

IN PRACTICE

## NATIVE AMERICAN LAW

### Tribal Sovereign Immunity: What It Is and Why You Should Care

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There are more than 560 sovereign nations within the United States. These sovereigns — Native American tribes recognized by the federal government — are acknowledged in the U. S. Constitution and have been recognized by the courts for more than 180 years as “domestic dependent nations.” Tribal sovereignty is limited: tribes may not convey land to anyone but the United States, and tribes may not deal with foreign powers. Otherwise, tribes have the right to govern and to regulate activities of their members and of nonmembers who enter into consensual relationships with the tribe or its members (for example, in commercial transactions). They also have the right to enter into contractual relationships, subject to limitations imposed by federal law.

Tribes offer unique opportunities for broad economic development to investors, developers and lenders in concert with tribes that are committed to creating jobs on reservations and to creating a sound economic base for their people.

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However, typical remedies in the event of a default, including litigation, may not be available under applicable federal law and tribal law because, like other sovereigns, absent a clear waiver, Indian tribes are immune from lawsuit.

Therefore, any contract with a tribe must include a clear “waiver of sovereign immunity” so that the nontribal party may seek legal recourse, if necessary.

#### Defining a Sovereign Immunity Waiver

Waivers of sovereign immunity must be clear and unequivocal. And they must be authorized and executed in accordance with tribal law. Whether persons purporting to act on behalf of a tribe or a tribal entity have the power and authority to speak for their principals strictly is a function of tribal law and custom, the nature of the entity and the entity’s organizational documents. Therefore, when dealing with tribes or tribal entities, it is inadvisable to rely on apparent authority.

The nature of the entity with whom the investor is dealing also may affect the investor’s rights and remedies, whether the entity has the power to waive its immunity, how the waiver must be authorized and even what language it must include. Therefore, it is critical that, before contracting with a tribe or a tribal entity, the non-Indian party understand the na-

ture of the entity with which it is contracting and the protocol and conditions for entering into binding, enforceable agreements and for obtaining a binding, enforceable waiver of immunity. Failing to appreciate each of these issues is likely to result in unenforceable waivers of immunity and agreements with tribes and their business enterprises.

At a minimum, potential investors should review the tribe’s and tribal entity’s organizational documents (e.g., constitution, if any, and any corporate or partnership documents and the resolutions approving them). Additionally, the tribe and the tribal entity should adopt resolutions specifically authorizing the transaction and counsel for the tribe should deliver opinions regarding the organization of the tribe, the organization of the tribal business, the respective power and authority of each to grant the waiver of immunity and the enforceability of the transaction agreements and the waivers of immunity from suit.

#### Provisions of a Sovereign Immunity Waiver

All waivers of sovereign immunity from suit should address the following issues:

- Who may bring suit and the identity of the beneficiaries of the waiver. The waiver may also state who may not bring a claim. For example, the waiver may permit the general contractor and the general contractor’s successors and assigns to sue but may prohibit any other persons, including subcontractors, from suing.

- Who may be sued, including all tribal entities involved in the transac-

tion. Certain tribal entities may have the independent power and authority to waive their immunity (e.g., a tribal corporation chartered under Section 17 of the Indian Reorganization Act of 1934). Waivers should be obtained from those entities, as well.

- The kinds of claims that may be brought against the tribe. At a minimum, include claims to enforce the contract. The waiver may prohibit certain types of claims, such as claims arising in tort.

- The amount and type of damages that may be recovered. The waiver may limit the judgment to a maximum dollar amount (such as amount of the contract) and may prohibit recovery of other damages (e.g., punitive and consequential damages). If attorneys' fees or post-judgment interest are permitted by contract or law, they also should be addressed in the waiver.

- Where claims may be brought. Tribes generally will want the forum to be tribal court. The nontribal party is likely to prefer federal or state court. However, federal courts do not have automatic jurisdiction over contractual claims against tribes because tribes are not citizens of a state for purposes of diversity jurisdiction; and, generally, disputes and/or actions to enforce contracts and business transactions with tribes or tribal entities will not present a federal question.

#### **Consequences of Failing To Secure a Waiver**

Failing to document and settle any of these points in a waiver of sovereign immunity invites disastrous consequences

if a dispute arises over a development project in Indian country. One of many examples, a recent case, *Seminole Tribe of Florida (STOF) v. Eastern Regional Director, Bureau of Indian Affairs (BIA)*, decided June 3, 2011, is illustrative. In that case, STOF appealed the BIA Eastern Regional Director's refusal to cancel the tribe's commercial lease to a non-tribal entity called Hollywood Mobile Home Estates, Ltd., (HME).

HME operated a mobile home park on STOF land under a lease which HME assumed in 1986. The lease was set to expire in 2024. In 2008, STOF claimed various defaults under the lease and notified HME that the tribe was terminating the lease, ejecting HME and retaking the property.

HME denied that it breached the lease and demanded arbitration. The tribe responded that the arbitration clause in the lease did not apply to defaults; and, on July 15, 2008, the tribe declared the lease terminated and retook the property. When HME filed an emergency motion to prevent STOF from retaking the leased premises, relief was denied because the federal court agreed with STOF's assertion that the arbitration clause did not apply to the default provision in the lease and that the tribe had not waived its sovereign immunity from suit. Therefore, the court concluded, HME could not satisfy one of the requirements for obtaining a preliminary injunction, namely, that it was likely to prevail on its claims against the tribe.

HME next appealed the Regional Di-

rector's decision to the Interior Board of Indian Appeals (IBIA). In a ruling more favorable to HME, the IBIA found that, generally, HME had not breached the lease and that, even if some of HME'S management practices rose to the level of defaults, the lease would not be cancelled because the tribe violated BIA's leasing regulations when it failed to give HME notice and an opportunity to cure any claimed default before dispossessing HME.

Unfortunately for HME, its victory before the IBIA was, at best, half a loaf. IBIA did not rule in HME's favor on the arbitration or sovereign immunity issues (in fact, the IBIA did not address them at all) and did not order STOF to permit HME to occupy the leased premises. As a result, HME could only regain possession through litigation. Absent an enforceable waiver of immunity, such a path is uphill and treacherous and could have been avoided (and, perhaps, a preliminary injunction issued) had the lease included a clear waiver of immunity and an arbitration clause clearly applicable to disputes over defaults and breaches of the lease.

The lesson here is fundamental: no contracting entity should be pushed or cajoled into accepting a contract that lacks a clear waiver of immunity. It is essential to draft carefully and to consult with an expert in federal Indian law before entering into any contract with a tribe or tribal entity. There is a much better chance of developing a favorable exit strategy by taking care of the basics at the beginning of the deal. ■