Waiving Goodbye to Tribal Sovereign Immunity?

By Gabriel S. Galanda

Tribal sovereign immunity, the legal principle that Indian tribal governments, like other sovereigns, may not be sued without their own consent, is under a full frontal attack. Consider these passages from recent federal and state court opinions:

> Tribal immunity is "divorced from the realities of the modern world."
>
> "[H]opefully [tribes] will eventually conclude that this litigation tactic [of asserting sovereign immunity] is not the best policy to promote a profitable business."
>
> "[T]he constitutional right of the State to preserve its republican form of government trumps the common law doctrine of tribal immunity."

Unless Indian Country reacts to such scathing judicial indictments through more strategically thought out assertions of sovereign immunity, tribal governments *will* lose that right and the ability to develop reservation economies without the threat of ruinous lawsuits.

Presently, sovereign immunity is the strongest defense to litigation attacks against tribal treasuries and the assertion of state regulatory authority on tribal lands. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi*, 498 U.S. 505 (1991). Without immunity protection, tribes would be faced with an avalanche of personal injury and class action lawsuits that could bankrupt tribal treasuries. Unimpeded by tribal immunity doctrine, state and local governments could sustain legal attacks on tribal governments *in state courts* that would further erode Indian sovereignty and regulatory control over the reservation.

On May 14, 2007, the Native Nations Institute for Leadership, Management and Policy and Indigenous Peoples Law & Policy Program at the University of Arizona, hosted a roundtable forum on tribal sovereign immunity. Led by Harvard economist and anti-trust expert Joseph Kalt and Indian law professor and Tribal Court Chief Justice Robert Williams, the sovereign immunity forum coincided with the Economic Policy Summit that NCAI hosted in Phoenix. Tribal government and business leaders and tribal attorneys from throughout Indian Country, as well as BIA officials and executives from the private financial, construction and surety markets, participated in the forum.

The lively discussion moved from the arcane (e.g., the mysteries of calculating basis points on commercial loans to tribal governments), to the mundane (as one tribal leader recounted how a safe holding the tribe's gaming receipts fell through the floor of a double-wide trailer that once housed a tribal bank!). Even more importantly, there were passionate defenses of tribal sovereignty and amazing success stories of tribal economic development and diversification achieved through strategic decisions about when, where and how to make limited waivers of immunity and / or avoid asserting an immunity defense in court.

The dialogue made clear that when a tribal government waives sovereign immunity in limited fashion, or foregoes the assertion of the defense in litigation for policy reasons, that tribe is *exercising* its sovereignty – not abandoning it. Moreover, the participants remarked that unless tribal governments define the time, place, manner and limits for claims against them or tribal entities, the Congress or state, federal and even tribal court judges will take it upon themselves to waive, or outright do away with, the tribal immunity defense.

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In the end, the forum yielded the following proactive business steps and pre-litigation strategies and litigation alternatives to use, and protect, tribal immunity as a nation building tool for Indian Country.

Tribal Organization: Many tribes are organized under Section 16 and / or 17 of the Indian Reorganization Act of 1934 (IRA). Under Section 16, a tribe will have adopted a constitution and bylaws that set forth the tribe's governmental framework. A tribe may also be incorporated under Section 17 pursuant to a standard federal charter issued by the Secretary of Interior, ostensibly to divide its governmental and business activities.

So-called "IRA tribes" must cautiously appreciate the risk that courts could construe the "sue and be sued" language in Section 17 charters as a tribal immunity waiver and thus make tribal treasuries vulnerable to court judgments arising from Section 17 business activities. The Ninth Circuit Court of Appeals recently held that such language did operate to waive a tribal housing authority's immunity, in *Marceau v. Blackfeet Tribal Housing Authority*, 455 F.3d 974 (9th Cir. 2006).

Although the "sue and be sued" language at issue in *Marceau* reads slightly different than that in Section 17 charters, that case illustrates how courts can and will construe such federally-imposed, boilerplate language to

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allow suit against tribal sovereigns. Accordingly, IRA tribes should reconsider doing business under their Section 17 corporate charter in favor of pursuing economic development activities as a Section 16 (or other) entity.

