DOING BUSINESS WITH INDIANS AND THE THREE "S"ES: SECRETARIAL APPROVAL, SOVEREIGN IMMUNITY, AND SUBJECT MATTER JURISDICTION

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Indian tribes and individuals are no longer economically isolated. They are increasingly involved in diverse economic activities, including operating on- and off-reservation enterprises, exporting reservation-produced products and services, and purchasing goods and services from off-reservation suppliers. The number and value of economic contracts between Indian and non-Indian enterprises are increasing rapidly. As with other commercial activities, transactions involving Indians and non-Indians have a profit motive. Legal costs, particularly litigation costs, erode or eliminate profit. While contracts with Indians are generally not different from contracts with other entities, they do raise some unique legal problems:

1. In some instances, particularly if Indian lands are involved, contracts must be approved by the Secretary of the Interior.

2. Many Indian enterprises are operated or controlled by tribal governments. Tribal governmental immunity extends to tribally owned or operated commercial activities.

3. When reservation-based events or activities are involved there can be substantial problems concerning what court has jurisdiction over the parties and subject matter.

The problems are unique but not insoluble. They must be addressed when a business transaction is initiated. While "normal" business legal problems can often be resolved after disagreements surface (given enough time and money), a failure to address the legal issues identified above usually cannot be cured after-the-fact—without regard to money or time. It is possible for non-Indian businesses to expend energy and money challenging a perceived "special" or "unfair" status of tribal businesses. That energy is undoubtedly wasted. It is more productive to acknowledge the tribes' position and work within that framework. This article discusses the unique legal considerations that must be addressed while negotiating contracts that involve Indian individuals and entities, or that affect land held by or for Indians. In particular, this article discusses the law relating to Department of Interior contract approval, tribal sovereign immunity and its waiver, and judicial jurisdiction to hear related

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litigation.

I. DEPARTMENT OF INTERIOR APPROVAL

Since 1872, contracts "relative to" Indian lands have been subject to the Secretary of the Interior's approval. In that year, Congress enacted the predecessor of 25 U.S.C. § 81, which reads in part:

> No agreement shall be made by any person with any tribe of Indians ... for the payment or delivery of any money or other thing of value ... or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands ... unless such contract or agreement be executed and approved as follows:
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> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
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> All contracts or agreements made in violation of this section shall be null and void.[1]

If Secretarial approval is required, no portion of the unapproved contract is enforceable, not even the part requiring that the tribe use its best efforts to obtain approval.[2] This rule applies even though approval was not obtained because Bureau of Indian Affairs officials opine that approval is not necessary.[3]

As discussed by the Court of Appeals for the Seventh Circuit, in one of the more-recent decisions concerning this statute, *Altheimer & Gray v. Sioux Manufacturing Corp.*,[4] a three-part inquiry is required to determine if Secretarial approval is necessary: (1) Is an Indian tribe one of the contracting parties? (2) Is the contract "relative to" Indian lands? (3) Was the contract approved by the Secretary of the Interior? In practice, there is seldom a factual dispute concerning whether Secretarial approval has been obtained.

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1. 25 U.S.C. § 81 (1988). In addition to the statute, some tribal constitutions require Secretarial approval of contracts. Most of those constitutional provisions result from a "model" constitution produced by the Department of the Interior in the mid-1930s after the enactment of the Indian Reorganization Act (48 Stat. 984, codified as amended at 25 U.S.C. §§ 461–79 (1988) (also known as the "Wheeler-Howard Act")). Those constitutional provisions are similar to the statute and would receive a similar interpretation. However, the language in some constitutions may be broader, requiring Secretarial approval in a greater number of instances. *See, e.g.*, [1968] Revised Constitution of the Jicarilla Apache Tribe, Art. XI, § 1(e), *quoted in* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134–135 (1982). That provision requires Secretarial approval of any tribal tax on nonmembers doing business on the reservation.

2. *See* Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed,* 487 U.S. 1247 (1988); A.K. Mgmt. Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); United States *ex rel.* Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co., 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed,* 789 F.2d 632 (8th Cir. 1986). The rule has been held to apply even to contracts between a tribe and a tribally chartered, non-profit management entity. Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987).

3. *See Barona Group*, 840 F.2d at 1404-05. In *Barona Group*, a bingo management contract was submitted to the local BIA office for approval. The Acting Superintendant responded with a letter stating that Secretarial approval was not required because Indian lands were not involved. The Ninth Circuit held that the erroneous administrative interpretation of the law did not estop the court from ruling the contract void, despite the fact that the court decisions supporting that conclusion were handed down after the administrative opinion was issued. *Id.*

4. 983 F.2d 803 (7th Cir. 1993), *cert. denied,* 114 S. Ct. 621 (1993).

A. Identity of Contracting Party

The identity of the contracting parties may present problems when considering the need for Secretarial approval. The statute only applies to contracts *with Indian tribes*, not with businesses that are only incidentally owned by Indian individuals or tribes. There are frequently questions concerning the status of tribally owned entities. In large part, those questions are identical to questions concerning what entities can properly claim sovereign immunity, an issue discussed in Part II. However, it should be noted that if the parties to a contract treat an Indian-owned entity and the related tribe as interchangeable, the court may treat the contract as being with an Indian tribe, even if that is not conclusively established as a matter of law.[5]

B. "Relative to" Indian Lands

The general rule applicable in determining if a particular contract is "relative to" Indian lands is that the statute requiring approval is to be interpreted liberally to effectuate its purpose of protecting Indians from unscrupulous non-Indians.[6] A contract that does not expressly deal with Indian land may still require Secretarial approval, depending on a number of factors. No one factor is dispositive. However, it is probably safe to say that Secretarial approval is required for any contract that limits tribal control of Indian land or transfers possession or control (even for a limited period) to a non-Indian.[7] A more difficult question arises if the contract contemplates activities on Indian lands but does not give control to the non-Indian party.

Altheimer & Gray v. Sioux Manufacturing Corp.[8] involved preliminary agreements between non-Indians and a tribal corporation concerning the commencement and operation of a manufacturing activity using an existing facility on the Devils Lake Sioux Reservation. After the initial contracts were signed, problems developed and the project was abandoned. A consultant to the non-Indian parties filed suit for its fees as a third-party beneficiary under the executed preliminary agreement. The defendant Indian entity contended that the agreement was not enforceable because Secretarial approval had not been obtained. After reviewing existing precedent, the Seventh Circuit stated:

> [I]t is clear that the following factors are important in determining whether a management contract is relative to Indian lands: 1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party have the exclusive right to operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?[9]

The contract under scrutiny included a number of provisions relating to

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5. *See* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993).
6. *See, e.g., In re* Sanborn, 148 U.S. 222 (1893); Wisconsin Winnebago Bus. Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985).
7. *See, e.g.*, Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement, 840 F.2d 1394 (9th Cir. 1987), *cert .dismissed,* 487 U.S. 1247 (1988); A.K. Mgmt. Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Wisconsin Winnebago Bus. Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985); United States *ex rel.* Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co., 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed,* 789 F.2d 632 (8th Cir. 1986).
8. *See supra* note 5.
9. *See supra* note 5, at 811.

the respective parties' control of the planned operations. The Seventh Circuit found that the non-Indian party was more than a mere consultant but could not unilaterally control the activity. In addition, the planned operation (production of latex medical products) did not derive any particular benefit from being located on Indian lands, in contrast to a bingo or gambling operation that could operate only on Indian lands. Therefore, the Seventh Circuit held, the contract was not "relative to" Indian lands and did not require Secretarial approval.[10]

The connection between the Indian land and the contract need not be obvious before Secretarial approval is required. In 1914, the Supreme Court held in *Green v. Menominee Tribe*[11] that the statute required approval of a tribe's contract to pay for equipment and supplies to be used by tribal members logging on tribal lands. The Court stated that the conclusion was so obvious that only reference to the statute's language was needed. *Green* is a relatively old decision but subsequent cases say nothing that would justify discounting it.

When negotiating a contract with an Indian entity, a non-Indian party must consider the possible need for Secretarial approval. When in doubt, approval should be obtained before significant investments are made.[12] Obtaining approval, of course, increases the time required and the costs of negotiating and establishing the contract. Those costs, however, are substantially less than the cost of not obtaining approval when it is needed, *i.e.*, the non-complying contract is void and all investments are lost.

II. TRIBAL SOVEREIGN IMMUNITY

A. The Basic Rules

In the seminal decision regarding tribal immunity, *United States v. U.S. Fidelity & Guaranty Co.*,[13] the sovereign immunity of Indian tribes was equated with that of the United States. Therefore, neither tribal governments, nor tribal officials acting within the scope of their authority,[14] are subject to nonconsensual suit in tribal, state, or federal court.

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10. *See Altheimer*, 983 F.2d at 812.

11. 233 U.S. 558 (1914).

12. An administrative opinion that no approval is necessary is, of course, subject to administrative "revision" and the risk of a differing court decision. *See* Barona Group of Capitan Grande Band v. American Mgmt. & Amusement, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988).

13. 309 U.S. 506 (1940). The United States filed suit on behalf of Indian tribes to recover royalties. A cross-claim against the tribes was filed, based on a prior judgment. The validity of the judgment on the cross-claim was conceded, up to the amount claimed by the tribes; the remainder of the judgment on the cross-claim was held void under the immunity doctrine. Later decisions reaffirming that immunity include Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) (nearly identical, procedurally, to *USF&G*), Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and Puyallup Tribe, Inc. v. Washington Department of Game, 433 U.S. 165 (1976) (*Puyallup III*).

