Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check

By Padraic I. McCoy

PHOTO: GRAN QUIVERA, SALINAS PUEBLO MISSIONS NATIONAL MONUMENT, NEW MEXICO. BY LAWRENCE R. BACA.

Federal and state governments in the United States enjoy sovereign immunity from suit, although the doctrine has been the subject of increasing attack. Historically, sovereign immunity has been routed in deference to the sovereign, in protecting government resources, and in leaving a long-recognized doctrine alone, or at least leaving it to the legislative branch. Where do these rationales and attacks fit with respect to tribal sovereign immunity from suit and with respect to tribal commercial activities? Should Indian tribes continue to be immune from suit when harm arises over their "nontraditional" business endeavors? What have the courts said? What still makes sense modernly, especially considering the competing policy concerns of redress for injured parties and express federal support for tribal self-determination and strong tribal governments?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
—Chief Justice John Marshall (1803), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

A principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.
—U.S. Congress (1988), The Indian Gaming Regulatory Act, 25 U.S.C. § 2701(4)

It is a fundamental premise of the Western legal tradition that every person should be liable for his or her harmful conduct. Chief Justice Marshall's quote expresses this long-held, societal value. Accordingly, it might seem unjust that a company like Fall Tee Construction should escape liability if the fence it builds tumbles over because of a construction defect, then strikes and injures an innocent passerby, or that *Daily Planet News* could, without penalty, abandon its obligations under a long-standing purchasing agreement, resulting in millions of dollars in damages to the faultless Paper Supply Co.

What if these businesses were *government*-owned? Should liability turn on whether injuries are caused by a private actor or a public one—whether the harm is caused by the operation of transport ferries owned by New York and New Jersey's Port Authority (an agency run by two states) or by federally owned operations like Amtrak or the U.S. Postal Service, or by the California State Lottery? Many examples exist of government-owned business enterprises.[1] Indeed, the idea of a government—or an entity owned by a government—engaging in commercial or profit-making activity is peculiar. After all, governments traditionally have raised revenues to support operations and programs by imposing all sorts of taxes and other charges and by issuing debt (for example, government bonds), which gets repaid with tax revenues.

Nevertheless, federal, state, and many local governments in the United States enjoy immunity from suit—sovereign immunity, as it has been called. Technically speaking, sovereign immunity deprives courts of subject-matter jurisdiction. Thus, a person either cannot sue a government or a government-owned enterprise if the entity's immunity is fully intact or, when a waiver has been given, a person can only sue the alleged at-fault entity to the extent of the waiver. In reality, many governments have chosen to waive their protection from suit—but usually with significant limitations. For example, in 1948, the United States waived its immunity as to certain tort claims (not contract claims) when the Federal Tort Claims Act was passed[2] but held back claims over "discretionary" functions and duties[3] and a number of intentional torts.[4] The U.S. Supreme Court has also limited the act's scope in military cases.[5] Colorado has waived its immunity as to certain tort actions (not contract actions), such as the operation of motor vehicles by state employees (emergency vehicles are excluded), the operation of a public hospital or correctional facility (incarcerated persons are excluded), or a dangerous condition in a public building or on certain public roads.[6] The Colorado statute contains harsh deadlines and limits, such as requiring a jurisdiction-killing 180-day notice and setting a maximum recovery for a single person at $150,000 for a single occurrence. And in the Foreign Sovereign Immunity Act, Congress ended the sovereign immunity of foreign nations as to commercial activity carried on within the United States.[7]

But what about *tribal* governments in the United States? Should the same immunity that applies to the United States or the individual states be available to Indian tribal governments? Should sovereign immunity depend on the location of the alleged harm (on- or off-reservation) or on the nature of the activity giving rise to the harm (tort or contract)? An important question centers on the special—and, indeed, unique—legal status of Indian tribes in the United States as well as the federal government's explicit federal policy of supporting tribal governments and tribal economies. The United States has more than 560 Indian tribes, which are counted as "domestic dependent nations"[8] and possess sovereignty. And every tribal government must address, at varying levels and degrees, the same basic issues every other government must address: housing, transportation, welfare, law enforcement, schools, health care, and other concerns. Like other governments, tribal governments enjoy sovereign immunity from suit—although the application of sovereign immunity to a tribe's businesses activities has been called into question.

