

Notes

WAIVER OF INDIAN TRIBAL SOVEREIGN IMMUNITY IN THE CONTEXT OF ECONOMIC DEVELOPMENT

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Economic development is a matter of major concern on Indian reservations around the country. The passage of the Indian Self-Determination and Education Assistance Act¹ in 1975 heralded congressional recognition of the fact that previous governmental policies and programs failed to bring about self-sufficiency among the Indian people.² With that recognition came the realization that the Indian people never abandoned the desire to control their own destinies and live self-reliant, productive lives according to their own values and traditions.³ The Act acknowledged that the United States has an obligation to encourage and support Indian participation in the economic and educational development necessary to achieve self-sufficiency on America's Indian reservations.⁴

Since its passage, some members of Congress have tried to make the goals of the Act become reality.⁵ The Indian Development Finance Corporation Act,⁶ introduced in the United States Senate by Senator Daniel Inouye⁷ on March 11, 1987, exemplifies one such effort.⁸ In his introductory statement, Senator Inouye identified the purpose of the bill: to provide financial and technical assistance to Indian-owned businesses and to stimulate the development of tribal economies through the establishment of a stock

1. 25 U.S.C. §§ 450-450n (1982).

2. "Congressional statement of findings" reads,

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.

3. *Id.* at § 450(a)(2).

4. *Id.* at § 450a.

5. *See infra* notes 6-18 and accompanying text.

6. S. 721, 100th Cong., 1st Sess. (1987).

7. D. Hawaii.

8. 133 CONG. REC. S3030-32 (daily ed. Mar. 11, 1987).

corporation sponsored by the government, supervised by a board of business specialists, and owned by Indian shareholders.⁹ The Senate referred the bill to the Select Committee on Indian Affairs, which has yet to take any affirmative action.¹⁰

Introduced in the Senate by Senator John McCain¹¹ on March 19, 1987,¹² the Indian Economic Development Act of 1987¹³ represents another effort to make the goals of the Self-Determination Act a reality. It provides for the creation of enterprise zones¹⁴ on Indian reservations. By amending the Internal Revenue Code of 1986,¹⁵ the bill offers incentives to private industry to locate on reservations to provide jobs, training, and economic revitalization.¹⁶ The methods used in the resolution of civil and contract disputes that may arise in the context of the commercial relationships established under this bill are of critical concern to those considering, and those seeking to take advantage of, the proposed legislation.¹⁷ While Title IV, section 401, of the bill grants authority to the Secretary of the Interior to approve plans for conflict resolution, it also prohibits any such plan from encumbering or diminishing tribal trust assets.¹⁸

Indirectly, then, the bill alludes to the baseline problem of this or any program that encourages economic relations between Indians and non-Indians: tribal sovereign immunity.¹⁹ This doctrine precludes a litigant from asserting a cause of action against a sovereign²⁰ or a party with sovereign attributes without the sovereign's consent.²¹ By waiving immunity, the sovereign gives consent to accountability in courts of law.²² This action assures contract enforceability should a dispute arise and allows for resolution by civil action if necessary.²³ With such assurances, non-Indian business enterprises are far more likely to avail themselves of incentives like those offered in the Indian Economic Development Act of 1987.

The Indian perspective varies markedly from that of non-Indians, how-

9. The Senator went on to say that Indian participation in the corporation is essential to provide a distinction between this program, in which Indians would have a vested interest, and other programs, in which only the government has had authority and accountability. *Id.* at S3031.

10. S. 721 was passed by the 100th Congress but pocket vetoed by President Reagan. The bill was reintroduced in the 101st Congress in substantially the same form on January 25, 1989 as S. 143.

11. R. Arizona.

12. 133 CONG. REC. S3509 (daily ed. Mar. 19, 1987).

13. S. 788, 100th Cong., 1st Sess. (1987).

14. Enterprise zones are selected locations targeted as recipients of directed resources, the purpose being to increase employment and investment by removing tax and regulatory obstacles to business. APPLICABILITY OF ENTERPRISE ZONES TO AMERICAN INDIAN RESERVATIONS 1 (Charles Trimble Co. 1982).

15. S. 788, 100th Cong., 1st Sess. § 1(b) (1987).

16. *Id.* at § 2.

17. *Id.* at § 401.

18. *Id.* S. 788 died in Committee at the end of the 100th Congress. On February 2, 1989, staff in Senator McCain's office advised that it will not be reintroduced in its present form but that another bill encouraging economic development on Indian reservations will be introduced during the 101st Congress.

19. See *infra* notes 66-72 and accompanying text.

20. "Sovereign" is defined as "[a] person, body, or state in which independent and supreme authority is vested." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

21. See *id.* ("sovereign immunity" entry).

22. See *infra* notes 121-25 and accompanying text.

23. *Id.*

ever. The concept of sovereignty represents the essence of tribal identity and the rights of self-determination. Sovereign immunity acts to protect sovereign status by protecting the assets and, thus, the autonomy of the tribes.²⁴ These concepts are crucial to the Indian community as a whole and, although the sovereignty of Indian tribes continues to be the subject of substantial controversy, are central to any discussion of economic development.²⁵ A careful balancing of interests is required to determine when, and to what extent, waiver of immunity is in the best interests of the tribes.

This Note explores the doctrine of tribal sovereign immunity, from its origins through the historical use of waiver to the implications of consent to suit as a means of promoting economic development on Indian reservations. Additionally, this Note proceeds on the assumption that tribal sovereign immunity is an attribute to be valued and protected against all incursions except in those instances when its waiver will advance the goals and autonomy of the tribe and its people.