14. Tribal officers acting beyond the scope of their authority are not immune from suit. Tribal officers act beyond the scope of their authority, *inter alia*, when they act to enforce tribal legislation that is beyond the scope of the tribe's authority. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908); Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993); Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir. 1984). The tribe remains immune even if tribal representatives or members lose immunity by acting beyond the scope of tribal authority. *See* Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94 (D.R.I. 1992).

In one respect particularly important to non-Indian businesses, tribal immunity is broader than the immunity enjoyed by other governments. Many states do not recognize, or have waived, immunity when the government is involved in a proprietary or commercial activity. The federal government's immunity is similarly limited.[15] Further, under the Foreign Sovereign Immunities Act[16] a foreign government is not immune from suit in federal or state court concerning that government's commercial activities.[17]

In contrast, tribal immunity extends to a tribe's commercial and proprietary activities.[18] In *In re Greene*,[19] the Ninth Circuit held that tribal immunity barred an adversary action by a bankruptcy trustee to recover a preference received by an enterprise wholly owned and managed by the Yakima Indian Nation. The Ninth Circuit acknowledged the problems created by tribal commercial activities outside the reservation. However, after reviewing state and Supreme Court decisions, the Ninth Circuit concluded that the Supreme Court's concern for promoting tribal economic opportunities required the conclusion that tribal sovereignty does not stop at the reservation's boundaries.[20]

Tribal immunity can be waived by the tribe or by Congress.[21] Cases decided before 1895 indicated that tribes could not waive immunity without prior congressional consent.[22] Over the years, the decisions have progressed from implying that tribes *might* be able to waive immunity regardless of

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15. *See, e.g.*, 28 U.S.C. §§ 1346(b), 2671-80 (1988).

16. 28 U.S.C. §§ 1602-11 (1988).

17. *See, e.g.*, De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985); Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393 (S.D. Fla. 1986). Justice Stevens, in his concurring opinion in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 514-16 (1991), questioned the propriety of recognizing tribal sovereign immunity when the tribe is involved in commercial activities outside its own territory, referring to the Foreign Sovereign Immunities Act's commercial activities exception.

18. *See, e.g., In re* Greene, 980 F.2d 590 (9th Cir. 1992) (concerning an action in bankruptcy to recover a preferential transfer of goods from a tribal economic enterprise); White Mountain Apache Indian Tribe v. Shelly, 107 Ariz. 4, 480 P.2d 654 (1971) (concerning alleged breach of contract by FATCO, a subordinate tribal enterprise); Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968) (concerning alleged tort by tribal enterprise).

19. 980 F.2d 590 (9th Cir. 1992).

20. *Id.* at 598. The Ninth Circuit's opinion, and Judge Rymer's concurring opinion, note the distinction between the sovereign immunity rules applied to tribes and those applied to state and foreign governments. Both opinions indicate that the rules applied to tribes are similar to the older, more protective rules that used to apply to other governments. Similar conclusions were reached by Justice Stevens in his concurring opinion in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 514-16 (1991).

21. Congress has this power because Indian tribes were legally categorized "domestic dependent nations" 160 years ago. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Through various mesne decisions, it is now established federal Indian law that Congress has plenary power over Indian affairs, up to and including the power to end the political existence of tribes. It has been held that Congress waived tribal immunity in, *inter alia*, the Resource Conservation and Recovery Act (Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989)), the Federal Hazardous Materials Transportation Act (Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993)), and the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725 (1988) (*see* Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94 (D.R.I. 1992)(dicta)). *See generally*, Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

22. *See* Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895), *discussed in* Atkinson v. Haldane, 569 P.2d 151, 159-60 (Alaska 1977).

congressional consent,[23] to assuming that unapproved tribal waiver was possible,[24] to holding that tribes have unrestricted independent authority to waive immunity.[25] However, any waiver must be "unequivocally expressed."[26] Consent will not be implied—even from acts that would support an implied waiver by a non-Indian government.[27] In addition, the waiver must be an act *of the government*; immunity "cannot be waived by officials."[28] Thus, to be effective, a tribal waiver of immunity must be an official act that unequivocally expresses consent to suit.

B. Tribal Business Entities

Tribal governments directly control or participate in commercial activities more frequently than other governments. Where Billings, Montana, or Rapid City, South Dakota, might use eminent domain and tax incentives to attract private enterprise, a tribal government might create a tribal agency or entity to operate similar enterprises.[29] Private companies lured to Rapid City remain private. In contrast, the tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.

Tribal immunity questions would be less perplexing if tribal activities were less diverse. That diversity is not necessarily inherent; in part it results from federal measures intended to increase Indian economic opportunities. In 1934, Congress adopted the "Indian Reorganization Act" (I.R.A.) authorizing the creation of tribal organizations, subject to Interior Department assistance and approval.[30] Section 16 of that Act[31] provides for the organization of tribal governments.[32] Section 17[33] provides for the organization of tribal business

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23. *See* Turner v. United States, 248 U.S. 354, 358 (1919).

24. *See* Puyallup Tribe, Inc. v. Washington Department of Game, 433 U.S. 165, 175 (1977) (Puyallup III).

25. *See, e.g.*, Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982); United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978); Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983).

26. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), *quoting* United States v. Testan, 424 U.S. 392, 399 (1976).

27. *See, e.g.*, American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) (signing promissory note providing for collection attorney's, mentioning remedies provided by law, and designating applicable law, not an express waiver of immunity); Red Lake Band of Chippewa Indians v. American Arbitration Ass'n, 8 INDIAN L. REP. (Am. Indian Law. Training Program) 3114 (D. Minn. 1981)(signatures of tribal chairman, secretary, and treasurer insufficient to constitute waiver by tribe). See *infra* part II.C.

28. United States v. U.S.F. & G., 309 U.S. 506, 513 (1940) (citing cases dealing with waiver of federal sovereign immunity); Hydrothermal Energy Corp. v. Ft. Bidwell Indian Community Council, 216 Cal. Rptr. 59 (Ct. App. 1985).

29. In many instances, direct government participation is the only way economic enterprises are brought to the reservation. Tribal government, by marshalling tribal assets and obtaining government loans and grants, has a better chance of fostering viable economic activities.

30. 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461–479) (1988).

31. 25 U.S.C. § 476 (1988 & Supp. 1992) [hereinafter "I.R.A. § 16 governments"].

32. Section 16, as amended, provides in part:

> (a) Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto.
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corporations.[34] Section 17 was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit.[35] However, I.R.A. § 16 governments are not precluded from engaging in economic activities; the existence of an I.R.A. § 17 corporation does not limit the related I.R.A. § 16 government's powers.[36]

Not all tribes are organized under the I.R.A.[37] A large percentage of the tribes that established an I.R.A. § 16 government also set up an I.R.A. § 17 corporation, usually contemporaneously. At least initially, almost all of the corporations adopted charters based on an Interior Department model. The model I.R.A. § 17 corporate charter included a "sue and be sued" clause, consistent with the 1934 congressional purpose. However, that charter also significantly limited the tribal property vulnerable to execution on judgments against the corporation.[38]

While the I.R.A. distinguished between tribal governments and tribal business corporations, the results in the field were different. In practice, the functions and features of I.R.A. § 16 governments and I.R.A. § 17 corporations were confused and commingled by both federal and tribal officials, to the extent that some tribes' governing bodies are called the Business Committee or Business Council.[39] The result has created problems.

(e) In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.

25 U.S.C. § 476 (1988 & Supp. 1992).

33. 25 U.S.C. § 477 (1988 & Supp. 1992) [hereinafter "I.R.A. § 17 corporations"].

34. Section 17, as amended, provides:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe. ... [s]uch charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477 (1988 & Supp. 1992).

35. *See Hearings on H.R. 7902*, 73d Cong., 2d Sess. 90-100 (1934); S. REP. NO. 1080, 73d Cong., 2d Sess. (1934).

36. *See* Solicitor, Dep't of Interior, *Timber as a Capital Asset of the Blackfeet Tribe*, Op. No. M-36545 (Dec. 16, 1958): "[T]he tribal municipal corporation [acting pursuant to section 16], *which may have as broad or broader powers as its business corporation counterpart* [acting pursuant to section 17]" *as quoted in* S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 384, 674 P.2d 1376, 1382 (Ct. App. 1984) (brackets and emphasis added by court).

37. The Navajo, the largest tribe in the United States, is not organized under the I.R.A. but its government has all of the same authorities and attributes. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985). Some smaller tribes, such as the Colville and Lummi in Washington State, are also not organized under the I.R.A. *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-54 (1980).