Tribal Corporate Formation: The Washington Supreme Court recently explained that "a tribe may waive immunity by incorporating the enterprise under state law, rather than tribal law." *Wright v. CTEC*, 159 Wash.2d 108 (Wash. 2006). Tribes that do not yet have business formation codes should pass such tribal laws – another necessary tool to build for vibrant tribal and inter-tribal economies.

If it makes political and business sense for tribally owned enterprises to be incorporated under tribal law, tribes should form them under tribal rather than state law. In addition to cloaking tribally owned businesses with immunity, incorporating under tribal law could also shield tribal companies –especially those doing business off the reservation – with tribal regulatory protection, to the exclusion of state authority.

Tribal Legislative Intent: In a recent *Washington Law Review* article titled "Intent Matters: Assessing Sovereign Immunity for Tribal Entities," 82 Wash. L. Rev. 205 (2007), Greg Wong argues that courts err if they do not examine a tribe's intent to extend its sovereign immunity to, e.g., a tribal corporation or economic development agency, when analyzing such an entity's amenability to suit.

Courts, which examine the federal and state governments' intent to extend or deny immunity to a governmental entity, should likewise defer to tribal sovereign status by examining a tribe's intent when determining whether a tribal business entity stands immune from suit. In order to allow such judicial deference to tribal self-rule, tribes should pass resolutions that affirmatively declare tribal intent regarding whether or not their business entities should be afforded immunity protection.

Tribal Administrative Procedures Acts: One forum participant commented that tribal legislative actions should be challengeable by tribal members much like state and federal actions can be contested pursuant to administrative procedure acts, which operate to waive governmental immunity in limited fashion.

As both Professors Kalt and Williams explained, the doctrine of sovereign immunity originated in merry-old England, where the courts held that the King, who basically owned the courts, "could do no wrong." The notion that a tribal government could deny its own citizens a forum to hold that government accountable for its decisions (or omissions) seems foreign to indigenous legal traditions and the customs and traditions of many Indian tribes on this continent.

While the *Ex Parte Young* doctrine may allow already suit against tribal officers for equitable relief in limited instances, tribes should consider creating processes and affecting limited immunity waivers to allow heightened transparency and accountability in tribal policymaking.

Reservation Due Process: In *Wright*, the Washington State Supreme Court held that tribally owned corporations stand immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. Importantly, the court commented that the plaintiff in *Wright*, a non-Indian employee who sued for discrimination, was not left without a remedy; he "could have filed a grievance or sought

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entity. In these circumstances, the Commission dismissed the application after concluding that the present applicant was "not the entity that originally filed the application."

J. More Law, More Often

Between now and the opening of the filing window, the FCC plans to issue public notices that will provide more information about filing procedures and application requirements. Expect more point system rulings as well. There are approximately 22 remaining proceedings involving mutually exclusive applicants for NCE applicants. Twelve of these involve questions of international law, such as treaties with Canada or Mexico. The remaining ten involve contested cases. The rulings on these cases, as well as any petitions to deny the applications of tentative selectees, may shed additional light on the point system.

III. Conclusion

The complex regulatory process makes it essential to get legal and technical advice before filing an application for a new station; but the potential rewards are high. Resources and assistance are available through Native Public Media, and Native FM stations currently in operation can serve as models for a start-up station. If your tribe is interested, investigate this opportunity promptly. The filing window will open for only a brief period of time and may not open again soon.

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1 *See* www.nativepublicmedia.org.

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relief through the Tribal Employments Rights Office" or "recover[ed] damages under a policy of insurance."

Judges who are asked to dismiss a suit against a tribal government or corporate entity are primarily concerned about whether the tribal government would otherwise afford the plaintiff some form of due process of law – i.e., "constitutional rights to access to the courts and to trial by jury." *Seminole Tribe of Florida v. McCor, 903 So. 2d 353 (Fla. 2d Ct. App. 2005).* Thus, tribes should consider promulgating and following employment laws that confer employees' grievance rights and perhaps even allow them to seek limited redress (e.g., equitable relief such as reinstatement) in tribal administrative and/or judicial forums.

