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STATE CORPORATIONS FOR INDIAN RESERVATIONS

Dao Lee Bernardi-Boyle*

Reservation American Indians are among the poorest people living in this country.¹ This poverty is not limited to reservations deprived of resources; "[d]espite abundant natural resources of land, timber, wildlife, and energy, Indian reservations remain among the most impoverished areas in the United States."² Although they have an impressive history of phenomenal resilience,³ the poor economic conditions on reservations threaten the survival of great American Indian Societies across the nation.

While there is an ongoing dispute over the proper role for government investment on reservations, everyone agrees that greater access to private capital is an essential ingredient for improving conditions on reservations. Capital from federal government sources has been used to help fill the void on many reservations but the uncertainty of continued federal funding makes it critical for all tribes to find effective methods of attracting outside investment.⁴ Professors Stephen Cornell and Joseph Kalt of the Harvard Project on American Indian Economic Development state that when "access to capital improves, so do the chances of successful development."⁵

Based upon a completion of surveys of tribal business leaders in the Northwest and an analysis of federal Indian law, this article shows that a major obstacle for investment on reservations is the inability of tribal governments to bind themselves in a way that allows a fair return to investors. Under federal case law, it is difficult for a tribe to assure its investors that a state or federal court will be able to enforce the tribal contracts notwithstanding the tribe's sovereign immunity and taxing power. Non-Indian

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1. STEPHEN CORNELL & JOSEPH P. KALT, *WHAT CAN TRIBES DO?* 3 (1995).

2. TERRY L. ANDERSON, *SOVEREIGN NATIONS OR RESERVATIONS?* 1 (1995).

3. CORNELL & KALT, *supra* note 1.

4. *Id.* at 11 (stating that, "[w]ith declines in federal funding over the last decade and poor prospects for significant increases in the near future, overcoming the access-to-capital obstacle is essential").

5. CORNELL & KALT, *supra* note 1, at 8.

businesses forego opportunities with sovereign tribes and assume that its business leaders might "simply ignore [their deeply felt] responsibility as business minded individuals" ⁶ Thus tribes are then caught in a catch-22: their only assets (generally land and mineral rights) stem from their unique status as sovereign nations; yet it is their sovereignty that prevents their recovery by eliminating their ability to completely contractually commit.

Towards this end, many tribes have created commercial codes and reliable tribal court and arbitration systems.⁷ Tribal legal systems do play a significant role in securing the future of tribes. "[T]ribal judicial systems are cornerstones of Indian self-rule and critical elements in successful economic development."⁸ It takes time, however, to establish a reputation for having a fair judicial system that respects the rule of law and private property rights. This is especially true given that polarized political conditions in many areas surrounding reservations make immediate progress difficult to attain.

This article suggests that tribes can overcome the stigma of instability and attract capital by conducting business through corporations formed under state law. In this way tribes can assure a fair deal to investors despite their sovereign immunity, taxing power, and ability to escape suits in non-tribal court systems. While multiple law review articles have been written on this topic, few have proposed ways in which the tribes themselves can eliminate the immunity problem.⁹

The first section of this paper details some of the economic problems that burden many tribes. The second section describes the federal law that governs tribal immunity, taxing power, and non-tribal jurisdiction over tribes. This section describes how federal law makes it extremely difficult for businesses to determine whether a tribe has effectively waived immunity. The effectiveness of such a waiver by tribal corporations formed under tribal and federal law is equally difficult to predict. In addition, federal case law has called into question a tribe's ability to contract away its taxing power and its ability to escape non-tribal jurisdiction.

The third section of this paper explains how a tribal corporation formed under state law can protect a business partner from the sovereignty of the tribe. Such a corporation is not normally immune from suit and, in any event,

6. See *infra* note 125 for a list of quotations from surveyed tribes.

7. For an evaluation of the underestimated reliability of tribal courts, see Nell Jessup Newton, *Tribal Court Praxis: One Year In the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

8. CORNELL & KALT, *supra* note 1, at 91.

9. See, e.g., John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 MICH. B.J. 440 (1997); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 HAMLINE L. REV. 417 (1994); William V. Vetter, *Doing Business With Indians and the Three 'S's: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994); Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345 (1993).

can readily waive immunity. Such a corporation can also contractually protect its business partners from the tribe's taxing power. Finally, state law corporations can readily guarantee accountability in a state court system because they are citizens of the state in which they incorporate. I conclude by speculating about why more tribes have not formed such corporations.

I. The Current State of Affairs on Reservations

American Indian Reservations across the country are frequently pockets of extremely high unemployment rates, high dependency on welfare, and disabling social problems. There is a "complete absence of sustainable, productive economic activity."¹⁰ "With unemployment at a 28-year low, still on some reservations more than 70 percent of all adults do not have regular work."¹¹ While a few tribes have found recent success, many reservations remain among the poorest areas in the nation. As President Clinton observed:

It is a time of unprecedented prosperity for some of our tribes Gaming and a variety of innovative enterprises have enabled tribes to free their people from lives of poverty and dependence. . . . But we know the hard truth — that on far too many reservations across America such glowing statistics and reports mean very little indeed. While some tribes have found new success in our new economy, too many more remain caught in a cycle of poverty, unemployment, and disease.¹²

An urgent question is, therefore, how will these resilient people recover from current conditions? Professors Stephen Cornell and Joseph Kalt of the Harvard Project on American Indian Economic Development list three key ingredients for successful tribal economic development. Among them is "external opportunity," under which "access to financial capital" is listed as a subingredient.¹³ The Harvard Project explains:

The primary problem tribes face in obtaining investment capital is real or perceived instability in tribal governments and policies. Thus, capital access is first and foremost a problem of political development: the establishment of an institutional environment in which investors feel secure. This holds true whether the investors are banks, corporations, venture capitalists, or tribal members. With declines in federal funding over the last decade and poor

10. CORNELL & KALT, *supra* note 1, at 3.

11. Press Release, White House, Remarks by the President to White House Conference Building Economic Self-determination in Indian Communities (Aug. 6, 1998), *available at* 1998 WL 459811, at *2.

12. *Id.*

13. CORNELL & KALT, *supra* note 1, at 8-11.

prospects for significant increases in the near future, attention to the institutions-of-governance factor can be the best way to overcome the access-to-capital obstacle.¹⁴

Thus, as many tribes have recognized, long-term tribal goals must include methods of establishing a "climate that is favorable and conducive to businesses."¹⁵ Simply put, long-term tribal business success requires the development of a reputation in the business community of fair dealing.

It takes time to develop such a reputation and part of such a development requires so called "reputational capital." Convincing outside businesses that the tribe will not abandon its contracts is much like a soft drink company convincing its customers that they will not find a roach in their drinks. Numerous massive advertisement campaigns by companies around the globe demonstrate that the more capital sunk into reputation, the more confidence the public has in the product. This is what Oliver Williamson called "using hostages to support exchange."¹⁶ To do this, tribes need greater financial capital and, consequently, immediate access to outside capital.

One of the most significant current barriers in the way of outside investment is non-Indian businesses' fear of tribal immunity.¹⁷ At least among some tribes in the Northwest, tribal business leaders recognize this fear. Six of the nine major tribes in Montana and Wyoming responded to a survey conducted for this article and all six acknowledged that non-Indian businesses fear tribal immunity.¹⁸ In addition, only one of the tribes selected conclusively that the fear was relieved by a tribal corporation's waiver of the immunity.¹⁹ As explained in the next section, this fear is largely due to the fact that federal law governing tribal immunity does not allow tribal governments to contractually bind themselves.