Before moving on, it's important to understand the concept of tribal governments engaging in "commercial" activities. Indian tribes engage in "profit-making" activities—both on and off the reservation—not to make profits that flow to owners or shareholders but to generate revenues to support operations and programs run by the tribal government. In fact, federally recognized tribes are true governments that, like other governments, have no owners or equity-holders. Even though tribes have the legal authority to impose taxes on certain persons and businesses inside their trust lands and reservations, typically tribes do not exercise this power to any great extent. After all, tribes generally try to attract businesses to the reservation, not repel them by adding a tribal tax on top of applicable federal and state taxes. As noted, most governments generate required revenues by collecting taxes, whereas Indian tribes generate revenues either through federal grants and programs or—more modernly—through the ownership and operation of commercial enterprises (for example, timber, cattle, gaming, tobacco operations, and so forth). Tribal governments also issue debt but repay it with revenues generated from commercial activities.

The dedication of commercially generated revenues for government or public purposes is codified in some cases. For instance, with respect to gaming (casinos) operated by tribal governments, Congress requires the net revenues from such activity to be used only "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations

of local government agencies."[9] In short, a tribe's commercial activities are rarely purely commercial, because the revenues generated from such activities flow to the tribal government to support government operations, programs, and the people. In some cases, federal law requires these revenues to do flow to these recipients.

Like other governments, tribes waive their sovereign immunity, and they do so with increasing frequency. Although no overarching statute imposes the requirement, many tribal leaders and advisers have concluded that tribes are effectively barred from entering into large construction contracts or from financing agreements, for example, without immunity waivers that allow an aggrieved party access to a court or arbitration. The size, scope, and application of the waiver; the forum permitted to adjudicate a dispute; and the substantive law governing the matter—all of these are subject to negotiation between the parties. For tort matters, nothing prevents an injured party from petitioning a tribe for a limited waiver after the fact in order to allow the party some avenue of recourse—similar to the writ of petition under English law.

This article examines the application of sovereign immunity to tribally owned business enterprises and tries to answer the following questions: Does the doctrine make sense policywise. What have the courts said about sovereign immunity? The discussion does not cover the related topics of when a particular fact or contract provision triggers an effective waiver (the cases involving the "sued and be sued" clause) or the scope of a waiver (whether it covers enforcement subpoenas).[10] This article also tries to avoid the topic of exemption versus immunity (when a tribe or tribal business is subject to a particular law as opposed to when a person is able to enforce that law in the courts), even though these certainly are significant issues in Indian country. Nor is this article intended to be a comprehensive review or list of all relevant cases; instead, it offers a limited discussion of select cases in order to provide a picture of the topic as a whole.

Finally, this article expressly does not aim to be a defense of governmental immunity in general. Indeed, like many controversial topics in the law, there are solid arguments on both sides, and well-reputed scholars have argued persuasively against the idea of federal and state government immunity in reasonably convincing fashion. Not so subtly, Professor Erwin Chemerinsky has argued that "[s]overeign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law."[11] Despite many other well-crafted legal arguments, we are left to ask whether there isn't something that provokes fear about subjecting our already overworked and undercapitalized governance structures (especially tribal ones) to the costly and resource-depleting process of litigation?

General Rationales for and Against Sovereign Immunity

Generally, the following five rationales are used or cited either to support sovereign immunity or at least to punt the issue and refrain from overturning it:

- The king can do no wrong (taken from English law)—a problematic notion under the American form of government and the U.S. Constitution.
- Protecting governments from suit is a natural consequence of a sovereign's autonomous status.
- It is important to protect government resources.
- Sovereign immunity is an established doctrine.
- As such, sovereign immunity is essentially a political question and only Congress should alter or do away with it.

Of these, the latter three rationales seem to be the most favored, with the need to protect government resources and leaving the issue to Congress the clear modern-day winners.

