Successful Bonding of Reservation Projects and Tribal Entities

I. INTRODUCTION

Notwithstanding over twenty-five years of Indian gaming, the passage of the Indian Self Determination and Education Assistance Act ("ISDEAA"), and an increasing number of tribal contractors, the number of reported decisions directly addressing the issues remains relatively small. Sovereign immunity, choice of law and forum, and determining the tribal entity remain the key issues the surety must address when bonding reservation projects and tribal entities. A number of decisions in recent years have narrowed the issues; however, determining whether to issue a bond on a particular reservation project or to provide a bonding line to a tribal contractor remains a matter of negotiating the form of the contract and assessing the risk. Unresolved issues in the law, the differences in tribal governments and entities, coupled with each tribe's unique set of laws and customs, challenges a simple, formulaic approach. [1] Understanding the basic legal principles, however, can provide insight into the positions taken by would-be obligees and/or tribal principals and, perhaps, can assist the surety in assessing the risk. Knowing what and where the risk factors are can lead to successfully bonding reservation projects and tribal entities

II. BONDING THE RESERVATION PROJECT

A. Sovereign Immunity – The Overriding Principle

Sovereign immunity in Indian Country can be compared to what Mark Twain said about the weather, "everyone talks about it but no one does anything about it." Originally, each Indian tribe was a separate nation within what is now the United States.[2] They enjoyed the same degree of sovereignty as that enjoyed by all other sovereign nations.[3] That has not changed in over two hundred years of federal and state jurisprudence, at least as to sureties. "Indian tribes remain 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. . . . They have power to make their own substantive law in internal matters . . . and to enforce that law in their own forums."[4]

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[1] See, e.g., *In re SRC Holding Corp.*, 352 B.R. 103, 118 (Bkrtcy.D.Minn. 2006)("Doing business with tribal entities has special risks, which include the inability to sue, without consent, in state or federal courts. Contracting with Indian tribes . . . is not like entering into a normal commercial transaction."); *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 259, 772 P.2d 1104, 1112 (1989)("[n]on-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit . . . .").

[2] *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959).

[3] See, *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)(Indian tribes have long been recognized to possess sovereign immunity).

[4] *Santa Clara Pueblo*, 436 U.S. at 55-56, quoting from *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

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Through their original incorporation into the United States, as well as through specific treaties and statutes, tribes have lost several important aspects of their inherent sovereignty.[5] As to which aspects of inherent sovereignty have been retained and which have been divested, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[6] But the Indian tribes' status as dependent nations has not divested them of "the powers of self-government."[7]

Although tribes retain control over their self-government, "in the exercise of the powers of self-government, as in all other matters . . . all Indian Tribes, remain subject to ultimate federal control."[8] "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.' "[9] The upshot of Congress's plenary power over the tribes is that it may "enact legislation that both restricts, and in turn, relaxes . . . restrictions on tribal sovereign authority."[10]

The same cannot be said with respect to the States' powers, if any, over tribes on in Indian Country. The tribes' right to self-governance may preempt contrary state law.[11] "Because of their sovereign status, tribes . . . are insulated in some respects by a 'historic immunity from state and local control,' and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'"[12]

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[5] While the legislative and legal history presented here may not impact the surety's addressing the issue of sovereign immunity, the narrative is presented to allow the surety to understand the tribes' position with respect to what the tribes see as a continuing attack on their sovereignty.

[6] *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087-1088 (1978); see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825 (2001)(only full territorial sovereigns enjoy the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens, and Indian tribes can no longer be described as sovereigns in this sense.**);** *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-668, 94 S.Ct. 772, 777 (1974)(Indian tribes can no longer freely alienate to non-Indians the land they occupy); *Worcester v. Georgia,* 6 Pet. 515, 559, 8 L.Ed. 483 (1832)(tribes cannot enter into direct commercial or governmental relations with foreign nations); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011 (1978)(tribes cannot try nonmembers in tribal courts); c.f. *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2004)(tribe has power to try non-member Indian in tribal court) ; *Macarthur v. San Juan County*, ---F.3d---, 2007 WL 2045456, 7 (10th Cir.2007)(denying enforcement of Navajo Tribal court preliminary injunction where court lacked jurisdiction over defendants).

[7] *Wheeler*, 435 U.S. at 326.

[8] *Id.* 435 U.S. at 327; see also *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986)("The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers.")

[9] *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 1635 (2004).

[10] *Id.* at 202.

[11] *Id.*; see also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)(states can only enforce laws applying to tribes that do not interfere with tribal self-government and that involve non-Indians).

[12] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

Notwithstanding any aspects of "implicit divestiture" by the federal government, tribes remain sovereign entities.[13] As such, Indian tribes may not be sued in federal or state court absent an unequivocal waiver of sovereign immunity or a Congressional grant of jurisdiction.[14] "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. . . . [T]ribal immunity is a matter of federal law and is not subject to diminution by the States."[15] In fact, as a sovereign, a tribe may be immune from suit even in its own tribal court.[16] "The issue of tribal sovereign immunity is jurisdictional in nature."[17]

Traditionally, courts have regarded tribal sovereign immunity as "an aspect of the tribes' inherent sovereignty" and have "treated tribal immunity as 'necessary to preserve the autonomous political existence of the tribes and to preserve tribal assets.'"[18] Although the Supreme Court has questioned the continuing vitality of tribal sovereign immunity in the modern era based on a perceived necessity to "preserve tribal assets," until Congress acts, tribal sovereign immunity remains intact and the surety must address it when dealing with any tribe.[19]

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[13] Alaskan Native villages and corporations may or may not enjoy the same sovereign immunity as their brethren in the lower 48 states. See subsection C for a more detailed discussion of these entities.

[14] *Santa Clara Pueblo*, 436 U.S. at 58.

[15] *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700 (1998).

[16] See, e.g., *Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Com'n*, 4 Okla. Trib. 1, 21, 1994 WL 1047927 (Cheyenne-Arapaho 1994)(tribe immune in tribal court absent waiver); *TBI Contractors, Inc. v. Navajo Tribe*, 16 Ind.L.Rep. 6017 (Navajo Sup.Ct. 1988)(Navajo Tribe, absent waiver, immune from suit in Navajo Tribal Court); see also *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279 (10th Cir. 2006)(affirming dismissal of action previously brought in tribal court, which dismissed the suit as barred by sovereign immunity).

[17] *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir.1989).

[18] *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264 n. 7 (10th Cir.1998).

[19] As noted by the Supreme Court in *Kiowa Tribe*:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
> * * *
> The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, *supra*, at 510, 111 S.Ct., at 910. It has not yet done so.
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> In light of these concerns, we decline to revisit our case law and choose to defer to Congress.

Id., 523 U.S. at 758, 759-60, 118 S.Ct. at 1704.

The surety must also address sovereign immunity when dealing with a tribal agency or tribal enterprises because, in general, a tribe's sovereign immunity extends to its agencies and business enterprises.[20] In *Kiowa*, the Court reiterated its long-held position that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[21] Unless Congress abrogates this immunity or the tribe waives it, immunity governs contractual claims against the tribe.

Although a tribe's assertion of sovereign immunity may leave a party without a forum to pursue its claims against tribal defendants, the Ninth Circuit has acknowledged this possibility and found it unavailing.[22] As the Supreme Court has noted: "In this economic context, [sovereign immunity] can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[23]

"It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "[24] There must be a clear, express, and unequivocal waiver of the tribe's sovereign immunity before a suit may be brought against it.[25] Although the waiver of sovereign immunity must be clear and express, it need not employ the specific words "waive" and "sovereign immunity" to be effective.[26] To determine whether an agreement is sufficiently "clear" to effectuate a valid waiver 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."[27]

A tribe's agreement "by express contract, to adhere to certain dispute resolution procedures" and to be bound by those resolution procedures has been held to constitute an explicit waiver of sovereign immunity.[28] However, where a tribe gives such consent,

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[20] *Kiowa Tribe*, 523 U.S. at 757-60; see also *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir.2000)("The [Housing] Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir.2000)(sovereign immunity extends to tribal college); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir.1998)(same, for tribal housing authority); *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.1995)("[A] waiver of sovereign immunity cannot be inferred from [an Indian] Nation's engagement in commercial activity."); cert. denied *sub nom. Willingham v. Sac & Fox Nation*, 516 U.S. 810, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995).

[21] *Kiowa Tribe*, 523 U.S. at 760.

[22] *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir.1990); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir.1975)(sovereign immunity may leave a party with no forum for its claims, but the tribe is immune nonetheless), cert. denied, 425 U.S. 903 (1976).

[23] *Kiowa Tribe*, 523 U.S. at 758.

[24] *Santa Clara Pueblo*, 436 U.S. at 58, quoting from *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

[25] See *Santa Clara Pueblo*, 436 U.S. at 58; *Marceau*, 455 F.3d at 978; *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir.1995)(waiver must be "unmistakable"); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal.App.4th 1185, 1193-1194 (2005)(waivers are "strictly construed" and there is a "strong presumption" against them).

[26] *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589 (2001).

[27] *Ninigret Dev. Corp.*, 207 F.3d at 31.

[28] *Id.*, 532 U.S. at 420, 121 S.Ct. at 1595.

any condition or limitation imposed thereon must be strictly construed and applied.[29] A tribe's waiver of immunity to suit in state court does not waive immunity to suit federal court.[30] "On a [tribe's] motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists."[31]

The Supreme Court has recognized that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe."[32] Although the initiation of a lawsuit by a tribe may constitute consent to the court's jurisdiction, the corresponding waiver of tribal sovereign immunity has been held not to extend beyond the court's adjudication of the merits of that particular controversy.[33] Moreover, tribal sovereign immunity bars even compulsory counterclaims under Rule 13(a), Fed.R.Civ.P., filed against a tribe in an action commenced by the tribe.[34] However, the Fifth Circuit has held that tribal immunity did not bar a suit in equity for declaratory and injunctive relief.[35]

B. Tribal Corporations- An Open Question?

As noted previously, the sovereign immunity of a tribe extends to its sub-entities or enterprises of that tribe.[36] In state court, prior to the Supreme Court's decision in *Kiowa*, the question of whether or not tribal sovereign immunity protected a particular tribal business enterprise depended on the nature of the enterprise and its relation to

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[29] See, *e.g.*, *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir.2001).
[30] *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 955 (9th Cir. 2000); *In re White*, 139 F.3d at 1272 (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).
[31] *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir.2001); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407, 1418, 88 Cal.Rptr.2d 828 (1999).
[32] *Oklahoma Tax Comm'n v. Potawatomie Indian Tribe*, 498 U.S. 505, 509 (1991).
[33] *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 891, 106 S.Ct. 2305 (1986)(tribes' access to sue in state court may not be conditioned on global waiver); *Schaghticoke Indians of Kent, Connecticut, Inc. v. Potter*, 217 Conn. 612, 622 n. 9, 587 A.2d 139 (1991)(tribal action in state court insufficient to constitute consent); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir.1989)(plaintiff tribes consent only to risk of adverse determination); *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 918 A.2d 880, (Conn.2007)(same).
[34] See, *e.g.*, *Oklahoma Tax Commission*, 498 U.S. at 509, 111 S.Ct. 905 ("[p]ossessing ... immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits" [internal quotation marks omitted]); *Macarthur v. San Juan County*, 391 F.Supp.2d 995, 1036 (D.Utah 2005).
[35] *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes*, 261 F.3d 567 (5th Cir.2001).
[36] See *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir.1982)(reasoning that, based on trial court's finding that resort was a sub-entity of the tribe rather than a "separate corporate entity," the resort was "clothed with the sovereign immunity of the Tribe"); *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1379 (1983)(reasoning that, absent an express waiver, subordinate economic organizations of Indian tribes are immune from suit); *Local IV-302 Int'l Woodworkers Union v. Menominee Tribal Enters.*, 595 F.Supp. 859, 862 (E.D.Wis.1984)(tribal sovereign immunity also protects certain tribal business enterprises because "an action against a tribal enterprise is, in essence, an action against the tribe itself.")

the tribe.[37] To determine whether to extend tribal immunity to a particular tribal business entity, some state courts considered three relevant factors: " '1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.'"[38] However, in a recent Washington decision, *Wright v. Colville Tribal Enterprise Corp.*, the court examined no less than eleven factors to determine whether a subordinate tribal entity enjoyed the tribe's sovereign immunity.[39] Still other courts have found simply the tribe's immunity did not extend to subordinate tribal entities performing purely commercial functions or to the tribe itself where performing a commercial venture off the reservation.[40] The Alaska Supreme Court determines the issue based on, first, whether a judgment against the tribal entity would be satisfied out of tribal funds rather than the entity's funds.[41] The Alaska court then looks to other factors such as how much control the tribe exerts or whether the entity's work is commercial or governmental.[42]

After *Kiowa*, it could be surmised that a tribal business "enterprise," operating on or off the reservation, doing governmental or business functions, retains the tribe's sovereign immunity. However, when a tribe operates a separate corporation rather than just an informal "business enterprise," whether that corporate tribal entity enjoys the tribe's immunity still remains a matter of much debate and may depend on forum in

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[37] See, *e.g.*, *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998)(corporation created by Indian tribes does not lose its sovereign immunity simply because it performs off the reservation its contract to provide health services pursuant to the ISDEAA); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 305 (N.D.N.Y.2003)(holding casino tribal entity protected by tribal sovereign immunity); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F.Supp.2d 271, 274-76 (N.D.N.Y.2000) (holding casino protected by tribal sovereign immunity which "extends to tribal enterprises"); *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108, 113-114, 147 P.3d 1275, 1279 (Wash.2006) ("Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws."); c.f. *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654, 656 (1971)(tribal corporation must explicitly hold itself out as a separate and distinct entity to have waived immunity).