THE HISTORICAL SOURCE AND CONTEMPORARY APPLICATION OF INDIAN TRIBAL SOVEREIGNTY

Indian tribal sovereignty has its roots in natural law.²⁶ Franciscus de Victoria and Emmerich de Vattel each wrote on the nature of societies, their status as sovereigns, and the rights and obligations attaching to sovereignty.²⁷ Both addressed the specific nature of the aboriginal right in the New World and arrived at different conclusions.²⁸ Victoria concluded that the native had true title²⁹ which could only be divested voluntarily or as a result of a just war,³⁰ whereas Vattel concluded that the natives could not legally occupy more land than they needed.³¹

24. See *infra* note 68 and accompanying text.

25. See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *The Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), for historical insight into the controversy between the United States government and the states over the status of Indian tribes and Indian land. See also F. COHEN, *Preemption of State Laws by Federal Laws and Treaties Governing Indian Affairs*, in *HANDBOOK OF FEDERAL INDIAN LAW* 270-79 (1982 ed.).

26. See *infra* notes 27-31 and accompanying text.

27. Victoria was a Dominican priest in 16th century Spain. He was educated at the Sorbonne in Paris and later assumed the Primary Chair of Theology at the University of Salamanca in Spain. He was known as a humanist who combined theology with many other subjects, among them the rights of Indians in the New World and the law of war. Charles V of Spain sought Victoria's advice in dealing with New World issues. F. DEVICTORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 65-72 (E. Nys ed. 1917).

Vattel was an 18th century philosopher known for his translation and adaptation of the work of Christian Frederick von Wolff on the Law of Nations. E. VATTEL, *3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* iii-iv (C. Fenwick trans. 1916).

28. See *infra* notes 29-31 and accompanying text.

29. In advising the Emperor of Spain on the nature of aboriginal title in the New World, Victoria wrote ". . . that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners . . . both from the public and the private point of view." F. DEVICTORIA, *supra* note 27, at 128.

30. *Id.* at 161-62.

31. [I]t is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. . . . [S]uch a claim would be absolutely contrary to the natural law [which] only confers upon individual Nations the right to appropriate territory so far as

Chief Justice John Marshall relied on Vattel in divergent contexts for support in dealing with Indian sovereignty.³² In *Johnson v. M'Intosh*,³³ adjudicating the validity of land titles granted by Indian tribes to private individuals, Marshall drew on Vattel's conclusions when he reasoned that Indian tribes could not pass valid title to individuals.³⁴ However, in *Worcester v. Georgia*,³⁵ he quoted a contradictory passage³⁶ to support the findings that Indian tribes possessed inherent sovereignty which permitted them to be included among powers capable of making treaties and that, under the Constitution, treaties between the United States and Indian tribes are the supreme law of the land and not subject to encroachment by state law.³⁷

Given contradictions in the very foundation of Indian law, it is not surprising that the issue of Indian tribal sovereignty continues to suffer from contradictory and inconsistent court interpretations and rulings.³⁸ Congress-

they can make use of it. . . . [As to the wandering tribes, they] can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession.

E. VATTEL, *supra* note 27, §§ 208-209.

32. See *infra* notes 33-37 and accompanying text.

33. 21 U.S. (8 Wheat.) 543 (1823).

34. Speaking for the majority, Marshall explains:

Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. *A nation that has passed under the dominion of another, is no longer a sovereign state.*

Id. at 567-68 (emphasis added).

35. 31 U.S. (6 Pet.) 515 (1832).

36. According to Vattel, whom Marshall quotes directly: "Tributary or feudatory states . . . do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of that state." *Id.* at 561.

37. *Id.* at 559-60.

Total tribal immunity from state law has, of course, been eroded over the years. Note Justice White's words in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1972): "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia* . . . has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." See also *Rice v. Rehner*, 463 U.S. 713 (1983) (federal legislation authorized state regulation of Indian liquor transactions); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) (McCarren Act removed limitations on state court jurisdiction over Indian water rights).

38. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government and remain a separate people with power of regulating their internal and social relations.); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) (Indian tribes remain a separate people, with the power of regulating their internal and social relations, making their own substantive law in internal matters, and enforcing that law in their own forums.); *but see Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950) (When admitted to the union, the territory of Oklahoma acquired full and complete jurisdiction over all persons and things within its boundaries, including Indians, except to the extent that federal government expressly retained or asserted paramount jurisdiction over them as guardian and ward.); *State v. McAlhaney*, 220 N.C. 387, 17 S.E.2d 352 (1941) (Cherokee Indians in North Carolina, although under the supervision and guardianship of federal government are nevertheless "citizens" of the state of North Carolina and subject to the laws of the state.).

sional enactments that reflect dramatic changes in the political climate over time also affect interpretation of the issue.³⁹ Despite attempts to deny the existence of sovereignty, or to legislate it away, an abiding principle remains constant: Indian tribal governmental and societal independence preceded contact with Europeans, gained recognition through course of dealings with the United States, and continues so long as Congress does not act to divest tribes of their independence.⁴⁰

Indian tribes retained the attributes of full sovereignty⁴¹ until 1871, when a rider attached to the Indian Appropriations Act ended treaty-making between the United States government and Indian tribes.⁴² This enactment was prospective only and thus did not abrogate existing treaties,⁴³ which retained their status as the supreme law of the land.⁴⁴ Instead, the legislative action operated to limit the sovereignty of Indian tribes by eliminating the power to control their future external relations.⁴⁵ That power thereafter vested clearly with Congress.⁴⁶

Internal sovereignty was another matter. In *Cherokee Nation v. Georgia*,⁴⁷ Chief Justice John Marshall acknowledged, with the concurrence of a majority of the Court, that the Cherokee Nation was an autonomous political society that qualified as, and had been treated by the United States as, a

39. The Major Crimes Act, 18 U.S.C. § 1153 (1885) (This act overturned tribal jurisdiction in criminal matters and mandated federal jurisdiction over enumerated crimes. Initially covering seven crimes, amendments increased the number to sixteen.); The Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-381 (diminution of tribal lands and opening of reservations to non-Indians); The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (ending policy of allotment and encouraging tribal participation in reaching and maintaining self-support); The Termination Program, H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) (dissolution of special status and federal supervision); and The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (programs to be planned and implemented by tribes and funded by federal government).