In his article published in 2001, Chemerinsky identified six rationales used to support the doctrine:

- the need to protect government treasuries;
- separation of powers (that is, not allowing the judiciary too much power to override executive actions);
- the absence of authority for suing the government (Justice Holmes maintained that liability doesn't exist except where the law provides for it[12]);
- the existence of adequate alternative remedies (such as *Ex Parte Young* suits against government officials);
- the importance of "curbing bureaucratic power" by decreasing the power of unelected officials vis-à-vis elected officials[13] (a new rationale); and
- tradition (according to Chemerinsky, probably the "strongest argument").

Chemerinsky's main bone of contention with government immunity is that it finds no support in the Constitution and is offensive to it. Chemerinsky believes that sovereign immunity works against the main goals of tort law in the American system: to compensate victims for harm befallen to them and to deter future such wrongdoing. However, if these are the principal complaints of those who find the doctrine so offensive, how do they deal with the problem of suits against governments also involving non-tort injuries, such as breaches of contract and questions related to the application of the law? (For example, does the Americans with Disabilities Act apply to tribes?) Chemerinsky also bases his arguments against immunity for "all" governments largely on cases dealing with the sovereign immunity of states, although that doctrine is obviously tied in to the 11th Amendment and has a unique history and requires its own analytical approach.

My main dispute with overarching arguments against immunity for all governments, like the one Chemerinsky skillfully developed, is that they disregard sometimes important differences in the various governments within our system. The government is not a monolith; the United States has governments at many levels—federal, state, local (that is, counties, cities, towns, villages, water districts, airport authorities, and so forth), and Indian tribal governments. Each of those is made up of different branches—executive, legislative, and judicial—but not always. Many tribal governments have three branches of government, but many

Many tribal governments are small and have minuscule budgets that could be wiped out by one lawsuit—even a frivolous one—shutting down the government, ceasing operations, and disabling essential services for tribal members and their families. In comparison, a money judgment rendered against local governments—such as cities and counties—in a small state might be enforceable against the state treasury of the local government. This is not the case for tribal governments, which are independent "separate sovereigns" with no parent government to look to for the enforcement of money judgments.

do not. A popular form of government in Indian country today is a two-branch form of government, with the tribe's governing body (sometimes called a tribal council) serving as the tribe's executive *and* legislative branches. In some tribes, one body fulfills all the government's executive, legislative, and judicial functions.

Moreover, such arguments are inevitably incomplete when discussing the application of sovereign immunity to Indian tribes, especially their commercial activities. After all, the United States has repeatedly announced, as a formalized federal policy, its goal of supporting tribal self-government and economic development. In the 1988 Indian Gaming Regulatory Act, Congress said that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[14] This goal may be difficult to support if the courthouse doors are thrown open and tribal businesses are generally made subject to suit.

A related and practical point is that many tribal governments are small and have minuscule budgets that could be wiped out by one lawsuit—even a frivolous one—shutting down the government, ceasing operations, and disabling essential services for tribal members and their families. In comparison, a money judgment rendered against local governments—such as cities and counties—in a small state might be enforceable against the state treasury of the local government. This is not the case for tribal governments, which are independent "separate sovereigns" with no parent government to look to for the enforcement of money judgments.

In short, generalized philosophical or constitutional arguments against governmental sovereign immunity may not apply to business enterprises operated by tribes. The application of sovereign immunity to a tribe's commercial activities should be considered on its own.

Tribal Sovereign Immunity in the Courts

Tribal sovereign immunity arose, as the U.S. Supreme Court noted, "almost by accident."[15] According to Justice Kennedy in *Kiowa Tribe v. Manufacturing Tech.*, in the 1919 case of *Turner v. United States*, the Supreme Court essentially assumed, for the sake of its discussion, the existence of the Creek Nation's immunity from suit. It was not, according to Kennedy, a "reasoned statement of doctrine."[16]

Nevertheless, tribal sovereign immunity has been a well-settled feature of the legal landscape surrounding Indian tribes for nearly 100 years. Moreover, tribal governments are governments much like any other, and it would seem inequitable to apply the doctrine to some governments and not to others—whatever their origins. After all, equality under the law is also an overriding concern of the Western legal tradition.