Tribal Tort Claims Laws: For much the same reason, tribes should also enact tribal tort claims acts to ensure that people who are injured on the reservation have an opportunity to be made whole. Again, sovereign immunity is a governmental power to define the time, place, manner and limits for any suit against the sovereign, and waiving immunity in limited form is an exercise – not a waiver – of sovereignty.

Tribes like the Colville, Tulalip and Quinault Nations have crafted laws that allow a plaintiff who can prove that he or she was actually injured to recover damages through tribal legal processes, up to certain available liability insurance proceeds. Such tribes have exercised their sovereignty to define the terms under which they will allow redress to injured people – rather than allowing non-tribal courts or Congress to do so.

Tribal Liability Insurance Procurement: As explained in a recent *Indian Law Newsletter* article I co-authored with Debora Juarez, the insurance industry has no problem with taking gross advantage of tribal governments, if tribes let them. Standard form tribal insurance policies may not even provide tribes legal defense to tort claims. So what then is the essential benefit of the insurance bargain?

Those same policies likely disallow tribes from selecting legal counsel with expertise in federal Indian and tribal law to defend and advise them about the types of sovereignty issues and immunity alternatives discussed in this piece. In addition, those policies may allow an insurer to assert a tribe's immunity from suit without tribal consent, or deny coverage to the tribal insured if the tribe decides for policy reasons against asserting immunity as a defense to suit.

What's more, arbitration language in the policies may operate to divest a tribe's justice system of jurisdiction, and waive tribal immunity from countersuit under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411(2001), in the event the tribe must sue its insurer for insurance defense and/or indemnification.

And, those policies may not provide a self-governance or "638" tribe any private coverage if the tribe is "eligible" for defense by the U.S. Department of Justice pursuant to 1990 amendments to the federal self-determination act. Under "638 contracts," the U.S. funds tribal governmental programs that it would otherwise provide tribes, and must defend 638 tribes from tort claims arising from those programs (as further discussed below). But, with the Bush administration unrelenting in its refusal to defend tribes from 638-related claims, such policies could leave tribes without any private insurance protection as well.

For these reasons, senior tribal leadership and tribal lawyers – not just mid-level tribal staff – must take an active role in insurance procurement and tort claims handling for tribal governments and enterprises.

Alternative Dispute Resolution (ADR): Generally speaking, in commercial dealing tribes prefer that any dispute arising from the deal be heard in tribal court, while tribal business partners prefer state court as the forum for any such dispute. Binding arbitration, with appropriate enforcement of any arbitration award in tribal and/or state court, has become a popular compromise in major tribal business dealings.

While arbitration language likely operates to waive tribal immunity under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411(2001), vesting jurisdiction in a private arbitration panel eliminates the possibility that a tribe's sovereignty, immunity or jurisdiction would be adjudicated – or eroded – by a court.

Also, when faced with lawsuits not subject to mandatory arbitration, tribal governments could propose arbitration as an alternative mode of dispute resolution and consent to arbitrate a matter on the merits (a legal strategy discussed below). Yakama Nation leaders have a saying: "We don't put our treaty on trial." ADR contract language is one way to enforce tribal business rights and allow redress for tribal business partners, while keeping your sovereignty out of trial.

Federal Tort Claims Act Tenders: Under self-governance agreements called "638 contracts" (named after P.L. 93-638), the federal government funds tribal governmental programs that the U.S. would otherwise provide tribes in fulfillment of its trust responsibility. A 1990 amendment to the federal self-determination act provides 638 tribes protection under the Federal Tort Claims Act (FTCA) for claims resulting from tortious acts or omissions arising from their performance of self-governance contractual functions.

Importantly, the U.S. Department of Justice must defend 638-related tort lawsuits against self-governance tribal defendants, including having any tribal defendants replaced by the U.S. as the defendant to the lawsuit. Assuming the current federal government honors its legal, contractual and trust obligations to defend self-governance tribes, FTCA claim procedures help take tribal sovereignty and immunity out of the legal firing line.