38. For text of the charter § 5(i) *see infra* part II.C.1.

39. *See, e.g.*, Stock West, Inc. v. Confederated Tribes of Colville Reservation, 873

In *Parker Drilling Co. v. Metlakatla Indian Community*,[40] the plaintiff's aircraft landed at the Annette Island Airport to obtain fuel from Annette Aviation. In the process, it struck a plowed snow bank and was damaged. Both the airport and fuel supplier were operated by the Metlakatla Indian Community. The Community had formed both an I.R.A. § 16 government and an I.R.A. § 17 corporation; the documents of the two organizations were approved by the Interior Department on the same date. The Community contended that while it never fully understood the distinction between sections 16 and 17, with respect to the airport and aircraft servicing it intended to act solely as an I.R.A. § 16 government. The documentary evidence showed that the professed confusion actually existed: official documents (including ones approved by the Interior Department) were internally inconsistent concerning which entity was involved.[41]

A similar confusion appears in *Morgan v. Colorado River Indian Tribe*.[42] In *Morgan*, the Arizona Supreme Court began its opinion by stating that the defendant tribe "is an organized Indian tribe under the laws of the United States. 25 U.S.C. §§ 476-477 [I.R.A. §§ 16-17]." The opinion uses "tribe" and "tribal corporation" essentially interchangeably and makes no apparent effort to determine which tribal entity was involved in the business enterprise out of which the lawsuit arose.[43] The court held that the tribe was immune, even though the relevant commercial enterprise was one that the 1934 Congress would apparently have expected to be operated by the I.R.A. § 17 corporation.

The confusion is not limited to I.R.A.-based organizations. Tribal governments (I.R.A. and non-I.R.A.) can authorize incorporation via special or general legislation and can administratively create bureaus to oversee economic activities. When any one of those occur, the question arises: Does the resulting entity have a distinct, nongovernmental character and therefore is not immune, or is it merely an administrative convenience, *i.e.*, a "subordinate [tribal] economic organization," and therefore immune? That question has frequently arisen in (but is not limited to) Arizona.

Courts have used a number of factors to determine if a particular organization is immune from suit.[44] Factors favoring a finding that an

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F.2d 1221 (9th Cir. 1989); Namekagon Development v. Bois Forte Reservation Housing Auth., 517 F.2d 508 (8th Cir. 1975); Leigh v. Blackfeet Tribe, Fed. Sec. L. Rep. (CCH) ¶ 95,436 (D. Mass. 1990); Kenai Oil & Gas v. Department of Interior, 522 F. Supp. 521 (D. Utah 1981), *aff'd and remanded*, 671 F.2d 383 (10th Cir. 1982).

40. 451 F. Supp. 1127 (D. Alaska 1978).

41. *Id.* at 1132–33, 1135–36. *See also* Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751 (Alaska 1992) (mentioning a similar same-day dual chartering).

42. 103 Ariz. 425, 443 P.2d 421 (1968).

43. In Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970), there also appears to be confusion, though its source is not obvious. The action was to quiet title to land potentially within the tribe's reservation, based upon a mid-1800s treaty. That seems to be a matter for an I.R.A. § 16 government. However, in rejecting the tribe's immunity claim, the court relied upon a waiver clause (§ 5(i)) in the tribe's I.R.A. § 17 corporate charter.

44. Dixon v. Picopa Const. Co., 160 Ariz. 251, 772 P.2d 1104 (1989); Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 149 Ariz. 524, 720 P.2d 499, *cert. denied*, 479 U.S. 987 (1986); White Mountain Apache Tribe v. Industrial Comm'n of Arizona, 144 Ariz. 129, 696 P.2d 223 (1985); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ct. App. 1984), *review denied* (1984); White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971); Morgan v. Colorado River Indian Tribe,

organization is a subordinate part of tribal government, include the following:

- The entity is organized under tribal constitution or laws (rather than federal law).
- The organization's purpose(s) are similar to a tribal government's (*e.g.*, promoting tribal welfare, alleviating unemployment, providing money for tribal programs).
- The organization's managing body is necessarily composed primarily of tribal officials (*e.g.*, organization's board is, by law, controlled by tribal council members).
- The tribe's governing body has the unrestricted power to dismiss members of the organization's governing body.
- The organization (and/or its governing body) "acts for the tribe" in managing organization's activities.
- The tribe is the legal owner of property used by the organization, with title held in tribe's name.
- The organization's administrative and/or accounting activities are controlled or exercised by tribal officials.
- The organization's activities take place primarily on the reservation.

No one item is determinative. For example, an entity may be a subordinate tribal organization even though its commercial activities take place off the reservation.[45]

In *White Mountain Apache Indian Tribe v. Shelly*,[46] the Arizona Supreme Court addressed the status of the Fort Apache Timber Company (FATCO). Magini brought suit in state court alleging that FATCO had breached a contract concerning on-reservation construction. The trial court ruled that FATCO was not immune from suit. On appeal, the Arizona Supreme Court stated that FATCO's amenity to suit depended on whether it was part of the tribe or a separate legal entity. The court found that the tribal constitution authorized the Tribal Council to create subordinate organizations for economic purposes. The court reviewed the Council-adopted FATCO Plan of Operation, which provided: that four of the five FATCO Board members were to be selected from the Tribal Council; that any Board member could be suspended by the Tribal Council; that the FATCO Board acted "for and on behalf of" the Tribe; that the Tribe was the legal owner of FATCO; that all FATCO purchases must be made through the Tribal Purchasing Agent; and that all FATCO-purchased property must be held in the name of the Tribe.[47] The court held that FATCO was,

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103 Ariz. 425, 443 P.2d 421 (1968). *See also* Ramey Const. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (approving the District Court's finding that the "Inn of the Mountain Gods" was a subordinate economic activity of the Mescalero Apache Tribe); Altheimer & Gray v. Sioux Mfg. Corp., 780 F. Supp. 504 (N.D. Ill. 1991), *rev'd on other grounds*, 983 F.2d 803 (7th Cir. 1993) (Sioux Mfg. Corp. a "governmental subdivision" of tribal government); Southwest Forest Industries v. Hupa (Hoopa) Timber Corp., 198 Cal. Rptr. 690 (Ct. App. 1984) (Hupa Timber a "subordinate entity" of tribal government).

45. *See, e.g., In re* Greene, 980 F.2d 590 (9th Cir. 1992); Morgan v. Colorado River Tribe, 103 Ariz. 425, 443 P.2d 421; Ramey Const. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982).

46. 107 Ariz. 4, 480 P.2d 654 (1971).

47. *Id.* at 6, 480 P.2d at 656.

therefore, a subordinate economic entity of the Tribe.[48]

In contrast, in *Dixon v. Picopa Construction Co.*,[49] based on the following facts, the Arizona Supreme Court held that Picopa was not immune from suit as a subordinate economic organization:

- Picopa was incorporated under a tribal general law, it was not merely an authorized tribal activity.
- Picopa's managing board was not required to be composed of, or controlled by, tribal officials.
- Picopa's declared purposes did not include governmental activities; it was organized to engage in construction activities for profit.
- Tribal officials did not have the power to arbitrarily remove Picopa officials.
- Picopa had broad corporate-type powers.
- Tribal property was insulated from Picopa's debts and obligations.
- Picopa's property was not held in the tribe's name.
- Liability insurance was purchased to cover Picopa's tort liabilities.
- The incident precipitating the decision resulted from an off-reservation activity.[50]

In business transactions, the distinction between an I.R.A. § 17 corporation, an I.R.A. § 16 government, and a "subordinate economic organization" may not be obvious to the casual observer. *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*[51] was an action brought by a non-Indian vendor alleging that the defendants had refused to pay for several thousand gallons of herbicide delivered to the reservation. The named defendants were three different, apparently intertwined, entities—the I.R.A. § 16 government, an I.R.A. § 17 corporation, and a third entity, Gila River Farms ("GRF"), which was the actual operating entity. The plaintiff claimed that GRF was an I.R.A. § 17 corporate activity. However, the documentary evidence showed that the § 17 corporation had never been active. The farming operations in which the debt was incurred were run by tribal officials; the GRF operation was created for administrative convenience. GRF's legal status was apparent from the tribal documents establishing GRF. However, actual operations did not reveal that status or give cause for investigation, GRF appeared to be an independent, separate entity. After reaching its conclusion that the case must be dismissed because of immunity, the Arizona Court of Appeals stated:

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48. *See also* S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ct. App. 1984) (concerning Gila River Farms, which operated as an extension of the tribe under a Plan of Operation similar to FATCO's).

49. 160 Ariz. 251, 772 P.2d 1104 (1989).

50. *Id.* One unstated factor that may have influenced the court was the non-Indian's notice. In the *White Mountain Apache v. Shelly* and *S. Unique* cases, the non-Indian was knowingly dealing with an Indian entity and in *Morgan v. Colorado Indian Tribe,* the plaintiff was voluntarily in the near vicinity of a known Indian-operated enterprise. In *Dixon,* the plaintiff was stopped at a traffic signal outside the reservation when she was rear-ended by a Picopa truck; she had not knowingly or voluntarily placed herself in a position to be affected by Indian-controlled activities.

51. 138 Ariz. 378, 674 P.2d 1376 (Ct. App. 1984).

> [B]usinesses that deal with Indian tribes do so at great financial risk. In this case appellant could only have protected itself by investigating the Community's [Tribe's] Constitution and Bylaws, by investigating GRF's Plan of Operation and by investigating the Indian Corporation's Corporate Charter. This investigation would have revealed the fact that GRF was not a subsidiary of the Indian [I.R.A. § 17] Corporation but, rather, was a subordinate economic organization of the Community acting under its [I.R.A. § 16] Constitution and Bylaws, and as such, was entitled to tribal immunity. Confronted with this fact, appellant only then could have taken steps to protect its interests.[52]

Just how protection could have been obtained is a separate, and difficult, question.