So, when and where does tribal sovereign immunity apply? And what are the outer limits of the doctrine? Generally, the Supreme Court has explained, an Indian tribe may be sued only when the tribe itself has given the particular party an effective waiver of its immunity or when Congress has done the same.[17] The doctrine does not shield tribes from suits brought by the United States.[18] The immunity applies to the on- and off-reservation activities of a tribe[19] and has been held to apply to the tribe itself as well as to tribal agencies[20] and even intertribal bodies.[21] Sovereign immunity applies to money damages as well as equitable relief[22] and is effective in federal and state courts.[23] The Supreme Court has determined that a tribe's immunity from suit does not protect a tribal officer against suit for equitable relief.[24] However, the Ninth and Tenth Circuits have held that a tribe's immunity does cover a tribal official if that person acted within the scope of his or her authority and the relief sought would run against the tribe, although contrary authority exists on this point.[25]

A more important point here is the concern about whether the doctrine applies to the *commercial* activities of an Indian tribe. Since at least 1991, tribal immunity in that context—especially off-reservation commercial activities—has been under scrutiny in the courts. (The doctrine as applied to purely tribal "government" activity seems to enjoy some safety—at least for the time being)

Oklahoma Tax Commission

In 1991, the U.S. Supreme Court addressed Oklahoma's attack on tribal sovereign immunity in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, [26] in which the Potawatomi Tribe sued the state over the state's proposed assessment of taxes on the tribe's sale of cigarettes on tribal trust land. The state argued that "tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in this context."[27] Oklahoma maintained that the doctrine should be applied

only to tribal courts and to internal tribal affairs, because "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws" (in that case, tax laws).[28] Writing for the Court, Chief Justice Rehnquist rejected the state's argument—to a certain extent—and noted that tribal sovereign immunity has been a fixture for many years and has been upheld in numerous cases. He also looked to Congress' consistent support of the doctrine in various acts, which, according to the chief justice, reflect "Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.'"[29] Rehnquist also did not accept the state's argument that, whatever its longer-term viability, the doctrine should not apply to this particular case related to taxes, because the tribe's cigarette sales were occurring on tribal trust lands and not on an Indian "reservation." Rehnquist rejected that position by refusing to draw a line between trust lands and formal reservations for these purposes. He did not refuse the state's argument on the basis that the location of the activity didn't matter, however; his approach suggests that location may matter.

Agreeing with the state's argument, Justice Stevens' concurrence pulls no punches and states in its first utterance that "the doctrine of sovereign immunity is founded upon an anachronistic fiction."[30] Moreover, his comments aren't limited to *tribal* sovereign immunity. "In my opinion," he wrote, "all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct." He admitted, however, that the sovereign immunity of tribes is "an established part of our law."[31] Justice Stevens' position still raises two uncertainties. First, referring to the Foreign Sovereign Immunity Act, he questioned whether the rule "extends to cases arising from a tribe's conduct of commercial activity outside its territory."[32] The act says that foreign states "shall not be immune" from U.S. federal or state court jurisdiction when the action is based on a "commercial activity" carried on inside the United States by the foreign state. Of course, Indian tribes are "domestic dependent nations" and not "foreign states";[33] therefore, the Foreign Sovereign Immunity Act does not apply to tribes. The act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[34] Justice Stevens' second point that raises uncertainties is his question about the doctrine's application to claims for prospective equitable relief against a tribe—an exception that, according to Stevens, the majority implicitly acknowledged.

Kiowa Tribe of Oklahoma

In 1998, seven years after *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, tribal sovereign immunity in the commercial context again came under attack—this time more directly and more vigorously than in previous cases. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, the Supreme Court addressed the enforceability of a note entered into between the Kiowa Industrial Development Corporation (a tribal entity) and Manufacturing Technologies Inc. (MTI). The tribal company defaulted on the note and MTI sued in state court. The state trial and appellate courts ruled for MTI, holding that tribes are subject to suit in state court for "breaches of contract involving off-reservation commercial conduct." Although the note appears to have been signed on tribal lands, it was delivered to MTI and the work was to be performed off the reservation.

