THE INTERSECTION OF CORPORATE AMERICA AND INDIAN COUNTRY: NEGOTIATING SUCCESSFUL BUSINESS ALLIANCES

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I. INTRODUCTION

As a result of the economic boom in American Indian gaming, the number of businesses seeking to engage in transactions with Indian tribes and tribal casinos has increased significantly in recent years.[3] Indeed, some observers view the business of Indian gaming as akin to the "Gold Rush" of the 1800s in California.[4]

The success of tribal gaming is evident: more than 400 tribal casinos nationwide generated $19 billion in revenues in 2004, approximately a 12% increase over 2003 ($16.7 billion).[5] Based on this tremendous and rapid growth, business opportunities with tribes are plentiful and should continue for the foreseeable future.

For businesses unfamiliar with transactional and litigation considerations in Indian Country[6], this Article seeks to educate and

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3. *See generally* NAT'L INDIAN GAMING ASS'N, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2004 (2005), http://www.indiangaming.org/NIGA-econ-impact-2004.pdf.

4. *Id.*

5. *Id.* at 8.

6. Indian Country includes (1) all land within the limits of any Indian reservation, (2) "dependent Indian communities" within the borders of the United States, and (3) all Indian allotments, including rights-of-way. 28 U.S.C. § 1151

provide a better understanding of the intricacies and legal principles involved in doing business with tribes and tribal entities. Because tribal governments are separate and independent sovereigns (*i.e.*, similar to a state or municipality), unique federal Indian law issues come into play and must be considered when negotiating written agreements with tribes and tribal entities.

II. INDIAN TRIBES AS SOVEREIGN NATIONS

A. General Overview of Sovereign Immunity Principles

As sovereign nations, Indian tribes are viewed as nations within the nation.[7] The principle that an Indian tribe is a political body with powers of self-government was first distinctly enunciated in the 1800s in *Worcester v. Georgia*.[8] In that case, Chief Justice Marshall declared that "Indian nations had always been considered as distinct,

(2000). "Although [that] definition by its terms relates only to . . . criminal jurisdiction . . . it also generally applies to questions of civil jurisdiction . . . ." Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

The "dependent Indian communities" prong of the statute requires that Indian lands (1) be "set aside by the Federal Government for the use of the Indians as Indian land" and (2) that such lands be under federal superintendence. *Venetie*, 522 U.S. at 527. The Ninth Circuit has adopted a six-factor balancing test to analyze whether land qualifies as a "dependent Indian community." The factors are:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Id. at 525-26 (quoting Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286, 1294 (9th Cir. 1996)).

Several scholars have written articles about the definition of Indian Country as it pertains to tribal jurisdiction. *See, e.g.*, Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 ALASKA L. REV. 335 (1993); Geoffrey D. Strommer & Stephen D. Osborne, *"Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1 (2005); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U.L. REV. 1627 (1998).

7. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
8. 31 U.S. (6 Pet.) 515 (1832).

independent political communities, retaining their original natural rights" in matters of local self-government.[9]

Since that pronouncement, the sovereign immunity of Indian tribes has become a well-ingrained tenet of federal Indian law.[10] The Supreme Court, in *United States v. Kagama*,[11] held that Indian tribes are "separate people [armed] with the power of regulating their internal and social relations."[12] In the case of *Frazier v. Turning Stone Casino*,[13] the court observed, "Native American tribes are 'domestic dependent nations that exercise inherent sovereign authority over their members and territories.'"[14]

The United States Constitution expressly grants power to regulate commerce with the Indian tribes to the federal government.[15] The extent of Congress' power over Indian tribes is well described in *United States v. Kagama*.[16] Specifically, the Court observed that "these Indians are within the geographical limits of the United States soil. The soil and the people within these limits are under the political control of the Government of the United States or the States of the Union."[17]

Because tribes are viewed as independent sovereigns, they are accorded the same sovereign rights and immunities as state governments and local municipalities.[18] As a result, no state, county, or city may generally assert regulatory or jurisdictional power over a tribal government unless the federal government has expressly granted such rights by statute or the tribe has expressly consented.[19]

A notable exception where tribes have ceded certain regulatory and other jurisdictional powers to states can be found in tribal-state gaming compacts negotiated pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA).[20] The IGRA was the result of a

9. *Id.* at 559.
10. *See generally id.* at 559-97.
11. 118 U.S. 375 (1886).
12. *Id.* at 381-82.
13. 254 F. Supp. 2d 295 (2003).
14. *Id.* at 305 (quoting Okla. Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991)).
15. U.S. CONST. art. I, § 8, cl. 3.
16. *See generally Kagama*, 118 U.S. at 375.
17. *Id.* at 379.
18. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
19. *See id.* at 58.
20. 25 U.S.C. § 2710 (1988).

compromise between the tribes and the states whereby the tribes ceded certain powers to the states over tribal gaming conducted on Indian lands.[21] There are numerous tribal-state compacts where the state is permitted to exercise certain regulatory authority over the tribal casinos.[22]

Based on its sovereign status, a tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[23] With regard to contracts, "[t]ribes enjoy immunity from suits . . . whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[24] To date, the courts have provided little guidance in distinguishing between governmental and commercial activities.[25] Tribal immunity additionally extends to tribal casinos,[26] other tribal businesses,[27] Section 17 corporations, and tribal corporations chartered by the government.[28]

Tribal immunity generally shields tribes from suits for damages and requests for injunctive relief.[29] Tribes also have been generally immune from subpoena enforcement to compel production of corporate witnesses or tribal documents.[30]

21. *See id.*

22. *See, e.g.*, ARIZ. REV. STAT. § 5-601.02 (2002); CAL. GOV'T CODE § 12012.25 (West 1999).

23. Kiowa Tribe of Okla. v. Mfg. Techs., 523 U.S. 751, 754 (1998).

24. *Id.* at 760.

25. *See* Basset v. Mashantucket Pequot Tribe, 204 F.3d 343, 356-57 (2d Cir. 2000) (noting that precedent cases sustained tribal immunity without distinguishing between governmental or commercial activities).

26. *See, e.g.*, Gayle v. Little Six, Inc., 555 N.W.2d 284, 287 (Minn. 1996).

27. *See* Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548, 554 (N.M. Ct. App. 2004) (applying tribal immunity to a tribal-owned golf course); DeFeo v. Ski Apache Resort, 904 P.2d 1065, 1069 (N.M. Ct. App. 1995) (extending tribal immunity to ski resort owned by tribe).

28. Corporations organized under Section 17 of the Indian Reorganization Act retain tribal immunity. Alternatively, some tribes have purposefully waived their sovereign immunity by incorporating business entities under state law. *See generally* Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41 (2001-02).

29. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

30. *See* United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992) (standing for the proposition that a tribe has immunity at the time a subpoena is served unless immunity has been waived); Catskill Dev., LLC v. Park Place Entm't Corp., 206 F.R.D. 78, 89, 92 (S.D.N.Y. 2002) (enforcing a subpoena where waiver of tribal

B. Application to Off-Reservation Activities

The doctrine of sovereign immunity usually extends to suits arising from a tribe's "off-reservation" commercial activities, including activities of a tribal entity such as a casino.[31] The case of *Kiowa Tribe v. Manufacturing Technologies, Inc.*[32] is instructive regarding the application of sovereign immunity for off-reservation conduct.[33]

In *Kiowa*, the tribe's industrial development commission agreed to purchase certain stock from a non-tribal corporation, and "the then-chairman of the Tribe's business committee signed a promissory note in the name of the Tribe."[34] The tribe defaulted, and the corporation brought an action on the note in the Oklahoma state courts.[35] The corporation claimed that the note had been executed and delivered to it in Oklahoma City, which was beyond the tribe's reservation.[36] The tribe contended that the note had been signed within the boundaries of its reservation.[37]

The tribe moved to dismiss the claim based in part on the failure to waive sovereign immunity.[38] The Oklahoma trial court denied the motion and entered judgment in favor of the corporation.[39] The Oklahoma Court of Appeals affirmed and held that Indian tribes were subject to suit in state court for breaches of contract involving off-reservation commercial conduct.[40] The Supreme Court of Oklahoma declined to review the judgment.[41] The United States Supreme Court reversed the state court rulings and held that Indian tribes "enjoy immunity from suits on contracts, whether those contracts involve

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immunity was found and upholding the quashing of a subpoena that fell outside of waiver of tribal immunity).

