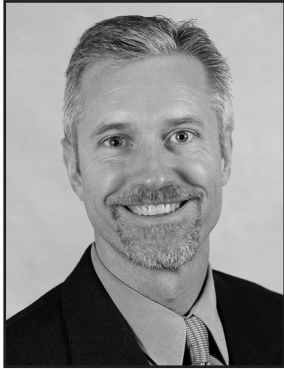


Construction Contracts with Indian Tribes or on Tribal Lands

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With a boom under way in construction of facilities for Native American tribes, counsel for non-Indian businesses should be prepared for their clients' legal needs and the often-unique issues of tribal sovereignty that arise. If a tribe or tribal entity refuses to pay a designer, contractor, or supplier under a contract, what remedies does the aggrieved party have against the tribe or tribal

entity? Can you record a mechanic's lien against the tribe's or tribal entity's property? Can you sue the tribe or tribal entity in state court? Can you sue the tribe or tribal entity in federal court? Can you sue the tribe or tribal entity in tribal court? If a judgment against the tribe or tribal entity is obtained, can you execute on the judgment? The majority of the answers to these questions depend on sovereign immunity.

Sovereign Immunity

As Sovereigns, with Few Exceptions, Native American Tribes Are Immune from Suit in Any Court

As a basic premise, Native American tribes enjoy sovereign immunity.¹ Protection from suit has been recognized as integral to the self-governance of Indian tribes.² The common law immunity of a Native American tribe is coextensive with that of the United States, albeit subject to the superior and plenary control of Congress.³ If a tribe's sovereign immunity remains intact, a federal or state court lacks the power to hear or decide the litigation.⁴ Indeed, at least one tribal court has held a non-Indian cannot sue the tribe, even in its own tribal court, if sovereign immunity has not been waived.⁵

Most courts hold that the extent of sovereign immunity is not affected by the type of remedy sought: money, declaratory relief, or an injunction.⁶ However, the Fifth Circuit has decided that actions for declaratory or injunctive relief can be brought notwithstanding a claim of sovereign immunity.⁷ Although sovereign immunity is jurisdictional, it operates essentially as a defense.⁸ Native American tribes can institute suits while maintaining exemption from cross-claims and counterclaims in the same action.⁹ However, it has been held that a tribe forgoes this protection as to claims of a defendant that assert mat-

ters in recoupment, that is, those arising out of the same transaction or occurrence that is the subject matter of the suit.¹⁰ By itself, a tribe's waiver of immunity to suit in state court does not allow suit in federal court.¹¹

Given the scope of sovereign immunity, Native American tribes, and their subordinate tribal entities, may not be sued absent an express and unequivocal relinquishment of this protection or abrogation of tribal immunity by Congress.¹² Whether Congress has abrogated the sovereign immunity of Indian tribes is a question of statutory interpretation and is reviewed *de novo*.¹³

Tribes and Tribal Entities Can Waive Sovereign Immunity

A tribe can relinquish its immunity by executing a waiver.¹⁴ A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."¹⁵ Having stated this, the U.S. Supreme Court also has held that the use of talismanic words such as "sovereign immunity" are not needed for a valid waiver.¹⁶ Some courts construing the "unequivocally expressed" requirement have held a tribe cannot be estopped from asserting immunity from suit absent express and unequivocal conduct.¹⁷ Additionally, citing cases dealing with the federal government, judges have decided such waivers must be liberally construed in favor of the tribal entity and restrictively against the claimant.¹⁸

In determining whether a tribe has relinquished its protection with sufficient clarity, courts have inquired "whether the language of [the operative agreement or clause] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so."¹⁹ To determine whether an agreement is sufficiently "clear" requires courts to take "a practical, commonsense approach in attempting to separate words that fairly can be construed as comprising a waiver of tribal sovereign immunity from words that fall short."²⁰ Taken together, the cases require that waiver be found when expressed in a way that could not unfairly surprise a tribe.

Given facts meeting these requirements, courts routinely uphold contractual waivers of sovereign immunity.²¹ The Ninth Circuit, for instance, has held that a tribe did so because it agreed to refer disputes to a federal district court.²² Prior to a recent U.S. Supreme Court decision, some judges held a tribe waives its sovereign immunity when it agrees to arbitrate disputes. Other courts criticize such holdings by referring to the language in *Santa Clara Pueblo v. Martinez* that any waiver must be unequivocally expressed.²³ At least one tribal court appears to treat all waivers as suspect.²⁴

Whether an arbitration clause can effectuate a waiver was decided by the U.S. Supreme Court in *C&L Enterprises, Inc.*

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v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*.²⁵ The Court first noted that for a tribe to relinquish its immunity, its renunciation must be “clear.”²⁶ The Court held that the waiver—an agreement to submit disputes to arbitration, to be bound by the arbitration award, and to have the award enforced in any court of law—was unambiguous and explicit.²⁷ Importantly, the arbitration clause in *C&L Enterprises* encompassed three elements: an agreement to arbitrate all disputes, an agreement to be bound by any arbitration award, and an agreement that any award could be enforced in any state or federal court with jurisdiction. Any deviation from this language in *C&L Enterprises* could engender an argument that the case is distinguishable.