Writing for the Court, Justice Kennedy challenged the Court's lukewarm endorsement of tribal sovereign immunity based on promoting economic development and self-sufficiency (which was rendered in the *Oklahoma Tax Commission* ruling). According to Kennedy, the Court's "rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."[35] Justice Kennedy continued his diatribe:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.[36]

Rounding out his assault, Kennedy referred to Congress' repeal of foreign sovereign immunity (as found in the Foreign Sovereign Immunity Act)—another judicially created doctrine.

In the end, however, Kennedy upheld tribal sovereign immunity—albeit begrudgingly—and not because it makes sense in his estimation. Rather, he explained, tribal immunity raises "competing policy concerns" and is a matter for Congress and Congress alone to "weigh and accommodate."[37] Although the Court has taken a lead in "drawing the bounds of tribal immunity," Kennedy said, only Congress should legislate on the matter, which it did in the past.[38]

Justices Stevens (his second go-round), Thomas, and Ginsburg filed a gloves-off dissent. First, they said, tribal immunity should fall because Indians generally are subject to nondiscriminatory state laws beyond reservation boundaries. Second, state courts should decide for themselves whether to "accord such immunity to Indian tribes as a matter of comity."[39] Third, they maintained that tribal immunity inappropriately confuses suits in the sovereign's *own courts*, which a sovereign can refuse to allow, with suits in the courts of another sovereign, which are subject to the second sovereign's law—one that might not support

the first sovereign's immunity.

Furthermore, the dissent argued that, prior to *Kiowa*, "in none of our cases have we applied the doctrine to purely off-reservation conduct."[40] The dissent alleged that the majority was "wrong" in saying it was just following precedent, because "we have simply never considered whether a tribe is immune from suit that has no meaningful nexus to the tribe's land or its sovereign functions."[41] The dissent described Kennedy's opinion as not merely supporting the doctrine's status quo but as extending it into new territory, which the dissent attacked on three grounds. (1) The Court's opinion announced a new rule of state power pre-emption and thus amounted to legislation. (2) "The rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the states, the federal government, and foreign nations."[42] (3) Tribal immunity is simply unfair—especially so for tort victims "who have no opportunity to negotiate for a waiver."[43]

It is beyond the scope of this article to respond to every attack on tribal immunity, but the states and the federal government do not enjoy a lesser immunity than do tribes. Rather, those government have decided, pursuant to their inherent power to do so, to waive their immunity from suit in certain circumstances, for certain remedies, and up to certain amounts, as discussed above, and have done so voluntarily. Presumably, the state and federal governments could undo those waivers and "restore" their immunity. Moreover, foreign nations provide an unhelpful comparison to Indian tribes; the former can do business anywhere in the world, in any one or more of the nearly 200 countries, while avoiding the United States, but Indian tribes cannot. Without forcing tribes oversees, tribes cannot avoid doing business in the United States or within a state's boundaries, especially considering the decimation of the Indian land base in the past two centuries.

As to tort victims, according to Chief Justice Rehnquist in *Oklahoma Tax Commission*, "[t]here is no doubt that sovereign immunity bars the [plaintiff] from pursuing the most efficient remedy," but that doesn't mean that "it lacks any adequate alternatives."[44] An injured party may be able to sue the responsible individual personally or under a theory similar to the ruling in *Ex Parte Young*, or pursue its goals as against other potentially liable parties, or seek post-injury permission from the tribe to seek redress, or have the county in which the tribally owned businesses enterprise is located negotiate a limited waiver for certain injuries.