31. *See, e.g.*, Kiowa Tribe of Okla. v. Mfg. Techs., 523 U.S. 751, 760 (1998); Doe v. Oneida Indian Nation, 717 N.Y.S.2d 417, 418 (N.Y. App. Div. 2000) (stating that tribes are immune from suits arising from their commercial activities, whether conducted on or off the reservation).

32. *Kiowa*, 523 U.S. 751.

33. *Id.* at 758, 760.

34. *Id.* at 753.

35. *Id.* at 754.

36. *Id.*

37. *Id.* at 753-54.

38. *Id.*

39. *Id.* at 751.

40. *Id.*

41. *Id.*

governmental or commercial activities and whether they were made on or off a reservation."[42]

Similarly, in *Doe v. Oneida Indian Nation*,[43] the plaintiff sued the tribe for damages arising from an accident in his hotel room.[44] The hotel was operated by the tribe but was located off of the reservation.[45] The court held that although the hotel where the plaintiff was injured was not located on the tribe's reservation, the principle of sovereign immunity still applied—the tribe was "immune from suits arising from [its] commercial activities, whether conducted on or off the reservation."[46]

Accordingly, neither the location of the conduct nor the nature of the conduct—governmental or commercial—determines the applicability of sovereign immunity.[47]

C. Application to Tribal Entities

The principles of sovereign immunity extend to the activities of tribal entities and enterprises such as tribal casinos. The rationale is that such entities are viewed as "economic arms" of the tribe itself and, therefore, are entitled to the same cloak of immunity.[48]

In *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*,[49] a building contractor sought to sue the Oglala Sioux Housing Authority, a tribal-business entity established and created under an Oglala tribal ordinance.[50] In affirming the trial court's decision, the Eighth Circuit Court of Appeals held that, as an arm of the tribal government, a tribal housing authority is extended the "attributes of

42. *Id.* at 760.
43. 717 N.Y.S.2d 417 (N.Y. App. Div. 2000).
44. *Id.* at 418.
45. *Id.*
46. *Id.* at 565.
47. *See supra* notes 31-46 and accompanying text.
48. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986).
49. 797 F.2d 668 (1986).
50. *Id.* at 670.

tribal sovereignty."[51] Therefore, "[S]uits against an agency . . . [were] barred absent a waiver of sovereign immunity."[52]

The result was the same in *World Touch Gaming v. Massena Management.*[53] There, the plaintiff leasing company asserted that the tribal casino had breached its contract relative to the lease and purchase of gaming machines.[54] The court confirmed that tribal enterprises, including a tribal casino, enjoy the protection of sovereign immunity just as the tribe itself does.[55]

D. Application to Tribal Officials and Employees

Tribal officials and employees acting in their official capacity are also accorded the protection of sovereign immunity. In this regard, the doctrine of sovereign immunity usually cannot be avoided or circumvented by naming a tribal employee instead of the tribe itself.[56] In *Snow v. Quinault Indian Nation,*[57] the court found that sovereign immunity extended to a revenue clerk in an action challenging a tribal-business tax.[58]

The extension of sovereign immunity to tribal officials has been confirmed time and again.[59] However, tribal officials can be subject

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51. *Id.* at 670-71 (citing Dubray v. Rosebud Hous. Auth., 565 F. Supp. 462, 465-66 (D.S.D. 1983)).

52. *Id.* at 671 (citing Wilson v. Turtle Mountain Band of Chippewa Indians, 459 F. Supp. 366, 368-69 (D.N.D. 1978) (stating suit against the tribal housing authority under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 was barred by the tribe's sovereign immunity)).

53. 117 F. Supp. 2d 271 (N.D.N.Y. 2000).

54. *Id.* at 274.

55. *Id.* at 276.

56. Snow v. Quinault Indian Nation, 709 F.2d 1319, 1322 (9th Cir. 1983).

57. 709 F.2d 1319 (9th Cir. 1983).

58. *Id.* at 1322.

59. Paszkowski v. Chapman, No. CV0100727865, 2001 WL 1178765 (Conn. Super. Ct. Aug. 30, 2001) (holding that tribal representatives sued in their representative capacities are cloaked with the sovereign immunity that attaches to the tribe itself); *see also* Lineen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. 2002); United States v. Oregon, 657 F.2d 1009, 1013 (9th Cir. 1982) (extending tribal immunity to tribal officials acting in official capacity); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985) (holding that sovereign immunity barred claims against the tribe, tribal court, tribal council, and officials in individual capacities); Davis v. Littel, 398 F.2d 83, 85 (9th Cir. 1968) (holding that general counsel of tribe enjoyed executive immunity from liability); E.F.W. v. St. Stephen's Indian High School, 264 F.3d 1297, 1304 (10th Cir. 2001) (holding that

to suit under certain exceptions. Specifically, courts have applied the *Ex Parte Young*[60] doctrine to tribal officials where an official has acted outside of the government's authority, thereby determining that the official was not immune for his or her conduct.[61] As such, the ability to invoke sovereign immunity is not limited to the tribe itself but may be available to those individuals acting on behalf of a tribe in their official capacity and within the scope of their authority.[62]

E. Waiver of Sovereign Immunity

i. Consensual Waiver

As noted above, tribes are immune from suit unless Congress has authorized the suit or the tribe has waived its immunity.[63] Any waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."[64] In fact, tribes enjoy the benefit of a strong presumption against a waiver of sovereign immunity.[65]

By way of illustration, in *Sanchez v. Santa Ana Golf Club*,[66] the plaintiff argued that a "sue or be sued clause" within the Section 17

claims against tribal social service agency employees barred by sovereign immunity); Romanella v. Hayward, 933 F. Supp. 163, 168 (D. Conn. 1996) (holding that tribal immunity extended to tribal employees responsible for maintaining a tribal casino parking lot on non-tribal land); Bruette v. Knope, 554 F. Supp. 301, 304 (E.D. Wis. 1983) (extending the common law immunity enjoyed by Indian tribes to tribal police officers acting in their official capacities); State v. Kelley, 480 P.2d 658 (Ariz. 1971) (extending tribal sovereign immunity to officers of a subordinate economic organization of the tribe); Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr. 2d 65, 72 (Cal. App. 1999) (applying tribal immunity in favor of tribal casino employees when failure to provide adequate security was within official authority of individuals).

60. 209 U.S. 123 (1908).

61. *Id.* at 159-60.

62. *See* United States v. Oregon, 657 F.2d at 1012; *see also White Mountain Apache Tribe*, 779 F.2d at 479; *Littel*, 398 F.2d at 85; *Knope,* 554 F. Supp. at 304.

63. Kiowa Tribe of Okla. v. Mfg. Techs., 523 U.S. 751, 754 (1998).

64. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (internal quotation marks and citations omitted).

65. Demontiney v. United States *ex rel.* Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001); Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548, 551 (N.M. Ct. App. 2004) (stating that all ambiguous provisions within a waiver of immunity should be interpreted in favor of the tribe).

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67. *Id.* at 552.

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71. *C & L Enters*

72. *Id.* at 422-23.

73. *Id.* at 414.

74. *Id.* at 415.

75. *Id.* at 416.

76. *Id.* at 422.