II. A Tribe's Inability to Contractually Bind Itself

The long-run ability of tribes to convince outside businesses that they will honor their contracts will require that tribes legally restrain themselves from

14. *Id.* at 11.

15. See *infra* note 125 for a list of quotes from surveyed tribes.

16. Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 540 (1983).

17. Courts and legal scholars have also recognized that tribal immunity "can impede . . . the economic development of tribes." Fogleman, *supra* note 9, at 1361 (citing, among other examples, the 9th Circuit's opinion in *United States v. Oregon*, 657 F.2d 1009, 1014 (1981), and the work of a tribal attorney for the Colville Confederated Tribes found at SMALL BUSINESS DIV. OF OKLAHOMA DEPT OF COMMERCE, TAX AND FINANCIAL INCENTIVES FOR DEVELOPING A PRIVATE SECTOR ON AMERICAN INDIAN TRUST LANDS: A TRIBAL PERSPECTIVE 13 (2d ed. 1989)).

18. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

19. *Id.*

reneging on their contracts. Under federal law, this is not an easy thing to do. It is difficult to determine the effectiveness of a waiver of tribal immunity, whether it concerns the business activity of the tribe or that of a tribal business entity. It is likewise difficult to determine whether a tribe will be allowed to use its taxing power to alter the terms of its contracts. Finally, while many businesses have not yet gained confidence in tribal courts, federal law does not allow for a tribe to guarantee accountability in state or federal court.

A. *The Inability of a Tribe to Waive Sovereign Immunity*

1. *Tribal Immunity and General Waiver*

The body of federal Indian law — the law that regulates the legal relationships between Indian tribes and the United States — is voluminous and expanding rapidly.²⁰ The law is "expressed in separate volumes of the United States Code and the Code of Federal Regulations, in some 380 treatise [sic], in hundreds of opinions of the Solicitor of the Department of the Interior, in thousands of cases, and in scores of law review articles."²¹ American Indians are subject to more extensive, and perhaps excessive, regulation than any other ethnic group.²²

Among the few general rules that exist within this labyrinthine body of law, is that federally recognized tribes are generally afforded the traditional powers and immunities of a sovereign nation.²³ As sovereign nations, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."²⁴ "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'"²⁵ This tribal immunity has been equated with that of the federal government.²⁶ On the other hand, tribal immunity is, in some senses, broader than that of the federal government and most other sovereigns. The federal government and most state governments do not recognize or have waived their immunity with regard to their commercial activity,²⁷ and foreign governments are similarly exposed under the Foreign Sovereign Immunities

20. DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 1 (4th ed. 1998).

21. *Id.*

22. *Id.*

23. For a brief review of the "organizational structure" of Indian tribes and the "nature of Indian country," see Jarboe, *supra* note 9, at 419-29.

24. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted); *see, e.g., Turner v. United States*, 248 U.S. 354, 358 (1919).

25. *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).

26. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

27. Vetter, *supra* note 9, at 173. For an example of federal waiver, *see, e.g., 28 U.S.C. §§ 1346(b), 2671-80* (1994 & Supp. V 1999).

Act.²⁸ "In contrast, tribal immunity extends to a tribe's commercial and proprietary activities."²⁹

A potential business partner of a tribe cannot easily predict whether this broad tribal immunity will ultimately allow the tribe to escape the terms of its contracts. This is because the federal law governing the proper waiver of tribal immunity lacks clarity and consistency. Tribes may be able to effectively waive immunity as a matter of law, but whether a tribe will necessarily be held to any given apparent waiver is a more complex question.

A tribe's ability to waive immunity is widely recognized by the courts.³⁰ Those doing business with tribes may be wary about whether a tribe will be held to an apparent waiver, however, because the elements of an effective waiver are both numerous and subtle. Indeed, an ordinary business person might consider the required formula a bit of a mystery. Several legal commentators have attempted to educate businesses that interact with tribes of the exact elements of an effective waiver.³¹ Notably, federal courts have applied different rules to the waiver of tribal immunity than those normally applied to the waivers of other sovereigns, requiring a greater showing before exposing a tribe to civil suit.³²

A tribe's waiver of immunity cannot be implied: it "must be unequivocally expressed."³³ Of the rules governing tribal immunity, this rule may have allowed the greatest number of tribes to escape an apparent waiver. This is

28. 28 U.S.C. §§ 1602-1611 (1994); *see, e.g.*, *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985); *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393 (S.D. Fla. 1986).

29. Vetter, *supra* note 9, at 173. Vetter cites the following examples:

In *re Greene*, 980 F.2d 590 (9th Cir. 1992) (concerning an action in bankruptcy to recover a preferential transfer of goods from a tribal economic enterprise); *White Mountain Apache Indian Tribe v. Shelly*, 107 Ariz. 4, 480 P.2d 654 (1971) (concerning alleged breach of contract by FATCO, a subordinate tribal enterprise); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) (concerning alleged tort by tribal enterprise).

Id. at 173 n.18. It may also be worth mentioning that there is some question as to the propriety of this judicial fining of such a broad immunity. Justice Stevens questioned the Court's holding that Indian tribes should be excepted from the Congressional mandate that foreign governments can be sued in state and federal courts. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514-16 (1991) (Stevens, J., concurring). The plainly evident special legal status of tribes, however, ensures the survival of their unique immunity. Strong indicators of such a status are demonstrated in discussions throughout this paper.

30. *See Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Fontenelle v. Omaha Tribe*, 430 F.2d 143 (8th Cir. 1970).

31. *See Bradley J. Fikes, Businessman Learns You Can't Sue Indians Unless They Say So*, SAN DIEGO BUS. J., Dec. 16, 1991, § 1, at 1; *see also* articles cited *supra* note 9.

32. For example, while most sovereigns can impliedly waive immunity, tribes cannot. *See supra* notes 7-12 and accompanying text.

33. *Santa Clara Pueblo v. Martinez*, 436 U.S. 44, 58 (1978) (internal quotations omitted).

due to the strictness of the federal courts' interpretation of the rule. "The lack of an express waiver is decisive, even if waiver is the only reasonable implication of the words used or action taken."³⁴ In *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*,³⁵ for example, the tribe had (1) agreed to an attorneys' fees clause, (2) signed into a bank loan agreement to pay any claims arising out of the business transaction, (3) certified to a federal agency that it was legally bound by the governing contracts, (4) bought surety bonds, and (5) conceded partial summary judgment to the portion of the suit that concerned retainage funds it withheld.³⁶ The court held that all these tribal actions, save the fifth, merely implied that the tribe had waived its sovereign immunity and therefore did not constitute an effective waiver.³⁷ The court further held that the tribe's concession to partial summary judgment was a waiver strictly limited to the retainage and did not even extend to the interest on those funds.³⁸

The Eighth Circuit similarly found no express waiver when a tribe had signed a promissory note that set forth the remedies to be delivered upon default.³⁹ The court held that "[t]o derive an express waiver of sovereign immunity from a promissory note that merely alludes to 'rights and remedies provided by law,' that provides for attorney fees in the event of a collection action, and that contains a choice of law provision, simply asks too much."⁴⁰ In addition, the Supreme Court has held that a tribe does not waive its immunity to counterclaims of a contractual partner, even when the tribe itself brings suit and submits contractual disputes to a court.⁴¹

Opinions such as these indicate that an effective waiver requires more than an express — rather than implied — waiver: these opinions require a very particular expression. Further, the waiver must not only be an absolutely unequivocal expression, it must also be made by the tribal government itself: "immunity cannot be waived by officials."⁴² Considering the diversity and complexity of tribal organizations, determining who the "government" is may not be straightforward.