40. F. COHEN, *supra* note 25, at 229-31. See also *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (sovereignty subject to complete defeasance by Congress); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 594 (1832) (laws and treaties should be abrogated by powers competent to do so); *Confederated Tribes of Colville Indian Reservation v. Washington*, 412 F. Supp. 651, 654 (E.D. Wash. 1976), *rev'd on other grounds*, 591 F.2d 89 (9th Cir. 1979) (sovereign rights of Indian tribe can be abrogated by federal legislation).

41. See *supra* note 36.

42. "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty. . . ." 25 U.S.C. § 71 (1982).

43. ". . . [N]o obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." *Id.*

44. ". . . [T]he Constitution as ratified by the people made the supreme law of the land to consist of three things: (1) The Constitution; (2) the laws of the United States which shall be made in pursuance thereof; (3) all treaties made or which shall be made under the authority of the United States." *Missouri v. Holland*, 252 U.S. 416, 421-22 (1920). See also *United States v. Rauscher*, 119 U.S. 407, 417 (1886); *In re Metzger*, 17 F. Cas. 234 (C.C.S.D.N.Y. 1847) (No. 9,511).

45. *Logan v. Andrus*, 457 F. Supp. 1318, 1322 (D. Okla. 1978). See also *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235, 237 (D. Neb. & W.D.S.D. 1975) (Native American Indian tribes have no external sovereignty).

46. *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (Congress has exclusive and plenary power to enact legislation with respect to Indian tribes.); *Barnes v. United States*, 205 F. Supp. 97, 100 (D. Mont. 1962) (full powers of internal sovereignty vested in Indian tribe as duly constituted organ of government subject only to limitations by treaty or express legislation by Congress).

47. 30 U.S. (5 Pet.) 1 (1831).

state.⁴⁸ Accordingly, the Court recognized the existence and validity of Indian internal sovereignty, that is, the right to manage their own affairs.⁴⁹ The designation of Indians as "domestic dependent nations"⁵⁰ and the enunciation of the trust relationship doctrine⁵¹ was the beginning of the limitation on external sovereignty, which culminated in 1871.⁵²

Under international law, dependence sufficient to deprive a political entity of international standing⁵³ does not deprive the entity of internal sovereignty.⁵⁴ In *Worcester*,⁵⁵ the Court dealt with the problem of internal sovereignty in its interpretation of Article Nine of the Treaty of Hopewell of 1785⁵⁶ between the United States and the Cherokee Nation. Marshall concluded that any interpretation resulting in a surrender of the right of self-government was illogical and necessarily erroneous.⁵⁷

Internal sovereignty of Indian tribes survived a century of legislation⁵⁸ and litigation,⁵⁹ albeit subject to the plenary power of Congress.⁶⁰ Matters left to the tribes are the same matters left to any sovereign in handling internal affairs: local self-government and a system of laws addressing the customs and traditions of the society.⁶¹ The sovereign entity is answerable to

48. *Id.* at 16.

49. *Id.*

50. *Id.* at 17.

51. *Id.*

52. See *supra* notes 42-43 and accompanying text.

53. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire these lands, or to form a political connexion [sic] with them, would be considered by all as an invasion of our territory, and an act of hostility.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17-18.

54. G. WILSON, HANDBOOK OF INTERNATIONAL LAW 33 (3d ed. 1939).

55. 31 U.S. (6 Pet.) 515 (1832).

56. The ninth article is in these words: "for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs* as they think proper."

Id. at 553 (emphasis in original).

57. "To construe the expression 'managing all their affairs', into a surrender of self-government, would be . . . a perversion of their necessary meaning. . . . It is equally inconceivable that they could have supposed . . . to have divested themselves of the right of self-government on subjects not connected with trade." *Id.* at 553-54.

58. See *supra* note 39.

59. See *Santa Clara Pueblo*, 436 U.S. 49 (Indian tribes retain power of regulating their internal and social relations.); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (Tribes possess attributes of sovereignty over both their members and territory.); *United States v. Jacobs*, 113 F. Supp. 203 (D. Wis. 1953), *appeal dismissed*, 346 U.S. 892 (1953) (Self-governing powers are inherent powers of tribal sovereignty which have never been extinguished.); *United States v. Charles*, 23 F. Supp. 346 (D.N.Y. 1938) (Indian tribe may govern itself in accord with tribal law and customs without interference from state courts.)

60. See *Wheeler*, 435 U.S. at 319 (Congress has plenary authority to legislate for Indian tribes in all matters including their form of government.); *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (Congress possesses plenary powers of control over unique situation of tribes.); *Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (Indian tribes have only as much internal sovereignty as has not been relinquished by them by treaty or explicitly taken by act of Congress.)