[38] *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 638-639 (1999); *Gavle v. Little Six, Inc.*, 555 N.W .2d 284, 294 (Minn.1996).

[39] "(1) whether the entity is organized under the tribe's laws or constitution; (2) whether the entity's purposes are similar to or serve those of the tribal government; (3) whether the entity's governing body is composed mainly of tribal officials; (4) whether the tribe has legal title to or owns property used by the entity; (5) whether tribal officials exercise control over the administration or accounting activities of the organization; (6) whether the tribe's governing body has the power to dismiss members of the organization's governing body; (7) whether the entity generates its own revenue; (8) whether a suit against the entity will affect the tribe's finances and bind or obligate tribal funds; (9) the announced purpose of the business entity; (10) whether the entity manages or exploits tribal resources; and (11) whether protection of Indian assets and tribal autonomy will be furthered by extending immunity to the entity." *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108, 130-131, 147 P.3d 1275, 1287-1288 (Wash. 2006).

[40] See, *e.g.*, *Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989)(corporation formed under tribal law to operate commercial venture not entitled to tribe's immunity); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988)(tribe operating commercial venture off-reservation not entitled to immunity).

[41] *Runyon v. Association of Village Presidents*, 84 P.3d 437, 440-41 (Alaska 2004).

[42] *Runyon*, 84 P.3d at 441.

which the dispute is brought.[43] This unique aspect is demonstrated by a number of decisions, one of which is often cited in treatises such as this: *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*.[44]

In *Stock West*, 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 . . . ."[45] 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.
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> 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.[46]

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.[47]

In a decision subsequent to *Stock West*, the Ninth Circuit held that a tribal casino operation was not a separate entity and that it shared the tribe's sovereign immunity.[48] The Ninth Circuit explained its reasoning as follows:

> And this is no ordinary business. The Casino's creation was dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(1), required the Tribe to authorize the Casino through a tribal ordinance and an interstate gaming compact. The Tribe and California entered into such a compact "on a government-to-government basis."

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[43] Compare *Dixon*, 160 Ariz. at 259 (tribal business enterprise operating off-reservation not immune) and *McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, 277 Wis.2d 801, 692 N.W.2d 247 (app.2004)(tribal immunity was not conferred on existing for-profit corporation when tribe purchased all of corporation's shares) with *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 305 (N.D.N.Y.2003)(holding casino tribal entity protected by tribal sovereign immunity).

[44] 873 F.2d 1221 (9th Cir. 1989).

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

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

[47] *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 Production 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.").

[48] *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006).

> These extraordinary steps were necessary because the Casino is not a mere revenue-producing tribal business (although it is certainly that). The IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). One of the principal purposes of the IGRA is "to insure that the Indian tribe is the primary beneficiary of the gaming operation." Id., § 2702(2). The compact that created the Gold Country Casino provides that the Casino will "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs."
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> With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. . . . In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.[49]

In summary, the United States Supreme Court has held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[50] Thus, there should be no question that a **tribe** enjoys immunity, whether engaging in governmental or commercial activities and whether on or off the reservation. However, the question still arises as to subordinate tribal entities, enterprises, and corporations: Does *Kiowa Tribe* apply to them? The careful surety will not want to risk litigating the issue of sovereign immunity after the fact. Instead, the surety should presume the subordinate entity will assert the tribe's immunity if a dispute arises. Given that presumption, the surety should determine, from a careful analysis of the documents that formed the entity, what is needed for an effective waiver from that particular entity. That analysis will be addressed in Section E.1.

C. Alaskan Native Villages and Corporations – Not So Sovereign?

Native Alaskan tribes, for the most part, were spared the changing federal policies that affected their brother and sister tribes in the lower 48 states. Some Alaskan Native groups did, in fact, organize under the Indian Reorganization Act, amended specifically in 1936 to apply to Alaska, and were granted tribal status and reservation lands. Most did not. Courts consistently have recognized that Alaska Native groups have a very different history and their interactions with the federal government have been very different from those between the federal government and tribes of the lower 48 states.[51] As the United States Supreme Court stated in *Metlakatla:*

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[49] *Allen*, 464 F.3d at 1046-47 see also *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 978 (9th Cir.2006)(tribal housing authority enjoyed tribe's sovereign immunity).

[50] *Kiowa Tribe of Oklahoma*, 523 U.S. at 760, 118 S.Ct. at 1705.

[51] See, *e.g.*, *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 50-51, 82 S.Ct. 552, 556-57, 7 L.Ed.2d 562 (1962); *Atkinson v. Haldane*, 569 P.2d 151, 154 (Alaska 1977)(Reservation status of Metlakatla Indian Community sets them apart from other Alaska natives and such community should be

> There were no Indian wars in Alaska, ... There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other States, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation.[52]

Because the land resources of Alaska appeared limitless in the early days of the territory, "the westward migration of white civilization which displaced the tribes [of the lower forty-eight states] never occurred in Alaska."[53] And, due to the non-hostile history of Alaska's settlement, the federal government never attempted to enter into treaties with Alaska Natives.[54] As a result of these circumstances, most of the history from which federal Indian law in the lower forty-eight states is absent from cases involving Alaska Natives.[55]

Native Alaskan tribes are also unique in federal Indian law because Congress derived its authority over these tribes from the 1867 Treaty of Cession with Russia, by which the United States acquired the Territory of Alaska. That authority reflects the historical existence of Alaska Natives as members of sovereign communities.[56] Through this treaty, Alaskan Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.[57] Therefore, Alaska Native groups are afforded the same treatment as Indian tribes for constitutional and legislative purposes.[58] This includes their self-determination and economic self-sufficiency.

Alaskan Natives have not historically been organized into reservations.[59] Alaskan Natives, unlike other American Indians, never entered into treaties with the United States designating reservation lands which Natives were entitled to occupy.[60] To accommodate the unique situation of Alaskan Natives, Congress has utilized methods other than tribal rolls or reservations, which have generally been used as eligibility criteria in statutory programs for the benefit of Indians. The Supreme Court has already noted and approved one such different treatment of Alaskan Natives.[61]

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accorded same treatment as Indian tribes in other states).

[52] *Metlakatla*, 369 U.S. at 51, 82 S.Ct. at 557.

[53] *Atkinson*, 569 P.2d at 154.

[54] *Id.*

[55] *Metlakatla*, 369 U.S. at 50-51, 82 S.Ct. at 556-57.

[56] See *Native Village v. Alaska*, 944 F.2d 548, 558 (9th Cir.1991)(applying *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978) to require Alaska to give full faith and credit to determinations made by tribal courts of the native villages).

[57] *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40 (1918); *Pence v. Kleppe*, 529 F.2d 135, 138 n. 5 (9th Cir.1976); *Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923), cert. denied, 263 U.S. 708, 44 S.Ct. 36 (1923).

[58] *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1168 (C.A.Alaska,1982)(upholding Alaska Native preference and citing *Alaska Pacific Fisheries* that statutes passed for the benefit of Indian tribes or communities are to be liberally construed and doubtful expressions resolved in favor of the Indians.

[59] See *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055 (1974).

[60] *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D.Alaska 1977), aff'd 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888, 101 S.Ct. 243 (1980).

[61] *Morton v. Ruiz*, 415 U.S. at 212, 94 S.Ct. at 1063.

No discussion of Alaskan Natives can be had without discussing the seminal piece of legislation: the Alaska Native Claims Settlement Act ("ANCSA").[62] In 1971, Congress enacted the ANCSA to settle the aboriginal claims of Alaska Natives to the land and resources of the State of Alaska. The ANCSA required the Secretary of the Interior to divide Alaska into twelve regions and the Natives of each region were required to form for-profit corporations under Alaska law.[63] Each Native Alaskan "enrolled" in a region receives one hundred shares of the Regional Corporation.[64] Only Native Alaskans can sit on the board of an Alaska Native Corporation and, until 1991, shares were not alienable except among Native Alaskans.[65] The purpose of the system was to foster self-determination and financial independence among the Alaska Natives.[66]

ANCSA was passed as a tool to help Alaska Natives attain their economic self-sufficiency, eventually allowing Congress the leeway to relinquish its trust obligation.[67] ANCSA states that "[n]otwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans."[68] ANCSA was a unique act that "(1) extinguished aboriginal title of the tribal villages to some 365 million acres, (2) authorized transfer of some 45 million acres to state-chartered Alaska Native village and regional corporations, and (3) "compensated" those corporations in the amount of $962.5 million for "extinguishment" of aboriginal title."[69]

When Congress enacted ANCSA, it was generally assumed that tribes did not exist in Alaska under the principles of what is generally called "federal Indian law." Article III of the 1867 Treaty of Cession provided simply, "The uncivilized tribes [of Alaska] will be subject to such laws and regulations as the United States may, from time to time adopt in regard to aboriginal tribes of that country. The Bureau of Indian Affairs treated Alaska Native villages as tribes for administrative purposes, and seventy-one villages organized under the IRA in the 1940s.[70]

ANSCA also provided for the establishment of thirteen regional Native corporations, 43 U.S.C. § 1606, and a large number of village corporations which represented the residents of Native villages.[71] These entities were then entitled to select and obtain title to certain federal lands, and to share in proceeds of the cash settlement from the federal government.

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[62] 43 U.S.C. §§ 1601 *et seq.* (1971).
[63] 43 U.S.C. § 1606(a), (d).
[64] *Id.*
[65] 43 U.S.C. § 1606(f).
[66] See H.R.Conf.Rep. 92-746, 92d Cong., 1st Sess., 37, repr. in 1971 U.S.C.C.A.N. 2247, 2250; *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir.1984)(recognizing that the purpose of the ANCSA is to assist Alaska Natives in achieving financial independence and self-sufficiency).
[67] *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 997 (9th Cir. 1994).
[68] 43 U.S.C. § 1626(d).
[69] Case, D. and Dorough, D., Tribes and Self-Determination in Alaska, Human Rights Magazine (Spring 2006).
[70] *Id.*
[71] 43 U.S.C. § 1607.

History and legislation aside, the question whether Native villages and corporations retain sovereign immunity remained a somewhat open question. Soon after ANCSA's enactment, the shareholders of the ANCSA corporations in Arctic Village and Venetie voted to transfer all their lands to the federated tribal government of the two villages. The federated villages imposed a tax on a state school construction project in Venetie, asserting that the land was part of a "dependent Indian community" within "Indian country," as defined under federal law and subject to tribal taxing authority.

The state sued to enjoin the tax, denying both the existence of the tribe and its authority to tax ANCSA lands. While suit was pending, in 1993, the Department of the Interior ended decades of technical uncertainty about the status of the Alaska tribes by publishing a formal list of more than 200 federally recognized Alaska tribes. Congress ratified the list in 1994. However, four years later, the U.S. Supreme Court held in *Alaska v. Native Village of Venetie Tribal Government*,[72] that the ANCSA lands now owned by Venetie were not "Indian country" because they had not been "set aside" for the tribe but rather were conveyed to the ANCSA village corporations.[73] Moreover, the lands were freely alienable under ANCSA and therefore not under the "superintendence" of the federal government.[74] Although the Court mentioned the word "sovereign," it did not determine whether Alaskan Native villages and corporations retained sovereign immunity.

In Native Village of Tyonek v. Puckett[75], a case decided prior to Native Village of Venetie, the Ninth Circuit noted:

> We have held that certain Alaska native villages constitute tribes for the purpose of 28 U.S.C. § 1362 (1988), which provides for federal jurisdiction over civil actions raising a federal question "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." *Native Village of Venetie I.R.A. Council*, 944 F.2d at 551-52; *Native Village of Noatak*, 896 F.2d at 1160. However, we have not addressed the question whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity.[76]

Subsequent to *Tyonek*, in a 1992 decision, *Nenana Fuel Co. v. Native Village of Venetie*[77], the Alaska Supreme Court, in a concurring opinion by Justice Moore, determined that the ANCSA [78] terminated any sovereign immunity for all Alaskan Native villages and corporations except that of the Metlakatla Indian Community.[79] However, twelve years later, in *Runyon v. Association of Village Presidents*[80], the Alaska Supreme held Native Alaskan villages do enjoy sovereign immunity:

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[72] 522 U.S. 520, 118 S.Ct. 948 (1998).
[73] 522 U.S. at 524, 118 S.Ct. at 951.
[74] *Id.*
[75] 957 F.2d 631 (9th Cir.1992).
[76] *Id.*, 957 F.2d at 635.
[77] 834 P.2d 1229 (Alaska 1992).
[78] 43 U.S.C. § 1601 et seq.
[79] *Id.* at 1243.
[80] 84 P.3d 437 (Alaska 2004)

> Indian tribes are "distinct, independent political communities, retaining their original natural rights." In other words, they are sovereigns. Although Alaska no longer contains Indian country, its Native villages "retain those fundamental attributes of sovereignty ... which have not been divested by Congress or by necessary implication of the tribe's dependent status." "[T]ribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Each of AVCP's member tribes is therefore protected by tribal sovereign immunity.[81]

This confusing background leads to the conclusion stated in Section D, *post*.