To make matters worse, the rules of interpretation of a waiver officially favor finding that a tribe has not effectively waived immunity. All provisions and sources of law relevant to Indian litigation must be "construed to afford

34. Vetter, *supra* note 9, at 184.

35. 673 F.2d 315 (10th Cir. 1982).

36. *Id.* at 319.

37. *Id.* at 319-20.

38. *Id.* at 320.

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

40. *Id.* at 1380-81.

41. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

42. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940).

the [t]ribe the benefit of any ambiguity on the waiver-abrogation issue."⁴³ Courts have also refused to apply reasonable interpretations of a tribal waiver citing the rule that the waiver itself must be interpreted liberally in favor of the tribe and restrictively against the claimant.⁴⁴

The decision in *Ramey*⁴⁵ is a good example of a court refusing to apply such a reasonable interpretation. The court held that despite the tribal waiver as to the retainage, the interest that accrued on it was protected by the tribe's immunity.⁴⁶ Finally, an otherwise effective waiver of immunity can be useless when the court lacks jurisdiction to adjudicate the claim. As explained later, tribes are generally not subject to the jurisdiction of a state or federal court.

A legal realist⁴⁷ would argue that the stiffer requirements for proving waiver were invented by courts that were straining to find a basis for protecting tribes from suit. To the extent that this is true, courts have been shortsighted; for the enforcement of immunity of one tribe works to the detriment of the reputation of all other tribes. It is understandable when a tribe claims that its waiver of immunity is ineffective: tribes are caught in a "prisoner's dilemma."⁴⁸ It is unclear, however, why many courts have continued to extend previously waived immunity despite the effect of such holdings on the reputation of tribal business. Regardless, this tendency to error on the side of immunity may persist, which makes the rule of law even more difficult to identify.⁴⁹

2. The Inability of a Tribe to Waive Immunity through the Corporate Form

The Indian Reorganization Act of 1934,⁵⁰ under which tribes may organize, reflects Congress's concern with the sovereign immunity problem. Section 17 provides tribes with a means of forming federal corporations.⁵¹

43. *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 n.2 (1st Cir. 1993).

44. *Ramey*, 673 F.2d at 319.

45. *Id.* at 320.

46. *Id.*

47. Generally speaking, a legal realist believes that judges determine their ruling first and then look to the law for a justification of that ruling.

48. That is, each individual tribe may be better off trying to escape past waivers of immunity despite the fact that they would all be better off if they all stood by their waivers.

49. For a possible explanation of the court's approach, see *infra* notes 77-79 and accompanying text.

50. 25 U.S.C. §§ 461-479 (1994).

51. Section 17 of the IRA states:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe. . . . [S]uch charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange

"Section 17 was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit."⁵² Formation of these corporations could have allowed tribes to take advantage of the corporate form and limited liability exposure. The provision was intended to allow tribes to assure outside business of its accountability while not waiving immunity to all tribal government assets.

For many tribes, however, this distinction between the corporation and the tribal government has been lost along with its intended benefits.⁵³ When a tribal corporation and government are not completely distinct, the immunity of the latter extends to the business operations of the former. In addition, corporations formed under tribal law tend to be even more indistinct from the tribe.

Today it is more difficult to determine if a tribal corporation is immune from suit than it is to evaluate the effectiveness of a tribal government's waiver. Part of the problem is the diversity of tribal organizational forms and the lack of strict organization maintained by tribes. Perhaps the greater problem is the complexity of the law governing whether a tribal business organization shares its creator's immunity. Courts have used a multitude of subtle factors to determine if the corporation is adequately separated from the tribe and therefore not immune to suit.⁵⁴ In any event, both courts and

therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477 (1994).

52. Vetter, *supra* note 9, at 175.

53. "In practice, the functions and features of I.R.A. § 16 governments and I.R.A. § 17 corporations were confused and commingled by both federal and tribal officials, to the extent that some tribes' governing bodies are called the Business Committee or Business Council." *citing*, *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989); *Namekagon Development v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975); *Leigh v. Blackfeet Tribe*, Fed. Sec. L. Rep. (CCH) ¶ 95,436 (D. Mass. 1990); *Kenai Oil & Gas, Inc. v. Department of Interior*, 522 F. Supp. 521 (D. Utah 1981); *aff'd and remanded*, 671 F.2d 383 (10th Cir. 1982).

54. *See, e.g.*, *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982); *Althiemer & Gray v. Sioux Mfg. Corp.*, 780 F. Supp. 504 (N.D. Ill. 1991), *rev'd on other grounds*, 983 F.2d 803 (7th Cir. 1993); *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989); *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 720 P.2d 499, *cert. denied*, 479 U.S. 987 (1986); *White Mountain Apache Tribe v. Industrial Comm'n of Arizona*, 696 P.2d 223 (Ariz. 1985); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983), *review denied* (1984); *Southwest Forest Industries v. Hupa (Hoopa) Timber Corp.*, 198 Cal. Rptr. 690 (Ct. App. 1984) (opinion withdrawn by court order); *White Mountain Apache Indian Tribe v. Shelly*, 480 P.2d 654 (Ariz. 1971); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968). These cases are cited in Vetter, *supra* note 9, at 177 n.44.

scholars have recognized that it is difficult for outside businesses to determine whether any given tribal entity is part of the government or the corporation. Thus an Arizona court explained that:

businesses that deal with Indian tribes do so at great financial risk. In this case appellant could only have protected itself by investigating the [Tribe's] Constitution and Bylaws, by investigating [the operating entity's] Plan of Operation and by investigating the Indian Corporation's Corporate Charter. This investigation would have revealed the fact that [the operating entity] was not a subsidiary of the Indian Corporation but, rather, was a subordinate economic organization of the [Tribe] acting under its Constitution and Bylaws, and as such, was entitled to tribal immunity. Confronted with this fact, appellant only then could have taken steps to protect its interests.⁵⁵

"Just how protection could have been obtained is a separate, and difficult question."⁵⁶

Some courts have not even attempted to draw a distinction between Section 17 corporations and the tribes that created them and have simply extended immunity to both.⁵⁷ Regardless of whether a tribal corporation is ultimately held accountable, the "question . . . itself will generally need to be litigated and 'determined by the facts of each case.'"⁵⁸

If a tribal corporation is not immune, it is because it has included a so called "sue and be sued" clause in its corporate charter. Several corporations under tribal law and the majority of the Section 17 corporations have done

Below is a small sample of some of the factors that weigh in favor of finding that an organization is merely a subordinate part of the tribe's government.

[1.] The entity is organized under tribal constitution or laws (rather than federal law). [2.] The organization's purpose(s) are similar to a tribal government's (e.g., promoting tribal welfare, alleviating unemployment, providing money for tribal programs). [3.] The organization's managing body is necessarily composed primarily of tribal officials (e.g., organization's board is, by law, controlled by tribal council members). [4.] The tribe's governing body has the unrestricted power to dismiss members of the organization's governing body. [5.] The organization (and/or its governing body) "acts for the tribe" in managing organization's activities. [6.] The tribe is the legal owner of property used by the organization, with title held in tribe's name. [7.] The organization's administrative and/or accounting activities are controlled or exercised by tribal officials. [8.] The organization's activities take place primarily on the reservation.