Tribal Sovereign Immunity Since Kiowa

Although the Supreme Court cast its bait to the legislative branch in *Kiowa*, Congress has not bitten. Tribal sovereign immunity remains fairly intact as a judicially created doctrine subject to interpretation and definition by the courts. And the courts have not been silent on the issue. *Kiowa* has been discussed, mentioned, or cited in more than 320 federal, state, and administrative cases. As one might expect, there has not been universally warm acceptance of the decision, even when there has been compliance with it.

Just over a year after *Kiowa*, in a contract dispute case, *TTEA v. Ysleta Del Sur Pueblo*, the Fifth Circuit drew a line by declaring that Indian tribes have immunity "from an award of damages only." Citing Justice Stevens' concurrence in *Oklahoma Tax Commission*, the court ruled that tribal immunity might not extend to claims for prospective equitable remedies.[45] The Fifth Circuit also compared tribal immunity to *state* sovereign immunity, which fails to prohibit equitable relief against state officials under *Ex Parte Young,* and opined that tribal immunity should not extend further than state immunity. The claims in *TTEA*, however, appear to have been brought against both tribal court judges and the tribe itself, and the Fifth Circuit's decision is not always clear about which of those two parties to which the court is referring. The decision also sets the Fifth Circuit alone in its opinion.[46]

In 2002, the Northern District of California held in *Hollynn D'LiL v. Cher-Ae Heights* that federal civil rights must trump tribal immunity. In that case, a tribe owned an off-reservation inn that allegedly failed to comply with the Americans with Disabilities Act. The court held, first, that as a federal statute of general applicability,[47] the ADA and its public accommodation provisions govern the tribe. However, citing *Kiowa*, the court also recognized the important distinction between whether a tribe is *subject* to a particular law and—as far as sovereign immunity is concerned—a person's right to *enforce* the law (exemption versus immunity). Even so, the court said *Kiowa* is limited and "does not extend the doctrine of tribal sovereign immunity to all non-contractual off-reservation conduct."[48]

Recent Support for Kiowa

In *Cook v. Avi Casino Enterprises Inc.*,[49] the Ninth Circuit upheld a tribal corporation's immunity for an on-reservation tort injury. In this case, a drunken driver, an employee of the tribe's Avi Casino Enterprises Inc. (ACE), injured Cook while on the Fort Mojave reservation. Cook, who suffered catastrophic injuries, including the loss of a leg, and incurred more than $1 million in medical expenses, sued the tribe alleging negligence and dram shop liability. The tribe argued that the federal court lacked jurisdiction because the tribe had not waived sovereign immunity. The plaintiff argued that "tribal corporations competing in the economic mainstream should not enjoy the same immunity from suit given to Indian tribes themselves."[50] Furthermore, the plaintiff claimed that it was "unfair to allow tribes to create commercial corporations that can compete in the marketplace while enjoying immunity from the legal liability that all other corporations must face, and … that granting tribal corporations immunity is unnecessary to protect tribal autonomy and self-government."[51] As in *Kiowa*, although the Ninth Circuit was sympathetic to the plaintiff's arguments, the court held that Congress alone, and not the courts, should decide whether tribal corporations should be immune from liability.

In upholding immunity, the court noted the close nexus between the tribe and its corporation: (1) ACE was created under a tribal government ordinance, not as a corporation

under state or federal law. (2) The tribe wholly owned and managed ACE. (3) The casino's economic benefits were required to inure to the tribe. ACE's articles of incorporation required all capital surplus from the casino to be deposited into the tribe's general treasury account. Similarly, as ACE's sole shareholder, the tribe was required to enjoy all the benefits of an increase in the value of the casino. It is not known how the Ninth Circuit would have ruled if this close relationship between the tribe and the corporation had not existed.