61. See *Navajo Tribe v. Bank of New Mexico*, 556 F. Supp. 1 (D.N.M. 1980), *aff'd in part*, 700 F.2d 1285 (10th Cir. 1983) (Indian tribal sovereignty is no less than that of the United States absent congressional action to abrogate). Cf. *Jicarilla Apache Tribe*, 455 U.S. 130 (Power of Indian tribe to tax derives from tribe's general authority as sovereign, to control economic activity and to defray the cost of providing governmental services.)

the citizens for the regulation and protection of community assets. In short, the tribal entity retains all rights of self-government not expressly ceded by the tribe or preempted by Congress.⁶²

THE SCOPE AND IMPACT OF SOVEREIGN IMMUNITY

"The King can do no wrong" is a concept of English common law and forms the basis of the doctrine of sovereign immunity.⁶³ In the United States, sovereignty, or supreme political authority, lies with the people. The government's mandate is the exercise of that authority for the benefit of the people.⁶⁴ As custodian of their authority, the people authorize the government to declare war, make peace treaties, levy taxes, and take property for public use.⁶⁵ Presumably, the government acts lawfully and in the best interest of the public. Immunity, or exception, from suit is applicable in those instances where the judgment sought in a legal proceeding necessarily reduces the public treasury or in some manner interferes with the governmental responsibility.⁶⁶

This concept does not apply only to the federal government. Each unit of government, from state to municipality, has the attributes of sovereignty within its sphere of responsibility and the doctrine of immunity applies to each of these governmental entities.⁶⁷ Indian tribes, as governmental entities possessing internal sovereignty, are also protected by sovereign immunity.⁶⁸ In *United States v. United States Fidelity & Guaranty Co.*,⁶⁹ the Supreme Court issued a definitive statement concerning tribal sovereign immunity and held that, as a matter of public policy, Indian nations are exempt from suit absent consent.⁷⁰ A multitude of cases followed the consent requirement.⁷¹ It is important to reiterate that although sovereign immunity oper-

62. See *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985), *cert. denied*, 107 S. Ct. 2184 (1987) (Indian tribe is a domestic nation, a distinct political community that exercises powers of independence and self-government.); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (Courts will not interfere with the internal workings of Indian tribes.); *State v. Bertrand*, 61 Wash. 2d 333, 378 P.2d 427 (1963) (Full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs of government, subject to qualifications by treaties and express legislation by Congress.).

63. 2 W. BLACKSTONE, COMMENTARIES *246.

64. *Moore v. Smaw*, 17 Cal. 199, 218, 79 Am. Dec. 123, 131 (1861).

65. *Id.*

66. *Land v. Dollar*, 330 U.S. 731, 738 (1947).

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), overruled the specific holding in *Land v. Dollar* but did not disturb the basic premise of sovereign immunity from suit noted here.

67. Cf. F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* 596-620 (2d ed. 1986) (discussing the origin and scope of federal, state, and municipal immunity and recent trends in waiver and limitations of immunity).

68. See *Cogo v. Central Council of the Tlingit and Haida Indians of Alaska*, 465 F. Supp. 1286 (D. Alaska 1979) (doctrine of sovereign immunity applied to Indian tribes to protect assets from loss through litigation).

69. 309 U.S. 506 (1940).

70. The public policy . . . exempted the dependent as well as the dominant sovereignties from suit without consent. . . . These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

Id. at 512.

71. Recently, the Supreme Court reaffirmed the *United States Fidelity & Guaranty Co.* decision

ates to protect against suit in order to safeguard common assets and prevent interference with public administration, it does not preclude an Indian tribe from seeking access to the courts to file and maintain an action.⁷²

CHALLENGES TO TRIBAL SOVEREIGN IMMUNITY

The doctrine of tribal sovereign immunity, like sovereignty, remains viable, despite a variety of challenges to its validity.⁷³ Public Law 280⁷⁴ authorizes the voluntary assumption of criminal or civil jurisdiction or both over Indian country by any state so legislating⁷⁵ while protecting the trust status of reservation lands.⁷⁶ Under those provisions, six states⁷⁷ assumed both civil and criminal jurisdiction, although individual tribes within those states demonstrating an adequate, functioning, criminal justice system may be exempt from the operation of that portion of the law.⁷⁸ Congress amended this law in 1968, repealing the provision for unilateral state action,⁷⁹ and instead requiring Indian consent before the assumption of jurisdiction by a state.⁸⁰ The amendment also permits a state, with the concurrence of the tribes, to assume partial jurisdiction and allows a state to retrocede jurisdiction if it so chooses.⁸¹ These provisions partially amelio-

in *Santa Clara Pueblo*, 436 U.S. 49. See also *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir.), cert. denied, 385 U.S. 918 (1966) (Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in federal or state courts, without congressional authorization.); *Chemehuevi Indian Tribe*, 757 F.2d 1047 (Indian tribes enjoy sovereign immunity from uncontested suit, subject to plenary control of Congress.); *Weeks v. United States*, 406 F. Supp. 1309 (D. Okla. 1975) (Indian nations are exempt from suit without congressional authorization.).

72. By statute, federal district courts have original jurisdiction to hear all civil actions brought by Indian tribes in controversies arising under the Constitution, laws and treaties of the United States, including situations where the amount in controversy does not meet the requirement or when the government of the United States declines to act to safeguard Indian property rights. 28 U.S.C. § 1362 (1982). See also *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 472 (1976) (Congress intended section 1362 to open the federal courts to the kind of claims properly brought by the United States as trustee but which, for whatever reason, were not pursued.).

73. See *infra* notes 74-95 and accompanying text.

74. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-89 (codified at 28 U.S.C. § 1360 (1982) (civil jurisdiction) and at 18 U.S.C. § 1162 (1982) (criminal jurisdiction)).

75. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 403(b), 82 Stat. 79, repealed section 7 of the Act of August 15, 1953, ch. 505, 67 Stat. 590, which gave the consent of the United States to any other state not having civil and criminal jurisdiction to assume jurisdiction by legislative action. 28 U.S.C. § 1360 notes (1982).

76. The statute provides:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360 (1982).

77. The six states are California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. C. GOLDBERG, PUBLIC LAW 280: STATE JURISDICTION OVER RESERVATION INDIANS 51 n.50 (1975).

78. *Id.* at 3, 50-51 n.29, 51 n.51.

79. See *supra* note 75.

80. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 401, 402, 82 Stat. 78, 79 (1968) (codified at 25 U.S.C. §§ 1321(a), 1322(a) (1982)).