Vetter, *supra* note 9, at 177.

55. *S. Unique*, 674 P.2d at 1384-85.

56. Vetter, *supra* note 9, at 179.

57. See *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968).

58. Fogelman, *supra* note 9, at 1368 (quoting *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1135 (Alaska 1978) (quoting in turn Opinions of the Solicitor, Department of the Interior, No. M-36545 (Dec. 16, 1958))).

so.⁵⁹ Nevertheless, these provisions provide little assurance that the corporation can ultimately be held accountable. Even if outside business can determine that the business corporation of the tribe is completely distinct from the tribal government, courts may still interpret such general waivers to be basically ineffective. For example, one court found that such a "sue and be sued" clause merely subjected the tribal corporation to suit in tribal court.⁶⁰

3. The Inability of a Tribe to Waive Immunity Through Other Business Agreements⁶¹

"[C]ourts have rejected claims that a tribe had expressly waived its immunity by entering into various business agreements, obtaining liability insurance, [and] agreeing to an arbitration clause in a contract."⁶² Many business partners of tribes learned the hard way that such measures must be supplemented with an effective waiver of tribal immunity. One such company discovered that a tribe's "payment and performance bonds from a surety" were meaningless without its effective waiver of immunity.⁶³ Absent an effective waiver, even a tribe's insurance company may be prevented from paying on a policy covering tribal business operations.⁶⁴ Other agreements for resolution of business disputes have been similarly disregarded when tribal immunity remains intact. For example, an agreement by a tribe to an arbitration clause was disregarded absent a waiver of the tribe's immunity.⁶⁵ A settlement agreement may lack legal force as well.⁶⁶

There simply are not many normal business solutions to the tribal immunity problem short of the tribe performing first, which can be costly, especially when the tribe is attempting to secure capital with a long-term payout. For example, if the tribe is trying to contract with a mining company, the tribe is unlikely to have the ability to cover the extremely high costs that must be sunk before any minerals can be taken out of the ground. If the tribe

59. See *Dixon v. Picopa Constr. Co.*, 755 P.2d 421, 424 (Ariz. Ct. App. 1987) ("Our research has revealed no cases involving a suit against a § 17 corporation whose charter did not include a 'sue and be sued' clause.")

60. See *Hickey v. Crow Creek Hous. Auth.*, 379 F. Supp. 1002 (D. S.D. 1974).

61. For a more detailed argument that tribal immunity is not surrendered by arbitration agreements and business activity off the reservation, see Elaine Smith & Angelina Okuda-Jacobs, *Winner, Best Appellate Brief in the Native American Law Student Association Moot Court Competition*, 23 AM. INDIAN L. REV. 181 (1998).

62. Fogleman, *supra* note 9, at 1365, 1366 (footnotes omitted).

63. *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 (10th Cir. 1982).

64. See *White Mountain Apache Tribe v. Indus. Comm'n*, 696 P.2d 223 (Ariz. Ct. App. 1985); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977); *Graves v. White Mountain Apache Tribe*, 570 P.2d 803 (Ariz. Ct. App. 1977).

65. See *Pan American Co. v. Sycuan of Mission Indians*, 884 F.2d 416 (1989); *Haile v. Saunooke*, 246 F.2d 263 (1957).

66. See *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993).

runs a casino, the cost of assuring accountability may be prohibitive because written waivers cannot be made with each patron.

B. The Inability of a Tribe to Surrender Its Taxing Power

Tied closely to the sovereignty issue is the tribe's power to tax or, as Chief Justice John Marshall put it, "the power to destroy." Under Supreme Court precedent, Indian tribes can change the terms of their contracts with the use of their taxing power. Professor David Haddock, an Indian Law scholar at Northwestern University Law School, has referred to this as the "Sovereign's Paradox."⁶⁷ The paradox is that a tribe's sovereignty both empowers it to contract and makes it an unattractive contractual partner.

In *Merrion v. Jicarilla Apache Tribe*⁶⁸ the U.S. Supreme Court reviewed tribal action that amounted to a breach of contract. The Jicarilla Apache Tribe (the Jicarilla) had executed mineral leases with two companies thereby allowing them to extract and remove gas and oil from tribal land.⁶⁹ Long after the contracts were signed and operations began, the Jicarilla enacted a severance tax upon each unit of gas and oil pumped off the land.⁷⁰ In other words, the Jicarilla required the companies to make payments in order to continue operations beyond that which the tribe had originally contracted.⁷¹ The Court upheld the tax, stating that to hold otherwise would impinge upon the Jicarilla's power to tax and, therefore, undermine its tribal sovereignty.⁷² The Court's decision was obviously beneficial to the Jicarilla; to tribes who hoped to lease their land for mineral extraction, however, the decision was harmful. The appeal of a contractual agreement with a tribe is obviously lost when the tribe has the power to change the terms of the contract unilaterally.

The Court wrote in *Merrion* that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."⁷³ This language indicated that a tribe could bind itself into a contract and preclude itself from changing its terms through its taxing power by

67. The phrase "Sovereign's Paradox" was coined in (and following argument was developed from) articles written by Professor David Haddock. See David D. Haddock & Thomas D. Hall, *The Impact of Making Rights Inalienable: Merrion v. Jicarilla Apache Tribe, Texaco, Inc. v. Short, Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, and Ridgway v. Ridgway*, 2 SUP. CT. ECON. REV. 1 (1983). See also, for this professor's evaluation of problems facing tribal development, David D. Haddock, *Foreseeing Confiscation by the Sovereign: Lessons From the American West*, in *THE POLITICAL ECONOMY OF THE AMERICAN WEST* 129 (Terry L. Anderson & Peter J. Hill eds., 1994).

68. 455 U.S. 130 (1982).

69. *Id.* at 135.

70. The severance tax was imposed on "any oil and natural gas severed, saved and removed from Tribal lands." *Id.* at 133.

71. *Id.* at 135.

72. *Id.*

73. *Id.* at 148.

clearly surrendering that power in the contract. The Court tends to be very hesitant, however, to find that a sovereign has actually surrendered its taxing power. Indeed, there is good reason to believe that a tribe simply cannot contract away such power. While the functioning of the Constitution demonstrates that a sovereign can set out constraints on its own power, the Court has recognized another "fundamental constitutional concept": a legislature cannot limit a future legislature's exercise of powers central to its function as a sovereign.⁷⁴

The Court explained,

we have recognized that "a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature" . . . [and] on this side of the Atlantic the principle has always lived in some tension with constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation.⁷⁵

Although a tribe, as a sovereign, can create constitutional restraints on its power, it is not clear what power it can surrender through a contract. Certain substantive powers of sovereignty simply cannot be contracted away.⁷⁶

So not only has the Court found that certain powers of a sovereign can only be surrendered through unmistakable terms, but it has also pointed out the possibility that it will find that some powers cannot be waived at all.⁷⁷ Perhaps a tribe could surrender its power to tax through a contract, but from the perspective of a potential contracting partner, this close question of law makes contracting with the tribe risky.