Subordinate Tribal Entities Also May Have Sovereign Immunity

The scope of sovereign immunity can extend to subordinate tribal economic entities.²⁸ One court has noted: “Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast.”²⁹ The determination of whether a tribe’s or tribal entity’s activities on or off the reservation waive sovereign immunity varies by state and, sometimes, by court. For example, Arizona courts hold that sovereign immunity applies whether a tribe is acting in a governmental or a business capacity, and regardless of whether those activities take place on the reservation.³⁰ New Mexico, however, has held that a tribe forgoes its sovereign immunity protection for activities conducted off the reservation.³¹ California courts have held subordinate tribal entities retain sovereign immunity.³² Alaska distinguishes between a tribal entity operating in its governmental capacity, which retains its sovereign immunity, and one acting as a commercial enterprise, which may have waived its protection.³³

A federal court may find a tribal entity does not enjoy the tribe’s immunity while the tribe’s own court concludes that the same entity retains sovereign immunity. In *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*,³⁴ the Ninth Circuit found a tribal entity named “Colville Tribal Enterprises Corporation” (CTEC), organized under Colville Tribal law, to be a corporation that was “separate from the tribal Business Council. . . .”³⁵ The Colville Tribal Court, however, in the related tribal court proceeding, characterized CTEC as follows:

CTEC is a corporation formed under the laws of the Colville Tribe, CTC Chapter 25. The tribes’ intent in forming CTEC [and other corporate entities] . . . was to use these corporations to carry out the tribes’ constitutional duties in providing for the economic welfare and security of the Colville members.

The tribes may use a corporate forum, such as CTEC . . . to carry out its constitutional duties, and when it does so, the corporate organization becomes part of the tribal government and benefits from the privileges and immunities of the tribal government.³⁶

The tribal court also concluded that CTEC was “interwoven

with the business arm of Colville Tribe” and, as such, CTEC enjoyed the sovereign immunity of the tribe.³⁷

Many subordinate tribal entities have been formed with charters or constitutions that allow the entity to “sue or be sued.” Plaintiffs suing tribes or tribal entities in state or federal court often cite to such clauses as an express waiver of sovereign immunity. The strong weight of authority holds that mere enactment of a “sue or be sued” clause, in and of itself, does not constitute an effective waiver of sovereign immunity.³⁸ However, at least one state court has held a tribe forgoes its protection when it referred to both its governmental and corporate powers in the language introducing a “sue and be sued” clause in its corporate charter.³⁹ In summary, when contracting with a subordinate tribal entity, the careful practitioner will obtain a waiver of sovereign immunity from the entity and an express approval of that decision from the tribe.

Who Can Waive Sovereign Immunity?

The question that often arises: Who can effectively execute the waiver such that it will be binding on the tribe or tribal entity? The answer may be found in the constitution or charter of the tribe or tribal entity. Two cases illustrate the issues involving authority to sign a valid waiver.

In *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*,⁴⁰ plaintiff HEC contracted to provide services to the tribe. The latter was governed by the Fort Bidwell Indian Community Council. The agreement was executed by the council’s chairwoman and chief executive officer. The contract contained a clause that all disputes were to be arbitrated before the American Arbitration Association and could be enforced in “any court of competent jurisdiction.”⁴¹ When the tribe refused to pay for services rendered, HEC demanded arbitration. Although the tribe argued there had been no waiver of immunity, the arbitrator found a waiver and entered an award in favor of HEC. When the superior court confirmed the award, the tribe appealed.

The California Court of Appeal reversed in favor of the tribe. From a review of the tribe’s constitution and bylaws, the appellate court concluded that the chairwoman did not have

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the authority to execute a waiver of the tribe’s sovereign immunity unless the tribal council expressly had granted such authority to her. Given no resolution or other document from the tribal council granting such powers, the waiver was invalid. The court also held the tribe had not relinquished its immunity by appearing at the arbitration to contest the waiver issue.⁴²

In the second decision, an unreported case from California,

Lobo Gaming, Inc. v. Pit River Tribe of California,⁴³ Lobo Gaming loaned funds to the tribe and entered into an equipment lease with it. The lease contained a waiver of sovereign immunity that the tribal council approved. The tribal constitution conferred on that council the power to “negotiate, consult

Given no resolution or other document from the tribal council granting such powers, the waiver was invalid.

and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations.” The Tribal Constitution also granted the tribal council the right to execute a waiver of sovereign immunity, but with a proviso: “. . . no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.”⁴⁴ When Lobo Gaming sued, the tribe successfully moved to quash service based on its sovereign immunity. Lobo Gaming appealed.

The California Court of Appeal again affirmed the trial court’s dismissal. Because the Tribal Constitution specifically required a vote of the tribe to effectuate a waiver, the tribal council’s approval of the lease with the waiver language was of no effect.⁴⁵ Lobo Gaming attempted to argue the tribal council’s authority to waive immunity was part of its “express” power to contract because the authority to contract is a nullity without the authority to provide enforceable remedies. The court refused to find any such “implied” waiver given the express majority vote requirement in the Tribal Constitution.