81. 25 U.S.C. § 1323(a) (1982).

rate the negative effect of Public Law 280 on tribal sovereign immunity.

Another major challenge to the doctrine came with the passage of the Indian Civil Rights Act (ICRA).⁸² The ICRA provides for the drafting of a model code to govern the administration of justice in Indian courts over Indian offenses on reservations,⁸³ extending constitutional rights⁸⁴ and the privilege of habeas corpus.⁸⁵ It also grants United States governmental consent to the states to assume criminal and civil jurisdiction in Indian country, waiving federal authority.⁸⁶ These provisions, however, require tribal consent, thereby reserving to the tribes the right to retain or waive sovereignty in these matters as they see fit.⁸⁷ Despite this seemingly clear statement, lower courts have consistently ruled in suits filed under the ICRA, that Congress impliedly abrogated tribal sovereign immunity upon its enactment.⁸⁸ In 1978, the Supreme Court, in *Santa Clara Pueblo v. Martinez*, unequivocally overruled these prior decisions.⁸⁹ The Court held that, although Congress has the power to authorize civil actions against tribal officials and has exercised that power with regard to habeas corpus relief,⁹⁰ the Court will not infer such intent generally absent a clear legislative statement.⁹¹

The question of congressional waiver of tribal sovereign immunity remains controversial.⁹² According to the Court, however, congressional authority to waive and abrogate is plenary and unquestioned.⁹³ The trust

82. 25 U.S.C. §§ 1301-1341 (1982).

83. *Id.* at § 1311.

84. *Id.* at § 1302.

85. *Id.* at § 1303.

86. *Id.* at §§ 1321(a), 1322(a).

87. *Id.*

88. See *Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation*, Washington, 484 F.2d 200 (9th Cir. 1973) ("ICRA evidences congressional exception to general policy of immunity of Indian tribes from suit."); *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194 (D.S.D. 1975) (ICRA "abrogates by implication sovereign immunity Indian tribes enjoy from suit."); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (ICRA expressly limits Indian self-government, representing congressional modification of tribal sovereign immunity.).

89. It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, . . . the provisions of § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

436 U.S. 49, 58-59 (1978) (citations omitted).

90. *Id.* at 60.

91. *Id.* at 59.

92. Notwithstanding the seemingly precise statement by the Supreme Court in 1978 in *Martinez* that a "waiver . . . must be unequivocally expressed," see *supra* note 89, the issue continues to be litigated. The question appears to be what constitutes an unequivocal waiver and arises in varying contexts. See *generally Rice*, 463 U.S. 713 (18 U.S.C. § 1161 authorized application of state law to on-reservation liquor transactions.); *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986) (Contract action against Indian tribe cannot be maintained, despite waiver clause, for failure of approval by BIA, as required by 25 U.S.C. § 81.); *Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614 (9th Cir. 1985) (Absent specific waiver, BIA and tribe immune from suit by tribal members for mineral rights on allotted land.).

93. See *Jicarilla Apache Tribe*, 455 U.S. 130 (Only federal government may limit Indian tribe's exercise of its sovereign authority.); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable . . . on an Indian reservation except where Con-

relationship between Indians and the United States government and the serious ramifications of relinquishing the protection of sovereign immunity demand serious and specific consideration.⁹⁴ Any action that appears to affect the protection inherent in sovereign immunity must therefore be accompanied by a definitive statement that such an impact was intended.⁹⁵

INTERPRETATION AND USE OF WAIVER OF SOVEREIGN IMMUNITY

An examination of individual cases reveals the full import of tribal sovereign immunity and the waiver doctrine. For example, in *Chemehuevi Indian Tribe v. California State Board of Equalization*,⁹⁶ a case in which the tribe challenged the application of the state cigarette tax to cigarettes sold by the tribe on the reservation to non-Indian purchasers, the California State Board of Equalization filed a counterclaim against the tribe for taxes allegedly due.⁹⁷ The Ninth Circuit, after finding that waiver of immunity cannot be implied from the tribal action in filing suit, held that the tribe's sovereign immunity barred the counterclaim.⁹⁸ In *Weeks v. United States*,⁹⁹ an Oklahoma district court rejected attempts to circumvent tribal immunity by suing tribal officers or the United States in its capacity as trustee or guardian for the tribe.¹⁰⁰ And, in *Atkinson v. Haldane*,¹⁰¹ the Alaska Supreme Court rejected allegations that securing liability insurance constitutes a waiver of

gress has expressly provided that State laws shall apply."); *Confederated Tribes of Colville Indian Reservation v. Washington*, 412 F. Supp. 651 (D. Wash. 1976) (Sovereign rights of Indian tribes can be abrogated by federal legislation.).

94. The scope of the trust relationship between the Indian tribes and the federal government is a matter that remains controversial since Chief Justice Marshall first identified the Indians as "domestic dependent nations" in *Cherokee Nation*. Much of the confusion results from the coalescing of what might be considered mutually exclusive doctrines: the status and interpretation of treaties made with the Indians prior to 1871, congressional plenary power over Indian tribes as extrapolated from the commerce clause in the Constitution, and the fiduciary standards governing the conduct of the guardian in managing the affairs of the ward. Generally speaking, rules of treaty construction (ambiguities must be resolved in favor of the Indians involved, treaties must be interpreted as the Indians understood them, and treaties must be liberally construed in favor of the Indians) evolved into the amorphous standards by which all Indian issues are judged: although Congress possesses ultimate power over Indians, their possessions, and their affairs, any exercise of that power is presumed to be in the best interests of the Indian wards in light of contemporary standards and generalized moral principles. Thus, in an era where self-determination and economic self-sufficiency are valued, the presumption necessarily is that autonomy in tribal affairs and the protection of tribal assets are in the best interests of the tribes. See *Kenai Oil and Gas, Inc. v. Department of Interior*, 522 F. Supp. 521 (D. Utah 1981), *aff'd*, 671 F.2d 383 (10th Cir. 1982) (Relationship between the federal government and an Indian tribe is a trust relationship established for the protection of the Indians.); *Sanapaw v. Smith*, 113 Wis. 2d 232, 335 N.W.2d 425 (Ct. App. 1983) ("[A]lthough Indian sovereignty doctrine has undergone significant evolution, . . . [i]t remains relevant as the backdrop against which applicable treaties and federal statutes must be read."); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 612-18 (1975) (discussing rules of treaty construction and elements of the trust relationship).