C. Inability of a Tribe to Contractually Consent to Outside Jurisdiction

If a tribe has not escaped accountability through the use of its sovereign powers or immunities, its business partner may still be prevented from suing the tribe in state or federal court. Even a complete waiver of tribal immunity does not confer a state or federal court jurisdiction over a suit against a tribe.⁷⁸ A court must have personal jurisdiction — jurisdiction over the parties — and subject matter jurisdiction — jurisdiction over the dispute — before it may enter a valid judgment. Personal jurisdiction is not a significant problem because tribes can readily subject themselves to the jurisdiction of a

74. See *United States v. Winstar*, 518 U.S. 839 (1996).

75. *Id.* at 873 (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905)).

76. See, e.g., *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (holding that a state could not contract away its power of eminent domain); *Stone v. Mississippi*, 101 U.S. 814 (1880) (holding that state could not contract away its police power).

77. See *Winstar*, 518 U.S. at 878 (explaining *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987)).

78. See *Weeks Constr. Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986).

state. On the other hand, state and federal courts frequently do not have subject matter jurisdiction over a dispute with a tribe.

While the tribe's tribal court may have jurisdiction, many outsiders feel that tribal court systems are often an inadequate substitute. "There is a widespread feeling held by many non-Indians that tribal judges are biased against them. There are also complaints of incompetence, and even corruption in some tribal courts."⁷⁹ If a tribal court is the only court with jurisdiction over a tribe, an outside investor may worry about having a fair means of enforcing a contract against the tribe. As mentioned earlier, many tribes have developed or have begun to develop reliable court systems. While tribes are waiting for non-Indians to recognize their advances, they need to be able to assure that they can be held accountable in non-tribal court.

1. Federal Court Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. There are two primary kinds of federal subject matter jurisdiction, federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction exists over "[c]ases arising under [the] Constitution of the United States, Acts of Congress, or treaties, and [cases] involving their interpretation and application"⁸⁰ The federal question must be a part of a well-pleaded complaint: the use of a federal defense does not necessarily confer jurisdiction.⁸¹ Federal courts do not have federal question jurisdiction over law suits merely because they involve Indian tribes.⁸² Similarly, federal jurisdiction is not conferred merely because a tribal corporation is incorporated under federal law.⁸³ While other federal corporations are subject to federal jurisdiction, the statutes granting such jurisdiction do not apply to tribal corporations.⁸⁴ Federal courts therefore do not necessarily have federal question jurisdiction over contractual disputes involving Indian tribes or their corporations.⁸⁵

Federal diversity jurisdiction "extends to cases between citizens of different states"⁸⁶ "[A] tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."⁸⁷ To the extent that Indian individuals and corporations are considered citizens with regard to diversity jurisdiction, they have been held to be citizens of the state in which their

79. GETCHES ET AL., *supra* note 20, at 528.

80. BLACK'S LAW DICTIONARY 612 (6th ed. 1990); see 28 U.S.C. § 1332 (1994 & Supp. V 1999).

81. See *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (holding that a tribe's use of a federal defense did not give rise to federal jurisdiction).

82. See *Tamiami Partners v. Miccosukee Tribe*, 999 F.2d 503, 507-08 (11th Cir. 1993).

83. See *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979 (9th Cir. 1983).

84. See 28 U.S.C. § 1349 (1994).

85. See *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999).

86. BLACK'S LAW DICTIONARY, *supra* note 80, at 477; see also 28 U.S.C. § 1331 (1994).

87. *GNS, Inc. & Slot, Inc. v. Winnebago Tribe*, 866 F. Supp. 1185, 1191 (N.D. Iowa 1994).

reservations sit.⁸⁸ This precludes diversity jurisdiction over suits brought by citizens of the state in which the reservation of the defendant tribe sits. In addition, federal courts created a requirement of exhaustion. This requirement is another means of allowing tribal courts to have greater autonomy and power. Federal courts apply this rule in order to stay federal proceedings and allow a tribal court system to adjudicate the claim.⁸⁹ The result is that those parties doing business with Indians can rarely count on federal courts to hear their suits.

2. State Court Subject Matter Jurisdiction

State courts are said to have general jurisdiction — jurisdiction that "extends to all controversies that may be brought before a court within the legal bounds of rights and remedies" ⁹⁰ This means that they would normally have jurisdiction over contractual and tort claims. There are special considerations, however, in determining whether a state court has jurisdiction over claims against Indian tribes. These considerations have originated out of the federal policy of preserving tribal self-government. "Even in matters involving commercial and domestic relations, [the Supreme Court has held that] subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may undermine the authority of the tribal court and hence infringe on the right of the Indians to govern themselves."⁹¹

Multiple standards have been developed to determine state court jurisdiction over Indian disputes. Some courts have applied a "substantial contacts" test that is used in certain personal jurisdiction determinations.⁹² The standard more likely to be applied is much like the "most significant relationship" test.⁹³ Courts apply this test regardless of whether the tribe has consented to the jurisdiction of the court. Considerations of fairness to a particular tribe are not involved in determining whether a state court imposes jurisdiction over the subject matter of a suit against a tribe. Rather, the question of subject matter jurisdiction is one of Indian law policy: whether Indian tribes in general will lose autonomy and power if their court systems are not allowed to adjudicate disputes on their lands.

The "most significant relationship" test examines the following factors: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the

88. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Weeks Constr. Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

89. For an explanation of the federal exhaustion requirement, see *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998).

90. BLACK'S LAW DICTIONARY, *supra* note 80, at 684.

91. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (internal quotations omitted).

92. See *R.C. Hedreen Co. v. Crow Housing Tribal Auth.*, 521 F. Supp. 599 (D.C. Mont. 1981).

93. See *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 985 (9th Cir. 1983).

place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."⁹⁴ Tribes can adjust some of these locations but it is difficult to predict which factors the court will find determinative. There is simply no easy way for tribes to guarantee that they can be held accountable in a state or federal court. A dispute with a tribe concerning tribal lands must almost always be fought in tribal court.⁹⁵

III. Incorporation Under State Law as a Solution

Given the problems associated with the tribes' inability to assure accountability, a sample survey of tribes in the Northwest revealed interesting information regarding tribal awareness of the problem and their current solutions. The survey was of the tribal business leaders of the nine major tribes in Montana and Wyoming. Six tribes responded and each of them had recognized the immunity problem. Two thirds of the tribes had created corporations but only two of them created corporations under state law. This is somewhat surprising when one considers that, as explained below, state law corporations can be used to overcome the sovereign immunities and powers problem.

The two tribes that had formed corporations under state law were also the only two tribes that indicated that non-Indian competitors did not have an advantage on them.⁹⁶ They were also the only two tribes to find that the tribal government did not have a more difficult time attracting business than individuals on the reservation.⁹⁷ Finally, half of the tribes surveyed acknowledged that corporations formed under state law were the most effective corporations in attracting outside business.⁹⁸ These survey results are not surprising when one considers that state law corporations can readily waive tribal immunity, protect business partners from the tribe's taxing power, and submit themselves to the jurisdiction of state courts.

A. Unlike Other Tribal Entities, State Law Corporations Can Readily Waive Immunity

A corporation formed under state law is a different species than those formed under federal and tribal law. The federal incorporation provision for tribes, section 17 of the Indian Reorganization Act, merely serves as an alternative provision under which a tribe may choose to organize. Section 17 corporations are a form of the tribe with a corporate-like organization. Courts

94. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 209 (1996).