D. Summary – Assume Sovereign Immunity Applies

In summary, for a surety and its principal to ensure any recourse against a tribe or tribal entity, corporate or otherwise, a waiver of sovereign immunity of some kind must be procured. As will be discussed in the next section, that waiver can take many forms, can be limited in a number of ways, and can be tailored to fit whatever circumstances may present themselves as to each individual tribe, tribal entity, or reservation project. This flexibility allows the surety and its principal to work through a tribe's concerns over a blanket waiver of its sovereign immunity. However, that same "flexibility" results in the surety and its principal faced with an ever increasing multitude of creative drafting by tribal attorneys to craft what appears to be a waiver but may, in fact, not be a waiver. These concerns will also be addressed in the next section.

III. Drafting and Negotiating the Waiver Clause

Sovereign immunity affects whether a surety or its principal can effectively recover against a tribal obligee. The waiver of that immunity is the first step facing the surety and its principal. On reservation projects, as outlined in the previous sections, absent an effective waiver, sovereign immunity prevents suit against the tribal obligee to recover contract funds and/or contract damages. Therefore, the surety must ensure that an effective waiver of sovereign immunity is procured prior to issuing any bond.

One point should be made early in any discussion: there should be a distinction between bonding a tribal project, with a tribal obligee, versus bonding a tribal principal. When a surety is approached to bond a tribal project, the surety may be presented with a pre-negotiated contract. The surety is then faced with competing principles. On the one hand, the surety wants to accommodate its customer, to keep good relations with its accounts, and to garner the premiums for issuing the bonds, something bonding agents readily comprehend. On the other had, knowing the risks with tribal projects, the surety may have little opportunity to negotiate contract terms without disturbing the relationship between the principal and the tribe.

On the other hand, when contemplating bonding a tribal principal, the surety should have all the cards in its hand when requiring clear, express, and unequivocal waivers of sovereign immunity from the would-be principal and, depending on the

[81] *Runyon*, 84 P.3d at 439.

financial status of the principal, from the tribe itself. The proffered indemnity agreement should contain as broad a waiver as possible.

In addressing waivers, the surety should be aware that tribes view their sovereignty as under attack by both Congress and the courts.[82] Recent rulings by the United States Supreme Court on tribal court jurisdiction can be interpreted as limiting tribes' exercise of their sovereignty.[83] Tribes, therefore, seek to guard every aspect of their sovereignty, one aspect of which is sovereign immunity, and increasingly are reluctant to grant any waivers of sovereign immunity, even limited ones. Additionally, many Native Americans do not appreciate starting a project discussing what will happen if a dispute arises. Discussing what will happen in case of a dispute is counter-productive in their view because it creates a self-fulfilling outcome: that the project will result in a dispute.

The surety, therefore, as noted, is faced with competing interests: protect itself in case of default by demanding a blanket waiver of sovereign immunity balanced against losing the account by refusing to issue a bond without a waiver. Most casino projects are the result of negotiated rather than publicly bid contracts. The contractor may have established a relationship with the tribe that has resulted in an "award" of the project. The contractor then comes to the surety for a bond. The surety asks the principal-to-be whether it has obtained a waiver of the tribe's sovereign immunity. The principal may or may not have even procured a waiver, limited or otherwise, and, in fact, may not have discussed the concept. If it has not been discussed, the principal may be reluctant to raise the issue for fear of damaging its good relationship with the tribe. Further, the tribe may be unwilling to grant any type or form of waiver. At this point, the surety has to balance the risk of going forward without a waiver with the prospect of losing the account if a bond is refused.

If a waiver has been discussed, often the parties have only generally addressed the concept without crafting specific language. If language has been proposed, more often than not the language does not grant an "explicit" and "unequivocal" waiver. The successful surety will ensure, prior to the issuance of the bond, that an effective waiver of sovereign immunity is drafted and consented to by the tribal obligee.

There is no formula that a waiver of sovereign immunity clause must follow. As will be discussed, the nature of reservation projects require certain issues be addressed. However, the waiver clause itself, to be effective, only has to be "explicit" and "unequivocal."[84] The clause could be as simple as "[Tribal Obligee] hereby waives its sovereign immunity from suit in any court." Unfortunately, because of the tribes' reluctance to grant blanket waivers of sovereign immunity, such simplistic yet effective language is rarely agreed to by tribal obligees. Instead, if the clause is proffered in the first instance by the contractor or surety, the tribal obligee will attempt to water down

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[82] As noted in *Granite Valley Hotel Ltd. Partnership v. Jackpot Junction Bingo and Casino*, 559 N.W.2d 135, 181 (Minn.App. 1997): "One Minnesota tribal leader was quoted as stating, "We're going to put the 105th Congress on notice that Indian tribes will not tolerate attacks on their sovereignty." Brian Bakst, American Indians demonstrate at Capitol to protest 'attacks on sovereignty', Native American Press, Jan. 24, 1997, at 1, 3."

[83] *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001)(holding tribal court had no jurisdiction over tribal member's civil rights and tort action filed against State officials in their individual capacities arising from execution of search warrant on reservation).

[84] *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59.

the scope and effect of the clause. If proposed in the first instance by the tribal obligee, the clause may contain language that makes the waiver "un-explicit" and/or "equivocal." The negotiating of a waiver clause can be a "make or break" process depending on the willingness of the tribal obligee to agree to an effective waiver.

As will be discussed in subsection 2, *post*, depending on the forum selected, a court may find a waiver effective, even if not "express" and unequivocal." State courts more often find an arbitration clause waives sovereign immunity even though there are no words of waiver or a mention of sovereign immunity.[85] Federal courts, however, are more likely to construe a waiver provision strictly to find there has been no waiver unless it is expressly stated.[86]

If the tribal obligee is willing to agree to some type of waiver, the negotiating points typically center on what entity(ies) is(are) granting the waiver (Entity Form), where disputes will be resolved (Available Fora), what law will govern in the event of a dispute (Applicable Law), and enforcement of any award or judgment with respect to tribal assets, i.e., bank accounts (Enforcement). The negotiating process can be complex, but only because of the tribe's unwillingness to agree to a simple, blanket waiver of its sovereign immunity. The discussion below on the main points that need to be addressed should help the surety successfully negotiate the process.

A. Entity Form

There are many papers and articles written about the various business forms tribal obligees can take.[87] Under typical non-tribal circumstances, the obligee could be a public entity, i.e., federal, state, or local government, a corporation or limited liability company, or a joint venture or partnership. In the tribal context, the potential obligee may be the tribe itself, organized under Section 16[88] of the Indian Reorganization Act, a federally chartered Section 17 corporation[89], a tribally chartered enterprise or corporation, or a state chartered corporation. When identifying what tribal entity is the potential obligee, the inquiry should focus on which entity is granting the waiver and how that waiver must be effectuated, not whether a waiver is required or not. As stated previously, it should be assumed as a starting proposition that every tribal entity enjoys the tribe's sovereign immunity, notwithstanding various state court decisions to the contrary, as will be outlined below.

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[85] *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)(tribe waives its sovereign immunity by agreeing to contract terms inconsistent with sovereign immunity; express waiver not required) *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 provision in parties' contract, tribe waived sovereign immunity; express waiver not required).

[86] *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418-20 (9th Cir.1989)(arbitration clause in a management agreement between Indian tribe and the non-Indian operator of the tribe's bingo enterprise not a waiver of the tribe's sovereign immunity)

[87] See, e.g., Rubacha, E. "Reservations About the Reservation: Surety Concerns When Dealing With Native American Tribes, " Western States Surety Conference, 1996; Rubacha, E. "Construction Contracts With Indian Tribes or on Tribal Lands, The Construction Lawyer, Winter, 2006.

[88] 25 U.S.C. § 476.

[89] 25 U.S.C. § 477.

1. Determining the Entity.

In general, two types of tribes and tribal entities are recognized under federal law, Title 25: Section 16 and Section 17. A tribe may vote to be under Section 16 of the Indian Reorganization Act of 1934 ("IRA").[90] A Section 16 tribe typically is governed by a tribal constitution adopted and approved by the Secretary of the Interior. A tribe can also form as a corporate entity under Section 17 of the IRA.[91] Under Section 17, the tribal corporation operates under a corporate charter granted by the Secretary. A Section 16 tribe can form a separate corporate entity under Section 17 with powers to contract, to pledge assets, and to be sued. The Section 17 corporate entity is a separate legal entity from the tribe. As noted by the Alaska Supreme Court:

> Recognition of two legal entities, one with sovereign immunity, the other with the possibility for waiver of that immunity, would enable the tribes to make maximum use of their property. The property of the corporation would be at risk, presumably in an amount necessary to satisfy those with whom the tribe deals in economic spheres. Yet some of the tribal property could be kept in reserve, safe from a judgment execution which could destroy the tribe's livelihood, in recognition of the special status of the Indian Tribe.[92]

However, it is not necessarily the Section 17 entity that performs as the tribe's business arm. Often a Section 16 entity "may have as broad or broader economic powers as its business corporation counterpart acting pursuant to section 17."[93] Although Section 17 corporate charters often include a clause that the corporate entity has the power "to sue and be sued," by including such language, the corporate entity has not necessarily consented to a blanket waiver of sovereign immunity.[94]

Sureties are familiar with corporations, limited liability companies, joint ventures, and other forms of business entities where black-letter law defines who can bind the entity to a contract by his signature. Typically, the same entity that will be the obligee, or its lender, has the construction funds to build the project. That well-known and comfortable scenario does not apply to reservation entities. Often, tribes form what are termed "subordinate tribal entities" for specific governmental and business functions. Tribes can form these subordinate tribal entities by a formal process under tribal law; that is, the tribal constitution or code may allow the formation of tribal corporations. They also can be formed by tribal council resolution or by appointment of the tribal chairperson. These entities are not listed in any tribal compendium and typically are not registered with any non-tribal authority. Given the variety found in tribal entities, a principal may believe it is contracting with the tribe itself but when the contract is issued, it finds it really is contracting with a subordinate tribal entity.

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[90] 25 U.S.C. § 461 *et seq.*
[91] 25 U.S.C. § 477.
[92] *Atkinson v. Haldane*, 569 P.2d at 174-75.
[93] *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*, 138 Ariz. 378, 384, 674 P.2d 1376, 1382 (Ct. App. 1983)(*citing* Op. No. M-36545, Timber as a Capital Asset of the Blackfeet Tribe (Dep't Interior, Dec. 16, 1958))
[94] Compare *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir 1991) (formation of corporation to conduct business affairs does not affect tribe's immunity in governmental capacity), with *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989) ("sue and be sued" clause in corporate charter waived sovereign immunity).

As will be discussed in the next section, who has authority to sign for that subordinate tribal entity may not be easy to determine. Whether the entity has any funds of its own or is dependent on tribal fiscal resources is often an open question. The successful surety, early in the process, asks what entity will be the contracting party and obligee. Once defined, the next step to acquiring an effective waiver is taken.

2. Determining How to Acquire an Effective Waiver.

Most tribes have constitutions, charters, and codes. These forming or "organic" documents define what form the tribal government will take and what powers the tribal government has. Often these documents address what powers the president or tribal chairperson has vis a vis the tribal council. They may also define what is required for an effective waiver of sovereign immunity. Unfortunately, more often than not, what is required to effectuate a waiver of the tribe's sovereign immunity, is not addressed. What is required for a subordinate tribal entity to grant a waiver is even less frequently defined or addressed.[95]

Some subordinate tribal entities have charters or constitutions that allow the entity to "sue or be sued." The strong weight of authority holds that a "sue or be sued" clause in a corporate charter or forming document, in and of itself, does not provide an effective waiver of sovereign immunity.[96] However, at least one state court has held a tribe waives its sovereign immunity when it referred to both its governmental and corporate powers in the language introducing a "sue and be sued" clause in its corporate charter.[97]

When tribes form subordinate tribal entities by a formal process under tribal law, the forming documents for that entity can be analyzed to determine what must be done to effectuate a waiver. When tribes form subordinate tribal entities by ordinance or tribal council vote, such informal organization leaves little, if any, documentation setting out what powers the entity has, what governs the operations of the entity, and, ultimately, who can sign on behalf of that entity. This fact often makes it difficult to determine what is needed for an effective waiver. However, the important step is acquiring a copy of whatever documentation exists for the entity to ensure that if specific steps must be taken to acquire an effective waiver, those steps are taken.

Two California decisions outline the importance of researching the tribal entity's forming documents. First, in *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*,[98] the tribe was governed by the Fort Bidwell Indian Community Council. The contract contained a clause that all disputes were to be arbitrated before the AAA and

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[95] See, *e.g.*, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo.App.2004)(question of apparent authority, not actual authority, to waive sovereign immunity because the tribe did not have any procedure for waiving sovereign immunity); *Bradley v. Crow Tribe of Indians*, 67 P.3d 306 (Mont.2003)(proof of the contract waiving sovereign immunity, not authority to waive sovereign immunity, was at issue) *Smith v. Hopland Band of Pomo Indians*, 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455 (Cal.App.2002)(although tribal chairman's authority to waive sovereign immunity not expressly defined, entire contract containing a waiver was presented to and accepted by the entire tribal council, rendering the issue of authority to waive immunity moot).

[96] See, *e.g.*, *Ninigret Dev. Corp.*, 207 F.3d at 30.