In summary, the careful construction practitioner should investigate the constitution, bylaws, charter, ordinance, or whatever foundational documents exist for each tribe or tribal entity to determine what governing body, chairperson, president, or other officer is authorized to execute a waiver. Additionally, the practitioner should analyze and follow any procedures required to effectuate a valid waiver prior to entering into any contract requiring a waiver of sovereign immunity.

Assuming a Valid Waiver, What Courts Have Jurisdiction?

Federal Court

Even if a tribe or tribal entity has waived its sovereign immunity and has consented to jurisdiction in federal court, parties cannot, by contract or stipulation, grant subject matter jurisdiction to a federal district court because it is a court of limited jurisdiction.⁴⁶ Unless a federal question exists under 28 U.S.C. § 1331, diversity exists under 28 U.S.C. § 1332, or a bond was issued pursuant to the federal Miller Act, 40 U.S.C. § 270a, the district

court, with its limited jurisdiction, cannot entertain the action.

Several cases involving Native American tribes have been brought in federal court based, in part, on federal question jurisdiction under section 1331.⁴⁷ Whether a particular contract is a management contract under the Indian Gaming Regulatory Act, 25 U.S.C. § 2711, presents a federal question.⁴⁸ However, the fact that a Native American tribe is involved does not by itself raise a federal question under 28 U.S.C. § 1331.⁴⁹ Nor does 28 U.S.C. § 1362 provide a basis for federal jurisdiction for every suit brought by a Native American tribe, especially a standard breach of contract action involving construction projects on the reservation.⁵⁰

Section 1332 often does not provide a basis for suit because tribes are not “citizens” of a state for purposes of diversity jurisdiction.⁵¹ However, a tribal entity incorporated under section 17 may be considered a “citizen” of the state of its principal place of business.⁵² Additionally, if a tribal enterprise is incorporated under state corporation laws, then the entity is unquestionably a citizen of the state in which it is incorporated. If the jurisdictional minimum is met, and if the parties are truly diverse, then a federal district court can properly assert jurisdiction over a dispute between a non-Indian and a tribal enterprise.⁵³ Tribal entities formed for economic purposes pursuant to tribal law may be “citizens” of the state in which they are incorporated for purposes of diversity jurisdiction.⁵⁴

State Court

In direct contrast to the jurisdictional limitations of federal district courts, most state courts are courts of general jurisdiction. However, whether a state court can entertain a dispute involving a Native American tribe is closely related to the issue of sovereign immunity and subject-matter jurisdiction.⁵⁵ Certain state courts have held that tribes operating as business entities off-reservation are subject to their jurisdiction, and the court has the power to resolve the dispute.⁵⁶ Other state judges have held the opposite, whether the tribe is operating on or off the reservation.⁵⁷ Therefore, even if sovereign immunity is waived, there may be some question whether the state court will address a dispute involving a project built on reservation land for a tribe or tribal entity.

There are three caveats to a blanket assertion of jurisdiction over every dispute between a Native American tribe and a non-Indian. First, there is an “ever-present, overriding principle: State jurisdiction must not interfere with Indian self-government, absent some compelling state interest.”⁵⁸ Generally, while a dispute between Native Americans and non-Native Americans that occurs entirely on the reservation may require tribal court relief, state courts may assume jurisdiction of a commercial dispute where the underlying transaction occurred entirely off the reservation.⁵⁹

Second, 28 U.S.C. § 1360 specifically excludes jurisdiction by the state court over a dispute involving “ownership or right to possession of [Native American] property or any interest therein.”⁶⁰ Three state courts interpret this section to mean that any dispute involving ownership of land that is arguably “Indian land” or “trust land” is outside their jurisdiction.⁶¹ Such cases would include mechanic’s lien foreclosure actions.⁶²

Third, if a tribal court has already asserted jurisdiction over a dispute involving tribal sovereignty or issues of tribal law, or has concurrent jurisdiction, then a state court may decline jurisdiction.⁶³ Indeed, if a separate suit has been filed in tribal court, then the exhaustion doctrine may require the state action to be dismissed in favor of the tribal court action, or at least stayed pending resolution of the tribal court action.⁶⁴

Tribal Court

Many tribes have established tribal courts,⁶⁵ which may be courts of either general or limited jurisdiction.⁶⁶ The jurisdictional limits of the tribal court sometimes are found in the tribe's charter, constitution, or code.⁶⁷ In many charters/constitutions, the tribe has granted a tribal court subject matter jurisdiction in the first instance over any suit to enforce a reservation-related contract.⁶⁸

Established tribal courts have exclusive jurisdiction over reservation affairs involving members of the tribe. They also may have jurisdiction over civil suits against tribal members that arise on the reservation.⁶⁹ The U.S. Supreme Court has noted that civil jurisdiction over activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute."⁷⁰ The Ninth Circuit has previously held that "the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation."⁷¹ Therefore, if the tribe has an established, functioning tribal court and an action is brought first in that court, then a federal or state court will likely defer to that court.

There is some question as to whether a tribal court even has jurisdiction over the tribe or tribal entity if the tribe or tribal entity has not executed a valid waiver of sovereign immunity. The difficulty in analyzing this question lies in the dearth of reported tribal court decisions. Although certain publications exist, there is no established compendium of all tribal court opinions.⁷² However, the Navajo Supreme Court has held that, absent a waiver, the Navajo Nation is not subject to suit in its own tribal court.⁷³ This would be similar to a suit against the United States in federal court, which suit is allowed only pursuant to statutes, for instance, the Federal Tort Claims Act. To the extent a Tribal Constitution, charter, or code allows suit against the tribe in the tribal court, sovereign immunity may have been abrogated and suit may be brought in that court.