77. *Id.*

corporation charter served as a waiver of immunity.[67] The court disagreed and held that a "sue or be sued clause" only acts as a waiver when the clause "clearly expresses an intent to waive immunity."[68] Waivers of immunity must come from the tribe's governing body and not from "unapproved acts of tribal officials."[69]

As more and more tribes engage in sophisticated dealings with off-reservation businesses, the requirement of a clear expression of the tribe's intent to waive immunity has become somewhat murky.[70] In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[71] the Supreme Court held that the inclusion of an arbitration clause in a standard form contract constitutes a clear manifestation of intent to waive sovereign immunity.[72] There, the tribe proposed that the parties use a standard form contract[73] containing an arbitration clause and a choice-of-law clause.[74] After a dispute arose, the tribe unsuccessfully attempted to avoid the enforcement of the arbitration by claiming sovereign immunity.[75]

Although no specific provision in the agreement expressly waived the tribe's sovereign immunity, the Court found that the arbitration clause was sufficient evidence of the tribe's intent to waive its immunity for purposes of dispute resolution.[76] Indeed, the Court expressly noted that attempting to hide behind sovereign immunity principles under the circumstances equated to a "game lacking practical consequences."[77]

Although *C & L Enterprises* and other recent decisions indicate a possible trend by the courts to erode the long-standing sovereign

67. *Id.* at 552.
68. *Id.*
69. Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108, 113 (S.D. 1998). The chairman of the tribe's Business and Claims Committee authorized participation in the arbitration. However, the court enforced the tribe's sovereign immunity because the waiver of immunity did not stem from the tribe's General Council. *Id.*
70. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 422-23 (2001).
71. *C & L Enters.*, 532 U.S. 411 (2001).
72. *Id.* at 422-23.
73. *Id.* at 414.
74. *Id.* at 415.
75. *Id.* at 416.
76. *Id.* at 422.
77. *Id.*

immunity principles, the doctrine remains alive and well.[78] Thus, it is important to seek an appropriate waiver of sovereign immunity in any transaction documents to assure later recourse and remedies. Absent an adequate waiver of sovereign immunity, the contract may not be enforceable against the tribe or tribal entity.[79]

It should be noted that many tribes and tribal enterprises will not generally agree to a complete waiver of sovereign immunity where all tribal assets and other rights may be impacted.[80] Instead, a limited waiver of sovereign immunity can usually be negotiated whereby the tribe or tribal enterprise permits recourse to only certain assets or other narrow circumstances permitting remedies.[81] For example, a tribal casino will usually limit its waiver solely to the casino-revenue stream and not permit recourse to general tribal assets or businesses.[82]

ii. Congressional Waiver

In the absence of a consensual waiver by the tribe, the only other method to obtain a waiver is through Congress.[83] The sovereignty of Indian tribes "exists only at the sufferance of Congress," which has the power to modify or limit a tribe's authority.[84] As a result, "all aspects of Indian sovereignty are subject to defeasance by Congress."[85] Thus, Congress has the power to waive tribes' sovereign immunity rights.

78. Kiowa Tribe v. Mfg. Techs., 523 U.S. 751 (1998) (upholding the sovereign immunity waiver of the tribe, but the Court expressed distaste for the principle of sovereign immunity and indicated that Congress should take action to do away with the concept); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (prohibiting the Navajo Nation from imposing a hotel tax upon non-members on non-Indian fee land within the reservation).

79. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890-91 (1986).

80. *See* John F. Petoskey, *Doing Business with Michigan Indian Tribes*, 76 MICH. B.J. 440, 444 (1997).

81. *Id.*

82. *See* Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 327-28 (2000).

83. *See* Petoskey, *supra* note 80, at 442.

84. United States v. Wheeler, 435 U.S. 313, 323 (1978).

85. Escondido Mut. Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765, 788 n.30 (1984).

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86. Martinez v. S
87. 435 U.S. 313.
88. *See id.* at 324
89. *See* Williams
90. 435 U.S. 191
91. *Id.* at 212.
92. 450 U.S. 544
93. *Id.* at 566.
94. *Id.* at 565.
95. *Id.* at 565-66.
96. *Id.* at 565.
97. *Id.* at 566.

III. JURISDICTION: STATE V. TRIBAL

A. Overview

For the most part, Indian tribes maintain their sovereign power over tribal members.[86] *United States v. Wheeler*[87] confirmed the tribe's independent sovereignty in prosecuting tribal members for criminal acts.[88] However, a tribe's authority over non-tribal members, even on the tribe's own lands, is limited.[89]

In *Oliphant v. Suquamish Indian Tribe*,[90] the Supreme Court held that the tribe's limited sovereignty meant that it does not have criminal jurisdiction over non-Indians residing within the reservation.[91] Thereafter, in the seminal case of *Montana v. United States*,[92] the Supreme Court held that the Crow Tribe did not have the authority to regulate the hunting and fishing activities of non-Indians on non-Indian land within the reservation.[93]

Relying on the reasoning in *Oliphant*, the Court held that tribes cannot generally regulate the activities of non-members on tribal land.[94] The Court listed two exceptions to this general rule.[95] First, "A tribe may regulate, 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."[96] Second, "A tribe may also retain 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."[97]

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86. Martinez v. S. Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957).
87. 435 U.S. 313.
88. *See id.* at 324-25.
89. *See* Williams v. Lee, 358 U.S. 217, 220 (1959).
90. 435 U.S. 191 (1978).
91. *Id.* at 212.
92. 450 U.S. 544 (1981).
93. *Id.* at 566.
94. *Id.* at 565.
95. *Id.* at 565-66.
96. *Id.* at 565.
97. *Id.* at 566.

One effect of the *Montana* case has been to greatly limit the jurisdiction of tribal courts.[98] In *Strate v. A-1 Contractors*,[99] the Supreme Court held that the second *Montana* factor was not enough to allow tribal courts to hear suits between non-Indians arising from car accidents on interstate highways on Indian land.[100] The Supreme Court has also held that a tribal court did not have jurisdiction over a tort suit brought by a tribal member against state police arising from a search of the tribal member's house on Indian-owned land.[101]

Although the general rule is that tribes do not have the authority to regulate the actions of non-members on tribal land unless one of the *Montana* exceptions applies, Congress has the power to delegate such authority to a tribe if it sees fit.[102] In *United States v. Mazurie*,[103] the Supreme Court held that the federal government validly delegated authority to the Wind River Tribes to regulate the sale of alcohol on reservation land owned by non-Indians.[104] In *Atkinson Trading Co. v. Shirley*,[105] the Supreme Court held that the tribe could not impose its hotel tax on a hotel on non-Indian land within the reservation because Congress had not delegated such authority to the tribe and the tax was not related to either of the *Montana* factors.[106] And in *Bugenig v. Hoopa Valley Tribe*,[107] the Ninth Circuit Court of Appeals held that the tribe exercised delegated authority to regulate logging on non-Indian-owned land within the reservation.[108]

B. Tribal Authority Over Non-Indians

When determining whether tribal jurisdiction applies, courts primarily consider whether a tribal member is involved and whether

98. *See* Catherine T. Struve, *How Bad Law Made a Hard Case Easy:* Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 296-97 (2003).
99. 520 U.S. 438 (1997).
100. *Id.* at 458-59.
101. Nevada v. Hicks, 533 U.S. 353, 364 (2001).
102. *See* United States v. Mazurie, 419 U.S. 544, 556-58 (1975).
103. 419 U.S. 544 (1975).
104. *Mazurie*, 419 U.S. 544.
105. 532 U.S. 645 (2001).
106. *Id.* at 659.
107. 266 F.3d 1201 (9th Cir. 2001).
108. *Id.* at 1218.

the activity in question takes place on tribal land.[109] While tribes largely retain jurisdiction over tribal members, if a non-member is involved, then the tribe has jurisdiction if one of three conditions is met:[110] first, if Congress delegated authority over the subject matter to the tribe;[111] second, if the party is in a consensual commercial relationship with the tribe;[112] or third, if the activity has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[113]

Based on *Montana*, tribes are clothed with jurisdictional authority over their lands only to the extent "necessary to protect tribal self-government or to control internal relations."[114] The purported exercise of tribal power beyond this general rule would be inconsistent with the "dependent status of the tribes, and so cannot survive without express congressional delegation."[115] Nevertheless, while "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations."[116]

The applicability of tribal jurisdiction over non-Indians generally turns on whether the tribe controls the land on which the dispute arose.[117] Specifically, the court will review whether the events at issue occurred in Indian Country,[118] particularly tribal lands or non-Indian lands within the boundaries of a tribal community.[119] Another issue is whether certain federal law grants a state civil authority to adjudicate disputes, either between Indians or in which Indians are a