[97] See, e.g., *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962).

[98] 170 Cal.App.3d 489, 216 Cal.Rptr. 59 (1985).

could be enforced in "any court of competent jurisdiction." The contract was executed by the council's chairwoman and chief executive officer.[99] When the tribe refused to pay for services rendered, plaintiff demanded arbitration. The tribe argued there had been no waiver of immunity but the arbitrator found a waiver and entered an award in favor of plaintiff. When the superior court confirmed the award, the tribe appealed.

The California court of appeals reversed in favor of the tribe on sovereign immunity grounds. From a review of the tribe's constitution and by-laws, the appellate court concluded that the chairwoman did not have the authority to waive 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 authority, the waiver was invalid. The court also held the tribe had not waived its immunity by appearing at the arbitration to contest the waiver issue.[100]

In another California decision, unreported, *Lobo Gaming, Inc. v. Pit River Tribe of California*[101], the tribal council approved a lease that contained a waiver of sovereign immunity. Although the tribal constitution conferred on the tribal council the power to "negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations," the Tribal Constitution also limited the tribal council's right to execute a waiver of sovereign immunity as follows: "[N]o 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."[102]

The California Court of Appeals again affirmed a dismissal by the trial court on sovereign immunity grounds. Because the tribal constitution specifically required a vote of the tribe to effectuate a waiver, the tribal council's approval of the lease without an affirmative vote was of no effect.[103] 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 requirement in the tribal constitution.

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[99] 216 Cal.Rptr. at 60; see also *World Touch Gaming v. Massena Management, 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); see also *Sharp Image Gaming, Inc. v. Big Sandy* Rancheria, 2002 WL 31684972 (Cal.App. 2002); but 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 provision in parties' contract, tribe waived sovereign immunity, despite claim that tribal chairperson who signed the contracts was without such authority).

[100] 216 Cal.Rptr. at 64.

[101] 2002 WL 922136 (Cal.App. 2002), cert. denied, 537 U.S. 1190, 123 S.Ct. 1260 (2003).

[102] *Id.*

[103] *Id.*

In the most recent federal district court decision, *Native American Distributing v. Seneca-Cayuga Tobacco Co.*[104], the district court followed the reasoning from *Kiowa Tribe*:

> [T]hat a tribe is "engaged in an enterprise private or commercial in character, rather than governmental, is not material" because "[t]o construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians." *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir.1966); *S. Unique Ltd.*, 674 P.2d at 1382 ("The distinction to be made is not between commercial and governmental functions in order to determine the availability of the defense of tribal sovereign immunity."). The constitutional organization of a tribe is capable of operating a commercial venture, just like a tribal corporation. See *S. Unique Ltd.*, 674 P.2d at 1382.[105]

The plaintiff argued the entity with which it dealt, the defendant, SCTC, was a tribal corporation with a "sue and be sued" clause in its charter, not the tribe itself and such an entity did not enjoy the tribe's immunity. The tribe argued that the entity with which plaintiff dealt was not a tribal corporation but, instead, was an "enterprise" of the tribe itself, formed by a resolution. The court reviewed the forming resolution and held:

> The Court concludes that the Resolution clearly declares SCTC to be an enterprise of the Tribe and not the Tribal Corporation, such that the Sue and Be Sued Clause in the Corporate Charter does not constitute an explicit waiver of SCTC's sovereign immunity, either in its dealings with Plaintiffs . . . . Several aspects of this case-including the fact that the Tribe and Tribal Corporation have the same name, the alleged representation by Wood that Plaintiffs did not need a waiver of immunity, the alleged initial lack of tribal involvement in managing SCTC, and the lack of an alternative judicial remedy-seem to render this a harsh result. However, it is not this Court's role to revisit established legal principles or to ignore the requirement of an express waiver of immunity based on perceived inequities. See Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8th Cir.1985) ("If injustice has been worked in this case, it is not the rigid express waiver standard that bears the blame, but the doctrine of sovereign immunity itself. But it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established."). Accordingly, SCTC is immune from suit on the breach of contract claims . . . .[106]

The lesson to be learned from these cases is two-fold. First, from a surety's perspective, attempting to determine whether the tribal entity-obligee enjoys the tribe's immunity is less important than determining what must be done to effectuate a waiver by that entity. Second, the surety should determine, based on the specific entity that will be the obligee and, from a thorough analysis of the entity's forming documents,

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[104] 491 F.Supp.2d 1056 (N.D.Okla.2007).
[105] 491 F.Supp. at 1067-68.
[106] 491 F.Supp.2d at 1070.

what must be done for an effective waiver. At the very least, every waiver should be supported by a resolution from the governing body of the tribe agreeing to the operation of that waiver.

When the forming documents of a particular entity are unclear, the surety should request that the tribe provide a waiver for itself and on behalf of the entity. Again, an analysis of the tribe's forming documents should be done to determine how the waiver is effectuated and by whom. But, as noted previously, tribes may be reluctant to provide blanket waivers and, indeed, may have formed the entity specifically to insulate the tribe's assets from potential judgments. In that case, the tribe may be willing to waive the immunity of the subordinate entity only, leaving the surety to look to that entity alone for recovery. In that instance, the surety should undertake additional analysis regarding the financial aspects of the particular entity.

B. Available Fora

A second aspect to negotiating waivers of sovereign immunity involves the forum in which disputes will be resolved. State court is always a viable option, along with mediation and arbitration. Federal court, although often the first forum chosen, is not typically a viable option, as will be discussed below. Tribal obliges almost always offer tribal court as the preferred forum to resolve disputes. Although some tribes may not have an established tribal court system, most larger tribes have a functioning tribal court and promote the use of that forum. Under either of these latter two options, the successful surety will negotiate for state court or arbitration.

1. Federal Court

Specifying federal court as the sole chosen forum involves risk to the surety, although not in the way most likely presumed. Faced with the choice of tribal court or federal court, most sureties would choose federal court. Indeed, tribally-proposed waiver clauses often specify federal court as the preferred forum, (after tribal court, of course). Unfortunately, federal court is a court of limited jurisdiction. 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.[107] Unless a federal question exists under 28 U.S.C. § 1331, or diversity exists under 28 U.S.C. § 1332[108], or a bond is issued pursuant to the federal Miller Act, 40 U.S.C. § 270a, the district court, as a court of limited jurisdiction, cannot entertain the action.[109]

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[107] See, e.g., Insurance 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.").

[108] "Most courts to have considered the question-including the First, Second, Eighth and Tenth Circuits-agree that unincorporated Indian tribes cannot sue or be sued in diversity because they are not citizens of any state." *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002).

[109] Tribes are not "citizens" of any state for purposes of diversity jurisdiction under 28 U.S.C. § 1332. See, *e.g.*, *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002)(Tribe is "stateless" for purposes of diversity, presence as party destroys diversity).

28 U.S.C. § 1362 grants district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . aris[ing] under the Constitution, laws, or treaties of the United States." However, at least one court has held that statute does not apply to basic construction disputes.[110] 28 USC § 1352 addresses bonds executed under federal law and provides district courts "original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States . . . ."[111] [F]ederal courts have authority to determine, as a matter "arising under" federal law [28 U.S.C. § 1331], whether a tribal court has exceeded the limits of its jurisdiction."[112] Although the Miller Act provides a jurisdictional basis for federal court, rarely, if ever, does this provide a basis for federal court jurisdiction for tribal obligees.[113]

An exception may exist in bankruptcy. 11 U.S.C. § 106, Waiver of Sovereign Immunity, states: "(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: [list of Bankruptcy Code sections]." In *In re Greene*[114], a pre § 106(a) amendment decision, the Ninth Circuit held that subsection (a) related to situations in which a sovereign has filed a claim in the bankruptcy proceedings. Subsequently, the section was amended and the Ninth Circuit has interpreted it to apply to Indian tribes as "governmental units."[115]

For purposes of diversity jurisdiction under 28 U.S.C. § 1332, a tribal entity incorporated under Section 17 may be a "citizen" of the state of its principal place of business.[116] Additionally, if a tribal enterprise is incorporated under state corporation laws, there is no question the entity is a citizen of the state in which it is incorporated. If the jurisdictional minimum is met, and the parties are truly diverse, a federal district court can properly assert jurisdiction over a dispute between a non-Indian and a tribal

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[110] See, *e.g.*, *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980)(basic construction contract dispute between tribe and architect did not raise federal question), cert. denied, 451 U.S. 911 (1981).

[111] See, *e.g.*, *Del Hur, Inc. v. National Union Fire Insurance Co.*, 94 F.3d 548 (9th Cir. 1996)(district court has jurisdiction under § 1352 over action on bond issued pursuant to federal regulations)

[112] *Strate v. A-1 Contractors*, 520 U.S. 438, 448, 117 S.Ct. 1404, 1411 (1997).

[113] See, *e.g., United States ex. rel. General Rock & Sand Corp. v. Chuska Dev. Corp.*, 55 F.3d 1491, 1493-95 (10th Cir.1995)(finding no federal question in suit involving Indian housing project because statute exempted tribal contracts from Miller Act requirements); *Midstates Excavating, Inc. v. Farmers and Merchants Bank & Trust of Watertown*, 410 N.W.2d 190, 193-194 (S.D.1987)(where 25 U.S.C. § 450j provides contracts with tribal organizations . . . need not conform with the provisions of section 40 USC 270a and under § 270a, "contractors" are required to furnish bonds to the "United States," bonds to tribal entity are not Miller Act despite use of federal funds); *contra U.S. on Behalf of and for Use of Time Equipment Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 129 (8th Cir.1993)(finding performance bond provided by contractor that contracted with the Rosebud Sioux Tribe was in compliance with 40 U.S.C. § 270a).

[114] 980 F2d 590 (9th Cir. 1992).

[115] *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004)(in amending 25 U.S.C. § 106(a), Congress intended to abrogate tribal sovereign immunity in bankruptcy court actions); see also *In re Russell*, 293 B.R. 34 (Bankr.D.Ariz. 2003)(Section 106(a) abrogated sovereign immunity of Navajo Tribe); contra *In re Mayes*, 294 B.R. 145 (10th Cir.BAP 2003)(§ 106 is unconstitutional and, if it is constitutional, it doesn't apply to Indian tribe).

[116] See, e.g., *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Enterprise Elec. Co. v. Blackfeet Tribe of Indians*, 353 F.Supp. 991 (D.Mont. 1973). Also, an incorporated arm of a tribe has been held to be a citizen of the state in which they reside. See *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1223 n. 3, 1226 (9th Cir.1989).

enterprise.[117] 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.[118]

Finally, some argue that by referencing arbitration as the preferred forum that such a reference allows the parties to enforce arbitration in federal court. Although the Federal Arbitration Act ("FAA")[119] expressly authorizes district courts to confirm, vacate, or modify an arbitration award, it does not provide an independent basis for federal court jurisdiction.[120] Even though the FAA expressly authorizes proceedings in federal district courts, it does not confer subject matter jurisdiction.[121] To assert subject matter jurisdiction in a federal court, "[it is not enough that the underlying dispute involves a federal claim . . . over which the court would have had subject matter jurisdiction if suit had been brought originally in federal court," or that "the arbitration award resolves a federal claim."[122] Consequently, a petition to compel arbitration must be brought in state court unless some independent basis for federal subject matter jurisdiction exists.

In a recent decision, *Auto-Owners Insurance Co. v. Tribal Court of the Spirit Lake Indian Reservation*[123], the Eighth Circuit Court of Appeals addressed a lack of federal question jurisdiction, diversity jurisdiction, tribal court exhaustion, and supplemental jurisdiction. The court's analysis is a good summary of the issues involved when seeking federal court jurisdiction in matters involving tribes and tribal entities.

In the district court, Auto-Owners filed a declaratory judgment action against its insureds, Tate Topa Tribal Education Board and Tate Topa Tribal School (collectively "Tate Topa"), to resolve potential coverage claims. Tate Topa moved to dismiss, contending that the action was barred by sovereign immunity, which it enjoyed as an entity of the Spirit Lake Sioux Tribe. The district court denied the motion

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

[118] See, e.g., *Stock West*, 873 F.2d at 1226; *R.J. Williams Co. v. Fort Belknap Housing. Auth.*, 719 F.2d 979, 982 n.2 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985); contra, *Weeks Construction, Inc. v. Oglala Sioux Housing 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).

[119] 9 U.S.C. § 1 *et seq.*

[120] *General Atomic Co. v. United* Nuclear *Corp.*, 655 F.2d 968 (9th Cir.1981)(applicants that seek confirmation of an arbitration award under Arbitration Act must demonstrate independent grounds of federal subject matter jurisdiction; the provisions of the FAA do not in themselves confer subject matter jurisdiction); *Minor v. Prudential Securities, Inc.*, 94 F.3d 1103 (7th Cir.1996)(must be independent basis of federal jurisdiction before district court can entertain motion under FAA; petitioning party must demonstrate that diversity or federal question jurisdiction exists): *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir.1996)(Section of FAA authorizing party to petition for order to compel arbitration does not give federal courts subject matter jurisdiction over action to compel arbitration, even when underlying claim involves federal question).

[121] *Id.*; see also *Iowa Management & Consultants, Inc. v. Sac & Fox Tribe Of The Mississippi In Iowa*, 207 F.3d 488 (8th Cir. 2000)(Federal Arbitration Act does not confer federal question jurisdiction on district court).

