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INDIAN LAW ALERT
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Lessons from the Federal Bench

The federal courts have again addressed two issues –**sovereign immunity** and **exhaustion of tribal remedies** -- that impact the relationship between tribes and people who do business with tribes. In each case, the court provides valuable lessons for negotiating contracts with tribes and tribal enterprises.

Lesson #1: Sovereign Immunity from Suit

The form and substance of a tribe's or tribal enterprise's waiver of its immunity from suit has been, and continues to be, of critical concern for persons doing business with tribes and their businesses. In *High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe of Indians*, the U.S. Ninth Circuit Court of Appeals reminds us that “[a]n Indian tribe is subject to suit only where Congress unequivocally authorizes suit, or where the tribe has clearly and expressly waived its immunity.” This black letter law seldom is questioned. What makes *High Desert Recreation* interesting and instructive is that the court held that the contractual waiver granted by the tribe was not enforceable because it did not identify a venue or jurisdiction in the event of a suit. The court explained that because neither jurisdiction nor venue was addressed in the waiver, “it is *unclear* whether the [waiver] refers to suits brought before federal courts, or to suits brought before the Tribal Court . . .” (emphasis in original).

While the better practice is for a tribe to expressly, unequivocally and clearly waive its immunity from suit and to consent to jurisdiction and venue, it is not uncommon for waivers of sovereign immunity to be silent respecting jurisdiction, leaving the parties to argue over jurisdiction another day. The Ninth Circuit warns us that such silence creates ambiguity and that ambiguity creates unenforceable waivers of immunity.

Take Away: Be sure to include a consent to jurisdiction and venue provision in the tribal waiver of immunity. Deferring arguments over which court will have jurisdiction to adjudicate disputes between parties to a contract may cause the waiver of sovereign immunity to be unenforceable, leaving the non-tribal party without the right to adjudicate at all.



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Lesson # 2: Exhaustion of Tribal Court Remedies

James Morrison filed suit against the President of the Northern Cheyenne Tribe in tribal court. The tribal court refused to consider Morrison's claims based on violations of his constitutional rights. So Morrison asked the federal court to hear the claims because any further attempts to have the claims heard in tribal court would be "futile."

Notwithstanding that federal courts clearly have jurisdiction over questions rooted in federal law, in *James Morrison v. Leroy Spang*, the federal District Court for the District of Montana denied Morrison's petition and suggested that he pursue his claims with the tribe's court of appeals. The court reasoned that taking jurisdiction over Morrison's claims would fly in the face of the Supreme Court's policy that and strongly discourages federal courts from assuming jurisdiction over claims when tribal court jurisdiction – including appellate jurisdiction -- has not been exhausted.

The *Morrison* case is neither unusual nor surprising. It is instructive, however, because it reminds us of two important things. First, tribal courts generally have jurisdiction over persons acting on Indian land. And, second, even when federal courts have jurisdiction over a claim involving a tribe, they are not inclined to exercise their jurisdiction if it means inserting themselves in a case over which a tribal court also has jurisdiction. Stated a bit differently, there is no guaranty that your federal claim will be heard by a federal judge.

Take Away: Be prepared to adjudicate claims in tribal court, and consider the benefits and risks thereof before you sign a contract with a tribe.