



Tribal sovereign immunity: An obstacle for non-Indians doing business in Indian Country?

What is sovereign immunity, and what does it mean in the tribal context?

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Native American tribes consider sovereign immunity to be crucial for the protection of tribal resources and the promotion of tribal economic and social interests. Because of the uncertainties surrounding this doctrine, however, this very same tool of self-determination may be viewed as a significant obstacle to the non-Indian investor, lender or developer who otherwise may be interested in doing business in Indian Country. Accordingly, questions that have long been asked are: what is sovereign immunity? and what does it mean in the tribal context?

Defining tribal sovereignty?

A sovereign state is one that is independent from all other authority, retaining the right and power to regulate its internal affairs without foreign interference. Sovereign immunity is the doctrine that precludes the assertion of a claim against a sovereign without the sovereign's consent.

Article Highlights

- › Sovereignty intricacies complicate potential Indian Country investments
- › Tribal sovereignty laws, ideologies change
- › Perception of tribal law, court systems is largest obstacle

Indian tribes are sovereign entities. The exact nature of tribal sovereignty, however, is not clear. One theory holds that tribal sovereign status is inherent. Tribal sovereignty is not granted to tribes by the United States but rather reserved as inherent in their status as governments predating the formation of the United States. The fact that the colonizing nations and, subsequently, the U.S. government entered into treaties with tribes supports this view.

A competing theory holds that notwithstanding original sovereignty, tribes today are only "quasi-sovereign." Tribes retain the attributes of sovereignty over their members and territory but only to the extent that sovereignty has not been limited or withdrawn by the federal government. In other words, tribes have been permitted to retain their sovereign status subject to the federal government's authority to revoke, limit or otherwise modify tribal immunity at its discretion.

Not surprisingly, over time the federal government has defined and redefined the breadth of tribal sovereignty. For example, the Supreme Court in 1832 characterized tribes as distinct, independent political communities, retaining their original natural rights, with the exception of the ability to deal with foreign nations. [1/](#) Contrast this rather broad interpretation with the Supreme Court's later assertion in 1978 that Native American nations are only quasi-sovereign authorities whose powers are restricted consistent with their domestic dependent status. [2/](#)

Without need to discuss further the merits of either theory, the law of tribal sovereignty as it has developed in the federal courts and by federal statutes, executive orders and treaties over the last two centuries now rests on several fairly well-settled tenets: 1) tribes have virtually unlimited authority over internal tribal affairs; 2) tribes are subject to the plenary, or absolute, power that Congress has over them; 3) tribes are presumptively immune from state law; 4) tribes cannot be sued absent their express consent or a waiver of their immunity; and 5) tribal sovereign immunity does not extend to individual tribal members except to the extent that tribal officials act within the scope of their official capacities.

Although these principles are well-established, how they (or any exceptions to them) apply in any given situation often is not clear, whether with respect to regulatory or taxation authority matters or to criminal or civil jurisdiction. The interests of the tribes, states and federal government all factor into any analysis, the variables of which make any determination of jurisdiction dependent on the specific case. Some of the uncertainty regarding the relationship between tribes and states, in particular, and thus the reluctance on the part of many nontribal entities to conduct business with tribes, can be attributed in part to the confusion surrounding the various legal roles a tribe may play or the legal status of a tribe. The federal government, through court decisions and legislation, has introduced numerous laws, rules and tests (and exceptions to those) that have further faded the bright line that

originally delineated tribal sovereignty. The confusion is compounded by the variety of ways in which land in Indian Country may be owned or held, and the nature of the particular tribal, federal or state interests that may be involved. In brief, it is often difficult for a nontribal entity to know with whom it is dealing, with whom it is best to deal, and with what it is dealing.