C. Waiver of Sovereign Immunity

To be effective, a waiver of tribal immunity must be "unequivocally expressed."[53] A waiver can be broad, or limited to a particular subject, court, or lawsuit. For example, in *Merrion v. Jicarilla Apache Tribe,*[54] oil and gas production companies holding leases on tribal mineral lands challenged a tribal severance on oil and gas production on Indian lands. The Tribe contended that it was immune from suit. The Tenth Circuit found that the ordinance adopting the contested tax specifically waived immunity with respect to actions in federal district court or tribal court to determine the validity of that tax. Because the suit met those requirements, the waiver was held effective.[55] In *Bank of Oklahoma v. Muscogee (Creek) Nation,*[56] one provision in a contract (¶ 3) stated that if a court action were commenced by either party "to obtain a declaration of right or duties" under the contract, that action must be brought in tribal court. In another provision (¶ 5) the tribe agreed to be subject to suit "to declare rights and duties under [the] contract". The Tenth Circuit held the waiver ambiguous except as to suits in tribal court, thus not allowing suit or crossclaim in federal court.[57]

1. General Waivers

Some corporate documents and tribal ordinances include a general provision allowing the entity to participate in litigation or consenting to suit. The model charter drafted by the Interior Department for I.R.A. § 17 corporations included in § 5(i):

> [The corporation has the power] [t]o sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said Tribe [I.R.A. § 16 government?], or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe

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52. *Id.* at 386–87, 674 P.2d at 1384–85.

53. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), *quoting* United States v. Testan, 424 U.S. 392, 399 (1976).

54. 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

55. *Id.* at 540 n.2 ("No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court."). *See also* Maryland Cas. Co. v. Citizens Nat'l Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966); Leigh v. Blackfeet Tribe, Fed. Sec. L. Rep. (CCH) ¶ 95,436 (D. Mass. 1990).

56. 972 F.2d 1166 (10th Cir. 1992).

57. *Id.* at 1171.

other than income or chattels specially pledged or assigned.[58]

While the charter's "sue and be sued" clause is a general waiver of immunity with respect to causes of action against the corporation, the assets potentially subject to execution are limited by the same clause. In *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*,[59] the contracting tribal entity was an I.R.A. § 17 corporation. The Seminole Tribe of Florida, Inc.'s corporate charter, a slightly edited version of § 5(i), provided:

> [The corporation has the power] To sue or be sued; but the grant or exercise of such power shall not be deemed a consent by the said corporation or the United States to the levy of any judgment, lien or attachment upon the property of the Seminole Tribe of Florida, Inc., other than income or chattels especially pledged or assigned.[60]

The plaintiff attempted to garnish a corporate bank account containing funds not expressly assigned to the project to which the judgment related. The Fifth Circuit held the funds were not garnishable, even to satisfy a valid judgment against the depositor-corporation.

Tribal entities ("subordinate economic entities") established for the specific purpose of participating in federal programs present similar problems. For some federal-tribal programs, federal regulations require express consent to suit, surety bonding, and insurance. The regulations do not, however, solve all the problems.

For example, Indian tribes are included in the entities that can qualify for federal housing aid.[61] Department of Housing and Urban Development (HUD) regulations require that a tribe create (by tribal ordinance approved by the Interior Department) a distinct entity known as an Indian Housing Authority.[62] The tribal ordinance provisions are essentially dictated by HUD regulations, including a provision concerning tribal immunity:

> The [Tribal] Council hereby gives its irrevocable consent to allowing the [Housing] Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.[63]

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58. Corporate Charter of Blackfeet Indian Reservation, ratified Aug. 15, 1936, *quoted in* Enterprise Elec. Co. v. Blackfeet Tribe of Indians, 353 F. Supp. 991, 992 n.1 (D. Mont. 1973). *See also* Leigh v. Blackfeet Tribe, No. 89-1568-Z, 1990 U.S. Dist. LEXIS 11026 (D. Mass. 1990); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 382, 674 P.2d 1376, 1380 (1984) (quoting the identical § 5(i) from the Gila River Pima-Maricopa Indian Community [corporation] charter); Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir. 1989) (same, Rosebud Sioux Tribe corporate charter); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143, 147 (8th Cir. 1970) (same, Omaha Tribe corporate charter). *Cf.* Contracts for the Employment of Managers of Indian Tribal Enterprises, 61 INTERIOR DEC. 8 (1952).

59. 361 F.2d 517 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966).

60. *Id.* at 521, *quoting* Seminole Tribe of Florida, Inc., Charter, Art. VI, § 7. This charter provision appears to alleviate some of the ambiguity caused by the use of "tribe" in the model charter.

61. 42 U.S.C. § 1437, *as amended by* Pub. L. No. 93-383, 88 Stat. 655 (1974).

62. *See* R.C. Hedreen Co. v. Crow Tribal Housing Auth., 521 F. Supp. 599, 605 (D. Mont. 1981) (citing 24 C.F.R. Part 805 [subsequently moved to Part 905]).

63. 24 C.F.R. Part 905, App. I to Part A, Art. V. ¶ 2 (1993). *See also* Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 149 Ariz. 524, 526 n.1, 720 P.2d 499, 501 n.1 (1986), *cert. denied*, 479 U.S. 987 (1986); R.C. Hedreen Co. v. Crow Tribal Housing Auth., 521 F. Supp.

Any comfort this provision may give is somewhat diminished by a later provision that Housing Authority property is not subject to judicial lien or execution based on a judgment against the Housing Authority.[64]

Housing Authorities may or may not be "subordinate economic enterprises"[65] but, even if they are, they are distinguishable from other tribal enterprises because of the federally mandated waiver. Despite the apparent adequacy of the express waiver, a number of immunity cases involving Indian Housing Authorities have been heard.[66] The "sue and be sued" clause appears to be both operative and permissive, *i.e.*, it gives tribal consent for suits by and against the Authority and gives the Authority permission to waive sovereign immunity in any contract. The courts' treatment of that provision has been inconsistent.

In *R.C. Hedreen Co. v. Crow Tribal Housing Authority*,[67] the U.S. District Court for Montana apparently assumed that the provision was self-executing, or the Housing Authority did not contend that an express contract waiver was also required. In contrast, in *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*,[68] the tribal Housing Authority apparently did not waive, or require waiver of, immunity for itself or a separate, subordinate tribal enterprise which it engaged as general contractor. Because of voluntary procedural actions by the plaintiff, the tribal entities were not before the Arizona Supreme Court when it made its decision in *Smith Plumbing*. The surety,[69] however, defended primarily on the basis that its principal (the general contractor subordinate tribal entity) was immune. In a related federal action, the tribe, as the alter-ego of the general contractor entity, claimed immunity.[70] There was, apparently, no assumption in the *Smith Plumbing* cases that the "sue and be sued" provision in the tribal ordinance was self-executing.

The Indian Self-Determination and Education Assistance Act[71] presents similar problems, with a slight twist. Under that Act, the Secretary of the

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599 (D. Mont. 1981). In Navajo Tribe v. Bank of New Mexico, 700 F.2d 1285 (10th Cir. 1983), the court held that tribal funds could not be used to satisfy a tribal housing authority's debt.

64. 24 C.F.R. Part 905, App. I to Part A, Art. VII, ¶ 7 (1993). The limitation does not apply to persons holding defaulted bonds issued by the Authority. Also, the Housing Authority is authorized to purchase insurance for property and "against any risk or hazards," which could include performance bonds or errors and omissions insurance. *Id.* at Art. V, ¶ 3(n).

65. The Housing Authority Board can be a department or division of tribal government. 24 C.F.R. Part 905, App. I to Subpart A, Art. IV n.2 (1993). The mandated tribal ordinance provides for Tribal Council appointment of Housing Authority Board members, and for Tribal Council removal of appointed members "for serious inefficiency or neglect of duty or for misconduct in office." *Id.* at Art. IV ¶ 1(d). That provision can be modified, so long as "adequate safeguards against arbitrary removal" are included. *Id.* at Art. IV n.5.

66. Those cases usually involve jurisdiction, but that, as demonstrated in R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F. Supp. 599 (D. Mont. 1981), requires consideration of the effect of the "sue and be sued" clause.

67. 521 F. Supp. 599 (D. Mont. 1981).

68. 149 Ariz. 524, 720 P.2d 499 (1986), *cert. denied*, 479 U.S. 987 (1986).

69. HUD regulations required that the general contractor provide performance and payment surety bonds for each contract with the tribal housing authority. *Id.* at 562, 720 P.2d at 501.