95. See R.J. Williams, 719 F.2d at 985.

96. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

97. *Id.*

98. *Id.*

will not even begin to consider whether a Section 17 corporation is exposed to a suit unless the tribe has declared the corporation to be a separate business entity.⁹⁹ By contrast, when a tribe forms a corporation under state law, it is creating a separate legal entity. Further, unlike Section 17 corporations that remain foreign, state law corporations are domestic state citizens, the identity of their incorporators notwithstanding.¹⁰⁰

Similarly, corporations under state law are different from a corporation formed under tribal ordinance. Tribal law corporations are assumed to be a subdivision of the tribal government.¹⁰¹ Such corporations are created by an act of the tribal government and their continued existence depends upon its decisions. On the other hand, corporations formed under state law are under the "plenary power and authority" of the states in which they are formed.¹⁰² To a large degree their rights and privileges are determined without regard to the identity of their incorporators or owners.

A few courts have extended immunity to tribal not-for-profit corporations formed under state law. For example, one court extended immunity to a not-for-profit corporation that was actually "the tribe [itself] that was recognized by the federal government."¹⁰³ Another court likewise extended immunity to a not-for-profit corporation "established to enhance the health, education and welfare of Tribe members, a function traditionally shouldered by tribal government."¹⁰⁴ These kinds of corporations are much like tribal corporations formed under federal law in that they are merely an organizational form of the tribe itself. Among the factors found to warrant immunity extension, were the corporations' not-for-profit feature and their performance of governmental functions.¹⁰⁵ Some courts have also extended a tribe's immunity to corporations formed by tribal law but registered in a state as foreign corporations. As shown above, corporations formed under tribal law are assumed to enjoy the tribal immunity.¹⁰⁶ Registration as a foreign corporation may not be seen as an acknowledgment to the contrary.

99. A tribal corporation must "hold itself out as a separate and distinct entity." *White Mountain Apache Indian Tribe v. Shelly*, 480 P.2d 654, 656 (1971).

100. 9 FLETCHER CYCLOPEDIA CORPORATIONS ch. § 51, at 4309 (perm. ed. rev. vol. 1999).

101. "[A]n action against a tribal enterprise is, in essence, an action against the tribe itself . . ." *Baker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F. Supp. 859, 862 (E.D. Wis. 1984) (Warren, J.).

102. *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 603 (N.D. 1983).

103. *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706, 709 (Mich. App. 1997).

104. *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 993 (N.Y. App. 1995).

105. See *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995) (citing *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108-11 (Ariz. 1989)).

106. See *infra* note 59; see also, *Gavle*, 534 N.W.2d at 284 (finding that, in 1995, there had been only been one state court to find a tribal law corporation did not enjoy the tribe's immunity)

For-profit incorporation under state law, on the other hand, is enough to effectively waive the corporation's immunity. This is because state corporation laws provide that corporations may be sued in the state in which they are formed. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."¹⁰⁷ The denial of immunity to corporations formed under state law is also consistent with the basic principles creating the corporate form. State incorporation laws were meant to create accountable entities.¹⁰⁸

These laws are inherently a state function upon which federal Indian policy was not meant to impinge. Federal Indian law does not confer "super-sovereign authority to interfere with another jurisdiction's sovereign rights."¹⁰⁹ A separate business entity created by a tribe in a separate jurisdiction cannot escape the laws that give rise to its existence.¹¹⁰ In any event, even if such corporations did enjoy the tribe's immunity, they could readily waive it in their corporate charters.

B. Protection from the Tribe's Taxing Power and Ability to Escape State Jurisdiction

Protecting a business partner from the tribe's taxing power is fairly simple when a tribe has formed a state law corporation. Such a corporation is a citizen of the state in which it is incorporated and, as such, lacks any of its tribe's sovereign powers. The corporation cannot, therefore, change the terms of the contract like the tribe can. Further, such a corporation could protect its business partners from the taxing power of the tribal government. For example, in a contract like the one in *Merrion*, a corporation could include a contractual provision that would reduce the price of reservation minerals in proportion to any additional severance taxes imposed by the tribe. That way a tribe's attempt to impose greater costs on a contractual partner would be countered by the corporation's discounts. The corporation would, in essence, bare the risk created by the Sovereign's Paradox.

A tribal corporation formed under state law could also assure a business partner that it could be sued in state court. Disputes with tribal corporations formed under state law are under the jurisdiction of that state's courts, the special Indian law jurisdiction rules notwithstanding. A tribal corporation formed under state law is a citizen of that state and can be sued in the state's

107. *Mescalero Apache Tribe*, 411 U.S. at 148-49 (citations omitted).

108. See WILLIAM L. CARY & MELVIN ARON EISENBERG, *CORPORATIONS* ch. 2, at 74-77 (6th ed. 1988).

109. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

110. "A corporate charter is not only the articles of incorporation, but includes all statutes which confer, define, or limit a corporation's powers." *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 603 (N.D. 1983) (citing *Nelson v. Dakota Bankers Trust Co.*, 132 N.W.2d 903 (N.D. 1964)).

courts.¹¹¹ These special subject matter jurisdiction considerations simply do not apply to claims against state corporations.¹¹²

IV. Why Have More Tribes Not Formed State Law Corporations?

At least among the tribes in Montana and Wyoming, incorporating under state law is not common.¹¹³ This seems odd considering the above-listed ways in which such incorporation can assist a tribe. It is not that tribes have not recognized the problem: as mentioned earlier, all six of the tribes surveyed in Montana and Wyoming recognized that non-Indian businesses fear tribal immunity. At least four of the tribes recognized that this fear persists despite its corporations' waiver of immunity.¹¹⁴ Further, one tribal leader stated explicitly that the most effective way to advertise accountability is "to be allowed to utilize the state."¹¹⁵ "This is always the compromise [that at least one tribe] is asked to consider."¹¹⁶ Two of the other tribes also stated that forming a corporation under state law, as opposed to federal or tribal law, is the most effective way to attract non-Indian business.¹¹⁷ Yet, only a couple of the tribes surveyed have formed such corporations.¹¹⁸

At first glance one might think that the lack of state corporations may be due to the simple failure of tribal lawyers.¹¹⁹ If they took an Indian Law course in law school, however, they are likely to have learned about the sovereign immunity and taxing power problems. Out of the fifty percent of Indian Law professors that responded to a survey, all said that they discuss tribal immunity in their classes.¹²⁰ Almost half of them devote at least a few hours to the topic, about two thirds discuss the immunity of tribal businesses, and most discuss the problems associated with a tribe's absolute power to tax.¹²¹

Perhaps the two main reasons for a tribe to chose not to incorporate under state law have to do with taxes and poor tribal relations with the surrounding

111. See, e.g., *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983); *Inecon Agricorporation v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753 (D. N.D. 1989).

112. See, e.g., *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437 (D. Idaho 1987). Even if they did apply, the fact that the corporation was formed in the state is frequently a determinative factor.

113. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

114. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

115. See *infra* note 125 for the list of quotes from the Montana and Wyoming tribes.

116. See *infra* note 125 for the list of quotes from the Montana and Wyoming tribes.

117. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

118. See *infra* note 125 for the survey results of the Montana and Wyoming tribes.

119. A good indication of this came from a tribal lawyer in Michigan who claimed that the immunity of Section 17 corporations is readily waived. He demanded to see the cases that held to the contrary; I sent him the citations, and I have not heard from him since.