95. *Santa Clara Pueblo*, 436 U.S. 49, 58. See also *Chemehuevi Indian Tribe*, 757 F.2d 1047 (Congress, no less than an Indian tribe, cannot imply waiver of immunity but must unequivocally express it.).

96. 757 F.2d 1047 (9th Cir. 1985).

97. *Id.* at 1050.

98. *Id.* at 1053.

99. 406 F. Supp. 1309 (W.D. Okla. 1975).

100. A tribe may not be sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe. *Id.* at 1325.

101. 569 P.2d 151 (Alaska 1977).

immunity to suit.¹⁰²

The doctrines of tribal sovereign immunity and waiver were codified by the Indian Reorganization Act of 1934,¹⁰³ which provides for the establishment of two separate and distinct entities within the tribal structure.¹⁰⁴ Section 16 grants the Indians the right to organize for the tribe's common welfare and to adopt a constitution and bylaws, thereby forming a governmental entity.¹⁰⁵ Section 17 permits the tribe to incorporate for purposes of conducting business.¹⁰⁶ The two entities are separate and distinct, each performing clearly defined functions.¹⁰⁷ A section 16 governmental entity en-

102. The court found that the purchase of insurance was an act to protect against the possibility of a judicial ruling adverse to sovereign immunity. As such, it should not be interpreted as an implied waiver of the very immunity being protected. *Id.* at 169-70.

103. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1982)).

104. See *infra* notes 105-06 and accompanying text.

105. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation . . . at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . . 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 of the Interior; 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.

Act of June 18, 1934, ch. 576, 48 Stat. 987 (codified as amended at 25 U.S.C. § 476 (1982)).

106. The Secretary of the Interior may . . . issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such 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 . . . and such further powers as may be incidental to the conduct of corporate business.

Act of June 18, 1934, ch. 576, 48 Stat. 988 (codified at 25 U.S.C. § 477 (1982)).

107. A good example of the distinction between the governmental and corporate entities is found in *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (1983).

The preamble to the Tribe's constitution reads:

We, the people of the Gila River Indian Reservation, in order to show our gratitude to Almighty God, and to preserve in ourselves the rights of self government and to provide a means for the orderly transaction of community business and the free expression of the community will, do ordain and establish this Constitution and Bylaws for the government of the people of this reservation, henceforth to be known as the Gila River Indian Community.

Id. at 382, 674 P.2d at 1380.

Contrast the constitutional provisions with the following excerpt from the corporate charter: In order to further the economic development of the Gila River Pima-Maricopa Indian Community of the Gila River Reservation in Arizona by conferring upon the said Community certain corporate rights, powers, privileges and immunities; to secure for the members of the Community an assured economic independence; and to provide for the proper exercise by the Community of various functions heretofore performed by the Department of the Interior, the aforesaid Community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Gila River Pima-Maricopa Indian Community." . . .

The Community [Indian Corporation] . . . shall have the following corporate powers

. . .

(i) To sue and be sued in courts of competent jurisdiction within the United States.

Id. The reader should note the distinctions in the entities' names in order not to be confused by the use of "Community" in textual references.

joys tribal sovereign immunity and extends that immunity to any subordinate organizations functioning under the governmental mantle.¹⁰⁸ A section 17 corporate entity also carries sovereign immunity.¹⁰⁹

The governmental entity has the power to waive sovereign immunity for itself, for any subordinate tribal organizations, and for the corporate entity.¹¹⁰ This can be accomplished through the enactment of a tribal ordinance,¹¹¹ a provision in a specific contract,¹¹² or, more commonly, by the inclusion of a "sue and be sued" clause¹¹³ in the corporate charter of a section 17 corporation. The waiver of immunity is limited to the entity or context specified; it will not be inferred or interpreted to affect other entities or activities undertaken within the tribal structure.¹¹⁴

Since the doctrine of sovereign immunity is designed to protect community assets, the tribal governmental entity is limited in the types of situations where it can effectively waive immunity.¹¹⁵ Generally, any waiver of immunity is subject to the approval of the Secretary of the Interior.¹¹⁶ The federal government, acting in its role as trustee, thus insures that tribal assets are safeguarded.¹¹⁷ In that context, it is unlikely that the tribal governmental entity would attempt, nor is the Secretary likely to approve, the waiver of

108. *White Mountain Apache Tribe v. Industrial Comm'n of Ariz.*, 144 Ariz. 129, 696 P.2d 223 (Ct. App. 1985) (Indian tribes are accorded sovereign immunity, as are subordinate tribal enterprises.).

109. The language of 25 U.S.C. § 477 is permissive, limiting only the corporation's ability to encumber reservation land and requiring only that the corporate charter be approved by the Secretary of the Interior. The scope of the corporation's duties and powers are left to the tribe. *See also Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978) (The mere fact of Indian corporate activity or existence does not waive sovereign immunity, although the corporation has the possibility for the waiver of that immunity.).