109. *Atkinson*, 532 U.S. at 649-50.
110. *See id.* at 649-51; *see also* Montana v. United States, 450 U.S. 544, 565-66 (1981).
111. *See Atkinson*, 532 U.S. at 649.
112. *Montana*, 450 U.S. at 565.
113. *Id.* at 566.
114. *Atkinson*, 532 U.S. at 658-59 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)).
115. *Montana*, 450 U.S. at 564.
116. *Id.* at 565.
117. Allstate Indem. Co. v. Stump, 191 F.3d 1071, 1075 (9th Cir. 1999).
118. *See supra* note 6.
119. "The ownership status of land . . . is *only one factor* to consider in determining whether [tribal courts have jurisdiction over nonmembers]. It may *sometimes* be a dispositive factor." Nevada v. Hicks, 533 U.S. 353, 360 (2001) (emphasis added).

party.[120] Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin all operate as "Public Law 280 States."[121]

C. State Authority on Tribal Lands and Erosion of Tribal Jurisdiction

As discussed above, tribal courts generally retain jurisdiction over a civil suit by any party, Indian or non-Indian, against an Indian defendant for a claim arising on the reservation.[122] A tribal court can only assert jurisdiction over a claim against a non-Indian defendant when such jurisdiction is "necessary to protect tribal self-government or to control internal relations."[123] Essentially, a tribal court only has jurisdiction over non-Indian parties "who enter consensual

120. 28 U.S.C. § 1360(a) (2000) (granting certain states jurisdiction over civil causes of action arising in Indian Country "to the same extent that such State has jurisdiction over other causes of action"). It is noteworthy, however, that when tribal ordinances or customs exist that do not conflict with applicable state law, such tribal laws can give rise to independent causes of action in state court. *Id.* § 1360(c). Also, some courts have decided that any ambiguities pertaining to § 1360 should be construed in favor of Indians; *see, e.g.*, *In re* Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Cal. 1977), *aff'd* 625 F.2d 330 (9th Cir. 1980).

121. 28 U.S.C. § 1360(a). In Alaska, California, Nebraska, and Wisconsin, the state has civil jurisdiction in all areas of Indian Country. The Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon are exceptions in those respective states where the states do not have civil jurisdiction. *Id.*

122. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory . . . .'" *Id.* (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)) (citation omitted).

123. Montana v. United States, 450 U.S. 544, 564 (1981). The two-pronged *Montana* test has its roots in the notion that, over time, the Indian tribes have lost many of the attributes of sovereignty. United States v. Wheeler, 435 U.S. 313, 326 (1978). As a result, tribes are less likely to have jurisdiction over nonmembers. Of course, federal statutes or treaties could also expressly authorize tribal jurisdiction over civil matters—but that has yet to occur. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); *see* Jamelle King, *Tribal Court General Civil Jurisdiction over Actions between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors*, 22 AM. INDIAN L. REV. 191 (1997). The *Montana* Court clarified the two exceptions to its rule that tribal courts do not have jurisdiction over non-Indians by noting that "[a] tribe may also retain . . . 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." *Montana*, 450 U.S. at 566. According to the *Strate* Court, the key to analyzing that exception is to determine whether tribal jurisdiction is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." 520 U.S. at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

relationships with the tribe . . . through commercial dealing, contracts, leases, or other arrangements."[124]

Pursuant to *Montana,* a private contract qualifies as a consensual relationship, thus preserving tribal-court jurisdiction over non-Indian parties to tribal contracts.[125] In recent years, the courts have greatly narrowed the circumstances of tribal jurisdiction, even on tribal lands, while at the same time expanding state jurisdiction.[126] The following cases illustrate this trend.

In *Nevada v. Hicks,*[127] the Supreme Court held that a state game warden had a right, under federal law, to enter upon a reservation for the purpose of searching a tribal member's home.[128] The warden obtained a search warrant from a Nevada state court for the purpose of seeking evidence that Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribe of Western Nevada, was poaching bighorn sheep.[129]

Following a search conducted by the warden, Hicks sued the warden in the Tribal court claiming that the warden exceeded the scope of the warrant.[130] The Tribal court confirmed its jurisdiction over the matter.[131] On appeal, the Ninth Circuit ruled in Hicks's favor, holding that the game warden overstepped his authority.[132]

However, upon review, the Supreme Court held that tribes lack adjudicatory jurisdiction to hear claims under 42 U.S.C. § 1983 arising from the activities of state officials on reservation land.[133] The

124. *Montana*, 450 U.S. at 565; *see also Strate*, 520 U.S. at 457.

125. *See Strate*, 520 U.S. at 457 (describing how A-1's subcontract work, although a "consensual relationship" with the tribes in question, did not give rise to tribal court jurisdiction because the tribe was not a party to the accident). The *Montana* Court described specific examples of relationships that it thought would meet the test in its opinion. 450 U.S. at 565-66; *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) (requiring that the law or regulation over which the tribal court seeks to exercise jurisdiction have a nexus to the consensual relationship itself) (cited in Ford Motor Co. v. Todecheene, 394 F.3d 1170, 1179 (9th Cir. 2005)).

126. *See* City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005); *see also* Nevada v. Hicks, 533 U.S. 353 (2001); *Ford Motor Co.*, 394 F.3d 1170.

127. 533 U.S. 353 (2001).

128. *Id.* at 366.

129. *Id.* at 356.

130. *Id.*

131. *Id.* at 357.

132. *Id.*

133. *Id.* at 364. The Court noted that "tribal authority to regulate state officers in executing process related to [off-reservation violations of state law] is not essential

Court went on to observe that it has "never held that a tribal court had jurisdiction over a nonmember defendant,"[134] and it noted that it had previously dodged "the question [of] whether tribes may generally adjudicate against nonmembers' claims arising from on-reservation transactions."[135] The Court reasoned that the state has jurisdiction over a tribal member on Indian lands when "state interests outside the reservation are implicated."[136]

In *Strate v. A-1 Contractors*,[137] the tribal court was found to have no jurisdiction over civil claims against non-members where the accident occurred on a public highway running through Indian reservation land.[138] The Supreme Court held that when an accident occurs on a public highway maintained by the state pursuant to a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance.[139]

The Court stated that tribal courts may not exercise jurisdiction to govern the conduct of nonmembers driving on the state's highway absent a statute or treaty granting the tribe such authorization or congressional direction enlarging tribal court jurisdiction.[140]

While opining that *Montana* governed the case, the Court concluded that neither exception under *Montana* applied to the circumstances of the case because "[t]he tortious conduct . . . does not fit" within the first exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and "[o]pening the Tribal court . . . is not necessary to protect tribal self-government[] and . . . is not crucial to the [Tribes'] 'political integrity, economic security, [health, or welfare].'"[141]

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to tribal self-government or internal relations . . . ." *Id.* It went on to assert that "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction," noting that § 1983 does not provide for tribal-court jurisdiction. *Id.* at 367-68.

134. *Id.* at 358 n.2 (citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855-56 (1985)).

135. *Id.*

136. *Id.* at 362.

137. 520 U.S. 438 (1997).

138. *Id.* at 459.

139. *Id.* at 442.

140. *Id.* at 453.

141. *Id.* at 456-59.