120. See *infra* note 125 for the survey of the Indian Law professors.

121. See *infra* note 125 for the survey of the Indian Law professors.

state. Unlike tribal corporations formed under tribal and federal law, state law corporations are subject to state tax. While this might seem to be a sound reason not to incorporate under state law, if it attracts business that the tribe would ordinarily not have, tribes are likely to profit from at least limited use of such corporations. The business that a tribe can do with nontaxable corporations could be continued while additional business could be conducted through a separate corporation formed under state law.

There is also good reason to believe that some tribes would rather not subject themselves to the powers of the states in which their reservations sit. Some tribes may have a history of disputes with their states and have reason to be wary of its courts. Fortunately, anyone can incorporate in most states regardless of whether she is a citizen of the state. Indeed, most domestic corporations do incorporate under the laws of one particular foreign state, Delaware.

A tribe may be better off incorporating under the laws of Delaware regardless of its relationship with the surrounding state. As a general matter, Delaware probably offers the best law under which a business can incorporate.¹²² Among the most important and relevant of these incentives is the Delaware court system's reputation as fair and knowledgeable in corporate litigation, precisely the reputation that tribes need.

So with the tax and state relations problems aside, there remains one significant reason not to form state law corporations: tribes may not want to go down another path of relying upon another sovereign's reputation. Developing a better reputation is probably one of the most important tasks to which a tribe can commit. As one of the tribal leaders mentioned in the survey, the best way to convince the outside world that the tribe will be held accountable is to publicize the fact that the tribe regulates itself. Investors will not fear tribal immunity if they believe that the tribal courts themselves¹²³

122. There are at least six key features of Delaware Corporate Law: their treatment of dividends, charter amendments, cumulative voting, staggered boards, preemptive rights, and indemnity. (1) Delaware law offers the most freedom in the payment of dividends. (2) Delaware permits some charter and by-law amendments with a mere simple majority of votes of the shareholders. (3) Delaware does not require cumulative voting, a tool by which minority shareholders can place directors. (4) Delaware permits corporations to have staggered boards. (5) Delaware doesn't require preemptive rights. (6) Delaware goes the furthest in allowing substantial indemnification so to allow directors to take risks without having to constantly worry as much about personal liability. See General Corporation Law for the State of Delaware, DEL. CODE ANN. tit. 8, §§ 101-398 (2001). See also *infra* note 125 for a complete list of the advantages to incorporating in Delaware.

123. The solution is not limited to a traditional court system. Other enforcement systems may be more effective, such as an arbitration or, so called, rent-a-judge systems. See Amy L. Litkovitz, *The Advantages of Using a "Rent-A-Judge" System in Ohio*, 10 OHIO ST. J. ON DISP. RESOL. 491 (1995); Paul H. Rubin, *Growing a Legal System In the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1 (1994).

will fairly adjudicate potential claims, the federal law governing immunity notwithstanding.¹²⁴

On the other hand, part of developing a better reputation is advertising that the tribe has something at stake. State law corporations can be used to achieve greater success and to accumulate reputational capital. In any event, while a tribe slowly builds a better reputation it can form a Delaware corporation in a matter of hours.

V. Conclusion

The sovereign status of American Indian tribes may be what has allowed them to hold on to their resources in the face of hundreds of years of struggle after the Europeans arrived. Their sovereign immunity has certainly protected the assets of some tribes from litigation. On the other hand, certain sovereign powers and immunities prevent tribes from recovering from horrific economic conditions. Outside businesses are unwilling to deal with an entity that is able to escape or change the terms of its contracts through its sovereign immunity, taxing power, and ability to escape state and federal court jurisdiction.

While tribes work on convincing investors that it will enforce its own contracts fairly, they can find more immediate success by at least temporarily surrendering their power to escape state court enforcement. It is important for tribes to retain their sovereignty but a temporary and limited waiver is becoming more and more crucial for tribal success. Federal law has made it difficult for tribes to effectively waive immunity, surrender the power to tax, and submit to the jurisdiction of a state court. A tribe can, however, do all these things through a tribal corporation formed under state law.

With the current state of affairs on reservations worsening and the future of federal funding uncertain, tribes should consider this solution despite its tax implications. The tribe does not have to abandon business activity through its tax exempt corporations; rather, a tribe can use a state law corporation to do the business that it would not normally otherwise attract. In addition, poor relations with the surrounding state should not prevent a tribe from utilizing the incorporation laws of a state. A tribe can easily incorporate in Delaware, for example, which has a very reliable court system. A limited and temporary waiver of sovereign powers and immunities through the formation of a Delaware corporation may be just the thing a tribe needs to "kick-start" its reservation's economic recovery.¹²⁵

124. A good demonstration of an extremely reliable court system that is not within the state or federal system is the Mormon courts of Utah. See David W. Jones, *Mormon Courts* (1995) (unpublished manuscript, on file with author) (citing Jay E. Powell, *Fairness in the Salt Lake County Probate Court*, 38 UTAH HIST. Q. 256 (1970)).

125. The surveys and their results are below, followed by further information about the advantages of incorporating in Delaware.

Survey of the Montana and Wyoming Tribes

I asked tribal business leaders of the nine major reservation Indian tribes in Montana and Wyoming to answer the below questions. Six of the tribes responded.

1) Do you find that it is more difficult for your tribal government to attract business from outside of the reservation than it is for non-Indian businesses to do so?

2) Do you find that it is more difficult for your tribal government to attract non-Indian business than it is for individuals on your reservation to do so?

3) Have you ever received any indication that non-Indian businesses think that the tribe's sovereign immunity is going to prevent them from receiving a fair deal?

4) Does your tribal government own a corporation?

5) How many of those corporations are created under tribal law?

6) How many of those corporations are created under federal law, such as Section 17 corporations?

7) How many of those corporations are incorporated under the laws of Montana?

8) How many of those corporations are incorporated under the laws of another state?

9) How many of the above corporations are also partially owned by non-Indian individuals or entities?

10) Do you find that non-Indian businesses still fear tribal immunity despite the waiver by your tribe's corporations?

11) Which kinds of corporations have you discovered to be the most effective at attracting non-Indian business, those under tribal law, federal law, or state law?

12) What have you found to be the most effective way of convincing non-Indian business that the tribe can be held accountable to the terms of its contracts?

	Q 1	Q 2	Q 3	Q 4	Q 5	Q 6	Q 7	Q 8	Q 9	Q 10	Q 11
TRIBE 1	N	N	Y	Y	0	2	2	0	0	Y	State Law
TRIBE 2	Y	Y	Y	N	0	0	0	0	0	Y&N	State Law
TRIBE 3	Y	Y	Y	Y	8	0	0	0	0	Y	Federal Law
TRIBE 4	Y	Y	Y	N	0	0	0	0	0	blank	State Law
TRIBE 5	Y	blank	Y	Y	4	2	0	0	0	N	Tribal & Federal
TRIBE 6	N	N	Y	Y	7	0	5	0	0	Y	Tribal Law

Answers to Question #12 Listed In a Different Order

"When signing a legal binding contract waiving sovereign immunity under that contract. Also, the waiver of sovereign immunity needs to be backed by CFR regs. of the U.S. Government."

"Public hearings and thru the news media."

"By establishing Tribal Commercial Codes. Upon establishing the codes and necessary infrastructure to support all . . . said codes, let the world know they exist. We've tried that and not only do outsiders not know of tribal enterprises, our own people and governing entities lack that knowledge also. Tribal politics cannot be a major factor for supporting and enforcing the codes, otherwise the opportunities will remain the same, little at best. Communication must go both ways."