If Sovereign Immunity Has Been Waived and a Judgment from a Court with Jurisdiction Has Issued, How Is the Judgment Enforced?

A creditor attempting to enforce a judgment against a tribe or tribal entity faces an uphill battle. First, tribal property is either owned by the United States and held in trust for all members of the tribe or owned in common by the tribe for the benefit of all living members. To protect this class (which changes with each birth and death) and the Native American land base, there are restraints against alienation of tribal lands. Under 25 U.S.C. § 177, regardless of whether the tribe or the U.S. government holds title, "[n]o purchase, grant, lease or other con-

veyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution."

Given this protection, and perhaps, more importantly, ownership of the land by the federal government, state mechanic's lien laws have no application to reservation land or to trust lands held by Native American allottees.⁷⁴ These antialienation principles apply likewise to land held in fee by Native American tribes or tribal entities.⁷⁵ It could be argued that state mechanic's lien laws do not even apply to lands off the reservation owned in fee simple by Native American tribes, given the

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sovereign immunity principles discussed previously. If the tribal owner of the property has sovereign immunity, then how can the prospective plaintiff name that entity to enforce a mechanic's lien properly recorded against the property?

Assuming the contract has an all-inclusive waiver of sovereign immunity (both for suit and for enforcement), that the appropriate tribal officer or governing entity has approved the waiver, that the tribe or tribal entity has not asserted sovereign immunity in the lawsuit, and that a judgment has been rendered, enforcement of that judgment is still not certain, and there are few reported decisions to provide guidance on the subject. One tenet seems clear: a waiver of sovereign immunity to suit does not automatically allow execution of a judgment against tribal assets absent language allowing such enforcement.⁷⁶ However, the tenet is based on decisions where an "all-inclusive" waiver was not obtained. An analysis of the most-cited decisions in the area, most involving garnishments, may be helpful to predict how a court might address an attempted enforcement of a judgment against tribal assets.

*Maryland Casualty Company v. Citizens National Bank of West Hollywood*⁷⁷ appears to be the first decision to address enforcement of a judgment against a tribe given a waiver of sovereign immunity. A surety, Maryland Casualty, sued its obligee, Seminole Indian Tribe, Inc. (SIT), a section 17 entity. Although the charter provided a basis to claim sovereign immunity had been waived through the "sue and be sued" clause, the charter also allowed execution on only such "income or chattels especially pledged or assigned."⁷⁸ Maryland Casualty recovered a judgment against SIT in state court. To enforce its judgment, the surety garnished SIT's account at an off-reservation bank. However, the funds were subject to a special deposit agreement between the United

States and SIT. SIT successfully moved to dismiss the garnishment action and Maryland Casualty appealed.

On appeal, the Fifth Circuit affirmed the dismissal and held the specific limitation on execution in the corporate charter “must be liberally construed in favor of the Seminole Tribe and all doubtful expressions therein resolved in favor of the Seminole tribe.”⁷⁹ The Fifth Circuit thus held that SIT was immune from the garnishment action.⁸⁰

In another oft-cited decision, *Joe v. Marcum*,⁸¹ Joe, a member of the Navajo Nation, borrowed money from USLife Credit Corp. The loan occurred off the Navajo reservation. When Joe did not repay the loan, USLife sued and acquired a state court judgment against him. USLife obtained a writ of garnishment from the state court naming Joe’s employer as garnishee. That employer was a Delaware corporation that operated a mine on the Navajo reservation.

Joe sought relief in federal court. The court found that because the Navajo tribal code did not provide for garnishment, allowing the state garnishment action to proceed “would thwart the Navajo policy not to allow garnishment. Such impinges upon tribal sovereignty.”⁸² The court noted that tribal members should not be allowed to use the reservation as a sanctuary to insulate themselves from state court actions arising from their off-reservation transactions, and it recognized that a garnishment is ancillary to the underlying action over which the state court has jurisdiction. Nonetheless, the judge held the interests of tribal sovereignty were paramount.⁸³

At least one federal court has concluded that state officials do not have the power to enforce state court judgments on reservations.⁸⁴ Minnesota and South Dakota courts have stated, in dicta, that state court judgments cannot be enforced on a reservation against Indian judgment debtors.⁸⁵ Montana, however, favors state interests over tribal interests and allows reservation wages to be garnished under state law.⁸⁶


The most recently cited garnishment decision is *Cherokee Nation v. Nations Bank, N.A.*⁸⁷ However, in that case, the garnishment action was approved because the state court judgment was entitled to full faith and credit under Cherokee law and the Cherokee courts had adopted Oklahoma statutes governing enforcement of judgments, including garnishment proceedings.⁸⁸ Under these circumstances, the court found no undue interference with tribal sovereignty.