[122] *Westmoreland Capital*, 100 F.3d at 267-68.

[123] --- F.3d ---, 2007 WL 2189094 (8th Cir.2007).

On appeal, the Eighth Circuit reversed. The court first addressed the lack of diversity jurisdiction:

> "A federal court has original jurisdiction over a civil action if the parties are of diverse state citizenship and the courts of the state in which the federal court sits can entertain the suit." . . . "[A]n Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction." *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir.1974); see also *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir.2003)("Diversity jurisdiction is not available here under 28 U.S.C. § 1332 because Indian tribes are neither foreign states nor citizens of any state.") (internal citations omitted).
>
> In the present case, no diversity jurisdiction exists as a basis for subject matter jurisdiction because Tate Topa-a sub-entity of the Spirit Lake Sioux Tribe-is considered a part of the Indian tribe. [124]

The court next addressed the lack of federal question jurisdiction and the tribal court exhaustion requirement:

> While a "non-frivolous claim of a right or remedy under a federal statute is sufficient to invoke federal question jurisdiction," "the fact that [a tribal entity] is created by and operates on behalf of an Indian tribe is not alone sufficient to find the existence of a federal question." . . . .
>
> But even where a federal question exists, due to considerations of comity, federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted.[125]
>
> . . .
>
> Federal question jurisdiction is not implicated at this time. Auto Owners' declaratory judgment action sounds in contract law raising a state-law question regarding the existence of coverage under the policies issued to Tate Topa. Both parties acknowledge that the underlying Lohnes action in tribal court invokes the FTCA. But this separate declaratory judgment action in federal court does not involve the FTCA. Ordinary contract principles apply to the claim. . . . [A]n ordinary contract dispute involving an Indian tribe does not raise a federal question.[126]
>
> The court completed its analysis finding no supplemental jurisdiction:
>
> [T]o establish supplemental jurisdiction, the "[c]laims within the action" must "derive from a common nucleus of operative fact." . . . Here, even if Auto Owners had exhausted the remaining tribal remedies, meaning that the federal court could then entertain the federal question of whether the tribal court exceeded its jurisdiction . . . , no supplemental jurisdiction would exist to entertain the state declaratory judgment action against Tate Topa because the claims do not derive from a common nucleus of

[124] *Id.*
[125] *Id.*
[126] *Id.*

> operative fact. . . . Auto Owners' contract claim against Tate Topa does not depend on Tate Topa's status as a part of the BIA under the TCSA. Instead, such claim depends on the interpretation and application of the insurance policies' language.[127]

The court completed its opinion by stating because there was no subject matter jurisdiction, it need not decide whether Tate Topa had sovereign immunity.[128]

As outlined in *Auto* Owners, notwithstanding the exceptions listed, the majority of tribal projects involving the tribe itself or a tribal enterprise will not support federal court jurisdiction. Unless there is a tribal court jurisdiction over a non-member issue, the matters in dispute will be state contract law related, not federal. Therefore, reference to federal court without a corresponding, fall-back reference to state court will leave the parties without an effective waiver to a particular forum, which is essentially no waiver at all. Successful sureties avoid language setting jurisdiction in federal court unless a clear basis for one of the few narrow exceptions is shown.

2. State Court

As opposed to federal courts, state courts are typically courts of general jurisdiction. Typically, the threshold jurisdictional questions that exist with choosing federal court jurisdiction don't arise. Second, state courts should be familiar with contract law and surety principles. Third, counsel are familiar with the rules of procedure of their own state court. Fourth, numerous construction law and surety law decisions provide a known quantity of citations and support for legal positions.

However, there are considerations to state court as the preferred forum. First, there is an "ever-present, overriding principle: State jurisdiction must not interfere with Indian self-government, absent some compelling state interest."[129] Generally, a dispute between Native American entities and a non-member that occurs entirely on the reservation may require tribal court relief whereas a state court may assume jurisdiction of a dispute concerning a commercial transaction only where the underlying transaction occurred entirely off the reservation.[130]

Second, 28 U.S.C. § 1360 specifically excludes jurisdiction by the state court over disputes involving "ownership or right to possession of [Native American] property or any interest therein."[131] At least three state courts have interpreted this section to mean any dispute involving ownership of arguably "Indian land" or "trust land" is outside

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[127] *Id.*
[128] *Id.*
[129] *Duluth Lumber & Plywood v. Delta Dev., Inc.*, 281 N.W.2d 377, 381 (Minn. 1979). The court echoed 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.
[130] See, e.g., *Indian Oasis School 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)(state court has jurisdiction over commercial loan transaction that occurred off-reservation between bank and individual Native Americans), cert. denied, 431 U.S. 924 (1977); 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).
[131] 28 U.S.C. § 1360(b).

their jurisdiction.[132] Such cases would include mechanic's lien foreclosure actions.[133]

Third, if a tribal court has already asserted jurisdiction over a dispute or has concurrent jurisdiction, a state court may decline jurisdiction if the dispute involves tribal sovereignty or issues of tribal law.[134] Additionally, if a separate suit is filed in tribal court, the state action may be stayed pending resolution of the tribal court action, or dismissed in favor of the tribal court action based on the exhaustion doctrine.[135] However, some courts hold that exhaustion of tribal court remedies is a federal court rule that does not apply to state courts while others enforce the rule.[136]

Finally, and perhaps overriding each of these issues, is the simple fact that tribes and tribal entities do not want to be in state court any more than sureties and their principals want to be in tribal court. Tribes have two positions to advocate in rejecting state court as the preferred forum. First, tribes do not feel that they are treated appropriately in state courts. They feel their laws are not followed or respected and that they will be taken advantage of. Second, tribes that have functioning court systems want to promote the use of their court systems, applying their laws. After all, if the project is for the tribe, on the tribe's reservation, and tribal law is to be applied, why wouldn't the tribal court be the preferred forum? The tribes see adjudication of disputes in their courts as a function of their sovereignty. Although there may be cogent answers to these questions, convincing a tribe to utilize state court in the first instance is often met with strong resistance. That's why more and more reservation contracts refer disputes to mediation and arbitration as opposed to litigation in either tribal or state court. Specifying arbitration as the preferred forum is addressed in Section D below.

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[132] *Boisclair v. Superior Court*, 51 Cal.3d 1140, 801 P.2d 305 (1990)(28 U.S.C. § 1360 preempts state court action involving ownership of Indian lands); *Jicarilla Apache Tribe v. Board of County Commissioners*, 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 Village of Tyonek*, 561 P.2d 31 (Alaska 1977), cert. denied, 434 U.S. 938 (1977)(28 U.S.C. § 1360 preempts state court jurisdiction involving ownership of Native American lands).

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

[134] This will be discussed in the following sub-section on Tribal Courts. See, *e.g.*, *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).

[135] *Id.*; see also *Stock West*, 873 F.2d at 1230; see also *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 265 Wis.2d 64, 665 N.W.2d 899 (2003)(requiring conference between state court and tribal court to avoid "race to judgment").

[136] Compare *Astorga v. Wing*, 211 Ariz. 139, 143, 118 P.3d 1103, 1107 (App.2005)("The principle of exhaustion [of tribal court remedies], however, does not apply to the petitioners' state court proceeding, because whether the Indian court has jurisdiction over the matter is not at issue in the state court proceeding.") with *Matsch v. Prairie Island Indian Cmty.*, 567 N.W.2d 276 (Minn.Ct.App.1997)(when a state court and a tribal court have concurrent jurisdiction tribal court remedies must be exhausted before the state court may consider taking jurisdiction).

Even if the surety can procure the tribe's consent to state court jurisdiction, the surety should also define how service of process will be effectuated.[137] State court approved process servers and sheriffs most often do not have jurisdiction to serve process on Indian reservations, although some states allow service by private process servers.[138] Appointing an off-reservation "agent" for purposes of service can be negotiated, as well as alternative forms of service, i.e., certified mail. The choice of how service is performed is not the issue as much as simply addressing the issue before a dispute arises.

3. Tribal Court

The use of tribal court as a chosen forum may involve a significant, hard-to-measure risk to the surety and its principal. Tribal court judges may not have the legal training common with most state and federal court judges. Even experienced tribal court judges may not have any specific expertise in contract law, not to mention construction and surety law. Tribal court judges most likely will attempt to apply tribal law to the dispute. The tribal court itself may not have an effective code of civil procedure. Finally, although perhaps not politically correct in today's climate, there is the issue of bias of the tribal court or a jury in favor of the tribe, a tribal entity, or a member.[139] If a tribal court judge is subject to the appointment and dismissal of the tribal president and/or tribal council, his or her impartiality may be compromised under such a system.

On the other hand, as noted previously, tribes with functioning court systems want to utilize their own courts to resolve disputes. It could also be argued that state court and federal court judges, not to mention the juries in such courts, often do not have a sufficient grasp of construction and/or surety principles any more than a tribal court judge would. On balance, the "unknowns" and peculiarities of tribal court procedures can increase the risk of issuing a bond on a reservation project.

As one example of a peculiar procedure of a tribal court, the Colorado River Indian Tribal Court, Local Rules of Procedure, Rule 14 provides:

> **Advice of Tribal Members on Traditional Customs and Usage and Lawful Tradition and Policies of the Tribes.** At any time and in any action or case, upon motion of the Attorney General, any party, *sua sponte*, and upon a finding of any doubt as to any traditional customs and usages

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[137] *Annis v. Dewey County Bank*, 335 F.Supp. 133, 136 (D.S.D.1971)("State officials have no jurisdiction on Indian reservations either to serve process on an enrolled Indian or to enforce a state judgment."); compare *Francisco v. State*, 113 Ariz. 427, 556 P.2d 1 (1976)(sheriff can't serve Indian on reservation) and *Bradley v. Deloria*, 587 N.W.2d 591 (S.D.1998)(same) with *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989)(Arizona "long arm" service statute allowed effective service) and *LeClair v. Powers*, 632 P.2d 370, 374 (Okla.1981)("Indian country is not a federal enclave off limits to state process servers. Service of process extends to an Indian defendant served within the Fort Peck Reservation.")

[138] *Id.*

[139] For an example of a tribal court judgment that was refused recognition by a federal court on bias and prejudice grounds, see *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir.2000), wherein the Ninth Circuit reversed the district court's grant of comity to a tribal court judgment against the non-Indian cooperative where closing arguments were so fraught with racial bias that the tribal court judgment did not satisfy due process.

> or lawful tradition and policies of the Tribes, the Court may convene a panel of Fifteen (15) to Thirty (30) Tribal-member elders; who the Court, in its sole and unfettered discretion, determines are familiar with customs and usages, to advise Court thereon, and who shall decide by either the eldest or majority opinion, whichever is more appropriate under the particular facts of the case.[140]

Although this procedure may seem different--a tribal judge polling a panel of elders to dictate the law[141]--parties in state or federal courts often rely on a panel of inexperienced jurors to decide (dictate) disputed facts? Additionally, one could ask how often traditional customs and usages would come into play in interpreting a construction contract or surety bond. Further, forewarned is forearmed. Understanding and addressing the issues the surety might face if tribal court is chosen can reduce the risk of choosing such a forum.[142]

It must be pointed out, however, that by contracting with the tribe or tribal entity, the principal, and its surety by the issuance of a bond in favor of the tribal obligee, subject themselves potentially to the jurisdiction of the tribal court notwithstanding the selection of an alternate forum.[143] 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."[144] The Ninth Circuit has 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."[145] Therefore, if the tribe has an established, functioning tribal court, and an action can be brought in that court, a federal or state court may defer to the tribal court even if jurisdiction concurrently exists in those courts.

In *Montana*, the Supreme Court held that as a general rule tribal courts do not have civil jurisdiction over nonmembers, stating: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without

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[140] Rule 14(d), CRIT LRP.

[141] The Navajo tribal courts employ a similar system. Commenting on Navajo common law, Navajo Supreme Court Associate Justice Raymond Austin noted: "You don't find it in a book . . . . We still have many elders who don't speak English. They have a lot of knowledge about common law, and we bring them in as expert witnesses." Navajo Supreme Court Associate Justice Raymond Austin as quoted in "Tribal Justice," California Lawyer, November, 1995, p. 39.

[142] In another tribal court, that of the Southern Ute Tribe, while the rules of procedure allow for domestication of judgments, the rule allows that any such domestication is subject to the court's determination, in its sole discretion, whether the domestication would be to the benefit of the Southern Ute Tribe. Assuming a state court judgment or arbitration award has been obtained, assessing the chances that a Southern Ute tribal court judge will find that domesticating a large judgment will be to the benefit of the tribe is difficult, at best.

[143] *Montana v. United States*, 450 U.S. 544 (1981).

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

[145] *R.J. Williams Co. v. Fort Belknap Housing. 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.").

express congressional delegation."[146] However, the Court identified two exceptions to this general rule. The first is a tribe's regulation "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[147] Issuing a bond for a tribal obligee is certainly within the first *Montana* exception: a consensual relationship. The second is a tribe's "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[148] Certainly, the principal's operations on the reservation, besides arising from a consensual relationship (the construction contract), can threaten the health or welfare of the tribe or its members.