70. White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301 (9th Cir. 1988).

71. Act of Jan. 4, 1975, Pub. L. No. 93-683, 88 STAT. 2203 (codified as amended at 25 U.S.C. §§ 450 et seq.).

Interior is directed to enter into contracts with Indian tribal organizations under which the tribes will conduct or administer programs or projects previously administered by federal agencies. With respect to those contracts, the Secretary is required to obtain or provide liability insurance coverage for the tribal contractors.[72] The statutory insurance provision addresses tribal immunity:

> Any policy of insurance ... shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside and beyond the coverage or limits of the policy of insurance.[73]

Another section provides that the Act is not to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."[74]

In *Evans v. McKay*,[75] the Ninth Circuit held that the statutory insurance requirement did not waive, or require waiver of, tribal immunity and that the related indemnification clause in the standard Tribal-B.I.A. contract[76] was not a waiver. To illustrate the provision's effect, the court described a hypothetical scenario where an injured person made a claim under the Federal Tort Claims Act. Responsibility for defending the claim would pass from the federal government, to the tribe, to the insurance carrier—which, by contract and statute, would be precluded from interposing the still-effective tribal immunity as a defense.[77] The insurance requirement may be beneficial to some non-Indians dealing with a tribal organization acting under this type of contract. However, any benefit is limited to the risks covered by, and the maximum amount payable under, the insurance contract. Since the Secretary is directed to consider potential Tort Claim liability, it is not likely that insurance would cover liability for breach of contract, unless performance bonds were also

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72. 25 U.S.C. § 450f(c) (1988). Prior to 1988, the Secretary was authorized to require any tribe to obtain "adequate liability insurance." Former 25 U.S.C. § 450g(c). In determining the appropriate coverage, the Secretary is directed to take into account the extent to which liability is covered by the Federal Tort Claims Act. 25 U.S.C. § 450f(c)(1) (1988). On its face the statute may not require insurance coverage for breach of contract actions.

73. 25 U.S.C. § 450f(c)(3)(A) (1988). That section is subject to the further qualification:

> (B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the state in which the alleged injury occurs.

25 U.S.C. § 450f(c)(3)(B) (1988).

74. 25 U.S.C. § 450n(1) (1988). That the § 450f insurance requirement, itself, does not imply or constitute a waiver of tribal immunity was specifically affirmed in *Evans v. McKay*, 869 F.2d 1341, 1345-46 (9th Cir. 1989). *Cf.* Atkinson v. Haldane, 569 P.2d 151, 167–70 (Alaska 1977) (holding that the purchase of insurance could not be construed as waiver of tribal immunity).

75. 869 F.2d 1341, 1345–56 (9th Cir. 1989).

76. *See* 25 C.F.R. Part 271 (1987).

77. *Evans*, 869 F.2d at 1347 n.6. *See also* Graves v. White Mountain Apache Tribe, 117 Ariz. 32, 570 P.2d 803 (Ct. App. 1977) (holding that tribe's purchase of liability insurance is not, *per se*, a waiver of immunity), *cert denied*, 436 U.S. 931 (1978). However, in Loncassion v. Leekity, 334 F. Supp. 370, 373 (D.N.M. 1971), the District Court found that a Tribal-B.I.A. contract did expressly waive tribal immunity with respect to the subject matter of that contract.

required.

2. Single-Contract Waivers

Whether particular language is a sufficient "unequivocal waiver" has been addressed on a number of occasions. In *Leigh v. Blackfeet Indian Tribe of Blackfeet Indian Reservation*,[78] part of a business-sale contract stated that if the parties could not settle a controversy through "mediation ... then both parties may pursue all available legal remedies; provided, however, that the forum shall be the United States Federal Court system and federal law shall apply."[79] The U.S. District Court for Massachusetts held the clause sufficiently unequivocal to waive immunity.[80]

In *Native Village of Eyak v. GC Contractors*,[81] the contract included an arbitration clause that provided, in part: "[t]he award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."[82] The Alaska Supreme Court held the arbitration agreement sufficient to waive immunity, primarily on the grounds that the clause would be meaningless if Eyak could, nevertheless, claim sovereign immunity. Obviously, no party would feel particularly constrained by an unenforceable arbitration clause. However, the Ninth Circuit held in *Pan American Co. v. Sycuan Band of Mission Indians* that an arbitration clause did not waive tribal immunity.[83] The clause involved in that case stated: "[E]ither party may seek arbitration of ... dispute[s] and both parties do hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rules and regulations as promulgated from time to time."[84]

The tribe contended that it was not subject to the arbitrator's or the court's jurisdiction. While the Ninth Circuit did not rule on the arbitrator's authority, it did hold that the arbitration clause was not sufficiently unequivocal to constitute a waiver of immunity. The Ninth Circuit was, apparently, not concerned about the practical nullity of an unenforceable arbitration agreement.

From a businessperson's perspective, the differences between the clauses in *Eyak* and *Pan American* probably would not seem particularly significant. The arbitration clause in a third case highlights the reason for the differing result. In *Val/Del, Inc. v. Superior Court*,[85] the Arizona Court of Appeals

78. Fed. Sec. L. Rep. (CCH) ¶ 95,436 (D. Mass. 1990).
79. *Id.* at *4.
80. The District Court also held that the Blackfeet Tribe was, in the contract, acting in its capacity as an I.R.A. § 17 corporation and the "sue and be sued" clause in the corporate charter was also a sufficient waiver of immunity. *See* discussion *supra* notes 56–58.
81. 658 P.2d 756 (Alaska 1983).
82. *Id.* at 758. The parties also contested the Village's status as an "Indian tribe" within the meaning of tribal sovereignty rules. The court did not resolve that controversy because it held that the Village, assuming it was entitled to claim immunity, had waived it.
83. 884 F.2d 416 (9th Cir. 1989).
84. *Id.* at 419. In a factually related case, A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986), in a bingo management contract the tribe unequivocally waived immunity for any lawsuit for interpretation or enforcement of that contract. The court held that provision ineffective, however, because the contract required Secretarial approval (25 U.S.C. § 81 (1988)), which had not been obtained. Until approved, the contract (including the waiver clause) was void.
85. 145 Ariz. 558, 703 P.2d 502 (Ct. App. 1985), *cert. denied*, 474 U.S. 920 (1985).

considered an arbitration clause almost identical to the one in *Pan American*. However, in *Val/Del* the clause had an added provision: "and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."[86] The Arizona Court of Appeals expressly agreed with the *Eyak* decision, holding that the tribe had expressly waived immunity with respect to an action requesting enforcement of an arbitration award, and that the waiver was not limited to tribal court actions. The *Val/Del* and *Eyak* clauses both specifically mention judicial enforcement, resulting in a waiver of immunity from that particular type of litigation. The *Pan American* clause does not *expressly* mention judicial enforcement and therefore did not waive immunity. The Ninth Circuit would not imply a waiver even though the agreement to submit to arbitration was thereby made meaningless.

In *Hydaburg Cooperative Association v. Hydaburg Fisheries*[87] the Alaska Supreme Court again found an arbitration agreement was sufficient to waive immunity from judicial enforcement of an arbitration award. The clause in that case merely said that any disputes "shall be settled in accordance with the Uniform Arbitration Act of the State of Alaska."[88] The Alaska court found this provision, which also did not expressly mention enforcement of an award, to be different from the one in *Pan American* because the referenced statute specifically authorizes state superior courts to enter judgments enforcing arbitration awards.[89] The court held that the agreement incorporated the entire Arbitration Act and therefore the tribe expressly agreed to be bound by the statute's provisions.

The lack of an express waiver is decisive, even if waiver is the only reasonable implication of the words used or action taken. In *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*,[90] Ramey contended that the tribe had waived immunity by (1) agreeing to an attorneys' fees clause in a contract, (2) obligating itself in a related bank loan agreement to pay and discharge claims of any kind, (3) certifying to a federal agency that the contracts were legally binding obligations, (4) obtaining surety bonds, and (5) consenting to partial summary judgment concerning contract retainage.[91] The Tenth Circuit held that the first four contentions were merely attempts to imply a waiver where no express one existed. Concerning the consent to partial summary judgment, the court held that that waiver was strictly limited to the consent's subject matter, *i.e.*, the retainage and nothing further—not even interest on the retained amount.[92]

A similar situation existed in *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*[93] In that case, the Tribal

86. *Id.* at 564, 703 P.2d at 508. *Pan American* was decided after both *Eyak* and *Val/Del* which are noted in *Pan American* and then ignored.

87. 826 P.2d 751 (Alaska 1992).

88. *Id.* at 755.

89. *Id.*, citing ALASKA STAT. § 09.43.170 (1989).

90. 673 F.2d 315 (10th Cir. 1982).

91. *Id.* at 319. Ramey contended that a "sue and be sued" clause in the tribe's I.R.A. § 17 corporation's charter also constituted a waiver but the court held that Ramey had dealt exclusively with the tribe's I.R.A. § 16 government and therefore the corporate charter clause was irrelevant.

92. *Id.* at 319–20. *See also* McClendon v. United States, 885 F.2d 627 (9th Cir. 1989) (holding that filing suit does not constitute a waiver concerning related matters).

93. 780 F.2d 1374 (8th Cir. 1985).

Chairman was expressly authorized, by a formal tribal council resolution, to sign any necessary documents related to a loan. Neither the documents nor their terms were incorporated in, or attached to, the resolution. Among the documents signed under that authority was a promissory note. The note's express remedies on default included: (1) the right to charge interest "in addition to such other and further rights and remedies provided by law;" (2) agreement to pay full reimbursement for any collection attorney's fees; and (3) that the note would be governed by District of Columbia law.[94] The Tenth Circuit held that those provisions, jointly or severally, were not sufficient to be an effective waiver because they did not "expressly speak to ... consent to suit or to waiver of immunity from suit."[95] The court noted that it would have no difficulty finding an *implied* waiver but it would not so find because of the rule that only express waivers are effective.[96]

In *White Mountain Apache Tribe v. Industrial Commission*,[97] the issue was if FATCO (a subordinate economic organization of the tribe), or its insurance carrier, was subject to state administrative adjudication of a worker's compensation claim. FATCO had a worker's compensation policy with Aetna. When an injured worker filed a claim with the state agency, FATCO and Aetna followed "regular" procedures: Aetna accepted service of the claim; FATCO filed an employer's report; Aetna paid the monthly benefit amount calculated by the state agency. When the worker was released for work, Aetna issued a statutory-form Notice of Claim Status, which expressly informed the worker that if he disagreed with the insurer-determined status, he had 90 days to request a hearing before the state agency. The worker requested a hearing. FATCO and Aetna moved for dismissal on the basis of tribal immunity. The Arizona Court of Appeals held that none of the tribe's documents or acts expressly waived immunity or granted permission for state agency adjudication.[98] The tribal entity and its insurer participated in the state agency's procedures until they felt it prudent to do otherwise. The state agency could do nothing further with the claim.