In *Ford Motor Co. v. Todecheene*,[142] a products liability case, the Ninth Circuit held that the tribal court lacked jurisdiction over Ford Motor Company.[143] The court came to this conclusion even though the financing agreements between the parties provided that "[a]ll actions which arise out of this Lease or out of the transaction it represents shall be brought in the courts of the Navajo Nation."[144]

The district court "discounted the effect of the forum selection clause in the financing agreement" on the grounds that "the lawsuit was wholly unrelated to the agreement between the tribe and Ford Credit."[145] "The district court also rejected the notion that the tribal self-government exception" under *Montana* applied.[146] The district court held:

> "[A] single vehicle rollover underlying a products liability lawsuit does not require a unique tribal court remedy and is not likely to be the type of conduct that the Supreme Court intended to fall within the second *Montana* exception as it does not threaten or have a sufficiently adverse effect on the political integrity, the economic security, or the health or welfare of the tribe as a whole."[147]

In affirming that the tribal court lacked jurisdiction over Ford Motor Company, the Ninth Circuit opined:

> Although the tribe does have an interest in protecting the lives of its police officers on tribal roads, unfortunately that interest does not fit within the parameters of the self-government *Montana* exception. That exception has been narrowly defined as encompassing events that interfere with a Tribe's ability to enact or be governed by its own laws. Although tragic, there is no indication in the record that the death of this tribal police officer in a rollover accident in any way prevented the Tribe from enacting or being governed by its laws. Evocation of a sympathetic reaction cannot erase the Supreme Court's narrowing interpretation of the tribal government *Montana* exception. In sum, we agree with the district court that neither of the *Montana* exceptions applied in this case, and no tribal jurisdiction existed. The tribal court was afforded the opportunity to make an initial

142. 394 F.3d 1170 (9th Cir. 2005).
143. *Id.* at 1171.
144. *Id.* at 1173.
145. *Id.* at 1177.
146. *Id.*
147. *Id.*

> determination regarding the existence of tribal jurisdiction over this case. That is all the exhaustion that is required.[148]

Accordingly, just as the courts appear to be more willing in current times to erode tribal sovereignty, the judicial trend also seems to narrow the reach of a tribal court's jurisdiction.[149]

Most recently, in *City of Sherrill, New York v. Oneida Indian Nation of New York*,[150] the Supreme Court did further damage to sovereignty rights of the tribes. The Supreme Court held that "'standards of federal Indian law and federal equity practice' preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold."[151]

The Supreme Court held that the Oneidas could not, through open-market purchases, regain governmental reins over lands that had long ago been relinquished.[152] The Court rejected the Tribe's theory that it had a right to assert sovereign dominion over parcels purchased in the open market because it claimed to have both unified fee and aboriginal title over the lands.[153]

The Court reasoned:

> The unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences . . . [because Sherrill and the surrounding area were] populated by non-Indians, and a checkerboard of state and tribal jurisdiction[s] . . . would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches.[154]

The Court also pointed out that if a unilateral reassertion of sovereignty were permitted it may open the courts to the initiation of a

148. *Id.* at 1182-83 (citation omitted).

149. *See generally* Case Comment, *American Indian Law—Tribal Court Civil Jurisdiction—Ninth Circuit Holds That Tribal Courts Lack Subject Matter Jurisdiction Over Products Liability Suits Arising on Tribal Land*, 118 HARV. L. REV. 2469 (2005) (discussing *Todecheene* in much more detail).

150. 125 S. Ct. 1478 (2005).

151. *Id.* at 1489-90.

152. *Id.* at 1483.

153. *Id.* at 1489-91.

154. *Id.* at 1493 (alteration in original) (quoting Solem v. Bartlett, 465 U.S. 463, 471-72 n.12 (1984)).

"new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."[155]

IV. DISPUTE RESOLUTION

Assuming a sovereign immunity waiver has been negotiated, contractual disputes involving tribes and tribal entities may be resolved in a variety of forums. The form depends on the choice-of-forum and law provisions negotiated in the contract.[156]

A. Federal Jurisdiction

Because federal courts are courts of limited jurisdiction, there must be a jurisdictional basis for any claim filed in federal court.[157] To obtain federal court jurisdiction, there must be either complete diversity of citizenship among the parties[158] or the dispute must pose a federal question.[159] The parties cannot simply agree upon federal court jurisdiction in their agreement— there must be subject matter jurisdiction for the federal court to accept review.[160]

Several courts have held that a tribe is not a citizen of any state for diversity purposes and, therefore, cannot sue or be sued in federal court based on diversity jurisdiction.[161] Thus, diversity may not

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155. *Id.*

156. *See, e.g.*, Rosebud Sioux Tribe v. Val-U Const. Co., 50 F.3d 560 (8th Cir. 1995) (holding that the tribe expressly waived its sovereign immunity with respect to an arbitration provision in a construction contract).

157. *See* U.S. CONST. art. III, § 2.

158. 28 U.S.C. § 1332(a)(1) (2000). Diversity of citizenship is established when "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different [s]tates." *Id.*

159. *Id.* § 1331. There is a federal question when the civil action arises under the "Constitution, laws, or treaties of the United States." *Id.*

160. *See* Penn Gen. Cas. Co. v. Pennsylvania. *ex rel.* Schnader, Att'y Gen., 294 U.S. 189 (1935).

161. Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 922-23 (2d Cir. 1972) (dismissing a tribe's claim because lack of citizenship defeated diversity jurisdiction); Standing Rock Sioux Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974) (stating that a tribe cannot sue or be sued in federal court under diversity jurisdiction); Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993) (stating that tribes are not citizens of any state for diversity-jurisdiction purposes); Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir. 1997) (holding that tribes are not citizens of any state and cannot be sued in federal court under diversity jurisdiction); Barker-Hatch v. Viegas Group Baron Long Capitan Grande Band, 83 F. Supp. 2d 1155, 1157

provide the basis for obtaining federal court jurisdiction against a tribe.

As a result, the dispute will require a "federal question" to obtain federal court jurisdiction because diversity jurisdiction is likely unavailable. Because most commercial contract disputes with tribes do not involve any issues of a "federal" nature, state or tribal courts are the more likely forums for resolution of such issues.[162]

B. State Court Jurisdiction

State courts do not generally have jurisdiction over matters arising on a reservation or on tribal lands where a tribe is involved.[163] The Supreme Court, in *Williams v. Lee*,[164] strongly enunciated the long-standing principle of Indian tribal rights of self-government and exclusive jurisdiction over civil matters on reservations.[165] There, the Court held that permitting the state court to exercise jurisdiction over the debt-collection proceedings would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[166]

When defining the limits of state power over tribal affairs, the Supreme Court has moved away from an inherent sovereignty analysis and toward a federal-preemption analysis.[167] The federal government is seen as having plenary power over regulating relations with the tribes.[168] The preemption doctrine asks whether the state's attempted regulation has been preempted by federal statutes or

(S.D. Cal. 2000) (holding that tribes are not citizens of any state for jurisdiction purposes); Am. Advantage v. Table Mountain Rancheria, NO. 00-17355, 2002 U.S. App. LEXIS 11692, at *19-23 (9th Cir. June 14, 2002) (holding that tribes lack diversity jurisdiction because tribal entities are not comparable to state corporations); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989) (stating that parties can waive personal jurisdiction but cannot waive court's lack of subject matter jurisdiction).

162. *See* 28 U.S.C. § 1360 (2000).
163. *See id.* § 1362 (2000).
164. 358 U.S. 217 (1959).
165. *See id.* at 220.
166. *Id.* at 223.
167. McClanahan v. Ariz. St. Tax Comm'n, 411 U.S. 164, 172 (1973).
168. *See id.* at 165.

treaties.[169] Because Congress is rarely explicit in preempting state law, the Court typically must engage in weighing the state's interest in controlling the conduct against the combined federal and tribal interests to determine whether state law is preempted.[170]

In *New Mexico v. Mescalero Apache Tribe*,[171] the United States Supreme Court stated that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the [s]tate interests at stake are sufficient to justify the assertion of [s]tate authority."[172] The Court then held that New Mexico could not impose its own fishing and hunting regulations on non-Indians on the reservation because of strong federal interests in "tribal self-sufficiency and economic development" and a lack of state interests.[173]

Although many preemption cases result in decisions that affirm tribal sovereignty,[174] the balancing approach of the modern preemption doctrine is significantly weaker than the more absolute inherent sovereignty analysis under *Worcester*[175] and *Kagama*.[176] The governing power that the tribes exercise is now seen as not inherent but wholly derived from acts of Congress.[177] As the Court observed in *United States v. Wheeler*,[178] "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[179]

169. *See* Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that Pennsylvania could not regulate aliens because Congress intended to control the area of immigration law).
170. *Id.* at 171-72.
171. 462 U.S. 324 (1983).
172. *Id.* at 334.
173. *Id.* at 344.
174. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (preempting the state from taxing gasoline sold by tribe on the reservation, but state may tax the income of Indians living outside of the reservation); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (preempting the state from taxing and regulating logging on reservation).
175. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
176. *See* United States v. Kagama, 118 U.S. 375 (1886).
177. United States v. Wheeler, 435 U.S. 313, 323 (1978).
178. 435 U.S. 313 (1978).
179. *Id.*

Case law, however, does not preclude a tribe from agreeing to state court jurisdiction by contract.[180] Parties to tribal contracts are permitted to resolve their disputes outside of the tribal court if the agreement relating to the dispute includes an express waiver and specific dispute-resolution provisions permitting adjudication in another forum.[181]

Nevertheless, if the option is available, many tribes may insist on the resolution of disputes in their own tribal courts.[182] In this regard, there are many tribal courts with well-developed case law and experienced judges.[183] The extent of tribal court jurisdiction is further explored below.

