangible
property right under Wisconsin law.

28 Kedrowski, 284 B.R. at 447.

1 See Fireman's Fund Mortg. Corp. v. Hobdy (In re Hobdy), 130 B.R.
2 318, 321 (9th Cir. BAP 1991) ("[a] general statutory rule usually
3 does not govern unless there is no more specific rule.") (citing
4 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989)).
5 Therefore, paragraph (4) generally reiterates the Tribe's
6 sovereignty and ownership. See Kedrowski, 284 B.R. at 450-51
7 (explaining that similar provisions emphasized the tribe's
8 sovereign status); see also 28 U.S.C. § 1360 (discussed below).

9 In addition, the IGRA treats per capita payments when made as
10 personal income,¹⁷ with the consequence that the Tribe must inform
11 the members that their Payments are subject to federal taxation.
12 See 25 U.S.C. § 2710(b)(3)(D); Campbell v. Comm'r of Internal
13 Revenue, 164 F.3d 1140, 1142 (8th Cir. 1999) (per capita
14 distribution of casino proceeds was a dividend taxable as ordinary
15 income). As such, per capita payments have been used to calculate
16 an individual's income for various purposes in state courts. See
17 Kedrowski, 284 B.R. at 448 (citing case law).

18 In summary, Mrs. Brown's interest in the Payments was an
19 intangible "right" to possess them whenever the shares of net
20 revenues are calculated (the "Payment Date"). As Trustee
21 contends, this was an "automatic" property interest. Appellee's
22 Brief (May 17, 2006), at 2. Although the Tribe could elect to
23 amend or revoke the Ordinance, which might affect the intrinsic or
24 marketable value of Mrs. Brown's right (see discussion below), it
25 did not alter her absolute right to a distribution, if any future

26
27 ¹⁷ However, this income is not "earned," as that term is used
28 in the exception to property of the estate for "earnings from
services performed by an individual debtor after the commencement
of the case." 11 U.S.C. § 541(a)(6).

1 distributions are made, pursuant to the extant Ordinance. See
2 Kedrowski, 284 B.R. at 446.

3 Finally, Debtors contend that the Payments were not a
4 property interest because they were not transferable. Debtors
5 maintain that the Ordinance restricts and prohibits Mrs. Brown
6 from transferring this asset because any Payment check may only be
7 made payable to the Tribal Member.

8 Even intangible property must be capable of being
9 transferred. “[I]t is a fundamental principle of law that one of
10 the chief incidents of ownership in property is the right to
11 transfer it.’ ‘A common characteristic of a property right, is
12 that it may be disposed of, transferred to another.’” McTiernan
13 v. Dubrow (In re Marriage of McTiernan and Dubrow), 133 Cal. App.
14 4th 1090, 1100, 35 Cal. Rptr. 3d 287, 295 (2005) (citations
15 omitted) (alteration in original). California recognizes the
16 transferability of intangible property. See, e.g., Cal. Civ. Code
17 § 1044 (“Property of any kind may be transferred”); Cal.
18 Com. Code § 9102(2), (42) and (61) (definitions of “account,”
19 “general intangible,” and “payment intangible” under Division
20 9–Secured Transactions); Cal. Com. Code § 9109 (noncollection-
21 related secured transactions in accounts or payment intangibles);
22 Cal. Com. Code § 9204 (security interest in after-acquired
23 property and future advances); Cal. Civ. Code § 955.1
24 (requirements for assignment of payment intangibles). Thus, under
25 California law, Mrs. Brown’s property interest is transferable.

26 Whether or not the transferability of the Payments is
27 restricted by virtue of the Ordinance, however, is irrelevant to
28 the question of whether they are property of the estate. Section

1 541(c)(1) provides, that except in regards to a beneficial
2 interest in a trust, "an interest of the debtor in property
3 becomes property of the estate under subsection (a)(1) . . . of
4 this section notwithstanding any provision in an agreement,
5 transfer instrument, or applicable nonbankruptcy law-(A) that
6 restricts or conditions transfer of such interest by the debtor;
7" 11 U.S.C. § 541(c)(1)(A). Thus, "'[p]ersonal' property
8 interests or 'personal' rights that may not be transferred under
9 federal or state law will nevertheless become property of the
10 estate." 5 COLLIER ON BANKRUPTCY ¶ 541.24, at 541-100 (Alan N.
11 Resnick & Henry J. Sommer eds., 15th ed. rev. 2005). Therefore,
12 Debtors' contention that Mrs. Brown's interest in the Payments was
13 not property of the estate because it was nontransferable must
14 fail.