III. JURISDICTION

Tribal immunity is not the only problem for persons wishing to bring

94. *Id.* at 1376 n.3.
95. *Id.* at 1376.
96. *Id.* at 1377–78.
97. 144 Ariz. 129, 696 P.2d 223 (Ct. App. 1985).
98. *Id.*, 144 Ariz. at 134–35. The court considered and rejected a contention that federal worker's compensation law (40 U.S.C. § 290) expressly waived Indian sovereign immunity. The court also rejected the contention that Aetna was subject to state jurisdiction even if the tribe were not. In contrast to the *Smith Plumbing* situation (see discussion *supra* notes 66–70, the question in this case was if the state agency had jurisdiction over the "claim". Since there could be no jurisdiction over a "claim" when the employer was not covered by the act, the state had no jurisdiction over the insurer. *Id.* at 136.

A similar Minnesota case, Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883 (Minn. 1986), reached a similar result. In addition to the issues in *White Mountain*, in *Tibbetts* the court addressed and rejected the contention that Public Law 280 (28 U.S.C. § 1360) waived tribal immunity in Minnesota. Of interest is the fact that the Leech Lake Reservation Business Committee (the tribe's governing body) adopted two ordinances expressly waiving immunity in worker's compensation cases. The waiver was, however, effective only when the tribe had effective insurance. It just happened that Tibbetts' injury occurred during a period when no insurance was in force.

suit against an Indian individual or entity. A waiver of immunity does not grant jurisdiction, even if the waiver names a specific court.[99] The question of the right to sue (immunity) is distinct from the question of jurisdiction. It is a fundamental tenet that a court cannot enter a valid judgment unless it has both subject matter jurisdiction and jurisdiction over the parties. For civil actions arising within a reservation, or involving reservation Indians, neither personal nor subject matter jurisdiction can be assumed.

A. Personal Jurisdiction

The exercise of personal jurisdiction presents fewer legal issues than does establishing the locus of subject matter jurisdiction. The United States Supreme Court has held that states cannot preclude Indian individuals or tribal entities from commencing litigation in a state court if that court can exercise jurisdiction over the non-Indian defendants, regardless of where the cause of action arose.[100]

If a cause of action arose outside a reservation, state courts can obtain personal jurisdiction over a defendant, even though the defendant may be a reservation-based Indian individual or tribal entity (assuming process can be served).[101] Tribal courts also normally can exercise jurisdiction over reservation-based Indian individuals or entities, even though the cause of action arose outside the reservation.

If the cause of action arose within a reservation, a different problem is presented. Tribal ordinances establishing personal jurisdiction frequently provide for jurisdiction over non-Indians or nonmembers only with their consent.[102] The consent requirement generally presents no problem for a plaintiff non-Indian businessperson. It might, however, be a problem if a non-Indian is an indispensable party defendant who will not agree to tribal court jurisdiction.[103] More recent tribal code provisions grant the tribal court jurisdiction over all persons within the reservation, regardless of affiliation or identity, and some have long-arm statutes.[104]

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99. *See* Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521 (D. Utah 1981), *aff'd on other grounds*, 671 F.2d 383 (10th Cir. 1982).

100. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986). Of course a tribe's filing suit is not a waiver of immunity with respect to counterclaims or crossclaims. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992).

101. *See, e.g.*, Crawford v. Roy, 577 P.2d 392 (Mont. 1978); Little Horn State Bank v. Stops, 555 P.2d 211 (Mont. 1976), *cert. denied*, 431 U.S. 924 (1977); State Securities, Inc. v. Anderson, 506 P.2d 786 (N.M. 1973); Duluth Lumber & Plywood Co. v. Delta Dev., Inc., 281 N.W.2d 377 (Minn. 1979); *cf.* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (state has jurisdiction to tax Indian activities that take place outside the reservation).

102. That provision is another product of the Interior Department. The model ordinances prepared by the Department after the I.R.A.'s enactment included only consensual jurisdiction over non-Indians. Most tribes, organized under the I.R.A. or not, adopted a similar limitation.

103. If a lawsuit has both an Indian and a non-Indian as indispensable parties, under normal civil court rules a plaintiff might find herself or himself in a situation where no court has jurisdiction over all the defendants. At that point the plaintiff would probably be required to bring two lawsuits and urge both courts to proceed because joinder is impossible. The risk of inconsistent results is real, as are problems in enforcing the judgments.

104. Tribal civil jurisdiction statutes will probably be sustained so long as they do not claim jurisdiction beyond that provided in state long-arm statutes. In Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990), the court held that an extremely broad tribal court interpretation of the tribal code language "submit themselves to

As a general rule, state courts do not have jurisdiction over reservation-based Indian individuals or entities if the cause of action arose within the reservation.[105] In 1953, Congress adopted Public Law 280[106] granting states, *inter alia*, civil jurisdiction over reservation-based persons and actions. Public Law 280 automatically gave jurisdiction to five states (with exceptions for particular reservations) and authorized all other states to assume similar jurisdiction through state legislation.[107] Public Law 280 jurisdiction does not, however, solve the problem when a tribal entity is involved; a Public Law 280 state still cannot exercise civil jurisdiction if that will interfere with, or infringe on, tribal self-government.[108] This is discussed further in Part III.B., *infra*.

Solving personal jurisdiction problems can be relatively simple—if they are considered in advance. Most courts will recognize and enforce contractual undertakings to submit to the jurisdiction of a particular court or courts. Solving subject matter jurisdiction problems is not so simple.

B. Subject Matter Jurisdiction

"Subject matter jurisdiction" refers to a court's power to decide a particular type of controversy. In a general sense, all state and federal courts, and almost all tribal courts, have subject matter jurisdiction over the normal causes of action that arise in a business setting, *e.g.*, breach of contract, negligence, misrepresentation, warranty liability. However, if an Indian individual or entity is involved, "subject matter" considerations include the political status of the parties and where the controversy arose. In addition, when an Indian tribal entity is involved, the subject-matter-jurisdiction issue frequently becomes entangled with the immunity issue.[109]

1. Tribal Court Subject Matter Jurisdiction

Most tribal courts have subject matter jurisdiction over all types of civil actions.[110] Many tribal codes do not include commercial statutes, such as the Uniform Commercial Code. Nor do tribal courts have an extensive "common law"; most tribal court decisions are not reported.[111] However, for subject

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the jurisdiction of the [tribal] [c]ourt" must be accepted in a diversity case. *Id.* at 138. *But see* UNC Resources v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981) (holding Navajo Code providing jurisdiction over all torts resulting in damage within the reservation was ineffective where the only contact with the reservation was some property damage); UNC Resources v. Benally, 514 F. Supp. 358 (D.N.M. 1981) (same).

105. *See* Williams v. Lee, 358 U.S. 217 (1959).

106. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (civil jurisdiction provision codified at 28 U.S.C. § 1360 (1988)).

107. In 1968, Public Law 280 was amended to preclude state assumption of jurisdiction without the consent of the affected tribe(s). Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1321(a), 1322(a) (1988)).

108. *See generally*, Bryan v. Itasca County, 426 U.S. 373 (1976); Southwest Forest Indus. v. Hupa Timber Corp., 198 Cal. Rptr. 690 (1984) (the court ordered that this decision not be published in the official reports which, under California court rules, means it *cannot* be cited as authority); Duluth Lumber & Plywood Co. v. Delta Dev. Inc., 281 N.W.2d 377 (Minn. 1979).

109. *See* R.C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F. Supp. 599 (D. Mont. 1981).

110. A few tribal courts are limited to criminal matters, or criminal and family law matters.

111. Navajo Tribal court decisions are published in the Navajo Reports and selected tribal court decisions from throughout the United States are reported in the Indian Law Reporter. Even considering those as the "common law" of all tribal courts, the sum is not nearly so extensive as

matter areas for which tribal law makes no provision, tribal codes or tribal court decisions allow reference to federal and state law.