The federal government encourages tribal self-government. In furtherance of these policies, the Supreme Court has held that a tribe whose jurisdiction has been challenged should have the first opportunity to determine the validity of such a challenge.[149] In *LaPlante*, the Court stated, "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' "[150] This policy favors abstention by non-tribal courts to allow tribal self-government of which tribal courts play an important role.[151] The policy allows tribal courts to be the first to respond to the invocation of or a challenge to their jurisdiction. It is prudential not jurisdictional; it is applied as a matter of comity and does not establish adjudicatory authority over lawsuits filed in tribal courts.[152] A tribal court's determination of jurisdiction is reviewable only after tribal remedies have been exhausted.[153]

"[W]hen a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims."[154] The doctrine applies even when a tribal agency other than a tribal court arguably has jurisdiction.[155] The doctrine applies even if no claim is currently pending in a tribal court or agency.[156] Finally, "the doctrine applies even though the contested claims are to be defined substantively by state or federal law."[157]

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[146] *Montana*, 450 U.S. at 564, 101 S.Ct. at 1258.
[147] *Id.* at 565, 101 S.Ct. at 1258 see also *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140 (9th Cir.2006)("We hold that a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of *Montana*.", cert. denied, 126 S.Ct. 2893 (2006).
[148] *Id.* at 566, 101 S.Ct. at 1258.
[149] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985)
[150] 480 U.S. at 16, 107 S.Ct. at 976.
[151] *Nat'l Farmers*, 471 U.S. at 856, 105 S.Ct. at 2454.
[152] *Strate*, 520 U.S. at 453; *LaPlante*, 480 U.S. at 16, n.8, 20 n.14. Comity is a discretionary policy where "the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect. Courts extend immunity as a matter of comity to foster cooperation, promote harmony, and build goodwill." *Levert v. Univ. of Ill.*, 857 So.2d 611, 618 (La.App.2003), writ denied, 864 So.2d 635 (La.2004).
[153] *Id.*
[154] *Ninigret Development*, 207 F.3d at 31.
[155] *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir.1991).
[156] *Ninigret*, 207 F.3d at 31; *Burlington*, 940 F.2d at 1246.
[157] *Ninigret*, 207 F.3d at 31.

There are exceptions to the application of the exhaustion doctrine. It does not apply in situations where: "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[158] Exhaustion also does not apply "[w]hen ... it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," and the exhaustion requirement "would serve no purpose other than delay."[159] Finally, at least one court has held that exhaustion of tribal court remedies does not apply where the parties have agreed to an alternate forum.[160]

The Supreme Court has not specifically held that the exhaustion of tribal remedies doctrine applies to state courts.[161] Arizona courts hold tribal exhaustion is a federal court issue, not applicable to state court while Minnesota courts hold to the contrary, that state courts should enforce the tribal court exhaustion rule.[162] However, the Court stated in *Iowa* that "[a]djudication of such matters by any nontribal court . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."[163]

An example of how the tribal court exhaustion doctrine may affect the surety is illustrated in a very recent case from Louisiana, *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*.[164] In that case, the parties entered into an Agreement for Professional Services. A Supplemental Agreement, which revised the Agreement, stated that it would be "interpreted, governed and construed under the laws of the State of Louisiana."[165] The parties also "irrevocably consent[ed] to the jurisdiction" of Louisiana state courts and agreed that any dispute arising under the contract would be heard "by a court of competent jurisdiction in the Parish of Allen, or any other Parish mutually agreed to, State of Louisiana."[166] The Coushatta Tribe "specifically waive[d] any rights, claims or defenses to sovereign immunity" with regard to the Agreement.[167] A subsequent Memoranda of Agreement provided that, if either party had to file suit, it had to be "filed in the Fourteenth Judicial District Court, State of Louisiana."[168]

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158 *Nat'l Farmers*, 471 U.S. at 856, n. 21.
159 *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S.Ct. 1404, 1416, fn. 14 (1997).
160 See, *e.g.*, *FGS Constructors v. Carlow*, 64 F.3d 1230, 1233 (8th Cir.1995)(district court has no significant comity reason to defer litigation first to the tribal court where contract contains a "choice of forum" clause allowing suit in tribal court or "other court of competent jurisdiction," tribe agreed disputes need not be resolved in tribal court).
161 Lower federal courts have held it applies to both federal and state courts. See, *e.g.*, *U.S. v. Plainbull* (9th Cir.1992) 957 F.2d 724, 728 (9th Cir. 1992).
162 Compare *State v. Zaman*, 190 Ariz. at 212, 946 P.2d at 463 ("*LaPlante* describes an exhaustion rule. It does not purport to establish tribal court adjudicatory authority.") with *Matsch v. Prairie Island Indian Cmty.*, 567 N.W.2d at 279 (state should require exhaustion of tribal court remedies and give tribal court ruling *res judicata* effect).
163 480 U.S. at 16, 107 S.Ct. at 977.
164 2007 WL 2255368 (La.App.2007).
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*

The Supplemental Agreement was the subject of a lengthy and detailed Resolution passed by the Tribal Council on January 14, 2003 which authorized the Tribal Chairman "to negotiate and execute all necessary Agreements with Meyer and Associates, Inc." and "to negotiate and execute . . . all Other Agreements as may be necessary to Develop and Implement the [Power Plant Project]."[169] It also authorized the Tribal Chairman to designate someone to act in his stead in conjunction with the Project. The Resolution did not, however, specifically waive sovereign immunity.

Coushatta filed suit first in Coushatta Tribal Court. When Meyer & Associates sued the tribe in the 14th Judicial District as required by the Supplemental Agreement, Coushatta contended that it did not waive its sovereign immunity and that is was not subject to suit in state court because the January 14, 2003 Resolution did not satisfy its Judicial Code's requirements for waiver of sovereign immunity. The Coushatta Judicial Code, Title 1, Section 1.1.05, provided:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit . . . . Nothing in this code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such.[170]

Notwithstanding what appeared to be an unequivocal and express waiver, the Louisiana state court stayed the action in favor of allowing the action to go forward in the Coushatta Tribal Court. The court reasoned as follows:

> [T]he . . . circumstances present here favor application of the exhaustion doctrine: 1) a contract between a tribe and a nonmember, not a Louisiana statute, is at issue; 2) the stated purpose of the contract is to provide economic support for Coushatta; 3) suit was filed first by Coushatta in its Tribal Court; and 4) interpretation and application of a tribal ordinance bears on the determination of whether the tribe waived sovereign immunity.[171]

Therefore, if the surety wishes to avoid tribal court, an alternative forum must be specified in any waiver clause. Further, the waiver clause should expressly state that the parties waive recourse to tribal court and any failure to exhaust tribal court remedies. There are no reported decisions construing the effectiveness of such language.[172] The surety must be aware that by issuing a bond to a tribal entity, it has entered into a "consensual relationship" within the parameters of *Montana* and, therefore, a tribal court properly can assert jurisdiction over any disputes between it and the tribal obligee.

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[169] *Id.*
[170] *Id.*
[171] *Id.* at 5.
[172] The Tenth Circuit "has taken a 'strict view of the tribal exhaustion rule,' " *Calumet Gaming Group-Kan., Inc. v. Kickapoo Tribe of Kan.*, 987 F.Supp. 1321, 1327 (D.Kan.1997) and has construed the rule as more than "a mere defense to be raised or waived by the parties," *Smith v. Moffett*, 947 F .2d 442, 445 (10th Cir.1991).

4. Alternative Dispute Resolution: Arbitration/Mediation

Given the unavailability in most instances of federal court and that tribal entities will not agree to state court, and the perceived risks in tribal court, the resulting forum, chosen almost by the lack of another viable alternative, is often arbitration. The United States Supreme Court has upheld the choice of arbitration as a viable forum when dealing with Native American tribes and that where the parties agree to binding arbitration with enforcement in any court, such a clause operates as a waiver.[173] The arbitration clause upheld in *C&L Enterprises* encompassed three elements: (1) an agreement for binding arbitration of all disputes; (2) an agreement to be bound by any arbitration award; and (3) an agreement that any award could be enforced in any court of jurisdiction. Any deviation from the language of the clause in *C&L Enterprises* would, of course, engender an argument that the case is distinguishable.[174]

Before the decision in *C&L Enterprises*, courts struggled with whether a simple agreement to arbitrate disputes effectuated a waiver of a tribe's sovereign immunity.[175] These decisions could become applicable if an arbitration clause does not follow *C&L Enterprises*.[176] The surety would cite decisions upholding arbitration clauses while the tribe cites contrary decisions stating that, without an express waiver, arbitration clauses do not waive sovereign immunity. The successful surety will require that any arbitration clause follow the dictates of *C& Enterprises*.

One issue that arises is the proffering of a simple "The parties agree to binding arbitration of all disputes" without specifying any other forum. What happens if the tribe decides it has no wish to arbitrate? Without an express waiver setting an alternate forum to enforce the demand for arbitration, there is no recourse to force the tribe to arbitration. For example, one tribe offers the following language in its contracts:

> Disputes: All claims, disputes, and other matters in question under this Agreement shall be resolved through a mutually agreed upon mediation process or by arbitration in accordance with the Pascua Yaqui Rule of Arbitration currently in effect.

As to the selected forum, the contract states:

> In the event the Parties fail to reach an agreement in an arbitration or

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[173] *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,*532 U.S. 411, 121 S.Ct. 1589 (2001).

[174] Tribal attorneys argue because *C&L Enterprises* involved an off-reservation project and the application of state law, if a project was a tribal project, on a reservation, governed by tribal law, that the result could be different.

[175] See, *e.g.*, *Val/Del, Inc. v. GC Contractors, Inc.*, 145 Ariz. 558, 703 P.2d 502 (App. 1985)(upholding arbitration clause), cert. denied, 474 U.S. 920 (1985); *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560 (8th Cir. 1995)(upholding arbitration clause); *contra 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).

[176] The surety should also incorporate a waiver of recourse to tribal court and tribal court remedies to head off a run to tribal court. See, *e.g.*, *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995).

> mediation proceeding or if Tribe makes the determination to forego arbitration and mediation proceedings, all claims, disputes, and other matters in question under this Agreement shall be resolved pursuant to the Laws of the Pascua Yaqui Tribe in the court system of the Tribe.

In another section, the contract states: "All disputes arising under this Agreement shall be resolved pursuant to the laws of Tribe in the court system of Tribe." However, in another section, the contract states "Nothing contained herein shall be construed to effect a waiver of the tribe's sovereign immunity." The contract was not negotiated and the terms were dictated by the tribe.

When a dispute arose and arbitration was demanded, the tribe declined to arbitrate. Pursuant to the express language of the contract, suit was brought in Pascua Yaqui tribal court. The tribe filed a motion to dismiss, asserting its sovereign immunity. The Pascua Yaqui Tribal Court granted that motion. Notwithstanding the agreement to tribal court jurisdiction if the tribe decided not to arbitrate, the court held the "Nothing contained herein . . ." language trumped all other language.

Increasingly, tribal attorneys are proffering federal court jurisdiction to enforce the terms of arbitration clauses. That is, if the tribe decides not to arbitrate, then the other party can pursue the matter in federal court pursuant to the FAA. From the prior section on Federal Court, *ante*, the surety knows that such a reference does not provide any federal court with jurisdiction. The FAA simply does not provide a separate basis for jurisdiction. Allowing such language to remain without specifying access to state court could leave the surety and its principal without an effective remedy.[177]

In summary, the choice of the preferred forum is, as with other aspects of a waiver clause, subject to negotiation. State court is preferable to other venues simply because it is a known entity. Often, however, the tribal obligee will refuse to submit to state court jurisdiction. The surety and its principal are then left to negotiate for an alternative forum. Given federal court likely is not available, and given the perceived risks involved with tribal court, arbitration may be the sole viable alternative. Any arbitration clause should follow, as closely as possible, the clause found in *C&L Enterprises* or the surety will risk an argument that the clause was not a waiver or does not operate to require arbitration.

C. Applicable Law

The next issue in negotiating waiver clauses is what law will apply in the event of a dispute. After reading this far, it needs little foresight to predict that a tribal obligee may specify that tribal law apply. A fall back provision is often a reference to "federal law." Sureties and their principals ideally want state law to apply. The successful surety will have a perspective on how the choice of law may affect the resolution of disputes.

[177] The arbitration clause could require that if either party does not appear at the arbitration hearing, then the arbitration can proceed and any result is binding on the absent party.