C. Tribal Court Jurisdiction

Similar to the federal and state governments, tribal governments can be complex bureaucracies, consisting of executive, legislative, and judicial branches.[184] The office of the tribal chairperson, president, governor, or Chief (executive branch), and the tribal council (the legislative branch) usually govern the tribe pursuant to a tribal constitution and code of laws.[185] As for the judicial branch, many tribes have created their own court system with extensive court rules and procedures (*e.g.*, the Mashantucket Pequot tribal courts and Navajo Nation tribal courts).[186] These courts are generally equipped to handle almost all matters that are unique to tribal cultural practices, including matters arising on or related to tribal lands and matters involving tribal entities.[187]

180. *See generally* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 173-74, 179-85 (1994) (explaining how tribal immunity can be waived).

181. *Id.*; *see also* Puyallup Tribe v. Dept. of Game, 433 U.S. 165, 172 (1977) (suggesting that a state court could exercise jurisdiction in situations where tribal courts would normally be empowered if the tribe had given an effective waiver of such jurisdiction).

182. *See generally* Vetter, *supra* note 180.

183. See *infra* Part IV.C.

184. *See* CHOCTAW NATION of OKLA. CONST. of 1983.

185. *Id.*

186. *See* Mashantucket Pequot Tribal Laws (2005); 7 NAVAJO NATION CODE tit. 7 (1977).

187. *See* Vetter, *supra* note 180 at 187-89.

Tribal courts are similar in structure to other courts in the United States; however, the 150 Tribal courts are also unique in their own separate ways. For example, the qualifications of tribal court judges vary widely depending on the court.[188] Some tribal court judges are required to have law degrees, while others are not; some tribes require that the judge be a member of the tribe, while others do not.[189]

Most tribal law and order codes contain procedural rules specific to the tribal court, as well as tribal statutes and regulations.[190] Tribal-procedural laws outline the tribal court's adjudicatory authority and may set forth limitations on tribal jurisdiction.[191] Tribal laws also include traditional practices, including commercial customs, that are based on oral history but may not be codified.[192] Increasingly, tribes are adopting commercial laws modeled after the Uniform Commercial Code.[193]

Tribal court judges usually will adhere to the precedent created by their own courts.[194] In some instances, tribal judges will cite to decisions from other tribal courts.[195] Unfortunately, conducting research on prior tribal court decisions may be difficult. There is no official tribal court reporter that compiles all published decisions from the various courts. Further, not all tribal courts maintain prior opinions in an easily researchable format, if at all.[196] However, the Tribal Court Clearinghouse website does publish many tribal court decisions and can be an excellent resource.[197]

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188. *See* Gorden K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401-02 (1985); *see also* Ted Wills, *De Novo Review: An Alternative to State and Federal Court Jurisdiction of Non-Indian Minor Crimes on Indian Land*, 17 AM. INDIAN L. REV. 309, 316-17 (1992).

189. *Compare* Laws of the Confederated Salish & Kootenai Tribes, Codified pt. 2 (2003), *with* Poarch Band of Creek Indians Code 3-1-3 Qualifications of Tribal Judge (1997).

190. *See, e.g.*, II AK-CHIN INDIAN CMTY. LAW AND ORDER CODE (2000).

191. *See, e.g.*, I AK-CHIN INDIAN CMTY. LAW AND ORDER CODE ch.1 (2000).

192. *See, e.g.*, MASHANTUCKET PEQUOT TRIBAL LAWS ch.1 § 3 (2005).

193. *Id.*

194. *See generally Tribal Court Clearinghouse*, Tribal Court Decisions, http://www.tribal-institute.org/lists/decision.htm (last visited Mar. 29, 2006).

195. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 521-22 (2000).

196. *See supra* note 194.

197. *Id.*

Federal and state court opinions can often serve as persuasive authority to a tribal court, particularly in commercial litigation matters.[198] Many state courts extend full faith and credit to tribal court orders; similarly, federal courts generally grant comity to tribal judges' rulings.[199]

If the parties to the contract go to the tribal court for dispute resolution, and tribal law governs, parties should undertake sufficient due diligence to understand the structure and process. Such due diligence necessarily includes review of the tribe's constitution or other governance document (if applicable); the tribal entity's organizational or other governance documents; applicable tribal-council resolutions; and other applicable and relevant tribal laws, codes, and regulations.

D. Arbitration

Where the parties are unable to agree on state or tribal court as the forum for resolving disputes, the parties may compromise by agreeing to arbitration or another alternative dispute resolution mechanism (*e.g.*, mediation).[200] In such a situation, questions relating to *where* the arbitration award would be enforced need to be considered. For instance, in *Val/Del, Inc. v. Superior Court*,[201] it was held that an arbitration agreement that did not draw a distinction between the tribal court system and another court system may mean the tribal court also has jurisdiction over enforcement of arbitration awards.[202]

198. *See, e.g.*, Mamiye v. Mashantucket Pequot Gaming Enter., 1 Mash. 245, 247-49 (1996) (citing to Federal as well as Connecticut cases as persuasive authority).

199. *See, e.g.*, Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 555 (9th Cir. 1991).

200. Val/Del, Inc. v. Super. Ct., 703 P.2d 502, 508 (Ariz. Ct. App. 1985).

201. 703 P.2d 502 (Ariz. Ct. App. 1985).

202. *Id.* at 565.

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203. Nat'l Farme
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204. *Id.* at 857 ("
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205. *Nat'l Farme*
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206. *Iowa Mut. In*
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207. *See* Duncan
Reservation, 27 F.3

208. *Nat'l Farme*
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V. EXHAUSTION OF TRIBAL REMEDIES

A. Doctrine Overview

The doctrine of exhaustion of tribal remedies is a reflection of an ongoing tension between tribal and federal courts.[203] If a tribal court has jurisdiction over a non-Indian party to a civil proceeding, the party is usually required to exhaust all options in the tribal court prior to challenging tribal jurisdiction in federal district court.[204]

Ultimately, the question of whether a tribal court has jurisdiction over a non-Indian party is one of federal law and gives rise to federal-question, subject matter jurisdiction.[205] When sued in tribal court, non-Indian parties can ultimately challenge tribal jurisdiction in federal court.[206] Pursuant to this doctrine, a federal court will not hear a matter arising on tribal lands until the tribal court has determined the scope of its own jurisdiction and entered a final ruling.[207] Ordinarily, a federal court should abstain from hearing the matter "until after the tribal court has had a full opportunity to determine its own jurisdiction."[208]

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203. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

204. *Id.* at 857 ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief."). *See id.* at 856 (stating that tribal courts should be allowed to examine the scope of their own jurisdiction in the first instance); *see id.* at 857 (outlining three general exceptions to the exhaustion doctrine); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (refining the "exhaustion doctrine" by clarifying that "the alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*."); John Arai Mitchell, *A World Without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country*, 61 U. CHI. L. REV. 707 (1994); Phillip Allen White, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65 (1997).

205. *Nat'l Farmers Union*, 471 U.S. at 852; 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

206. *Iowa Mut. Ins. Co.*, 480 U.S. at 19 ("If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court.").

207. *See* Duncan Energy Co., Inc. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1299-1300 (8th Cir. 1994).