110. *See Seminole Police Dep't v. Casadella*, 478 So. 2d 470 (Fla. Dist. Ct. App. 1985) (Sovereign immunity of tribe and its subordinate economic units can only be waived by tribe itself or United States government.). *See also* F. COHEN, *supra* note 40, at 325 (discussing whether tribe's exercise of waiver authority is subject to approval by the Secretary of the Interior); *infra* note 117.

111. *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979).

112. *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975).

113. A representative "sue and be sued" clause is found in *Enterprise Elec. Co. v. Blackfeet Tribe of Indians*, 353 F. Supp. 991, 992 n.1 (D. Mont. 1973):

To 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, or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattel specially pledged or assigned.

114. *See Gold v. Confederated Tribe of Warm Springs Indian Reservation*, 478 F. Supp. 190 (D. Or. 1979) ("Indian tribe's corporate charter does not waive tribe's sovereign immunity for government conduct."); *Boe v. Fort Belknap Indian Community*, 455 F. Supp. 462 (D. Mont. 1978) (Corporate waiver is not a waiver of tribal organization's immunity from suit.).

115. *See supra* notes 66-72 and accompanying text.

116. It is generally understood that all waivers of tribal immunity are subject to governmental authorization. *See A.K. Management Co.*, 789 F.2d 785 (Waiver of sovereign immunity by tribe pursuant to management contract is inoperable where waiver clause was part of an agreement which was void for failure to comply with statute requiring governmental approval of contract.); 25 U.S.C. § 81 (1982) (Any contract encumbering tribal assets must have federal government approval.); F. COHEN, *supra* note 40, at 325-26 (Waiver of immunity generally requires approval.). *But see* *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (The phrase "without congressional authorization," within rule exempting all Indian nations from suit without congressional authorization, cannot be construed to mean that an Indian tribe is unable to waive its immunity.).

117. *Bell v. Phillips Petroleum Co.*, 641 P.2d 1115 (Okla. 1982) (In its role as constitutional protector of the Indian, the United States has authority to do all that is required to perform that obligation.).

that entity's immunity or that of any subordinate tribal entity.¹¹⁸ Alternatively, waiver is a viable option in the context of a tribal corporate entity.¹¹⁹

If a tribe chooses to incorporate under section 17 of the Indian Reorganization Act, it usually does so for the purpose of conducting business activities that will benefit the tribe economically.¹²⁰ In the non-Indian business world, where the doctrine of sovereign immunity is generally non-existent, it is understood that contracts between parties are enforceable in courts of law¹²¹ and also that the courts are available in any other civil action that may attach to a given situation.¹²² If one party is not subject to the jurisdiction of the court, it is unlikely that a prudent business executive would undertake a contractual arrangement that, in the event of a dispute, would be unenforceable.¹²³ In order to gain equal footing and become competitive in the business world, an Indian tribe or corporation must be willing to render its activities subject to the same constraints as all other participants.¹²⁴ It is for that reason that many Indian corporate charters contain the "sue and be sued" clause.¹²⁵

A waiver clause is not, however, a complete relinquishment of protection.¹²⁶ In addition to the section 17 limitation on a tribal corporation's ability to affect tribal assets,¹²⁷ the tribe can place limits on any waiver it chooses to make.¹²⁸ For example, in *Parker Drilling Co. v. Metlakatla Indian Community*,¹²⁹ a federal district court in Alaska held that a tribal corporate entity may restrict the extent of its waiver clause to exclude tort

118. See *supra* notes 66-70 and accompanying text.

119. The purpose of the Indian Reorganization Act was to grant tribes the freedom to participate in the private business world. In answer to an objection that tribal immunity would prevent such participation, Congress authorized the formation of a corporate entity, capable of waiving its own immunity but not that of the tribal entity. See F. COHEN, *supra* note 40, at 325-26.

120. "The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device. . . ." Request for Interpretive Opinion on the Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act, 65 I.D. 483, 484 (1958) [hereinafter *Opinion on Separability*].

121. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

122. "These rules govern the procedure in the United States district courts in *all suits of a civil nature* whether cognizable as cases at law or in equity . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1 (emphasis added).

123. That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.

1 CORBIN ON CONTRACTS § 1 (1963).

124. "Only with the potential for imposition of tort liability are Indian corporations truly equal, regardless of the desirability of certain aspects of that status [immune from suit]." *Parker Drilling Co.*, 451 F. Supp. at 1137.

125. See *supra* note 113 and accompanying text.

126. See *infra* notes 127-135 and accompanying text.

127. "Such [corporate] charter . . . [grants] no authority . . . to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation." 25 U.S.C. § 477 (1982).

128. See *infra* notes 129-135 and accompanying text.

129. 451 F. Supp. 1127 (D. Alaska 1978).

liability.¹³⁰ The corporation fell within the court's jurisdiction because it failed to exclude such liability, choosing instead to enact a general unlimited waiver of immunity and obtain the necessary approval.¹³¹ In *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*,¹³² a case involving a breach of contract allegation, the Eighth Circuit reached a similar result, holding that when a tribe does consent to suit, the court will strictly construe any conditional limitations placed on the consent.¹³³ The Fifth Circuit, in *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*,¹³⁴ considered whether consent to suit constitutes consent to the levy of an adverse judgment, lien, or attachment on property other than that specifically pledged or assigned. The court concluded that it does not.¹³⁵

These opinions demonstrate judicial recognition of the power of Indian tribes to limit their exposure to liability and judgment. Judicious use of that power is in keeping with the precepts upon which the doctrine of sovereign immunity is based. The judiciary has not, however, been alone in such recognition. In a 1958 opinion,¹³⁶ the Solicitor General of the United States explored the legislative history of the Indian Reorganization Act. After stating that the powers, privileges, and responsibilities of the tribal entities formed under the Act differ materially from one another, the Solicitor General concluded that Congress intended that the tribes take advantage of incorporation as a means of conducting the business of the tribe while at the same time eliminating the possibility of federal liability.¹³⁷ The use of the power is in the hands of the tribes.