15 In summary, the bankruptcy court did not err in determining
16 that Mrs. Brown had a property interest in both the present and
17 future Payments which became property of Debtors' bankruptcy
18 estate. On this point, then, we AFFIRM the bankruptcy court.

20 2. Value or Benefit to the Estate

21
22 The determination that Mrs. Brown's interest in the Payments
23 was property of the estate was, however, only the first step in
24 deciding the motions for abandonment and turnover. Section 554(a)
25 also requires the bankruptcy court to determine whether the
26 property was "burdensome" or "of inconsequential value or benefit
27 to the estate." 11 U.S.C. § 554(a). An interest in future
28 distributions is only of value to the estate if it can be

1 assigned,¹⁸ sold or reached for the enforcement of judgments.

2 Per capita distributions of profits from tribal enterprises
3 are a discretionary choice of the tribal government, and
4 therefore, we look to the language of the Ordinance to determine
5 whether Trustee may take control of future Payments for the
6 estate's benefit, and whether there are any restrictions imposed
7 upon that interest. See Cohen, supra, § 16.04[2] & n.225 (2005);
8 § 541(a)(6). Furthermore, the Supreme Court has admonished courts
9 to interpret Indian treaties and applicable federal statutes by
10 resolving any doubtful expressions in favor of the Indians'
11 sovereignty. McClanahan v. State Tax Comm'n of Ariz., 411 U.S.
12 164, 172-74 (1973).

13 In ruling on another issue (i.e., spendthrift trust), the
14 bankruptcy court concluded that the Ordinance contained no
15 restrictions on transfer and specifically permitted transfer,
16 citing the provision for allowing a third party to receive a
17 Tribal Member's check upon the Tribal Member's signed and
18 notarized written instruction. See Memorandum Decision, supra, at
19 2. That provision reads:

20 Each Per Capita Payment shall be made by Tribal check,
21 made payable only to the Tribal Member, except in the case
22 of minors or legal incompetents, in which case payment
23 shall be made as provided in Section (4). If requested in
24 writing by the Tribal Member, the Treasurer shall mail
25 each Per Capita Payment check to said member at the
member's current address on file with the Treasurer;
otherwise, Per Capita Payment checks shall be available at
the office of the Treasurer during normal business hours.
Upon the signed and notarized instruction of the Tribal

26 ¹⁸ In California, an "assignment" refers to "a class of acts
27 by which the right or title to something of value is transferred
28 to another before the object of the transfer has become property
in possession." Cross v. Sacramento Savings Bank, 66 Cal. 462,
466, 6 P. 94 (1885).

1 Member, Per Capita Payment checks may be released to
2 another person, provided that said person provides valid
3 picture identification and signs for the check. If a
4 Tribal Member who has not requested that his/her check be
mailed fails to claim his/her Per Capita Payment check
within 90 days after issuance, the Treasurer shall cause
the check to be voided

5 Ordinance, art. V, sec. 1004(3) (emphasis added).

6 The Ordinance does not provide that a Payment check may be
7 made payable to a third party, nor that it would be subject to
8 attachment or garnishment under state law. Nor does it clarify
9 what the words "may be released to" mean. For example, the
10 Ordinance may be contemplating a situation in which someone is
11 authorized to pick up, then deposit, the distribution to an
12 elderly or infirm person. Therefore, construing the Ordinance in
13 favor of Mrs. Brown, we hold that the bankruptcy court erred in
14 its interpretation.