Given these authorities, it could be surmised that state and federal courts are reluctant to allow judgment creditors to enforce their judgments, whether by garnishment or otherwise, against on-reservation assets or, as in *Maryland Casualty*, off-reservation tribal accounts. Certainly, it is almost a given that a sheriff or other officer has no jurisdiction on the reservation to seize assets for a creditor’s sale. Where on-reservation assets must be seized to satisfy the judgment, recourse must be had to tribal court.⁸⁹ Whether the tribal court has execution procedures or will allow execution against the tribe would be subject to tribal law.⁹⁰

However, as stated previously, with a properly drafted all-inclusive waiver that allows for enforcement in state and federal court, many of the cited decisions can be distinguished. Given an off-reservation bank account holding general funds

of a tribe or tribal entity, and an all-inclusive waiver allowing not only for suit but also for enforcement of any judgment in state and federal court, the judgment creditor should be able to present a persuasive argument to recover on its judgment.

Conclusion

Any designer, contractor, subcontractor, or supplier contemplating a construction contract with an Indian tribe or tribal entity on tribal land faces several challenges, not the least of which are the sovereign immunity of the tribe or tribal entity and the trust status of the tribal land. A complete examination of these two topics would entail much more than the limited number of pages provided herein. However, this article gives the practitioner a basic understanding of how sovereign immunity and the trust status of tribal lands affect the contracting process, and will be a valuable reference for anyone contracting with a tribal entity. 

Endnotes

1. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”); *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165 (1977); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940); *Arizona Pub. Serv. Co. v. Aspaas*, 69 F.3d 1026 (9th Cir. 1995).
2. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756–58, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). *See also Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (recognizing the sovereign immunity of Indian tribes absent a clear waiver by the tribe or congressional abrogation); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986) (“The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.”); *Santa Clara Pueblo*, 436 U.S. at 58.
3. *Santa Clara Pueblo*, 436 U.S. at 58; *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).
4. *Puyallup Tribe*, 433 U.S. at 170.
5. *TBI Contractors, Inc. v. Navajo Tribe*, 16 Ind. L. Rep. 6017 (Navajo Sup. Ct. 1988).
6. *See, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985).
7. *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (tribal sovereign immunity does not preclude declaratory or injunctive relief in federal court).
8. *See, e.g., Krieg v. Prairie Island Dakota Sioux*, 21 F.3d 302 (8th Cir. 1994).
9. *See, e.g., 28 U.S.C. § 1362; see also United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940).
10. *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989).
11. *Big Horn County Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000); *In re White*, 139 F.3d 1268, 1272 (9th Cir. 1998) (citing general rule that a tribe’s waiver of sovereign immunity is only valid in particular proceeding in which waiver is knowingly and expressly given); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (tribe’s initiation of litigation does not necessarily establish waiver with respect to related matters).
12. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756–58, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (Indian tribes enjoy sovereign immunity from civil suits on contracts whether those contracts involve governmental or commercial activities and whether made on or off a reservation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Okla. Tax Comm’n v. Potawatomi Indian Tribe*,

498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); Arizona Pub. Serv. Co. v. Aspaas, 69 F.3d 1026, 1032 (9th Cir. 1995).

13. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004), citing Demontiney v. United States, 255 F.3d 801, 805 (9th Cir. 2001); *accord In re Russell*, 293 B.R. 34 (Bankr. D. Ariz. 2003) (Indian tribes are “domestic governments” as to which sovereign immunity is abrogated under the Bankruptcy Code).

14. *Kiowa Tribe*, 523 U.S. at 754.

15. *Santa Clara Pueblo*, 436 U.S. at 58.

16. C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 420, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). As noted by the Eighth Circuit, “while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of magic words stating that the tribe hereby waives its sovereign immunity.” *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 563 (8th Cir. 1995).

17. *See, e.g., Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845, 850 (N.M. 1988).

18. *See, e.g., Maryland Cas. Co. v. Citizens Nat’l Bank*, 361 F.2d 517, 521 (5th Cir. 1965), *cert. denied*, 385 U.S. 918 (1966); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*, 138 Ariz. 378, 674 P.2d 1376 (App. 1983).

19. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996).

20. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000).

21. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 621 (1993) (contractual waiver upheld); *c.f. Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (8th Cir. 1998) (forming ordinance allowing waiver insufficient absent contractual waiver); *see also Snowbird Constr. Co. v. U.S.*, 666 F. Supp. 1437 (D. Idaho 1987) (forming ordinance clause that allowed for waiver sufficient); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff’d*, 517 F.2d 508 (8th Cir. 1975) (contractual waiver as to funds otherwise payable to tribal entity upheld); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff’d*, 455 U.S. 130 (1982) (contractual waiver upheld); *Weeks Constr. Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986) (contractual waiver upheld); *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) (contractual waiver upheld); *Tibbetts v. Leech Lake Reservation Bus.*, 397 N.W.2d 883 (Minn. 1986) (Native American community can effect a limited waiver of immunity by contract).

22. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) (by intervening in action, and by agreeing to submit all disputes to federal district court, tribe waived sovereign immunity).