208. *Nat'l Farmers Union*, 471 U.S. at 857. The *Iowa Mutual Ins.* Court noted that the exhaustion doctrine has its roots in "considerations of comity." 480 U.S. at

The doctrine assumes concurrent jurisdiction of sovereigns and that no federal statutes expressly direct exclusive federal jurisdiction[209] or provide for state court jurisdiction.[210] "Advocates for mandatory exhaustion" of tribal remedies express the view that "a case first must be addressed by tribal courts to serve the underlying federal Indian law policies of sovereignty and self-determination."[211] It is argued that this is the only manner in which "tribal courts [will] develop the experience necessary to bring true self-governance to Native American people."[212]

If the tribal court concludes it has jurisdiction, it will proceed to rule upon the merits of the case.[213] After exhausting any available appellate options,[214] the non-Indian party can then file suit in federal court, whereby the question of tribal jurisdiction is reviewed on a de novo standard.[215] The federal court may look to the tribal court's jurisdictional determination for guidance; however, such determination is neither binding nor controlling.[216] If the federal court affirms the tribal court determination, the non-Indian party may

15. Also, "[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Nat'l Farmers Union*, 471 U.S. at 857. *But see* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (reiterating a Supreme Court statement from *Iowa Mutual* that the exhaustion requirement was "prudential" and not jurisdictional).

209. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (1988 & Supp. 1993).

210. *See* William V. Vetter, *The Four Decisions in Three Affiliated Tribes and Pre-Emption by Policy*, 23 LAND & WATER L. REV. 43 (1988).

211. Phillip Wm. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. Rev. 277, 278 (1995).

212. *Id.*

213. *See Iowa Mut. Ins. Co.*, 480 U.S. at 16.

214. *See id.* at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.").

215. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852-53 (1984) ("[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."); *see also* Ford Motor Co. v. Todecheene, 394 F.3d 1170, 1173 (9th Cir. 2005) ("Whether a tribal court properly exercised its jurisdiction is a question of law reviewed de novo.") (quoting AT & T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 904 (9th Cir. 2002)).

216. *Iowa Mut. Ins. Co.*, 480 U.S. at 19.

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220. *Id.* at 852.
221. *Id.* at 855-56.
222. *Id.* at 856.
223. *Id.*
224. *Id.*
225. *Id.* at 856-57.

not relitigate issues already determined on the merits by the tribal court.[217]

B. National Farmers Case

The key case framing the doctrine of tribal-court exhaustion is *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.[218] There, the issues were whether there was a federal question and whether remedies in tribal court had to be exhausted first.[219]

On the first issue, the Supreme Court held that the question of when the tribe retains the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question.[220] On the second issue, the court held that

> the existence and extent of a tribal court's civil jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, [policies of the executive branch and tribal courts] as embodied in treaties and elsewhere, and administrative or judicial decisions.[221]

The Supreme Court also held that the analysis of the existence and extent of a tribal court's civil jurisdiction should be conducted first in a tribal court.[222] The Court explained the underlying policy as favoring "a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[223] The Court further stated that an "orderly administration of justice in the federal court [would] be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed."[224] As such, the federal court should "stay[] its hand until after the tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."[225] According

217. *Id.* ("Unless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.").
218. 471 U.S. 845 (1985).
219. *See id.*
220. *Id.* at 852.
221. *Id.* at 855-56.
222. *Id.* at 856.
223. *Id.*
224. *Id.*
225. *Id.* at 856-57.

to the Supreme Court, "Exhaustion of tribal court remedies . . . encourage[s] tribal courts to explain to the parties the precise basis for accepting jurisdiction[] and . . . also provide[s] other courts with the benefit of their expertise in such matters in the event of further judicial review."[226]

In summary, the issue of the scope of a tribal court's jurisdiction is a federal question, and actions first brought in tribal court are not subject to jurisdictional challenges in federal court prior to exhaustion of tribal court remedies.[227] As a result, tribal court remedies generally must be exhausted before the federal court can address any dispute arising on tribal lands.[228] The tribal court must first determine the scope of its own jurisdiction over such matters arising on the reservation and make a final ruling before any such action will be entertained by the federal courts.[229]

C. Exceptions to Exhaustion Doctrine

There are several exceptions to the exhaustion doctrine. Federal courts are not required to defer to tribal courts when 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."[230] Further, when "it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," exhaustion "would serve no purpose other than delay."[231]

Moreover, where the primary issue involves a federal question, exhaustion of tribal remedies may not be mandated. In *Altheimer &*

226. *Id.* at 857.
227. *Id.* at 856-57.
228. *Id.* at 857.
229. *Id.* at 856.
230. *Id.* at 856 n.21 (quoting Judice v. Vail, 430 U.S. 327, 338 (1977)).
231. Strate v. A-1 Contractors, 520 U.S. 438, 459-60 n.14 (1997); *see also* Nevada v. Hicks, 533 U.S. 353, 369 (2001) (citing the *Strate* exception in finding that the exhaustion requirement did not apply to a case in which a tribal court tried to exercise jurisdiction over a state official performing his official duties on a reservation); *see* Ronald Eagleye Johnny, Nevada v. Hicks*: No Threat to Most Nevada Tribes*, 25 AM. INDIAN L. REV. 381 (2000) (giving a more thorough critique of Nevada v. Hicks).

Gray v. Sioux Manufacturing Corp.,[232] the federal court refused to mandate exhaustion of tribal remedies because the main issue in the case involved a federal question.[233] There, the court refused to apply *National Farmers* and *Iowa Mutual* in requiring exhaustion of tribal court remedies as a judicial condition precedent to federal courts taking cases arising on Indian reservations.[234] The court distinguished *National Farmers* and *Iowa Mutual* on the grounds that there was no challenge to tribal court jurisdiction, there was no pending case in tribal court, and the dispute did not touch or concern a tribal ordinance or law.[235]

VI. DOING BUSINESS WITH TRIBES AND TRIBAL ENTITIES: PRACTICAL CONSIDERATIONS

A. Contracting Entity

The first practical consideration is determining with whom you are dealing. Numerous Indian tribes are organized pursuant to the Indian Reorganization Act of 1934 (IRA).[236] Pursuant to Section 16 of the IRA, a tribe adopts a constitution and bylaws setting forth the hierarchy of the tribe's government and the executive authority assigned to each of the branches of the "government."[237]

A tribe may also seek the formation of a Section 17 corporation under the IRA,[238] whereby the Secretary of the Interior issues a federal charter to the tribe.[239] Through a Section 17 corporation, the tribe creates a separate legal entity and assigns to that entity the responsibility of performing, carrying out, and discharging the functions of the tribe's governmental and business activities.[240] The tribal entity incorporated under Section 17 adopts corporate governance charters—such as articles of incorporation and bylaws identifying the entity's purpose, limitations, and other similar

232. 983 F.2d 803 (7th Cir. 1993).
233. *Id.* at 808-15.
234. *Id.* at 814-15.
235. *Id.* at 814.
236. 25 U.S.C. § 461 (2000).
237. *Id.* § 476.
238. *Id.* § 477.
239. *Id.*
240. *Id.*

provisions—like any private corporation incorporated under state laws would.[241]

Tribal entities may be incorporated under tribal or state law.[242] If the entity is formed under tribal law, the tribe will have done so pursuant to its own corporate or other particular business code.[243] Under federal common law, the tribal corporation likely enjoys sovereign immunity from lawsuits.[244] A state-chartered tribal corporation is generally not immune from suit and may be sued in state court.[245]

Based on the foregoing, when negotiating a tribal-business transaction, one should determine whether the contract is with a tribal corporation and, if so, under what law it was incorporated. In this regard, the tribe's corporate charter should be consulted to confirm the authority of the tribal agents participating in the transaction. Further, the IRA places certain limitations on incorporated tribes.[246] Some transactions, such as the sale or lease of tribal land and assignment of income, require the approval of the Secretary of the Interior.[247]

B. Authority to Execute Contracts

It is important to ensure that the tribal entity signing the contract has authority to do so; absent appropriate authority, the agreement may not be valid and binding.[248] This issue can get very complicated depending on the tribe or tribal entity involved in the transaction.[249]

241. *See id.* §§ 476-77.