15 Moreover, in denying Debtors' motion to compel abandonment,
16 the bankruptcy court implicitly ruled that the Payments were of
17 some value or benefit to the estate, presumably because they could
18 be assigned or sold by Trustee. This ruling was premature,
19 because the bankruptcy court had neglected to analyze the "value"
20 element of 554(a) or to make separate findings and conclusions
21 which justified that a value could indeed be placed upon future
22 distributions.¹⁹

23 However, the interest in future Payments may not be
24 transferable or subject to enforcement proceedings such as

25
26 ¹⁹ We agree that the Payments that Mrs. Brown had already
27 received, as of the petition date, were freely transferable.
28 However, we disagree with the bankruptcy court's conclusion in
regards to Mrs. Brown's interest in an ongoing and unaltered
stream of future Payments. Too many unanswered questions affect
that conclusion.

1 garnishment.²⁰ The Supreme Court has held that Indian Nations
2 enjoy immunity from judicial attack absent consent to be sued or
3 express abrogation of tribal immunity. See Kiowa Tribe of Okla.
4 v. Mfg. Techs., Inc., 523 U.S. 751, 757 (1998); Krystal Energy,
5 357 F.3d at 1056 (Congress abrogated tribal immunity in § 106(a)
6 of the Bankruptcy Code). Federal Indian law can also preempt
7 state law "if the balance of federal, state and tribal interests
8 tips in favor of preemption." Hoop Valley Tribe v. Hongkong and
9 Shanghai Banking Corp., Ltd. (In re Blue Lake Forest Prods.,
10 Inc.), 30 F.3d 1138, 1142 (9th Cir. 1994). "The more the federal
11 government and the tribe have taken control of an activity, the
12 more likely is the state to be preempted." William C. Canby, Jr.,
13 American Indian Law in a Nutshell 292 (1998). "Indian law
14 preemption . . . determines which government – federal, tribal, or
15 state – has jurisdiction in Indian country." David H. Getches,
16 Charles F. Wilkinson & Robert A. Williams, Jr., Cases and
17 Materials on Federal Indian Law 562 (5th ed. 2005).

18 Tribal gaming is an important tribal interest which provides
19 the sole source of revenues for the operation of a tribe's
20 government and the provision of tribal services. Cal. v. Cabazon
21 Band of Mission Indians, 480 U.S. 202, 218-19 (1987). Garnishment
22 and other state enforcement of judgment remedies of a tribal
23 member's per capita payments could implicate the tribe's sovereign

24
25 ²⁰ See, e.g., Begay v. Roberts, 167 Ariz. 375, 382, 807 P. 2d
26 1111, 1118 (Ct. App. 1990) (quashing justice court writs of
27 garnishment of wages earned by a reservation Indian as being an
28 infringement on tribal sovereignty, and on the basis of tribal law
preemption). See also McClanahan, 411 U.S. at 173 (holding that
absent explicit congressional authorization, a state acts outside
its authority if it infringes on the right of reservation Indians
to make their own laws and be governed by them).

1 immunity or preemption. See North Sea Prods., Ltd. v. Clipper
2 Seafoods Co., 92 Wash. 2d 236, 237, 595 P.2d 938, 939 (1979);
3 People v. Superior Ct., 224 Cal. App. 3d 1405, 1410, 274 Cal.
4 Rptr. 586, 589 (1990) (noting, and citing Tenth Circuit law, that
5 "Native Americans residing on reservations enjoy protection from
6 compulsion of the state courts in a variety of matters such as . .
7 . garnishment . . .").

8 In California, federal law grants the state limited
9 jurisdiction over civil actions involving Indians to the same
10 extent that it has jurisdiction over other civil causes of action,
11 and its general laws apply in Indian country. See 28 U.S.C.
12 § 1360(a) ("Public Law 280").²¹ However, § 1360(b) limits the
13 scope of such state power and jurisdiction: it provides that
14 § 1360(a) does not authorize the "alienation, encumbrance or
15 taxation of any real or personal property . . . belonging to any
16 Indian, or any Indian tribes, bands or community," nor does it

17
18 ²¹ Section 4 of Public Law 280, 67 Stat. 589 (1953), is
19 codified in 28 U.S.C. § 1360. Subsection (a) provides, in
20 relevant part:

21 (a) Each of the States listed . . . shall have
22 jurisdiction over civil causes of action between
23 Indians or to which Indians are parties which arise
24 in the areas of Indian country listed opposite the
25 name of the State to the same extent that such State
26 has jurisdiction over other civil causes of action,
27 and those civil laws of such State that are of
28 general application to private persons or private
property shall have the same force and effect within
such Indian country as they have elsewhere within the
State:

29 . . .