"1. Creating a policy business climate that is favorable and conducive to businesses. (Corporate and Private.) 2. Need for an arbitration system for business disputes."

"to be allowed to utilize the state, to assert jurisdiction in business transactions to be conducted on and with the Indians of any tribe within the state. This is always the compromise the tribe is asked to consider. They feel if we throw up sovereignty, we are putting up a red flag, we want to simply ignore our responsibility as business minded individuals, collectively drawn together as a tribe."

[One omitted because answer would reveal identity.]

Survey of Indian Law Professors

I asked the below questions of the sixty law professors currently teaching Indian Law. Interestingly, the professors were generally less willing to cooperate than the Montana and Wyoming tribes. After weeks of repeated prompting, I received less than half of the professors' surveys — twenty-eight out of sixty. Also worth noting is the hostility I experienced from some of the professors. Multiple professors took the time to call or e-mail me with concerns about what I might be up to and what kind of group I worked for. One refused to respond to my survey stating, "Frankly, I was unhappy with a survey which asked me whether I taught particular authors' writing." Of the two groups I surveyed, the one who was less willing to share information was the one who, to a large extent, free-rides off information provided by others.

- 1) What is your approximate average enrollment?
- 2) Which text book do you use?
- 3) How many lecture hours does your course have?
- 4) Do you lecture on the subject of tribal sovereign immunity?
- 5) Approximately how many hours of your lectures are devoted to the topic?
- 6) Do you normally discuss cases that address the immunity of tribal businesses? (e.g., *Stock West, Inc. v. Confederated Tribes of Colville Reservation*; *Namekagon Development v. Bois Forte Reservation Housing Auth.*)
- 7) Do you normally discuss cases that address tribal waivers of immunity? (e.g., *Santa Clara Pueblo v. Martinez*; *Wichita & Affiliated Tribes of Oklahoma v. Hodel*; *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*)
- 8) Do you normally discuss judicial reinforcement of the tribal power to tax? (e.g., *Merrion v. Jicarilla Apache Tribe*; *Kerr-McGee Corp. v. Navajo Tribe*)
- 9) Do you normally discuss criticisms of these holdings? (e.g., David D. Haddock, Thomas D. Hall, *The Impact of Making Rights Inalienable: Merrion v. Jicarilla Apache Tribe*, *Texaco, Inc. v. Short*, *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, and *Ridgway v. Ridgway*)
- 10) Do you normally discuss a tribe's ability to contract away this power?

	Q 1	Q 2	Q 3	Q 4	Q 5	Q 6	Q 7	Q 8	Q 9	Q 10
PROFESSOR 1	24	Getches	2	Y	2	N	Y	N	N	Y
PROFESSOR 2	40	Clinton	10	Y	6 to 7	Y	Y	Y	Y	N
PROFESSOR 3	8 to 20	Both G&C	3	Y	pervasive	Y	Y	Y	Y	Y
PROFESSOR 4	40 to 60	Getches	3	Y	one half	Y	Y	Y	Y	Y
PROFESSOR 5	15	Getches	3	Y	15 hours	N	Y	Y	Y	Y
PROFESSOR 6	14	Clinton	2	Y	1 + pervasive	N	Y	Y	N	Y
PROFESSOR 7	15	my own	2	Y	1 to 2	Y	Y	Y	Y	Y
PROFESSOR 8	40	Getches	3	Y	2	Y	Y	Y	N	Y

PROFESSOR 9	15	Getches	2	Y	4 + pervasive	Y	Y	Y	Y	Y
PROFESSOR 10	25	Getches	3	Y	1	Y	Y	Y	Y	Y
PROFESSOR 11	10	Getches	3	Y	2	Y	Y	Y	N	Y
PROFESSOR 12	30	Getches	3	Y	2	Y	Y	Y	Y	Y
PROFESSOR 13	18	Clinton	3	Y	1	N	Y	Y	N	Y
PROFESSOR 14	10	my own	3	Y	pervasive	Y	Y	Y	N	Y
PROFESSOR 15	20 to 30	Getches	3	Y	2 to 3	Y	Y	Y	Y	Y
PROFESSOR 16	15	Getches	2	Y	1 to 2	Y	Y	Y	Y	N
PROFESSOR 17	40	Getches	3	Y	2	N	Y	Y	Y	Y
PROFESSOR 18	15 to 20	Getches	3	Y	1 1/4	Y	Y	Y	Y	Y
PROFESSOR 19	30	Clinton	3	Y	one half	N	Y	Y	Y	N
PROFESSOR 20	25	Clinton	3	Y	2 courses	Y	Y	Y	Y	Y
PROFESSOR 21	25	Getches	3	Y	6	N	N	Y	Y	N
PROFESSOR 22	12	Getches	2	Y	4	N	Y	Y	N	Y
PROFESSOR 23	85	my own	3	Y	blank	Y	Y	Y	blank	Y
PROFESSOR 24	35	Getches	3	Y	6	Y	Y	N	N	N
PROFESSOR 25	12	Getches	2	Y	4 to 5	Y	Y	Y	Y	Y
PROFESSOR 26	blank	Getches	3	Y	2	Y	Y	Y	Y	Y
PROFESSOR 27	15	Getches	3	Y	2	N	Y	Y	Y	Y
PROFESSOR 28	3	Getches	3	Y	6	Y	Y	Y	Y	Y

Delaware Incorporation Advantages

Delaware developed a plethora of other incentives for businesses to incorporate under its law. The below list was taken from LawService.com at www.lawservice.com/delaware.html (Emphasis omitted).

- No minimum amount of capital is required.
- Delaware has:
 - No Sales Tax
 - No Personal Property Tax
 - No Intangible Property Tax
- Delaware state income tax is not levied on corporations which are not doing business in Delaware.
- Annual franchise tax is low (minimum is \$30 tax plus \$20 filing fee, total \$50).
- One person can be the only Officer, Director, and Shareholder.
- Officers and Directors can be indemnified, limiting their personal liability.
- Corporate Books and records may be kept anywhere in the world.
- Non-resident shareholders pay no Delaware tax on shares.
- Shareholders are protected by takeover statute, which limits abusive hostile takeover tactics.
- Directors need not be shareholders.
- Service from State of Delaware is fast and efficient.
- Incorporation costs are low.
- Most Delaware corporations can be formed within minutes and documents are available with 24 hours.
- Delaware corporation law has well-established legal precedent.

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- Delaware courts are respected nationwide for their expertise in corporate matters.
 - Voting Provisions requiring greater-than-majority approval may be enacted.
 - Liberal choice of corporate name provisions and ease of reserving corporate name.
 - Corporation may pay dividends from profits and surplus.
 - Shareholders, directors, and/or committee members may act by unanimous written consent in place of formal meetings.
 - Directors may be given the power to make and alter by-laws.
 - Corporation may hold stocks, bonds or securities of other corporations, real and personal property, within or outside the state, with no limitation as to amount.
 - Different kinds of business may be carried on in combination.
 - Corporation may fix quorum of board of directors — not less than one-third of the whole board; two if only two shareholders; one if only one shareholder.
 - Voting trusts and voting agreements may be created.
 - Generally, stockholder liability is limited to stock held in the corporation.
 - Delaware law includes Close Corporation provisions.
 - Classes of stock may be issued in series.