242. Am. Vantage Co. v. Table Mountain Rancheria, 292 F.3d 1091, 1094 (9th Cir. 2002).

243. Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993).

244. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670 (8th Cir. 1986); *see also* World Touch Gaming v. Massena Mgmt., 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000).

245. *See* Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery, 818 N.E.2d 1040, 1049-50 (Mass. 2004); Airvator v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983).

246. *See* 25 U.S.C. § 477 (2000).

247. *See, e.g., id.* § 81.

248. AMERICAN INDIAN LAW DESKBOOK: CONFERENCE OF WESTERN ATTORNEYS GENERAL 503 (Hardy Myers et. al. eds., 3d ed. 2004).

249. *Id.*

The complication arises from the structure of the tribe or tribal entity and the applicable governance and formation documents.[250]

As noted above, before entering into an agreement with a tribe or tribal entity, certain due diligence should be undertaken. Specifically, the tribal constitution or equivalent tribal governance document should be reviewed to determine approval powers, authority, limitations, and restrictions that may be applicable to or affect the transaction. If a tribal enterprise is involved, the enterprise's organizational or formation documents should be reviewed to ensure that the enterprise has been properly delegated the necessary authority to enter into a binding agreement. Additionally, appropriate resolutions from the tribe or tribal enterprise should be obtained to confirm their authority to execute the contract.

Failure to discern proper authority can lead to adverse results. For example, in *World Touch Gaming v. Massena Management*,[251] the casino, a wholly-owned, unincorporated subsidiary of the tribe, agreed to waive its sovereign immunity from suit to enforce the agreement.[252] However, the tribe had not issued a similar waiver of sovereign immunity, nor had it authorized its agent, the casino management, to waive the tribe's sovereign immunity.[253] Such authorization could only be obtained through a tribal resolution, and the tribe had not passed any resolution granting authority to waive its sovereign immunity.[254]

As a result, World Touch's claims seeking damages for breach of the lease-purchase agreements were dismissed for lack of subject matter jurisdiction.[255] The court held that the purported waiver of sovereign immunity found in the casino management company's agreement was invalid, ineffective, and unenforceable because the management company did not have express, implied, or apparent authority to waive sovereign immunity.[256]

250. *Id.*
251. 117 F. Supp. 2d 271 (N.D.N.Y. 2000).
252. *Id.* at 273.
253. *Id.*
254. *Id.*
255. *Id.* at 277.
256. *Id.* at 276-77; *see also* Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council, 216 Cal. Rptr. 59, 59-60 (Cal. Ct. App. 1985).

C. Governmental Approval

The Secretary of Interior must approve any contract or agreement that "encumbers Indian lands for a period of 7 or more years," unless the Secretary determines that approval is not required.[257] Section 81 defines the term "Indian lands" as "lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation."[258]

Federal regulations issued by the Secretary state that

> [e]ncumber means to attach a claim, lien, charge, right of entry[,] or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.[259]

Pursuant to amendments to Section 81 enacted in 2000, the Secretary will not approve any such contract or agreement if the document does not do the following: set forth the parties' remedies in the event of a breach; disclose that the tribe can assert sovereign immunity as a defense in any action brought against it; or include an express waiver of tribal immunity.[260]

Failure to secure Secretarial approval can render the agreement void.[261] In *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*,[262] the agreement was invalid because it was not approved by the Secretary of the Interior as required by 25 U.S.C. § 81.[263]

Leaseholds for Indian lands, which typically run twenty-five years in duration, also require Secretarial approval.[264] Leases under 25

257. 25 U.S.C. § 81 (2000). *But see* 25 C.F.R. § 84.004 (2004) (listing contracts that are exempt from secretarial approval).
258. § 81.
259. 25 C.F.R. § 84.002 (2004).
260. 25 U.S.C. § 81.
261. § 81(b).
262. 216 Cal. Rptr. 59 (Cal. Ct. App. 1985).
263. *Id.* at 59-60.
264. 25 U.S.C. § 415 (2000).

U.S.C. § 415 are similarly void and have no legal effect without the Secretary's approval.[265]

If the contract pertains to a tribal casino, the parties should consider whether the contract needs to be submitted to the National Indian Gaming Commission (NIGC) for approval pursuant to the Indian Gaming Regulatory Act (IGRA). Any "management agreement" for a tribal casino requires NIGC approval to be valid and enforceable.[266] Sometimes, the parties will submit an agreement to the NIGC seeking a determination that the agreement does not constitute a "management agreement,"[267] and, therefore, the NIGC should decline to exert any approval jurisdiction.[268] In such cases, the NIGC issues a "declination letter" that signifies the validity of the parties' contractual agreement.[269]

D. Limited Waiver of Sovereign Immunity

In these modern times, most tribes and tribal entities are willing to agree to a limited waiver of sovereign immunity.[270] In such a case, the agreement will limit the waiver for recourse only to the assets of the business contemplated in the transaction, *i.e.*, the casino-revenue stream and no other assets of the tribe, thereby retaining complete unfettered sovereign immunity over all "personal assets" of the tribe itself.[271]

E. Dispute Resolution

In the interest of all contracting parties, agreements with tribes and tribal entities should address and contain provisions identifying the forum in which any disputes arising from the transaction contemplated may be resolved without leaving room for any ambiguity. The contract should contain an express, unequivocal

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265. *See* Sangre de Cristo Dev. Co., Inc. v United States, 932 F.2d 891, 894 (10th Cir. 1991); Lawrence v. United States, 381 F.2d 989, 990 (9th Cir. 1967).

266. 25 U.S.C. § 2711 (2000); First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc., 412 F.3d 1166, 1176 (10th Cir. 2005).

267. *See, e.g., First Am. Kickapoo*, 412 F.3d at 1168.

268. *See* 25 U.S.C. §81 (2000).

269. *See, e.g.*, NATIONAL INDIAN GAMING COMMISSION AGREEMENT, Art. II, cl. 6, http://www.nigc.gov/nigc/documents/actions/2000/preopgagremnt0008.jsp (last visited Mar. 29, 2006).

270. *See generally* Bernardi-Boyle, *supra* note 28.

271. *See* Petoskey, *supra* note 80, at 444.

agreement by the parties that disputes arising from the contract shall be brought in the federal court, state court, or tribal court, or be resolved by alternate dispute resolution mechanisms such as mediation or arbitration.

As a practical measure, and in exercising good-faith business judgment, parties enter into agreements that provide for a mix of dispute-resolution provisions.[272] For example, agreements may contain provisions whereby disputes, not exceeding a certain monetary limit, will be resolved in tribal courts, and all other matters shall be resolved by arbitration.[273]

The contract should contain specific language regarding what law and other procedures are applicable to the transaction. For example, the contract should specify (a) whether federal law, state law, or tribal law applies, and (b) whether filing and recording of relevant security documents will be in the state recorder's office, at the Bureau of Indian Affairs office, with the tribe, or whether the recording should be in all such recorders' offices.

VII. CONCLUSION

The increasing rate of economic development in Indian Country through the success of gaming has prompted many businesses to explore and undertake more transactions with tribes and tribal entities.[274] Because of the unique sovereign and jurisdictional characteristics attendant to business transactions with tribes and tribal enterprises, certain due diligence should be conducted with respect to the pertinent tribal organizational documents and governing laws, which may collectively dictate and control the business relationship. The most critical contract provision is an express and unequivocal waiver of sovereign immunity.[275] Absent a waiver of sovereign immunity, the non-Indian contracting party may not be able to enforce the contract against the tribe or tribal enterprise in any forum, including tribal courts or arbitration.[276]

272. *See, e.g.*, Val/Del, Inc. v. Super. Ct., 703 P.2d 502, 509 (Ariz. Ct. App. 1985).
273. *See id.*
274. *See generally supra* note 3.
275. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
276. Bernardi-Boyle, *supra* note 28, at 41, 46.

The key to successful partnerships with tribes and tribal entities is to ensure that the transactional documents contain clear and unambiguous contractual provisions which address all rights, obligations, and remedies of the parties. Assuring that both sides of the transaction fully understand and respect the deal will likely lead to a long-lasting and beneficial business relationship for all parties.