30 California All Indian country within the
State[.]

31 28 U.S.C. § 1360(a).

1 authorize the "regulation of the use" of Indian property "in a
2 manner inconsistent with any Federal treaty, agreement, or
3 statute, or with any regulation made pursuant thereto."

4 Furthermore, § 1360(b) provides that the general grant of
5 civil jurisdiction "does not confer jurisdiction upon the State to
6 adjudicate, in probate proceedings or otherwise, the ownership or
7 right to possession of [Indian] property or any interest therein."
8 28 U.S.C. § 1360(b).

9 Finally, § 1360(c) provides that a tribal ordinance or custom
10 which is not inconsistent with applicable state civil law will "be
11 given full force and effect in the determination of civil causes
12 of action pursuant to this section." 28 U.S.C. § 1360(c).

13 Public Law 280 did not abrogate Indian sovereign immunity,
14 nor does it deprive a tribe of concurrent subject matter
15 jurisdiction in civil matters. See Bryan v. Itasca County, 426
16 U.S. 373, 389-91 (1976); Getches, supra, at 508 n.2. Moreover,
17 § 1360(b) precludes states from asserting jurisdiction over
18 disputes concerning Indian trust land, even if one party is non-
19 Indian. Boisclair v. Super. Ct., 51 Cal. 3d 1140, 1152, 276 Cal.
20 Rptr. 62, 69, 801 P.2d 305, 312 (1990).

21 [F]or section 1360(b)'s jurisdictional preclusion to
22 operate and its protective purpose to be fulfilled, the
23 threshold question must be whether one possible outcome of
24 the litigation is the determination that the disputed
property is in fact Indian trust land. If that outcome is
possible, then a state court is barred from assuming
jurisdiction of the case.

25 Id. (emphasis added); see also Lamere v. Super. Ct., 131 Cal. App.
26 4th, 1059, 1064, 31 Cal. Rptr. 3d 880, 883-84 (2005), cert. denied
27 sub nom. Salinas v. Lamere, 126 S.Ct. 2291, 164 L. Ed. 2d 813
28 (2006) (Public Law 280 does not provide jurisdiction over disputes

1 involving a tribe).

2 In addition, in a garnishment, the tribe is the real party in
3 interest, and therefore, Indian sovereign immunity may be at
4 issue. See Stephen Pevar, The Rights of Indian Tribes 355 (2002).
5 Whether a judgment is obtained in a Public Law 280 state or not,
6 Indian trust property will be protected from garnishment or
7 execution. See Robert Laurence, Service of Process and Execution
8 of Judgment on Indian Reservations, 10 AM. IND. L. REV. 257 (1982).
9 A tribal code may govern such enforcement. Id. at 268-69. A
10 leading authority on Indian law has stated: "[E]ven in Public Law
11 280 states, the better rule is that state court judgments should
12 be presented to tribal courts for recognition, and not merely
13 executed upon by state officers using state enforcement process
14 on-reservation." Cohen, supra, § 7.07[2][c].

15 Here, the per capita shares did not become Mrs. Brown's
16 personal property until each Payment date. Her contingent
17 interest in future Payments, while intangible property of the
18 estate, may or may not be protected against transfer to third
19 parties.²² This matter was neither addressed by the bankruptcy
20 court nor satisfactorily analyzed in either Johnson or Kedrowski.

21 The facts in Johnson are distinguishable from our case.
22 There, the debtor had granted a bank a consensual security
23 interest in his stream of per capita payments in order to secure a
24 loan, rather than absolutely assigning the payments to the bank.

25
26 ²² In addition, under California law, a contingent debt owed
27 by the garnishee which is uncertain in the sense that it may never
28 become due and payable is not subject to garnishment. Javorek v.
Super. Ct. of Monterey County, 17 Cal. 3d 629, 640, 131 Cal. Rptr.
768, 777, 552 P.2d 728, 737 (1976).