If the tribal court does not have jurisdiction over general civil litigation, then the parties are, of necessity, relegated to state courts. State jurisdiction where there is no tribal court with jurisdiction does not infringe on tribal self-government.[112]

2. State Court Subject Matter Jurisdiction

State court subject matter jurisdiction issues are almost entirely tied to tribal sovereignty issues—not immunity but preservation of the integrity of tribal government and rights of self-government. Those considerations turn, in part, on the extent to which the Indian entity or individual voluntarily goes outside reservation boundaries.[113] In significant ways, state court subject matter jurisdiction is not dissimilar from state personal jurisdiction over Indian individuals.[114]

In *Williams v. Lee*,[115] the United States Supreme Court held that a state court cannot exercise jurisdiction over a non-Indian's civil action for debt (breach of contract) where the defendant was a reservation Indian and the debt was incurred on the reservation. Retaining meaningful self-government requires maintaining viable governmental institutions, including courts. The Supreme Court held that allowing state courts to adjudicate reservation-based controversies involuntarily involving reservation Indians would have a negative impact on the viability of tribal courts. At the other end of the spectrum is *Mescalero Apache Tribe v. Jones*,[116] involving state taxation of Indian-owned property situated outside the reservation. The Supreme Court held that when tribal activities extend beyond reservation boundaries, they become subject to nondiscriminatory state laws applicable to all citizens, unless expressly exempted by Congress.

Determining where a particular controversy arose is, obviously, important. When a non-Indian is involved, contract-related activities usually occur both on and off the reservation. Under those conditions, determining the legal locus of the controversy is not simple. To support an off-reservation locus, the off-reservation "contacts" may have to be more extensive than would

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the common law of any single state.

112. *See* Fisher v. District Court, 424 U.S. 382 (1976); *In re* Marriage of Limpy, 636 P.2d 266 (Mont. 1981); Bad Horse v. Bad Horse, 517 P.2d 893 (Mont. 1974), *cert. denied*, 419 U.S. 847 (1974).

113. In this context, "going outside reservation boundaries" includes an Indian individual or entity commencing litigation in state courts. If the plaintiff is the Indian, particularly a tribal government entity, general state court rules on subject matter jurisdiction apply. *See* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986).

114. On subject matter jurisdiction issues, Public Law 280 states (*see* discussion *supra* notes 106–108) are in much the same situation as other states. As construed in Bryan v. Itasca County, 426 U.S. 373 (1976), and its progeny, the civil-law effect of Public Law 280 is essentially limited to removing some restrictions on state personal jurisdiction in civil actions arising on a reservation. Of particular interest when dealing with the tribe or a subordinate economic entity is the holding that Public Law 280 did not delegate jurisdiction over a tribe. *See* Bryan v. Itasca County, 426 U.S. at 388-89; Atkinson v. Haldane, 569 P.2d 151, 163 (Alaska 1977). In Public Law 280 states, there may be fewer tribal courts or their jurisdiction may be more limited. That leaves a broader area for exercising state civil jurisdiction.

115. 358 U.S. 217 (1959).

116. 411 U.S. 145 (1973).

be adequate for long-arm jurisdiction purposes.

R.C. Hedreen Co. v. Crow Tribal Housing Authority,[117] involved a contract for construction of housing on the Crow Reservation. The non-Indian construction company filed a diversity action in federal court alleging breach of contract. In discussing the tribe's contention that any waiver of immunity was limited to tribal courts, the U.S. District Court for Montana found there was no such limitation. The waiver thus authorized suit in any court of competent jurisdiction, which would include state courts because the defendant tribal entity had ventured beyond reservation boundaries for business purposes. In support of that conclusion, the court stated:

> Adequate *substantial contacts* with the state are manifest: (1) the contracts were made with non-Indian entities residing off the reservation, (2) they [the contracts] contemplated the procurement of supplies and labor off the reservation, (3) bids for the work were solicited off the reservation, (4) the [non-Indian] plaintiff executed the contracts off the reservation, and (5) the bond essential to the contracts was procured and signed off the reservation.[118]

The District Court's discussion mentions factors normally considered in deciding long-arm jurisdiction problems.

The *R.C. Hedreen* decision was not appealed, but it was directly criticized by the Ninth Circuit in *R.J. Williams Co. v. Ft. Belknap Housing Authority*.[119] In that decision, the Ninth Circuit employed a "significant contacts" test commonly used in conflicts-of-law issues:

> In determining *the locus of a contract dispute*, courts generally look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute. When a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant. Here, as in *Hedreen*, the contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the tribe. We think these factors determine the locus of the dispute, although workers, supplies, and the construction bond would have to come in from off the reservation. There were thus no "substantial activities giving rise to a dispute" arising outside the reservation. Thus, the "significant contacts" test is not met here.[120]

In *Padilla v. Pueblo of Acoma*,[121] the Pueblo government established a subordinate enterprise called Sky City Contractors that registered under the state contractor-licensing laws and engaged in off-reservation business activities. The New Mexico Supreme Court's analysis was similar to the Ninth Circuit's in *R.J. Williams* but reached an opposite result based on the facts. The court held that the exercise of state jurisdiction over a dispute concerning an off-reservation construction contract did not infringe on tribal self-government, primarily because the contract-related events occurred almost

117. 521 F. Supp. 599 (D. Mont. 1981).
118. *Id.* at 607 n.4. (emphasis added).
119. 719 F.2d 979, 985 (9th Cir. 1983).
120. *Id.* at 985 (citations omitted) (emphasis added).
121. 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989).

exclusively off the reservation.[122]

The limitation on state-court subject matter jurisdiction is policy based and therefore somewhat subjective. Federal policy supports tribal authority over internal affairs. "Internal" in this sense has both geographic and political components. The policy is partly based on the proposition that tribal government is generally seen as weak if it does not provide normal governmental services both within its territory and to or for its members. The tribe's interests are, therefore, strongest when a controversy involves an Indian party and on-reservation events. The tribe's interests diminish sharply if no Indian party is involved or the controversy relates to off-reservation events. If the tribal court cannot, under its own rules, exercise jurisdiction, there is no adverse effect from the state's exercise of jurisdiction.

Overall, in assessing the possibility of state subject matter jurisdiction, it is probably most appropriate to apply a choice-of-law-type test rather than a long-arm-jurisdiction-type test. Long-arm jurisdiction considerations are solely due process considerations. In contrast, choice-of-law tests examine the relative substantive interests of the competing jurisdictions and are, therefore, more consistent with the federal law policy of preserving tribal self-government.

3. Federal Court Subject Matter Jurisdiction

Federal courts have limited subject matter jurisdiction. The presence of an Indian party does not establish federal court jurisdiction and may, in fact, create additional problems. The same limitations apply to tribes; there is no federal jurisdiction merely because a tribe is organized or operating under federal statute.[123] Federal question jurisdiction (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332) must still be established.

Federal question jurisdiction requires that the action involve some right or remedy provided by federal law.[124] Jurisdictional provisions allowing actions by or against federal corporations[125] or by recognized Indian tribes[126] are inapplicable unless an Indian tribe (or a subordinate economic activity) is the plaintiff. For ordinary civil litigation, there is no federal court jurisdiction unless the parties qualify for diversity jurisdiction. For diversity purposes, an

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122. *Id.* at 850-51. The court also held that the construction company could not claim sovereign immunity. *See also* Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104 (1989) (involving tort by employee of a reservation-based business corporation engaging in off-reservation construction activities).

123. *See* Blackfeet Tribe v. Wippert, 442 F. Supp. 65 (D. Mont. 1977).

124. Since Indian tribes are not subject to federal constitutional restraints or general civil rights acts, and the Indian Civil Rights Act (25 U.S.C. § 1302(8) (1988)) allows only habeas corpus relief, civil actions alleging civil rights violations by Indian tribes are not normally within federal jurisdiction. *See* R.J. Williams Co. v. Ft. Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

125. 28 U.S.C. § 1349 (1988) (applies only to federal corporations in which the United States owns at least one-half of the capital stock).

126. 28 U.S.C. § 1362 (1988). This statute, in addition to allowing actions by official bodies of recognized Indian tribes, waives only the jurisdictional amount requirement of other jurisdictional statutes. If no federal question is involved, section 1362 does not grant jurisdiction. *See, e.g.*, Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (construction contract); Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975) (contract); United States v. State Tax Comm'n, 505 F.2d 633 (5th Cir. 1974) (tax on corporation organized under tribal law).

Indian individual, tribal entity, or corporation incorporated under tribal law is treated as a citizen of the state in which the reservation lies.[127]

The generally applicable rule is that a federal court cannot exercise diversity jurisdiction unless the state's courts could exercise jurisdiction. As shown previously, state courts often cannot exercise jurisdiction over an Indian individual, government or entity. That would seem to preclude federal diversity jurisdiction. However, for cases involving Indians, the normal rule is modified (or focused) somewhat because it is not *state* law that precludes state court jurisdiction.

Iowa Mutual Insurance Co. v. LaPlante [128] related to contested insurance coverage of an intra-Indian tort that occurred on the Blackfeet Reservation in Montana. The plaintiff's complaint alleged diversity jurisdiction; the plaintiff was an Iowa resident and the defendants were Montana residents. The lower courts held that the action should be dismissed for lack of diversity jurisdiction because the Montana state courts did not have subject matter jurisdiction. On review, the Supreme Court stated that the district court should consider staying, or "prudentially dismissing," the action pending exhaustion of the related tribal court proceedings but that the action should not be dismissed for lack of diversity jurisdiction.[129] The Court's reasoning is not entirely clear:

> [The Ninth Circuit] apparently assum[ed] that the exercise of federal [diversity] jurisdiction would contravene a substantive state policy. However, it is not clear that Montana has such a policy, since state-court jurisdiction seems to be precluded by the application of the federal substantive policy of non-infringement, rather than any state substantive policy.[130]

Apparently, what the Court was saying is: (1) The Montana courts would have, and could exercise, jurisdiction over the action but for the federal rule precluding the exercise of state jurisdiction when it would infringe on tribal self-government. (2) Because state jurisdiction is barred by federal law, not state law, the standard diversity-jurisdiction rule is inapplicable.[131]

Establishing diversity or federal question jurisdiction does not, however, assure a federal forum. Even with personal and subject matter jurisdiction, a federal court may stay proceedings, or dismiss the case pending exhaustion of tribal remedies, as a matter of comity. If there is a tribal court that has, or may have, jurisdiction, the federal policy supporting tribal self-government supports deferring to tribal court, particularly on issues of tribal court jurisdiction.[132] That rule was first enunciated in *National Farmers Union Insurance Companies v. Crow Tribe* [133] concerning federal question jurisdiction, and was extended to

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127. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Weeks Constr. Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986); Enterprise Elec. Co. v. Blackfeet Tribe, 353 F. Supp. 991 (D. Mont. 1973).