A VIEW TOWARD THE FUTURE

The United States government's attitude toward, and approach to, the nation's Native Americans has changed dramatically and often over time.¹³⁸ The modern philosophy combines the mechanisms of the Indian Reorganization Act with the goals of the Self-Determination Act and encourages the realization of economic development and prosperity on Indian reservations. Standing alone, however, these enactments have failed to bring about even a semblance of success.

130. *Id.* at 1137.

131. *Id.*

132. 517 F.2d 508 (8th Cir. 1975).

133. "[T]he general rule [is] that since an Indian tribe is immune from uncontested suit, if it does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied." *Id.* at 509.

134. 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966).

135. Consent is "not [to] be deemed a consent to [the] levy of any judgment, lien, or attachment on [the] property of [the] tribal corporation other than income or chattels especially pledged or assigned." *Id.* at 518.

136. Opinion on Separability, *supra* note 120, at 483.

137. "This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credits and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature." *Id.* at 484.

138. "While the assimilationist policy prevailing at the beginning of this century must be considered in analyzing statutes which were also enacted at that time, it should be kept in mind that present federal policy favors the strengthening of tribal self-government. *Estate of Johnson*, 125 Cal. App. 3d 1044, 1048, 178 Cal. Rptr. 823, 826 (1982), *cert. denied*, *Cory v. Campbell*, 459 U.S. 828 (1982).

The 1980 census reported a per capita income on the Navajo Reservation of \$2,400.00.¹³⁹ The current official unemployment rate is thirty-three percent, a figure that does not include individuals who are no longer seeking employment or certain areas of the reservation where the unemployment rate exceeds sixty percent.¹⁴⁰ Similarly, the Shoshone-Bannock Tribes report that, according to the 1980 census, forty-six percent of Indian households on the reservation live below the poverty line.¹⁴¹

Legislation such as that proposed by Senator Inouye, which makes available much needed financial assistance,¹⁴² and legislation sponsored by Senator McCain, which offers tax incentives in exchange for on-reservation employment,¹⁴³ are attempts to facilitate progress toward economic parity. It is, however, improvident to suggest that such legislation is the answer to the economic problems that pervade the nation's Indian reservations. Even if such proposals survive the legislative process and become law,¹⁴⁴ the impact of new legislation, in all probability, is some years away.

There is no need to await further government action. The mechanisms that permit Native Americans to participate profitably in economic ventures already exist. The Solicitor's Opinion and the court decisions in *Parker Drilling*, *Namekagon*, and *Maryland Casualty* illustrate the current legal climate.¹⁴⁵ Indian tribes possess the power to limit the vulnerability of tribal assets to civil judgment. A tribe can select projects that are in keeping with its unique philosophy and fiscal circumstances, assess the degree of risk it wishes to undertake, and limit its liability accordingly.¹⁴⁶

General waiver of sovereign immunity exposes all assets, except those protected as part of the federal trust, to judgment in tort and other civil actions as well as in contract litigation.¹⁴⁷ A tribe can maximize its opportu-

139. *Hearing on the Indian Economic Development Act Before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee*, 100th Cong., 1st Sess. 1 (1987) (P. MacDonald, Chairman, Navajo Nation) (available from the Senate Finance Committee).

140. *Id.* at 1-2.

141. *Hearing on the Indian Economic Development Act Before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee*, 100th Cong., 1st Sess. 2 n.4 (1987) (C. Pace, Director, Economic Analysis Office, Shoshone-Bannock Tribes) (available from the Senate Finance Committee).

142. *See supra* notes 6-10 and accompanying text.

143. *See supra* notes 11-18 and accompanying text.

144. The Administration continues to support the enterprise zone concept as a constructive approach to assist structurally depressed local economies. However, a Federal enterprise zone program should be considered in the context of current budget constraints. . . .

[T]he Administration believes that consideration of S. 788 [Indian enterprise zone bill] and S. 983 [rural enterprise zone bill] should be deferred. Although we continue to support the enterprise zone concept, we believe that the current budget situation and the new tax reform law provide an opportunity to reassess the proper mix of tax incentives and other Federal programs intended to encourage business development in economically distressed areas most efficiently.

Hearing on the Indian Economic Development Act Before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee, 100th Cong., 1st Sess. 2 (1987) (C. Eugene Steurle, Deputy Assistant Secretary, Department of Treasury) (available from the Senate Finance Committee).

145. *See supra* notes 129-37 and accompanying text.

146. *Id.*

147. *Parker Drilling Co.*, 451 F. Supp. 1127.

nities for success and minimize risk by tailoring the waiver and collateral assets pledged to each individual business venture.

Waiver of sovereign immunity is, however, but one of the possibilities for dispute resolution. The development and strengthening of tribal court systems, mediation, and arbitration are alternatives to expensive and protracted legal battles in state and federal courts.¹⁴⁸ The government's policy of self-determination implicitly recognizes that Indian people enjoy distinctive cultures and that they possess the right to live according to the dictates of their individual cultures. Alternatives to the adversarial nature of the American judicial system may well prove more in keeping with Indian values and warrant serious consideration. A system that offers the certainty of a forum and demonstrates the ability to reach just resolutions of disputes for Indians and non-Indians alike removes a major impediment to economic development. In concert with tribal, federal, and private efforts to improve reservation economies, the development of a comprehensive plan for dispute resolution insures progress toward true self-determination for Native Americans.

148. For a discussion of alternative methods of dispute resolution, see C. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985). See also *ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS* 6-7 (A. Widiss ed. 1979); Deloria, *Indian Law and The Reach of History*, 4 J. OF CONTEMP. L. 1, 12-13 (1977).