23. *Compare Val/Del, Inc. v. GC Contractors, Inc.*, 145 Ariz. 558, 703 P.2d 502 (App. 1985), *cert. denied*, 474 U.S. 920 (1985) (where tribe agreed to arbitrate all disputes, sovereign immunity waived); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000) (arbitration clause coupled with forming ordinance waived sovereign immunity); *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. 1995) (tribe’s agreement to arbitrate disputes waived sovereign immunity); *accord Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431 (D.S.D. 1995) (agreement to arbitrate and confirm award in federal court waived tribe’s sovereign immunity), *with Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d at 1380 (Ninth Circuit in *U.S. v. Oregon* “presses the boundary” of *Santa Clara Pueblo*); *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (agreement to arbitrate before AAA did not constitute waiver of sovereign immunity); *GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F. Supp. 1185 (N.D. Iowa 1994) (arbitration clause did not waive sovereign immunity); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. at 438 (participation by tribe in arbitration proceedings cannot be construed as waiver).

24. *See, e.g., Confederated Tribes of the Colville Reservation v.*

Stock West, Inc., 15 Ind. Law. Rep. 6019 (Colv. Tr. Ct. 1988) (language in agreement did not result in a waiver).

25. 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

26. *Id.* at 418.

27. *Id.* at 420.

28. *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1131 (D. Alaska 1978) (holding that the sovereign immunity afforded to tribes extends to their governmental organizations and business entities).

29. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

30. *See, e.g., Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) (tribe operating marina park off-reservation immune from suit for wrongful death; court did not have jurisdiction because of tribe’s immunity); *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 1, 480 P.2d 654 (1971) (tribal enterprise, as part of the tribe, retains immunity from damages for breach of contract); *c.f., Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989) (no immunity for tribal entity, although incorporated under tribal law and wholly owned by the Salt River Pima Maricopa Indian Community, where off-reservation activities were independent of any activity connected to or designed to promote tribal self-government).

31. *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988) (state court has jurisdiction over tribal contractor, an unincorporated association, registered and authorized by the state to do contracting business, engaged in off-reservation activity). In his dissent from the Supreme Court’s denial of certiorari of *Padilla*, Justice White noted the split between the Arizona and New Mexico courts. Justice White argued the Court should have granted the petition for certiorari to resolve the split. *Pueblo of Acoma v. Padilla*, 490 U.S. 1029 (1989). A more recent unreported New Mexico decision has held that “waivers of sovereign immunity cannot be created by implication through activities. . . .” *Sanchez v. Santa Ana Golf Club, Inc.*, 2005 WL 106144 (N.M. App. 2005).

32. *See, e.g., Long v. Chemehuevi Indian Tribe*, 115 Cal. App. 3d 853, 171 Cal. Rptr. 773 (1981), *cert. denied*, 454 U.S. 831 (1981) (28 U.S.C. § 1360 allowing states civil jurisdiction over Indian lands does not abrogate sovereign immunity of Native American tribe itself even when operating commercial enterprise).

33. *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977) (section 17 tribal entity operating as the business unit is legally separate from the section 16 governmental entity).

34. 873 F.2d 1221 (9th Cir. 1989).

35. *Id.* at 1223. The Ninth Circuit did not discuss the question of sovereign immunity with respect to CTEC.

36. *Confederated Tribes of the Colville Reservation v. Stock West, Inc.*, 15 Ind. Law. Rep. 6019, 6020 (Colv. Tr. Ct. 1988).

37. *Id.* at 6021. The careful practitioner should be aware that a federal court may be bound by a prior tribal court’s factual determinations. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1404 (1991); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996) (“when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts’ findings of fact for clear error and conclusions of law de novo”).

38. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000).

39. *See, e.g., Martinez v. S. Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962).

40. 170 Cal. App. 3d 489, 216 Cal. Rptr. 59 (1985).

41. *Id.*, 216 Cal. Rptr. at 60; *see also World Touch Gaming v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000) (tribal constitution restricted authority to waive tribe’s sovereign immunity to tribal council; because tribal council did not authorize officer of tribal management company to waive sovereign immunity, any waiver in contract signed by officer was invalid); *c.f. Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (2002) (by agreeing to an arbitration clause and enforcement provi-

sion in parties' contract, tribe waived sovereign immunity, despite claim that tribal chairperson who signed the contracts was without such authority).

42. *Hydrothermal Energy Corp.*, 216 Cal. Rptr. at 64.

43. 2002 WL 922136 (Cal. App. 2002).

44. *Id.*

45. *Id.*

46. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104 (1982) (“[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) [and] principles of estoppel do not apply, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17–18, 71 S. Ct. 534, 541–542, 95 L. Ed. 702 (1951).”); *see also* Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989) (“Mere consent to be sued does not confer jurisdiction on any particular court.”).

47. *See, e.g., Nat'l Farmers Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (federal question jurisdiction present under section 1331 to review whether a tribal court has exceeded the lawful limits of its jurisdiction); *Arizona Pub. Serv. Co. v. Aspaas*, 69 F.3d 1026, 1031–32 (9th Cir. 1995) (federal question whether tribal officials have exceeded their authority under federal law presents federal question notwithstanding tribe's sovereign immunity).

48. *See, e.g., Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431 (D.S.D. 1995); *Tom's Amusement Co. v. Cuthbertson*, 816 F. Supp. 403 (W.D.N.C. 1993).

49. *See, e.g., Stock West*, 873 F.2d at 1225.