1. Federal Law: Federal Indian Law/Federal "Common Law"

Our country's expansion initially, and then to the West, resulted in relocation and removal of many Native American tribes by means of force, treaty, and relocation.[178] The government's policy towards Native Americans has changed over the years from force, treaty, and relocation to one of assimilation, then to a trust relationship (Indian Reorganization Act), afterwards to terminating the trust relationship, and, finally, to the "current policy of 'self determination and self governance.' "[179] One court recently described the ever changing federal policy as follows: "The treatment and policies by the United States of the conquered Indian people could be described by the undersigned as the Flying Trapeze Policies, swinging back and forth from protection to termination as the political winds directed.[180]

25 U.S.C. § 1 et seq., compiles the majority of statutes, acts, and laws relative to Native Americans. However, these statutes, along with their supporting federal regulations, are like all federal laws and regulations: voluminous, confusing, and ever-changing. Of even more concern, all statutes passed are construed in favor of the tribes.[181]

As to federal "common law," meaning reported decisions of federal courts, as noted previously, federal Indian policy has moved back and forth, depending on the policy of the time and, often, court decisions reflect the policy at the time the decision was rendered.[182] Decisions issued during a time of assimilation policy may not be applicable in today's policy of self-determination. Additionally, federal decisions involving federal construction projects often involve the Federal Acquisition Regulations, most of which are not applicable to tribal contracts.[183] As stated by the Third Circuit Court of Appeals in *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*,[184]:

> The construction of contracts is usually a matter of state, not federal, common law. Federal courts are able to create federal common law only in those areas where Congress or the Constitution has given the courts the authority to develop substantive law, as in labor and admiralty, or where strong federal interests are involved, as in cases concerning the rights and obligations of the United States.[185]

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[178] See; *e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).
[179] See, *e.g.*, *Cobell v. Babbitt*, 91 F.Supp.2d 1, 9 (D.D.C.1999); *Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162 (9th Cir.1982)(recognizing that the guardian-ward relationship arose because of the Indian tribes' subordination of sovereignty for protection of the government).
[180] *U.S. v. Newmont USA Ltd.*, ---F.Supp.2d---, 2007 WL 2386425, 1 (E.D.Wash.,2007).
[181] The "Indian canon of construction" provides that because of the trust relationship between the federal government and the tribes, statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766.
[182] See *Atkinson v. Haldane*, 569 P.2d at 163-167, for a condensed summary of the oft-changed federal policies towards Native Americans.
[183] ISDEAA projects excluded.
[184] 783 F.2d 352 (3d Cir.1986).
[185] *Id.* at 356.

In *Wilson v. Omaha Indian Tribe*[186], the Supreme Court explained that

> controversies . . . governed by federal law do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. . . . ."[187]

Given federal statutes are construed in favor of tribes and tribal interests, and whether a court attempting to apply "federal law" would have to decide whether to "adopt state law" or "fashion a nationwide federal rule," any reference to the application of "federal law" simply places the risk of an adverse result on the surety and its principal. Most federal decisions based on diversity apply state law in any event. The successful choice of law clause should not include a reference to federal law.

2. Tribal Law

Given the discussion involves bonds for projects located on the reservation, the tribal obligee will likely request its own tribal law apply. Indeed, most form contracts specify the applicable law as the law of the place where the project is located. However, one simple problem exists with tribal law: very few know what it is. From a common law perspective, there are very few reported tribal court decisions; even less involving construction and sureties. From a statutory perspective, very few, if any, tribal codes address construction law or surety law. Finally, there are over 500 different tribes, each with a unique set of laws, codes, customs and traditions. Attempting to address a summary of such laws, codes, customs, and traditions is beyond the scope of this paper (notwithstanding its apparent bulk already). However, looking at a few examples of tribal laws is instructive.

The Colorado River Indian Tribe's resort to a panel of tribal elders to interpret the law is one example of a unique tribal code section. For another example, the Hopland Band of Pomo Indians have a tribal ordinance that provides, in pertinent part:

> *2.070 Sovereign Immunity of the Tribe.* Except as otherwise provided by a duly enacted Ordinance of the Hopland Tribal Council or a Resolution of the Hopland Tribal Council adopted pursuant to such authorizing Ordinance, explicitly waiving the Tribe's sovereign immunity from unconsented suit, the Hopland Band of Pomo Indians:
>
> A. Does not consent to be sued and is not subject to suit in any administrative or court proceeding; and
>
> B. Is not liable for any act or omission of any Tribal officer, elected official, Tribal employee, or any other person, organization, or entity owned or operated by the Tribe.

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[186] 442 U.S. 653, 99 S.Ct. 2529 (1979).
[187] *Wilson*, 442 U.S. at 671-72.

In 2000, the Tribe enacted its "Tribal Claims Ordinance" (Ordinance). The Ordinance provides, in relevant part, "All claims against the Tribe or any of its business enterprises for money or damages shall be presented to the Tribal Council and acted upon as a prerequisite to suit thereon as further provided in this Ordinance." The Ordinance requires a claim relating to any cause of action except death or injury be presented to the Tribe within 180 days after the accrual of the cause of action. The Ordinance also provides that if a claim is rejected in whole or in part, a notice shall be given stating in part, "[Y]ou have one hundred eighty (180) days from the date this notice was personally delivered or deposited in the mail to file a court action on this claim."

Assuming a waiver clause in a contract requiring arbitration, signed by the tribal chairperson, absent a tribal council resolution approving such a waiver, under Section 2.070, a tribe could argue that the clause would be of no effect. The Hopland Band made such an argument and won in California Superior Court but lost on appeal.[188] The California Court of Appeals held:

> the Tribal Council authorized [the tribal chairperson] to negotiate and execute the contracts with appellant, was aware of the terms, including the arbitration clause, and, by resolution, approved the contract. Thus, not only did [the tribal chairperson] clearly have authority to agree to all the contract terms, but also the Tribal Council ratified her action when it approved the contract. Despite respondent's declaration that the Tribal Council did not subjectively understand that by agreeing to its terms it had explicitly waived its sovereign immunity, the court's decision in *C & L Enterprises, supra,* 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 has definitively resolved that issue in appellant's favor.[189]

The Band next argued that tribal law, specifically, the tribal waiver ordinance, required not only a resolution on the contract, but also specifically waiving sovereign immunity. The court of appeals rejected that arguments as follows:

> we question the premise that the issue whether the Tribe has waived its sovereign immunity by entering into this contract should be determined by reference to a tribal law. . . . We conclude that, where, as here, the person negotiating and signing the contract is authorized to do so, and the Tribal Council approves the contract, the question whether that act constitutes a waiver is one of federal law.[190]

The court then noted that even if federal law controlled, the parties agreed to the application of California law and, under that law, the Band had consented to the jurisdiction of the California state courts:

> Even if we were not to refer to federal law . . . we would not apply the sovereign immunity ordinance, because the contract itself specifies that it is to be governed by *California law.* Nothing in the Tribal sovereign immunity ordinance, purports to limit the manner in which the Tribe may

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[188] *Smith v. Hopland Band of Pomo Indians*, *supra*.
[189] *Smith*, 95 Cal.App.4th at 8-9, 115 Cal.Rptr.2d at 461.
[190] *Smith*, 95 Cal.App.4th at 10, 115 Cal.Rptr.2d at 462.

> consent to a *choice of law* provision, and respondent does not contend [the tribal chairperson] did not have authority to agree to it, or that the Tribal Council did not have the power to approve a contract containing such a provision. Therefore, at least for purposes of interpreting and enforcing this contract, respondent agreed to be governed by California law, not tribal law. Under California law "[t]he making of an agreement ... providing for arbitration to be had in this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement ... and by entering judgment on an award [hereunder]." (See Cal.Code Civ. Proc., §§ 1293, 1287.4.)[191]

Notwithstanding the dearth of applicable tribal law decisions, the application of tribal law, in the first instance, often becomes a matter of politics or pride with the tribal council. Again, the project is a tribal one, on tribal land, ultimately for the tribal members; why shouldn't tribal law apply? A fall-back provision often seen is "tribal law in the first instance and, if no applicable tribal law, then federal law." The foregoing discussion regarding "federal law" reveals the risks with such a formulation. The *Smith* decision supports the propriety of a provision requiring state law, not tribal law, to govern the resolution of any disputes between the parties.

3. State Law

Based on *Smith*, and other similar decisions, the successful surety, and their principals, negotiate for the application of state law to govern the contract between the parties. The numerous construction law and surety law decisions provide a known backdrop to what may be perceived as an otherwise risky venture. Additionally, if the parties have agreed that state law will apply, that provides one more argument that resort to tribal court was never intended. Absent an effective choice of law clause, a state court may apply tribal law.[192]

This issue, again, becomes a negotiating point however. Somewhere in the process, the principal may inform the surety that pushing the applicable law issue may force the tribe to dig in its heels and demand that tribal law apply. The surety may again be faced with the choice of issuing the bond and assuming the risk that if a dispute arises, tribal law will be applied, or risk the chance of losing the account if a firm position is taken. Careful negotiation of this challenge in the language of the waiver of sovereign immunity clause is required for a successful outcome in bonding the tribal project.

D. Enforcement

The successful surety is aware that a waiver of sovereign immunity does not necessarily include the right to execute on a judgment.[193] The complete waiver clause

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[191] *Smith*, 95 Cal.App.4th at 10-11, 115 Cal.Rptr.2d at 463.

[192] See, *e.g.*, *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal.App.4th 1185, 1192 (2005)(finding tribal constitution, bylaws, and tribal resolutions judicially noticeable).

[193] *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F2d 517 (5th Cir. 1965)(clause in corporate charter limited execution of any judgment only to collateral specifically pledged). *cert. denied*, 385 U.S. 918 (1966); *Dacotah Properties-Richfield*, 520 N.W.2d at 170 ("sue and be sued" clause limited power to levy judgment to income or chattels specifically pledged).

must contain additional language to address how any judgment or arbitration award can be enforced. This language may include a waiver of sovereign immunity as to certain assets or an agreement that tribal court process may be used to execute on the judgment or to enforce the award.

The surety is also aware that tribal real property is, for the most part, owned by the United States and held in trust for all members of the tribe or the real property is owned 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 United States government holds title, "[n]o purchase, grant, lease or other conveyance 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 ownership of the land by the federal government, and that state laws, in general, do not apply on the reservation, state mechanic lien laws have no application to reservation land or to trust lands held by Native American allottees.[194] The anti-alienation principals apply to land held in fee by a Native American tribe or tribal entity.[195] Arguably, state mechanic's lien laws do not apply to lands off the reservation if owned in fee simple by a Native American tribe if there is no applicable waiver.

Assuming an effective, all-inclusive waiver of sovereign immunity (both for suit and for enforcement), and a judgment has been rendered, how that judgment is enforced has not been addressed in many reported decisions. One rule 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.[196] Decisions involving garnishments are the most insightful cases for enforcement.

Maryland Casualty Company v. Citizens Nat. Bank of West Hollywood,[197] appears to be the first decision to address the issue of enforcing a judgment against a tribe given a waiver of sovereign immunity. In *Maryland Casualty Co.*, a surety, Maryland Casualty, sued its obligee, Seminole Indian Tribe, Inc. ("SIT"), which was a Section 17 entity. The charter provided a "sue and be sued" clause but limited execution on only such "income or chattels especially pledged or assigned."[198] Maryland Casualty recovered a judgment against SIT in state court. To enforce its judgment, Maryland Casualty garnished SIT's account at an off-reservation bank that was subject to a special deposit agreement

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[194] See, e.g., *U.S. v. Chinburg*, 224 F.2d 177 (10th Cir. 1955)(house built by allottee on land held in trust by United States was not subject to state law providing for mechanic's liens), cert. denied, 350 U.S. 897 (1955); *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).

[195] 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).

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

[197] 361 F.2d 517 (5th Cir.), cert. denied, 385 U.S. 918, 87 S.Ct. 227, 17 L.Ed.2d 143 (1966).

[198] *Maryland Casualty*, 361 F.2d at 521.

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."[199] Based on the limitations in the charter clause, the Fifth Circuit held that SIT was immune from the garnishment action.[200]

In another decision, *Joe v. Marcum*,[201] 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 allow for garnishment, allowing the state garnishment action to proceed "would thwart the Navajo policy not to allow garnishment. Such impinges upon tribal sovereignty."[202] 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 off-reservation transactions and recognized garnishment is ancillary to the underlying action but held the interests of tribal sovereignty paramount.[203]

At least one federal court has held that state officials do not have the power to enforce state court judgments on reservations.[204] Minnesota and South Dakota courts have stated, in dicta, that state court judgments cannot be enforced on a reservation against Indian judgment debtors.[205] Montana, however, favors state interests over tribal interests and allows reservation wages to be garnished under state law.[206]

Certainly, it can be assumed that a sheriff or other state or county officer has no jurisdiction on the reservation to seize assets for a creditor's sale. In the instance where on-reservation assets must be seized to satisfy the judgment, tribal court processes, if any, must be sued.[207] Whether the tribal court has execution procedures or will allow execution against the tribe would be subject to tribal law.[208]

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[199] *Id.*
[200] *Maryland Casualty*, 361 F.2d at 522.
[201] 621 F.2d 358 (10th Cir. 1980).
[202] 621 F.2d 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.").
[203] 621 F.2d at 361-62. *C.f., Cherokee Nation v. Nations Bank, N.A.*, 67 F.Supp.2d 1303 (E.D.Okla. 1999)(enforcement of state court judgment, entitled to full faith and credit under Cherokee law and enforcement in the Cherokee courts, did not unduly interfere with tribal sovereignty).
[204] *Annis v. Dewey County Bank*, 335 F.Supp. 133, 136 (D.S.D. 1971).
[205] See, *e.g., Commissioner 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).
[206] *Little Horn State Bank v. Stops*, 555 P.2d 211 (Mont. 1976).
[207] See, *e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983)(must comply with reservation laws when executing state court judgment), cert. denied, 466 U.S. 926 (1984).
[208] Any attempt to provide even an overview of tribal law would be impossible given the

With a properly drafted waiver that allows for enforcement in state and/or federal court, 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 enforcement of any judgment in state and federal court, the successful surety should be able to recover on an arbitration award or judgment.

II. BONDING THE TRIBAL ENTITY

A. Sovereign Immunity-Tribes and Tribal Entities as Principal-Indemnitor

Each of the issues outlined previously apply with equal force to the surety that wishes to bond a tribal entity as the principal. The tribal principal, if a subordinate tribal entity, may enjoy the immunity of the tribe. Therefore, a waiver of immunity should be procured not only from the tribal principal, but also from the tribe itself. The subordinate tribal principal may have no financial resources of its own and is fully funded by the tribe. In that case, the tribe may also be required as an indemnitor and a waiver of its immunity procured.