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If the U.S. does not keep its promise to a 638 tribe, that tribe, if backed by proper liability insurance, could compel its carrier to underwrite a lawsuit in federal court against the federal government to compel it to defend and indemnify the tribe. Such a tactic would be reasonably related to the defense of the underlying tort lawsuit and thus should be covered under the tribe's insurance policy.

Early Settlement: Settling rather than dismissing personal injury or contract claims with merit, especially those brought by non-Indians, may be wise for at least two reasons. First and foremost, asserting immunity as a bar to suits brought by reservation patrons is not "the best policy to promote a profitable business." *Seminole, supra.*

Simply put, non-Indians will not return to the reservation for business or fun – activities that fuel tribal economies – if they cannot feel assured that their rights will be protected in the event something goes wrong. A liability insurance policy that honors tribal sovereign decision-making would make such an alternative even easier as insurance proceeds – rather than tribal monies – would be available to help make the injured party whole.

Secondly, as Professor David Getches has observed: "While it is not always possible to prevent the [U.S. Supreme] Court from hearing an Indian case, the dismal record for tribes from the last fifteen years of Supreme Court cases should encourage tribes to settle." Since 2001, the High Court has been presented with 28 cases involving the tribal immunity doctrine.

Thankfully Indian Country has dodged those 28 bullets, as the Court has not taken any of those opportunities to abrogate tribal immunity. (Recall the Court not too long ago "suggest[ing] a need to abrogate tribal immunity, at least as an overarching rule" and "defer[ing] to the role Congress may wish to exercise in this important judgment." *Kiowa v. Manufacturing Technologies, 523 U.S. 751 (U.S. 1998)*).

But if Indian Country continues to roll the dice, our luck *will* run out. The next tribal immunity case that ends up before the conservative block of Justices, including Antoine Scalia and Clarence Thomas, will very likely sound the death knell for tribal immunity, which would leave tribal treasuries exposed to high stakes class action litigation and tribes vulnerable to state regulatory encroachment through the courts. Accordingly, tribes must heed Professor Getches' advice and carefully consider settling certain claims short of motion practice.

Consent to Suit on the Merits: Tribes should also consider litigating certain suits, such as frivolous tort claims, on the merits. Consistent with defining the time, place, manner and limits for any claims against a tribal or tribal entity, a tribe could consent to a particular court's jurisdiction and limit any potential judgment against it to available liability insurance proceeds. *See generally Collins v. Memorial Hospital of Sheridan Cnty.*, 521 P.2d 1339 (Wyo. 1974). Such a tactic could allow the tribe to dismiss or defeat the lawsuit on the merits, without putting tribal sovereignty or immunity on trial.

That is precisely how the Muckleshoot Tribe recently defeated a lawsuit. In *Townsend v. Muckleshoot Indian Tribe*, the Tribe answered a state court civil complaint arising from a construction project, explaining: "As a matter of policy, the Tribe has determined to not assert its immunity to bar resolution of personal injury or property damage claims that are covered by and within the coverage limits of its liability insurance." 137 Wash. App. 1002 (Wash. App. 2007). (Again, you can see the importance of a strong liability insurance policy.) The Tribe then convinced the state court that plaintiffs could not prove their case as a matter of law and accordingly, the a summary judgment dismissal was entered in favor of the tribe. All the while, the tribe never allowed its sovereign immunity to be scrutinized or indicted by the state judiciary.

Indian people do not say or express "goodbye." We say "see you next time." Let's do what we can to avoid waiving goodbye to tribal immunity so Indian Country will have its protection next time – perhaps when we need it the most.

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not in control. Therefore, the Tribe's summary judgment victory stood.

While the second issue in the case certainly provided the Court of Appeals with an easy, non-controversial way to decide the case, the Court of Appeals missed an opportunity to address the scope of a limited waiver of sovereign immunity for personal injury in construction contracts on Tribal land. The Court of Appeals also missed an opportunity to address whether WISHA applied because of the language in the contract and in the Tribe's Answer to the Complaint. Such a decision would have assisted contractors and Tribes in drafting future contracts to make clear agreements regarding worker injury.

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