

Contract Waivers for Tribal Sovereign Immunity: What Every Idaho Attorney Needs to Know

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You've negotiated thousands of contracts in your career. You're convinced you can draft a binding contract between an Indian tribe and a non-Indian business. You may want to think again. Whether you represent an Indian tribe or seek to do business with a tribe, a basic understanding of tribal sovereign immunity is critical. Working with tribes can be a culturally rewarding and interesting professional experience. This article aims to give practitioners an overview of the doctrine, as well as key components of mutually satisfactory contractual waiver of tribal sovereign immunity.

The scope of Tribal sovereign immunity

Sovereign immunity is inseparable from government power. As Alexander Hamilton observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."¹ Put differently, the Tenth Circuit has observed that "sovereign immunity is an inherent part of the concept of sovereignty and what it means to be a sovereign."²

Federal courts consistently affirm that federally-recognized Indian tribes enjoy sovereign immunity from suits for damages or injunctive relief within state, federal and tribal courts.³ This immunity generally extends to tribal businesses and tribal officials, as well as to both on-reservation and off-reservation conduct.⁴ Importantly, sovereign immunity is near absolute. The Ninth Circuit has noted that there is a "strong presumption against waivers of tribal sovereign immunity."⁵ Federal courts also consistently find that there can

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be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case."⁶

The U.S. Supreme Court has held that tribal sovereignty and its corresponding right of sovereign immunity from suit are inherent powers that can only be waived in one of two ways: (1) from a tribe's express waiver; or (2) through a Congressional statute expressly abrogating tribal immunity.⁷ Federal courts require that waivers of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."⁸

For any waiver to be effective, it must be clearly expressed in the manner specified by the applicable tribal governing documents. Numerous federal courts have held that whether any individual tribal official or employee has authority to waive a Tribe's sovereign immunity is determined by tribal law.⁹

The rule on contractual waivers

Within the Ninth Circuit, whether and to what extent a contract clause constitutes a waiver of tribal sovereign immunity turns on both the terms of that clause and tribal law more broadly.¹⁰ For example, an

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The five federally-recognized tribes in Idaho:

- Coeur D'Alene
- Kootenai
- Nez Perce
- Shoshone-Bannock
- Shoshone-Paiute

arbitration clause which stated that "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association" has been construed by the Eighth Circuit as the necessary "clear expression" of a waiver of tribal sovereign immunity.¹¹

But, contractual language alone is not enough. In a case out of Washington state where the language of the contract was clearly a waiver of immunity, the district court found the waiver was nonetheless held to be ineffective against the tribe because the person who signed the contract lacked the authority under tribal law to do so.¹²

Indeed, federal courts have generally required that a tribal official have actual authority, pursuant to tribal law, to sign a contract and bind the tribe before finding a waiver of sovereign immunity effective.¹³ Thus, when negotiating a waiver of sovereign immunity it is important to not only use the correct language in the contract, but also to understand tribal law and the grant of authority given to the person charged with executing the contract.

Limited waivers of immunity

Because waivers of sovereign immunity are strictly construed, they must be prepared with intentionality. A thoughtful approach must start with the understanding that tribal sovereign immunity need not be an all-or-nothing proposition. Although a broad waiver is what many non-tribal contractors seek – and, of course, some tribes might want no waiver at all – most parties will find common ground on a limited waiver of sovereign immunity. This is because both parties want the business. Indian tribes recognize that meaningful (and enforceable) dispute resolution is necessary to attract investment to their reservations.

Limited waivers of sovereign immunity must be carefully tailored to the unique circumstances of the transaction and the contracting parties. Particular terms that might work for one transaction might not work for another. That said, what follows is an example of a common limited waiver of sovereign immunity, found in a business transaction between a tribe and a non-tribal party:

The Tribe hereby agrees to waive its sovereign immunity from suit for the sole and limited purpose of enforcement of the terms of this Contract, provided, however, that (1) this waiver is limited to the recovery of no more than the amount of

this Contract; (2) the payment of any amount shall be paid with funds from the [contracting program] budget and not with any real property belonging to the Tribe; (3) this waiver does not extend to nor allow any award of punitive, exemplary or other damages against the Tribe; and (4) this waiver is expressly limited to the adjudication of lawsuits before the Tribal Court pursuant to the agreement of the parties to this Contract with regard to jurisdiction.

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Let's break down the elements. First, the typical waiver of tribal sovereign immunity should limit who can bring a claim. Typically, this means that the waiver only runs to the contractor and not to any other party. Relatedly, the typical waiver of tribal sovereign immunity will limit claims to enforcement of the contract and any disputes arising under the contract, barring alternative theories of recovery. The typical waiver of tribal sovereign immunity may also seek to limit the source of funds (or property) available to a contractor to satisfy any judgment.

Second, the typical waiver of tribal sovereign immunity will limit the type of relief that may be claimed. The limitation can also narrow the scope of available remedies against the tribe in the event of a dispute. A typical term will seek to exclude, for example, attorney's fees.