As with the tribal obligee, the forming documents of the tribal principal must be analyzed for two purposes. First, to determine how an effective waiver is procured and who has authority to provide that waiver. The charter of the entity may provide that it has authority to waive its sovereign immunity and that the president of the entity can sign any such waiver. It may be that the signature of the tribal president of chairperson is sufficient. It may require a tribal council resolution and the signature of the tribe's president. The successful surety, often in cooperation with counsel, should determine what form the waiver must take to be effective.

Second, the forming documents should be analyzed to determine whether the tribal entity is simply a shell of the tribe itself, with any assets of the tribal entity subject to the direction of the tribe. For example, one Arizona tribal corporation's charter allows that in the event the tribe deems itself insecure as to the subordinate corporation, the tribe can, at any time, move all corporate assets into the tribe's possession and all monies held in any bank account could be transferred to the tribe's account.[209] Before bonding that tribal entity, given the language found in the analysis of the tribal corporation's charter, the successful surety required a resolution from the tribal council that if it took such steps in the event of a surety loss, then the surety could sue the tribe itself for recovery.[210]

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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.

[209] This action must be taken in context. Under most state laws, such an action would be deemed a preferential or fraudulent transfer. However, under that particular tribe's laws, given the corporate charter was approved by resolution of the tribal council, such action clearly would be "legal."

[210] Of course, the appropriate waiver of sovereign immunity from the tribe was also procured.

B. Available Fora

If a tribal entity comes to the surety requesting bonding, the surety should be able to dictate the terms of that bonding relationship. More than likely, a tribal principal will have been formed under tribal, not state law. Although not a settled question, some federal courts have held that incorporated tribal entities, whether under tribal or state law, are citizens of the state in which they reside for purposes of diversity jurisdiction.[211] Therefore, both state and federal courts are available for suit on an indemnity agreement, assuming an effective waiver. The successful surety will ensure that such fora are expressly specified in the indemnity agreement. Otherwise, the surety may find itself in tribal court simply because it is dealing with a tribal entity.

As was pointed out in the prior section on reservation projects (tribal obligee), the first *Montana* exception applies to grant tribal court jurisdiction over a non-member that enters into consensual dealings with the tribe. Obviously, an analogous argument can be advanced with respect to consensual dealings (read "General Indemnity Agreement") with a subordinate tribal entity-principal. In *Fidelity and Guaranty Ins. Co. v. Bradley*, [212] the surety found itself in such a position and was required to exhaust its remedies in tribal court in the first instance.

In *Bradley*, the surety issued a bond on behalf of Bradley, a tribal member, for a tribal project. Disputes between Bradley and the tribe led to a termination of Bradley and a demand on the surety to perform. The surety hired a completion contractor and paid substantial sums to complete the work. Bradley filed suit in tribal court against the tribe but did not name the surety. When the surety filed suit under the indemnity agreement against Bradley in federal district court, Bradley moved to dismiss for lack of jurisdiction. Although Bradley's motion was based on incorrect grounds (the district court clearly had jurisdiction), the district court stated the issues as follows: "There are two issues before this Court: (1) Does the Tribal Court have jurisdiction and; (2) if so, should this Court abstain from exercising its jurisdiction in favor of the doctrine of tribal exhaustion."[213] The district court analyzed the issues and held as follows:

> The undersigned can find nothing in the facts here presented which would excuse the longstanding policy of tribal court exhaustion. The construction project was on land owned by the Tribe; indeed, the initial construction contract was between Bradley and the Tribe. Tribal funds were used to pay for the construction and thus, any alleged breach thereof would directly impact tribal economic security and health. And Fidelity entered into a consensual commercial relationship with a member of the Tribe. Whether Fidelity is entitled to be indemnified by Bradley involves the same facts as those at issue in the pending Tribal Court action between the Tribe and Bradley. If Bradley did not breach the contract, it necessarily implicates the reasonableness of Fidelity's unilateral decision to take over the project and complete it. The fact that the current issue is one step removed from the original contract between Bradley and the Tribe has no bearing on the Tribe's interest in self-government.[214]

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[211] See, e.g., *Stock West*, 873 F.2d at 1226.
[212] 212 F.Supp.2d 163 (W.D.N.C. 2002).
[213] *Bradley*, 212 F.Supp.2d at 165.
[214] *Id.* at 166.

The district court dismissed the action without prejudice.[215]

Although the holding in *Bradley* is suspect, having to exhaust tribal court remedies in the first instance makes recovery under an indemnity agreement extremely difficult. Most state courts will not only enforce tribal court judgments, they may give such judgment *res judicata* effect.[216] Even more than in the tribal obligee situation, the indemnity agreement and the waiver language must state that jurisdiction is in state court (or federal court), that recourse to tribal court and exhaustion of tribal remedies is expressly waived. Assuming that the surety is in the superior bargaining position with respect to a tribal principal requesting a bond, there should be no competing interests to allow other than state or federal court jurisdiction for any potential indemnity action.

C. Applicable Law

Similar to the previous analysis on available fora, the surety contemplating bonding a tribal entity should require that state law apply to the interpretation of the indemnity agreement and the application of that law in any indemnity action. There is no reason to apply tribal law to the agreement or in the indemnity action and the agreement should expressly state as much.

III. OTHER CONSIDERATIONS

A. The Form of the Bond on Reservation Projects

The successful surety should never, if possible, issue a standard form bond on any reservation project. Issues of tribal court jurisdiction and the potential application of tribal law in such a forum dictate that any bond issued on a reservation project state expressly that the sole venue for any suit on the bond is in state or federal court and, further, that state law applies. As outlined previously, under *Montana*, issuing a bond to a tribal obligee is, without question, a consensual relationship with the tribe, thereby subjecting the surety to tribal court jurisdiction. The performance bond should require suit be brought in state court and should also state that the obligee waives any recourse to tribal court.

The successful surety will contemplate the issuing a form of performance bond more akin to a completion bond than a standard performance bond that incorporates the terms of the contract between the principal and the tribal obligee wholesale. The

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[215] Arguably, the district court was incorrect on a number of grounds. The court should have found that given no pending tribal court action between Bradley and the surety, the surety did not have to exhaust any tribal court remedies. Even if exhaustion was required, the district court should have stayed the action while the tribal proceeding went forward, not dismissed it. Finally, assuming standard language in the indemnity agreement, whether the tribal court ultimately found Bradley was or was not in breach should not be dispositive of Fidelity's actions in performing after the tribe terminated Bradley.

[216] See, *e.g.*, *Astorga*, 211 Ariz. at 144, 118 P.3d at 1108 ("Once a tribal court appropriately reaches a decision on the merits, Arizona law also provides that the decision be given effect.") citing *Tracy v. Superior Court*, 168 Ariz. 23, 34, 810 P.2d 1030, 1041 (1991) ("Arizona courts have consistently afforded full recognition to tribal court proceedings.") and *In re Lynch's Estate*, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962)(Navajo tribal court proceedings should be treated the same as court proceedings in a foreign state or country.)

completing surety may not desire to comply with any TERO[217] requirements that might have been set forth in the contract or requirements that tribal suppliers be used exclusively. However, the surety should incorporate any waivers of sovereign immunity into the performance bond as matter of course. The surety will have no wish to complete a project only to have the tribal obligee raise its sovereign immunity claiming notwithstanding a waiver in the contract, there is no waiver as between the tribe and the surety.

A similar formulation should be applied to any payment bonds issued on reservation projects. The successful surety has no desire to litigate payment bond claims by tribal members or tribal subcontractors in tribal court, with tribal law being applied. Any payment bond issued on a reservation project should restrict the scope of claimants to first level subcontractors. Although the Miller Act and various state "Little Miller Act" statutes set the scope of potential claimants, these laws simply do not apply to reservation projects. Absent applicable tribal law, the language of the bond will define the relationships between the surety and the potential claimant.

Unfortunately, there are no state or tribal court decisions on the rights of a surety using a "reservation bond form." Also, the tribal obligee may dictate the form of the bond. In that case, the surety may not be able to negotiate all the protections into the performance bond it issues. However, the tribal obligee should have no considerations about the form of the payment bond. In the case where the bond form is not dictated by the tribal obligee, the surety should provide itself as much protection by utilizing as one-sided a bond form as possible.

B. ISDEAA[218]

The ISDEAA promotes the long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over the administration of federal programs benefiting Indians. Under a self-determination contract, the federal government supplies funding to a tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly.[219]

Under the ISDEAA, at least as relates to a surety, instead of the Bureau of Indian Affairs constructing a project, it contracts with a tribe or tribal entity, provides the funding, and the tribe or tribal entity becomes the general contractor. However, from the principal and surety's perspective, the tribe appears simply as the owner. The tribe then contracts with the principal and may require bonds from the surety. Two decisions illustrate the issues with ISDEAA projects and the bonds issued thereunder.

In *FGS Constructors, Inc. v. Carlow*, the United States, through the Bureau of Indian Affairs (BIA), pursuant to the ISDEAA, agreed to provide funding to the Oglala Sioux Tribe (Tribe) for repairs to the White Clay Dam. The Tribe contracted with

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[217] "TERO" is an acronym for "Tribal Employment Rights Office," which exists under most tribal laws to ensure that projects are constructed using tribal labor.

[218] Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, also known as "Public Law 93-638." Projects under this statutory scheme are often referred to as a "638 job."

[219] 25 U.S.C. § 450f, b(j); *FGS Constructors, Inc.*, 64 F.3d at 1234.

Cooper Consultants, Inc. (CCI) to be the project engineer, and Michael Carlow d/b/a Carlow Enterprises (Carlow) to be the general contractor. Carl and Carole Oberlitner provided Carlow with a surety bond, purportedly pursuant to the Miller Act, 40 U.S.C. § 270a-d, guaranteeing Carlow's performance on the contract. Carlow hired FGS as a subcontractor to perform mechanical and structural work on the dam. FGS's responsibility was to perform repair and reconstruction work on the dam gates and spillway. FGS claimed that problems arose during performance of the contract, that the BIA and CCI failed to perform their obligation of draining the dam, which prevented FGS from performing its subcontract work on schedule and the delays materially raised FGS's costs. FGS subsequently suspended work and requested payment for the work already performed. FGS claimed that it had not been paid in full for the work that it had already performed. FGC sued Carlow for breach of contract, the Oberlitners on their Miller Act bond, and the United States under the Federal Tort Claims Act.

The *Carlow* decision is important for three reasons. First, as mentioned previously, the decision can be cited that forum selection clauses should be enforced with respect to reservation projects.[220] Second, the Eighth Circuit correctly held that the actions of CCI could not form the basis of an FTCA claim against the federal government because CCI was not an "Indian contractor" under the ISDEAA.[221] However, the 8th Circuit arguably missed the issue that the bond provided by the Oberlitners could not be a Miller Act bond. The bond was issued to the tribe, not the federal government, as obligee.[222] The bonds, therefore, were simply private bonds.

In a second ISDEAA decision, *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*,[223] an Indian tribal member hired by the tribe to work on dam repair project funded by federal government under the ISDEAA sued both the tribe and the government for breach of contract and claimed jurisdiction under various federal statutes. The district court dismissed for lack of jurisdiction and Demontiney appealed.

The Ninth Circuit affirmed. As to jurisdiction under the ISDEAA, the court reasoned there was none:

> The ISDEAA's waiver of federal sovereign immunity is limited to "self-determination contracts" entered into by Indian tribes or tribal organizations and the government. Because Demontiney cannot establish that he or Earthwalker is a tribe or tribal organization, he could not have entered into a self-determination contract with the BIA.[224]

The ISDEAA, or "638 jobs," will engender more and more requests for bonds from sureties working in the reservation or tribal area. The sureties issuing bonds for principals contracting with tribes and tribal entities for 638 jobs should realize that these bonds probably are not federal Miller Act bonds, despite the holding in *FGS Constructors* to the contrary, and do not provide a basis for federal court jurisdiction

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[220] The contract between Carlow and FGS contained the following dispute resolution clause: "In the event there is any dispute between the parties arising out of this agreement, it shall be determined in the Oglala Sioux Tribal Court or other court of competent jurisdiction."
[221] *FGS Constructors*, 64 F.3d at 1234-35.
[222] See, Note 113, *supra*.
[223] 255 F.3d 801, 813-814 (9th Cir. 2001).
[224] 255 F.3d at 805.

under the Miller Act or under the ISDEAA. Bonds issued to tribes constructing projects under the ISDEAA should be treated as if the tribe itself were funding the project. The issues discussed in this paper apply to the issuance of these bonds. The successful surety should negotiate for the appropriate waiver language, forum, and choice of law as outlined herein notwithstanding the apparent "federal" nature of the projects being bonded.

IV. CONCLUSION

To be successful in bonding reservation projects and tribal obligees, the surety need not be an expert in federal Indian law. The surety needs, however, to understand the issue affecting the issuance of these bonds such as sovereign immunity, applicable fora, and choice of law. An understanding of the position of tribal obligees and tribal principals should facilitate the negotiation of language for waiver clauses and bonds. Following the dictates of established authorities such as *C&L Enterprises* and the other authorities cited herein, and with the aid of competent counsel, the surety can issue bonds for reservation projects and for tribal entities successfully.