Moreover, the plaintiff sued certain employee defendants in name but sought recovery from the tribe as vicariously liable for its employees' actions. The court rejected the appeal to tribal revenues reasoning that it had extended federal sovereign immunity to federal employees previously and that "[t]he principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity."[52]

In another case, an on-reservation contract dispute, *Native American Distributing v. Seneca-Cayuga Tobacco Company*, the Tenth Circuit upheld tribal sovereign immunity for a tribally owned tobacco products manufacturer.[53] The plaintiff had entered into a contract with the company to distribute tobacco products made by the company. At the time the parties signed the agreement, the plaintiff's representative (a member of the tribe) had asked whether he should seek an immunity waiver to ensure the enforceability of the contract. Company officials responded in the negative, saying the company was created under the tribe's corporate charter (a false statement) and, therefore, was subject to the charter's "sue-and-be-sued" provision. Four years later, the relationship soured and the plaintiff sued the company and certain tribal officials for breach of contract. The company moved to dismiss the claims, arguing that the "sue-and-be-sued" clause did not operate as an automatic waiver and, even if it did, it was irrelevant because the company was created under the tribal government and not under its corporate charter.

In fact, the tobacco company was created as an "operating division" of the tribe and as a "tribal enterprise" to engage in "essential governmental functions." The trial court and the Tenth Circuit agreed that the company was a creature of the tribe, not of the corporate charter, and had been created to generate employment and revenues "for the tribe." Unlike the Ninth Circuit in *Cook*, the Tenth Circuit skipped such factors as the composition of the company's governing board and where company revenues were required to flow. Rather, the Tenth Circuit looked to the enabling documents that had established the entity. Like the Ninth Circuit, however, the Tenth Circuit echoed the Supreme Court's admonitions that only Congress can change the law in this area. In other words, until Congress acts, the law is that tribal sovereign immunity applies to tribes and tribal arms and to governmental as well as business enterprise functions of tribes.

As in *Cook*, the Tenth Circuit considered the portion of the suit against tribal employees involved in the failed deal. Much like the Ninth Circuit's inquiry into protecting tribal treasuries, the Tenth Circuit's approach was to identify the "real party in interest"—that is, if the plaintiff sought recovery from the officials in their individual capacity, then sovereign immunity shielded no one, but if the plaintiff sought recovery from the tribe's treasury, then sovereign immunity blocked the move. The court found the latter and barred that portion of the suit.

As to the "sue-and-be-sued" clause, courts have generally held that such clauses (which, in effect, grant a certain body the power to offer immunity waivers) do not themselves trigger a waiver.[54] In *Native American Distributing v. Seneca-Cayuga Tobacco Company,* the Tenth Circuit discussed the matter when doing so wasn't required. Arguably as dicta, the Tenth Circuit implicitly affirmed the trial court's determination that the "sue-and-be-sued" provision was an "unequivocal" waiver, because the tribe's attorney had failed to raise the issue on appeal, but the circuit court stopped short of expressing this as a rule in future cases.

Both the Ninth and Tenth Circuits upheld the application of tribal sovereign immunity to a tribe's business enterprises that were performing what some have called traditionally nongovernmental functions. And both courts noted that any change in the law in this area should come from Congress, not from the judiciary. However, in (reluctantly) protecting the current broad reach of tribal sovereign immunity, the Ninth and Tenth Circuits explained that a "sue-and-be-sued" provision of a corporate charter may, on its own, operate to waive sovereign immunity, even though such explanations weren't required to resolve the matters actually pending before those courts. Perhaps that finding sends a bit of a signal.

Final Thoughts

Sovereign immunity as applied to tribal commercial activities stands basically intact for the time being. But the post-*Kiowa* decisions reveal that courts apparently are growing increasingly uncomfortable with the concept and may be looking to new areas, such as "sue-and-be-sued" clauses, and drawing fine distinctions from *Kiowa*, to find a way around the seemingly harsh rule.

At a more general level, however, and certainly before any change in the law is considered, we must recognize a few basic truths. For one, although tribal sovereign immunity may share its origins with federal and state immunity, it has become its own doctrine and criticisms against federal and (especially) state immunity are not necessarily applicable to tribal immunity. The application of sovereign immunity to tribal governments and to government-owned enterprises, must stand—or fall—on its own.