50. *See, e.g., Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (28 U.S.C. § 1362 does not extend to breach of contract action by tribe against architects for negligent design of youth center built on reservation); *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975) (28 U.S.C. § 1362 does not extend to breach of contract action for failure to construct campsites on reservation land).

51. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *accord* *Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (Indian tribe is not considered to be a citizen of any state); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (same).

52. *See, e.g., Gaines*, 8 F.3d at 729; *Enter. Elec. Co. v. Blackfeet Tribe of Indians*, 353 F. Supp. 991 (D. Mont. 1973).

53. *See, e.g., Whiteco Metrocom v. Yankton Sioux Tribe*, 902 F. Supp. 199 (D.S.D. 1995).

54. *See, e.g., Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1226 (9th Cir. 1989); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 n.2 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); *contra* *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986) (no diversity jurisdiction over tribal entity organized under tribal ordinance to conduct business on behalf of tribe); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583–84 (8th Cir. 1998) (tribal housing authority enjoyed tribe's sovereign immunity).

55. *See, e.g., R.J. Williams*, 719 F.2d at 984, *cert. denied*, 472 U.S. 1016 (1985) (“if the dispute itself does not implicate the tribal government and the tribe has decided not to exercise its exclusive jurisdiction, it does not follow that the state courts are without power to resolve a controversy occurring within the state but on a reservation”).

56. *See, e.g., Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988) (state court has jurisdiction over tribal contractor engaged in off-reservation activity as unincorporated association, registered and authorized by the state to do contracting business).

57. *See, e.g., Long v. Chemehuevi Indian Tribe*, 115 Cal. App. 3d 853, 171 Cal. Rptr. 773 (1981), *cert. denied*, 454 U.S. 831 (1981); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

58. *Duluth Lumber & Plywood v. Delta Dev., Inc.*, 281 N.W.2d

377, 381 (Minn. 1979). The court went on to echo the oft-stated principle that where state court jurisdiction does not interfere with the right of a tribe to make its own laws and be ruled by them, state court jurisdiction is proper. *Id.* at 383.

59. *See, e.g., Indian Oasis Sch. Dist. No. 40 v. Zambrano*, 22 Ariz. App. 201, 526 P.2d 408 (1974); *Little Horn State Banks v. Stops*, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1977) (state court has jurisdiction over commercial loan transaction that occurred off-reservation between bank and individual Native Americans); *contra* *Williams v. Lee*, 358 U.S. 217 (1959) (non-Native American owner of general store on reservation could not invoke state court jurisdiction to collect debt owed by tribal member where debt arose solely on the reservation).

60. 28 U.S.C. § 1360(b).

61. *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 276 Cal. Rptr. 62, 801 P.2d 305 (1990) (28 U.S.C. § 1360 preempts state court action involving ownership of Indian lands); *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 862 P.2d 428 (N.M. 1993) (state court lacked jurisdiction to determine whether public road by prescription had been established across tribe's land); *Ollestead v. Native Vill. of Tyonek*, 561 P.2d 31 (Alaska 1977), *cert. denied*, 434 U.S. 938 (1977) (28 U.S.C. § 1360 preempts state court jurisdiction over disputes involving ownership of Native American lands).

62. *See, e.g., Inland Casino Corp. v. Superior Court*, 8 Cal. App. 4th 770, 10 Cal. Rptr. 2d 497 (1992) (foreclosure of mechanic's lien that could possibly affect Indian trust land outside state court's jurisdiction).

63. *Nat'l Farmers Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Crawford* [Please provide cite]; *Wellman* [Please provide cite]; *see also* *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379 (Minn. App. 1995) (where injury occurred on reservation, state court must dismiss action to allow tribal court to first examine issues of sovereign immunity and jurisdiction).

64. *Id.*; *see also* *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1230 (9th Cir. 1989); *see also* *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 265 W.2d 64, 665 N.W.2d 899 (2003).

65. The term “tribal court” as used here should not lead to the conclusion that a formal “court” exists. Many tribes employ a variety of tribal, judicial, law-applying, or dispute-resolving fora that are referred to as “tribal court.” Notwithstanding the informal nature of such tribunals, the Supreme Court has recognized that “[n]on-judicial tribal institutions . . . [are] competent law-applying bodies.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978).

66. It may be an incorrect assumption to assume a tribal court exists for any particular tribe. For example, a number of tribes in California do not have an established tribal court and rely on the state or federal courts to adjudicate their disputes. *See, e.g., Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990). A similar situation exists in Alaska regarding the federally recognized status of native villages and whether tribal courts operated by such villages are a proper forum. *See, e.g., State of Alaska v. Native Vill. of Venetic*, 856 F.2d 1384 (9th Cir. 1988).

67. *See, e.g., Colville Law and Order Code* § 1.3.01; *Fort Berthold Reservation Tribal Code*, ch. II, § 1(a); *Fort Belknap Law and Order Code* ch. I, § 14.1 (1970), as amended by *Fort Belknap Ord. No. 2–80* (1980).

68. For example, the tribal code of the Confederated Tribes of the Colville Indian Reservation provides that the jurisdiction of the tribal court “shall include all territory within the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein.” *Colville Tribal Code* § 1.3.01.

69. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959) (suit by non-Indian owner of trading post on reservation to collect debt owed by Navajo must proceed in tribal court); *contra* *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (tribal court cannot assert jurisdiction over nonmembers absent consensual

relationship with the tribe or its members or where nonmember conduct threatens or directly affects the tribe's political integrity, economic security, health, or welfare).

70. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

71. *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); *accord* *Stock West Corp. v. Taylor*, 737 F. Supp. 601, 603-04 (D. Or. 1990) (tribal courts "presumptively have civil jurisdiction over disputes directly implicating tribal affairs or arising on tribal reservations").

72. Westlaw does compile certain decisions from Oklahoma tribes.

73. *See TBI Contractors, Inc. v. Navajo Tribe*, 16 Ind. L. Rep. 6017 (Navajo Sup. Ct. 1988).

74. *See, e.g., U.S. v. Chinburg*, 224 F.2d 177 (10th Cir. 1955), *cert. denied*, 350 U.S. 897 (1955) (house built by allottee on land held in trust by United States was not subject to state law providing for mechanic's liens); *Inland Casino Corp. v. Superior Court*, 8 Cal. App. 4th 770, 10 Cal. Rptr. 2d 497 (1992) (foreclosure action that could possibly affect Indian trust land was outside California state court jurisdiction).

75. *See, e.g., U.S. v. Candelaria*, 271 U.S. 432 (1926) (25 U.S.C. § 177 applies equally to lands held in fee simple by Native American tribe); *Alonzo v. U.S.*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958) (25 U.S.C. § 177 applies to off-reservation lands purchased by tribe).

76. *See, e.g., Aircraft Equip. Co. v. Kiowa Tribe*, 2 P.3d 338 (Okla. 2000) (tribe entitled to sovereign immunity against judgment creditor's efforts to garnish tribal accounts); *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1965), *cert. denied*, 385 U.S. 918 (1966).

77. 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918, 87 S. Ct.

227, 17 L. Ed. 2d 143 (1966).

78. *Id.* at 521.

79. *Id.*

80. *Id.* at 522.

81. 621 F.2d 358 (10th Cir. 1980).

82. *Id.* at 362; *accord* *Begay v. Roberts*, 807 P.2d 1111 (Ariz. Ct. App. 1990) (courts may not garnish the wages of an Indian who lives and works on a reservation where tribal code does not authorize garnishments); *see also* *United States v. Morris*, 754 F. Supp. 185, 186 (D.N.M. 1991) ("the state has no authority to garnish wages 'located' on an Indian reservation").

83. *Joe v. Marcum*, 621 F.2d at 361-62.

84. *Annis v. Dewey County Bank*, 335 F. Supp. 133, 136 (D.S.D. 1971).

85. *See, e.g., Comm'r of Taxation v. Brun*, 174 N.W.2d 120, 126 (Minn. 1970), and *Bradley v. Deloria*, 587 N.W.2d 591, 593 (S.D. 1998).

86. *Little Horn State Bank v. Stops*, 555 P.2d 211 (Mont. 1976).

87. 67 F. Supp. 2d 1303 (E.D. Okla. 1999).

88. *Id.* at 1305-06.

89. *See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) (non-Indians must comply with reservation laws when executing state court judgment).

90. Any attempt to provide even an overview of tribal law would be impossible given the number of tribes, combined with the lack of reported tribal court decisions. If an attempt to enforce a judgment in tribal court must be made, the practitioner is advised to research the particular tribe's laws.

Planning Public Service

Making Service Part of the Workplace Is Good for the Profession and the Public

By Michael S. Greco, President, American Bar Association

Most lawyers feel a keen responsibility to the public, demonstrated now by the thousands of lawyers who are volunteering to assist victims of this year's hurricanes. Increasingly, however, lawyers today are facing the more rigorous demands of modern practice, which deplete their time and energy for pro bono and public service work.

This tension between the law's public interest roots and today's business realities must be addressed for the good of the profession and society. Lawyers feel less fulfilled in their work, while the public's need for volunteer legal services remains severe.

I have appointed the Commission on the Renaissance of Idealism in the Legal Profession to help lawyers strike a better balance in their law practices and allow them to perform more public service. The commission is led by Honorary Co-chairs U.S. Supreme Court Justice Ruth Bader Ginsburg and Theodore C. Sorensen, special counsel to President John F. Kennedy, and is chaired by Mark D. Agrast of Washington, D.C.

I charged the commission with developing workplace policies and practices that would enable lawyers

to do more pro bono and public service, and it already has developed the Pro Bono and Public Service Best Practices Resource Guide.

The guide is a free, online clearinghouse of more than 160 successful pro bono and public service programs from all practice areas. Lawyers may use best practices in the guide as models, drawing on other lawyers' ideas and experiences.

Additionally, legal employers who have implemented effective pro bono programs and public service projects are encouraged to submit them online so their ideas may benefit others in the profession and people in need of assistance.

When I took office as president of the ABA, I asked all lawyers to do more pro bono and public service, but I am not asking lawyers to do it alone. I urge you to visit the commission's website, www.abanet.org/renaissance, to learn from the guide's best practices and to help others by submitting your own. It is time for lawyers to balance professional interests with the public interest. The needs of society and our profession depend on it.

