

***Doing Business with Native American Tribes—  
Contract Enforcement Issues***  
**By David W. Kash, Esq,  
Jennings, Strouss & Salmon, P.L.C.**

Feb/Mar 2002

When doing business with Native American tribes, you are faced -with a special business relationship, one which involves, in addition to cultural differences, the existence of new risks. Tribal contract negotiations involve five basic areas: legal identity of the tribe, the need for pre-approval of the contract by the Federal Government, contract performance, contract enforcement, and securing payment. The subject of this article is contract enforcement. -

### **The Bounds of Tribal Immunity**

Native American tribes must be recognized under federal law to possess the requisite characteristics of a sovereign nation. A recognized tribe, just like a foreign country, enjoys sovereign immunity from suit. The primary Congressional purpose for tribal sovereign immunity is to protect tribal trust property from encumbrances. The United States Supreme Court in Kiowa Tribe of Oklahoma v. Manufacturing -Technologies discusses the bounds of tribal immunity.

In Kiowa, the tribe executed and delivered a note for the payment of shares of stock. The note was executed beyond tribal lands and obligated the tribe to make payments in Oklahoma City. The note did not specify a governing law but expressly stated that nothing in the note subjected or limited the tribe's sovereign rights. The payee brought suit in state court to recover on the note and the state court entered judgment against the tribe. The state appeals court agreed with the trial court decision. An appeal to the U.S. Supreme Court brought a reversal. The Supreme Court held that the tribe was entitled to sovereign immunity from suit regardless of whether the note was signed on or off the reservation and regardless that the note related to commercial as opposed to tribal activities, the result was that the tribe obtained the stock for free. Kiowa establishes

that as a matter of federal law, a tribe is subject -to suit only where Congress has authorized the suitor the tribe has waived its immunity.

The U.S. Supreme Court has sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. Although the Supreme Court has recognized tribal immunity as settled law, it notes that the doctrine developed by accident, and that the 1919 decision in Turner v. United States, which is relied upon for the doctrine of sovereign immunity, is but "a slender reed" for supporting tribal sovereign immunity as a viable legal principle. Like foreign sovereignty, tribal immunity is a matter of federal law and is not subject to diminution by the states, While the Supreme Court has taken the lead in drawing the bounds of tribal immunity, it looks to Congress, subject to constitutional limitations, to alter or limit tribal immunity through explicit legislation.

### **Some Cases Involving Tribal Immunity**

With this as background, the U.S. Supreme Court decided C&L Enterprises v. Pottawatani Indian Tribe of Oklahoma in April of 2001. Here the Court held that the tribe had waived its immunity from suit,

The Pottawatani Indians, a federally recognized Indian tribe under the regulations promulgated by the Department of the Interior and published in the Code of Federal Regulations, hired a contractor to install a roof on a commercial building owned by the Tribe in Oklahoma. After the contract was signed but before the work began, the Tribe changed its mind and hired another contractor to install a different form of roof. The Tribe and contractor executed a written agreement which called for: all claims and disputes to be decided by arbitration in accordance with the Rules of the American Arbitration Association; the arbitration award to be determined based upon the

law of the place where the project was situated; the award rendered by the arbitrator to be final; and that judgment may be entered upon the award in any court having jurisdiction.

After the Tribe dishonored the contract, the contractor submitted an arbitration demand. The Tribe declined to participate in the arbitration proceeding and the contractor was granted an award. The Oklahoma State Court enforced the award over the objections of the Tribe, who appeared and defended on the ground that, as a sovereign, it was immune from suit. The Oklahoma Appellate Court, relying on the Kiowa case, reversed the trial court's decision. The US. Supreme Court, on the other hand, enforced the arbitral award in favor of the contractor and against the Tribe. The Supreme Court noted that the parties had agreed that arbitration was the chosen method to resolve the dispute, and that since the agreed-upon rules of arbitration incorporated the law of the State of Oklahoma as the choice of law, and the arbitration called for enforcement by a court, the Indian tribe had therefore waived immunity to suit.

The Tribe argued that there was not an express waiver of suit immunity in the contract. The Tribe argued that, "no court on earth or even on the moon ... had jurisdiction because the Tribe had not expressly waived its sovereign immunity in any judicial form." The Supreme Court rejected this contention because the contract specifically authorized judicial enforcement by incorporation of the arbitration rules. Those rules called for an award to be enforced in a court of competent jurisdiction where the project was located. The Court also stressed that this was not an adhesion contract foisted upon the Tribe, but an unambiguous contract proposed and prepared by the Tribe for the contractor to sign. -

In *Val/Del. Inc. v. Pascua Yaqui Tribe*, an Indian tribe hired a management company to finance and operate the Tribe's bingo operation. Here, the Arizona Appellate Court in 1985 held that an arbitration provision constituted a clear indication that sovereign immunity had been waived. Having waived its sovereign immunity jurisdiction was concurrent in the Superior Court for the State of Arizona and in Tribal Court.

## **Recommendations -**

A waiver of a tribe's immunity from suit must be clearly expressed. While the words "waiver of immunity from suit" are not an absolute requirement, it is recommended that the contractor obtain an express waiver of sovereign immunity. "Implied" waivers are unenforceable. It is recommended that the parties agree on what law governs the contract and disputes and that an arbitral award be enforceable in a court with jurisdiction. (An agreement by the tribe to waive immunity from suit does not confer jurisdiction to a state or federal court, even if the parties name a specific court). While a tribe may not agree to waive immunity from suit in state court, the tribe may agree to:

- (i) Binding arbitration, (u) that Arizona law is controlling, (iii) that any award shall be confirmed in any court with jurisdiction, and (iv) that the judgment shall be enforceable against property owned by the tribal entity on or off the reservation.

For more information about this topic, please contact the author. David W Kash, at 602,262.5919 or [dkash@jsslw.com](mailto:dkash@jsslw.com).