Furthermore, the pairing of sovereign immunity and tribal commercial activity raises important and competing policy concerns. Giving aggrieved parties an avenue for redress is certainly important, but so is equal application of the law (other governments have decided waiver issues for themselves) and the U.S. government's explicit policy of supporting strong tribal governments and tribal econo-

mies. Because the revenues of tribal "commercial" activities are used—just like taxes to non-Indian governments (and citizens can't sue over taxes[55])—to support tribal governments, subjecting tribal businesses and commercial endeavors to the litigation process is the same as allowing plaintiffs access to the treasuries of tribal governments. **TFL**

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Endnotes

[1]Enterprises owned by the U.S. government include the following: Fannie Mae, Freddie Mac, Farmer Mac, Sallie Mae (formerly), National Railroad Passenger Corporation (Amtrak), Tennessee Valley Authority, Federal Deposit Insurance Corporation, Federal Crop Insurance Corporation, Pension Benefit Guaranty Corporation, Corporation for National and Community Service (Americorps), Federal Reserve, Legal Services Corporation, and many others.

[2]62 Stat. 982 (1948).

[3]28 U.S.C. § 2680(a).

[4]28 U.S.C. § 2680(h).

[5]*Feres v. United States*, 340 U.S. 135 (1950).

[6]The Colorado Government Immunity Act, C.R.S., Article 10, Title 24.

[7]28 U.S.C. § 1605(a)(2).

[8]*Cherokee v. Georgia*, 30 U.S. 1 (1831).

[9]25 U.S.C. § 2710(b)(2)(B).

[10]*See, e.g.*, *Colorado v. Cash Advance*, pending at the Colorado Supreme Court, Case No. 08SC639.

[11]Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1223 (2001).

[12]*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), discussed in Chemerinsky, *Against Sovereign Immunity* at 1219.

[13]Chemerinsky, *Against Sovereign Immunity* at 1222 (citing Roderick M. Hills Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 Stan. L. Rev. 1225 (2001)).

[14]25 U.S.C. § 2701(4).

[15]*Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751, 756 (1998).

[16]*Id.* at 757.

[17]*Id.* at 754.

[18]*EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001).

[19]*Kiowa* at 756.

[20]*Hagen v. Sisseton-Wahpeton Community College*, 205 F. 3d 1040 (8th Cir. 2000).

[21]*Taylor v. Alabama Intertribal Council,* 261 F.3d 1032 (11th Cir. 2001).

[22]*Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269 (9th Cir. 1991); *but see Hollynn D'Lil v. Cher-Ae Heights Indian Community*, No. C 01-1638, 2002 WL 33942761 (N.D. Cal. March 11, 2002) (holding that tribal sovereign immunity may be trumped by federal civil rights).

[23]*Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989).

[24]*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

[25]*See, e.g., Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *but see TTEA v. Ysleta Del Sur*, 181 F.3d 676, 680–81 (5th Cir. 1999).

[26]*Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

[27]*Id.* at 510.

[28]*Id.*

[29]*Id.*, citing *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987).

[30]*Id.* at 514.

[31]*Id.* at 515.

[32]*Id.*

[33]*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[34]28 U.S.C. § 1603(d).

[35]*Kiowa* at 757–58.

[36]*Id.* at 758 (internal citations omitted).

[37]*Id.* at 759.

[38]*Id.*

[39]*Id.* at 760.

[40]*Id.* at 764.

[41]*Id.*

[42]*Id.* at 765.

[43]*Id.* at 766.

[44]*Okla. Tax Comm'n* at 514.

[45]*TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999).

[46]*See, e.g., Hardin v. White Mtn. Apache*, 779 F.2d 476, 479 (9th Cir. 1985).

[47]*See Federal Power Comm'n v. Tuscarora*, 362 U.S. 120 (1960).

[48]*Id.* at *8.

[49]*Cook v. Avi Casino Enterprises Inc.*, 548 F.3d 718 (9th Cir. Nov. 14, 2008)

[50]*Id.* at 15391.

[51]*Id.*

[52]*Id.* at 15395.

[53]*Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d 1288 (10th Cir. Nov. 17, 2008).

[54]William Canby, American Indian Law at 111 (Nutshell, 2009, 5th ed.).

[55]*See Flast v. Cohen*, 392 U.S. 83 (1968).