128. 480 U.S. 9 (1987).

129. *Id.* at 19–20.

130. *Id.* at 20 n.13 (citation omitted).

131. The Ninth Circuit has so interpreted *LaPlante*. *See* Stock West, Inc. v. Confederated Tribes of Colville Reservation, 873 F.2d 1221, 1227 (9th Cir. 1989).

132. The deferral rule has been applied even when the allegations are that the tribal court has no jurisdiction because the relevant activities took place outside the reservation. *See* Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166, 1170 (10th Cir. 1992).

133. 471 U.S. 845 (1985).

diversity cases in *Iowa Mutual Insurance Co. v. LaPlante.*[134] The same comity principles require deferral to a tribal court's determination of the meaning of its own jurisdictional statutes.[135] If the tribal court decides it has jurisdiction, the same deference policy precludes relitigation of issues resolved in tribal courts.[136] If tribal court rules do not provide for interlocutory appeals on jurisdictional issues, the primary issue in federal court, after completing the tribal court process, is tribal court jurisdiction.[137]

A significant number of federal court actions have been dismissed or stayed under the rules announced in *National Farmers Union* and *LaPlante.*[138] However, the deferral rule is not mandatory, particularly if there is no pending tribal court action and/or the relevant substantive rules are based on federal or state laws.[139]

IV. CONCLUSIONS

A non-Indian business contemplating civil litigation involving Indian individuals or entities faces a confusing set of legal rules. The rules tend to favor tribal court adjudication of reservation-related controversies. A substantial number of non-Indian businesses do not wish to become involved in tribal court litigation.[140] However, tribal courts should not be automatically rejected. In some instances, tribal courts should be preferred because of their generally lighter caseload, with the attendant decrease in the time between filing and judgment. If any judgment will have to be enforced against assets on a reservation, it will probably be necessary to obtain the assistance of tribal court

134. 480 U.S. 9 (1987).

135. *See* Twin City Constr. Co. v. Turtle Mountain Band, 911 F.2d 137 (8th Cir. 1990).

136. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

137. The jurisdiction of tribal courts was held to be a federal question in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985).

138. *See, e.g.*, Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992) (involving interpleader by a bank holding funds claimed by a tribe and a bingo-operation management contractor); Brown v. Washoe Hous. Auth., 835 F.2d 1327 (10th Cir. 1988); United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986); Whitebird v. Kickapoo Hous. Auth., 751 F. Supp. 928 (D. Kan. 1990); Snowbird Constr. Co., Inc. v. United States, 666 F. Supp. 1437 (D. Idaho 1987).

139. *See, e.g.*, Altheimer & Gray v. Sioux Mfg. Corp., 780 F. Supp. 504 (N.D. Ill. 1991), *rev'd on other grounds,* 983 F.2d 803 (7th Cir. 1993) (contract stipulated that disputes would be resolved under Illinois law in Illinois state or federal courts), *cert. denied,* 114 S. Ct. 621 (1993). *See also* Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co., 149 Ariz. 524, 720 P.2d 499 (1986), *cert. denied,* 479 U.S. 987 (1986) (decided after *National Farmers* but before *LaPlante*).

140. This comment does not condone or condemn that attitude. There have been instances where tribal courts have unreasonably favored tribal litigants; where tribal judges were only marginally qualified; and where tribal political officials have exercised undue influence on tribal judges. However, for many years tribal courts and judges, and national associations (Indian and non-Indian), have been striving to improve the quality, independence and sophistication of tribal codes, courts and judges. Those efforts have resulted in significant progress, particularly in the tribes that have a larger number of members and/or have had significant commercial contact with non-Indians. In December, 1993, Congress adopted the Indian Tribal Justice Act. Pub. L. No. 103–176, 139 Cong. Rec. D1393 (daily ed. Dec. 3, 1993). The Act is intended to strengthen and professionalize tribal court systems. It establishes the Office of Tribal Justice Support in the Bureau of Indian Affairs, mandates a nationwide study of tribal court needs, supports continuing development of tribal codes and administrative systems, and authorizes appropriation of $50 million per year (1994 through 2000) for base support funding of tribal justice systems.

even if the initial litigation is in state or federal court.[141] In addition, if a long-term commercial relationship is intended, developing an atmosphere of mutual respect is desirable. Demonstrating a lack of confidence in tribal courts would not foster that atmosphere.

While no business expects every contract to result in litigation, planning for that possibility is an absolute necessity. Dealing with Indian individuals or entities requires detailed pre-contract planning. In a non-Indian-related business transaction, planning might be less necessary because it can be fairly safely assumed that the other party is amenable to suit and that any judgment will be enforceable in any state. In an Indian-related transaction, those assumptions should not be made.[142]

The first concern is the amenability of the Indian party to suit, *i.e.*, the possibility that it could successfully claim immunity. That determination is not necessarily easy. With Indian individuals, the only question is if the individual is acting for her/himself. If so, no question of sovereign immunity should arise. If an Indian entity is involved, it is mandatory that the precise legal status of that entity, under tribal and non-tribal law, is determined before a contract is made.

If the entity is an I.R.A. § 17 corporation, the existence of a "sue and be sued" clause in its charter should be confirmed, as well as any limitations in that clause. If a corporation organized under tribal law is involved, the scope of the corporation's ability to act for the tribe, and to waive any sovereign immunity claims, must be investigated. Reliance cannot be placed solely on corporate documents or undertakings. To be effective, any waiver must be traceable to an official government action (statute, ordinance, resolution) that expressly and unequivocally waives immunity or empowers particular officers to waive immunity. The official act may be in an ordinance creating the entity, an ordinance specifying the entity's powers, or a tribal undertaking concerning a particular transaction.

The extent of any waiver must be considered. Most waivers are limited (internally or by statute) to protect general tribal assets from execution. As a practical matter, a limitation may defeat a waiver; if no assets are subject to a judgment, the judgment is useless. Payment and performance bonds or other insurance may be the only means of collecting a judgment. If so, the policy limits and terms should be examined.

The significance of the contract (and sometimes "political" or extra-legal concerns) will dictate the amount of time and money spent in obtaining these assurances. However, those assurances may make the difference between having access to judicial relief and having a totally worthless cause of action.

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141. *See, e.g.*, Begay v. Roberts, 167 Ariz. 375, 807 P.2d 1111 (Ct. App. 1990) (holding off-reservation service of garnishment invalid when attempting to reach reservation Indian's wages earned on the reservation). The Navajo Code does not allow wage garnishments, but does provide other enforcement methods. Allowing state-court-based garnishment would infringe on tribal self-government. Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980).

142. Even after a tribal court judgment is obtained, there may be considerable problems in obtaining enforcement outside the reservation. Conversely, there may be difficulty in obtaining tribal court enforcement of a state court judgment. For a discussion of the application of the full faith and credit rules to tribal courts and tribal court judgments, see William V. Vetter, *Of Tribal Courts and "Territories"—Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987).

Another planning concern is jurisdiction. While federal subject matter jurisdiction may be a problem, state and tribal courts normally have subject matter jurisdiction so long as there is an adequate connection between the transaction and the chosen forum jurisdiction. The court decisions that have considered an express contract provision providing for choice of law and choice of forum have enforced those provisions. Therefore, a written contract should at least include, in addition to an express waiver of immunity:

- Consent to the jurisdiction of specific courts or jurisdictions (*e.g.*, "North Dakota state courts" or "federal court system").[143]
- Agreement that the law of a specific state will be applied in interpretation and enforcement.
- Express consent to judicial enforcement of any arbitration award, if the agreement includes an arbitration clause.

If there is any doubt about the official nature of the contract, the tribe's governing body should be requested to approve it through a regularly adopted resolution.

Naturally there are a number of important non-legal considerations that will affect how legal problems are addressed. At no time should a non-Indian business assume that its Indian counterpart is legally or commercially unsophisticated. Special consideration should be given to the nature of Indian society and culture, just as special consideration would be given when dealing with businesspersons from any other culture, be they Japanese, Egyptian, French, Mexican or Canadian.

Dealing with an Indian individual or entity need not be an unpleasant experience. All that is required is a healthy dose of forethought and sensitivity—not a bad formula for any business transaction.

143. If possible, it would not be a bad idea to specify the particular court in which any litigation must be commenced and prosecuted, *e.g.*, the District Court of the State of Montana for Big Horn County (the North Cheyenne Indian Reservation is split between Rosebud and Big Horn counties, with county seats over 70 miles apart).