1 The debtor had remained current on the loan by using the per
2 capita payments to pay the debt as they were distributed. See
3 Johnson, 259 B.R. at 130 n.4. The district court saw this
4 situation as “resembling” an assignment. Id. In fact, there was
5 no assignment in Johnson and, therefore, that case cannot support
6 a conclusion that per capita payments are always assignable. In
7 our case there was neither an assignment of, nor an encumbrance or
8 lien on Mrs. Brown’s interest.

9 In addition, the Johnson court noted that “[o]ther Tribe
10 members have granted security interests in the payments, and have
11 had them garnished.” Id. at 127. However, any conclusion
12 regarding garnishment was dictum because there was no garnishment
13 under the Johnson facts. The district court merely found that the
14 ordinance contained no restrictions on the debtor’s ability to
15 encumber the per capita payments on behalf of a third party. Id.
16 at 131.

17 Nor do we believe the Kedrowski opinion is persuasive on this
18 point. There, the ordinance stated: “[T]he Nation shall not
19 recognize or enforce any claim, garnishment, levy, attachment,
20 assignment or other right or interest in a Per Capita Share.” 284
21 B.R. at 450. Interestingly, the bankruptcy court concluded that
22 the ordinance did not expressly forbid per capita distributions
23 from being liable for the tribal member’s debts. Id. at 451. In
24 fact, this tribal rule could be read to treat the per capita
25 shares as trust property, which is protected from encumbrance in
26 Public Law 280 states, and Wisconsin is one of those states.

27 Moreover, we disagree with both Johnson and Kedrowski that a
28 lack of an express prohibition as to the transferability of per

1 capita payments in an ordinance should be construed as allowing
2 for such transfer. We hold, therefore, that to the extent the
3 bankruptcy court so interpreted the Ordinance, its conclusion was
4 erroneous. We further hold that the bankruptcy court's implicit
5 finding that Mrs. Brown's interest in the stream of future
6 Payments was of value or benefit to the estate was clearly
7 erroneous. See Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF
8 Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006) ("[W]e may regard a
9 finding of fact as clearly erroneous not only if it is without
10 adequate evidentiary support, but also if it was induced by an
11 erroneous view of the law.") (citation omitted). Further evidence
12 and support for this conclusion must be shown.

13 At the very least, the Ordinance is ambiguous, and more
14 evidence is required in order for the bankruptcy court to
15 determine whether Mrs. Brown's interest is transferable and, if
16 so, what it is worth. There is no evidence in the record of
17 whether any attempt had been made to value the stream of Payments,
18 nor any determination made as to whether the contingencies
19 affected its marketability. Such evidence may require the
20 testimony of tribal officers or valuation experts, or facts
21 judicially noticed concerning tribal law and financial affairs.
22 The issue is not purely one of law which we may review de novo,
23 and therefore a remand will preserve the trial court's role as
24 factfinder. See Matter of MCI, Inc., 151 B.R. 103, 109 (E.D.
25 Mich. 1992) (determining appeal of abandonment order de novo).
26 Thus, we VACATE AND REMAND for further proceedings.

27

28

1 **CONCLUSION**

2
3 The relevant legal authority to determine property of the
4 estate for a Tribal Member requires a consideration of federal and
5 state property law, as well as the tribal laws and the specific
6 Ordinance. The bankruptcy court correctly concluded that Mrs.
7 Brown's interest in the present and future Payments was property
8 of the estate, and its reliance on Kedrowski and Johnson for such
9 holding was proper. This part of the order is AFFIRMED.

10 However, the bankruptcy court ruled against Debtors'
11 abandonment motion without analyzing and making findings and
12 conclusions concerning whether there was any value or benefit to
13 the estate in the stream of future Payments. Any implicit
14 valuation determined against Mrs. Brown that was based on case law
15 from other jurisdictions or on the absence of prohibitive language
16 in the Ordinance was therefore an abuse of the court's discretion.
17 Specifically, the Ordinance is ambiguous concerning the
18 transferability of the future Payments, and more evidence is
19 warranted. Similarly, any determination of actual value requires
20 positive proof. We therefore VACATE AND REMAND for further
21 proceedings on the abandonment request, including a determination
22 of the asset's value to the estate.

23 **AFFIRMED IN PART; VACATED AND REMANDED IN PART.**

24
25
26
27
28