Third, the typical waiver of tribal sovereign immunity may name the forum where a dispute can be heard. Most tribes will seek to have the dispute heard in their tribal court. If so, the best practice is for counsel to engage in a meaningful exchange of information about the tribal court, including a review of applicable tribal laws. This should allay any concerns that the non-tribal contractor may have about appearing in tribal court.

Alternatively, some limited waivers of sovereign immunity may seek to provide a consent to the jurisdiction of a federal court. This can be a trap for the unwise; parties cannot contract for federal court subject matter jurisdiction, and such jurisdiction will not exist in many contractual situations. Tribal governments are not considered citizens of any state for diversity purposes, so the contract would have to trigger federal question jurisdiction.¹⁴

Fourth, although not addressed in the sample contractual limited waiver of tribal sovereign immunity discussed above, some contracts will also address related items. For example, a limited waiver of sovereign immunity may also specify the choice of law to be applied. In most situations, there will be no tribal law on point. In these circumstances, state or federal law would be applied – even by the tribal court – to resolve the dispute arising under the contract.

Some contractual limited waivers of tribal sovereign immunity may also be limited in duration. If such a clause is included, the duration of the waiver will be for a limited time after conclusion of the work to be

performed under the contract. The purpose of such language is to bring closure to a possible dispute by forcing resolution soon after the contract ends.

Finally, as discussed above, in addition to the waiver language, counsel should insist on representations concerning the scope of authority of the persons executing the contract. With respect to the tribal representative, attorneys for the non-tribal party should request a copy of the tribal council resolution authorizing the person to sign the contract and bind the tribe. Otherwise, even the most perfectly drafted contractual limited waiver of sovereign immunity may be unenforceable.¹⁵

Conclusion

Every day brings new beneficial business relationships between Indian tribes and private entities. These commercial relationships must embrace the challenges posed by tribal sovereign immunity. If negotiated properly, a mutually agreeable waiver of sovereign immunity, if appropriate, will protect all interests involved.

Endnotes

1. The Federalist No. 81, 130 (H.S. Com-mager, ed. 1949) (original emphasis).
2. *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (noting that the United States' sovereign immunity and tribal sovereign immunity are alike in that regard).
3. *Pit River Home and Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994).
4. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S. Ct. 2024 (2014) (affirming broad parameters of tribal sovereign immunity).
5. *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001).
6. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).
7. *Merrion v. Jicarilla Apache Tribe*, 617

F.2d 537, 540 (10th Cir.), *aff'd*, 455 U.S. 130 (1982) (tribal council passed a formal resolution expressly waiving sovereign immunity).

8. *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

9. *E.g., Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917, 922 (6th Cir. 2009) (finding a waiver of sovereign immunity ineffective when the tribe's charter required the governing body pass a resolution waiving immunity, and no such resolution was passed), *cited with approval Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011) (finding, in absence of evidence that Board of Directors ever adopted a resolution waiving immunity, no waiver of immunity); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-88 (11th Cir. 2001) (no effective waiver of sovereign immunity without a resolution from the tribal council doing so, as required by tribal law); *World Touch Gaming, Inc. v. Massens Mgmt, L.L.C.*, 117 F. Supp. 2d 271, 275 (N.D. N.Y. 2000) (waiver of sovereign immunity only valid if, pursuant to the tribe's constitution and code, the waiver is authorized by tribe's governing council).

10. *E.g., Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation.").

11. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995). *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001) (finding a standard form arbitration provision with no express waiver of sovereign immunity, but an agreement to enforceability of arbitration, to be enforceable against tribe because of agreement to AAA arbitration rules).

12. *Stillaguamish Tribe v. Pilchuck Group II, LLC*, No. 10-995 RAJ (W.D. Wash) (ruling "[T]he sole dispute is whether the Tribe authorized the Agreement, and more particularly, whether it authorized the arbitration clause and sovereign immunity waiver").

13. *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) (contractual provision purporting to waive tribal corporation's sovereign immunity was insufficient to waive immunity, where corporation's charter required board approval for waiver, and such approval was not obtained).

14. *E.g., Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974).

15. *Hydrothermal Energy Corp. v. Fort Bidwell Indian Comm'y Council*, 170 Cal. App. 491, 496 (Cal. Ct. App. 1985) (holding Tribal Chairwoman's signature on contract could not waive tribe's sovereign immunity to an arbitration unless the tribe expressly delegated the chairwoman that power); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-42, 844 (N.J. Super. 1999) (holding that controller's signature on contract containing forum selection clause insufficient to waive immunity, in part, because the right to unequivocally waive immunity reserved to tribal council under a Tribal law process); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520-21 (Okla. 2011) (holding no waiver of immunity because no express waiver of sovereign immunity by the Business Committee, or consent to such waiver by the Business Committee, as required by the Tribe's Constitution); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 316 P.3d 1248, 1251 (Ariz. Ct. App. 2014) (holding that Casino's marketing director did not have authority to waive the sovereign immunity of the Nation and rejecting apparent authority application).

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