To illustrate just some of the complexities, a tribe may or may not be organized under Section 16 of the Indian Reorganization Act of 1934 (IRA). A Section 16 IRA tribe will be organized under a constitution that defines the governing body, its powers and authority. Non-IRA tribes have their own governing structures. Whether a tribe is organized under Section 16 or not, it may also be incorporated under Section 17 of the IRA as a federal corporation, creating a legal entity distinct from the governmental entity of the tribe, that may, among other things, have the power to sue or be sued or to waive immunity without affecting the status of the tribal governmental entity. A tribe may also form business entities under tribal code or custom or under a state law charter.

Whether a nontribal entity does business with a tribal governmental entity, a Section 17 tribal corporation, a non-Section 17 tribal business entity or a business entity chartered by the tribe under state law will have significant bearing on a business transaction. For example, if a business venture is operated by or as part of the tribal government, the sovereign immunity of the tribe will extend to the tribal business. If a tribe operates a business as a separate entity, however, the business may be open to adverse legal action in state court and under state law.

Obscuring boundaries

In addition to the organizational intricacies that obscure the boundaries of tribal immunity are the regulatory authority and jurisdictional issues.

As a general principle of tribal sovereignty, state laws have no force in Indian Country, and state courts are without jurisdiction to hear lawsuits brought by non-Indians against tribes, tribal entities and tribal members with respect to transactions arising on reservations. Of course, there are numerous exceptions. Whether a tribe, state or the federal government has regulatory or civil jurisdiction over Indians or non-Indians on or off reservation lands depends on a variety of factors, including whether Congress has expressly granted authority to one or more sovereigns in a particular area.

For example, in 1953, Congress gave six states [3/](#) authority under Public Law 280 [4/](#) to assume state criminal and civil jurisdiction over tribal members in Indian Country, and it authorized all other states to assume civil jurisdiction, of which 10 did. Although the act only authorizes state courts to assert jurisdiction and not the application of state regulatory law, [5/](#) it significantly diminished tribal immunity.

Fifteen years later, in a partial reversal, Public Law 280 was amended to provide that thereafter, no state could assume civil jurisdiction under the act without the approval of tribal membership at an election. In addition to jurisdictional rights granted under Public Law 280, the Supreme Court has applied several tests when making regulatory or civil jurisdictional determinations, such as the preemption or infringement tests, under which states have been given, for example, specific taxation rights, rights to regulate on-reservation fishing and rights to require tribal members to acquire licenses to sell liquor on reservations.

Sovereignty issues involving land interests in Indian Country present similar challenges in proposed business transactions between tribes and nontribal entities. Ownership may include tribal trust lands, tribal fee lands, allotted trust lands held by individual Indians, fee land held by non-Indians, federal public land, and county and state lands, often resulting in adverse and competing tribal, state and federal interests. Tribal, state and federal jurisdictional authority varies with each. The nature of the property involved in a business transaction will determine whether, for example, a state court judgment can be enforced against real property in Indian Country.

This discussion illustrates some of the sovereignty issues the non-Indian investor, lender or developer may face when doing business in Indian Country. But perhaps the real obstacle posed by tribal sovereignty is not the uncertainty that state or federal law will apply or that disputes will be resolved in state or federal court but rather the lack of understanding of or confidence in tribal law and the tribal court systems. As tribes increasingly demonstrate capable self-governance through the continued development of their tribal courts and adoption of commercial and other regulatory codes, it is likely that the perception of tribal sovereign immunity as a barrier to the non-Indian seeking to do business in Indian Country will correspondingly lessen.

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1/ Worcester v. Georgia, 31 U.S. 515, 559 (1832).

2/ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

3/ Minnesota, Wisconsin, Oregon, California, Nebraska and Alaska.

4/ Act of Aug. 15, 1953, 67 Stat. 588 (1953); codified as amended at 18 U.S.C.A. §§1321-1326 and 28 U.S.C.A. §1360 (1988).

5/ The Supreme Court, in Bryan v. Itasca County, 426 U.S. 373 (1976), made it clear that the intent of the law was to grant states jurisdiction over private civil litigation involving tribal members in state law matters such as contract, tort, marriage, divorce and so on. *Id.* at 384 n. 10.