
David B. Jordan

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I. Introduction

In May 1998, the United States Supreme Court decided Kiowa Tribe v. Manufacturing Technologies, Inc.1 For Oklahoma, the Supreme Court decision represented a significant shift in Oklahoma's jurisprudence regarding tribal sovereign immunity. In essence, the Supreme Court held that Indian tribes are immune from suit in state and federal court on contracts performed on or off reservations.2 The immunity doctrine extends to both commercial and governmental activities of the tribal government.3 The United States Supreme Court's decision in Manufacturing Technologies stood in opposition to the Oklahoma Supreme Court's holding in Hoover v. Kiowa Tribe (Hoover II),4 decided just weeks before Manufacturing Technologies. The Oklahoma decision in Hoover II5 reaffirmed Oklahoma's position on tribal sovereign immunity.

The Oklahoma Supreme Court held that tribes are not immune from suit when (1) acting commercially with non-tribal members outside Indian country, or (2) engaging in activities with non-tribal members that do not interfere directly with the tribe's retained powers over domestic relations activities, tribal criminal matters, or tribal membership.6 This disparity between the Oklahoma Supreme Court and the United States Supreme Court proves to be dramatic for the types of legal relationships created between tribes and non-tribal entities.

2. See id. at 760.
3. See id.
5. Hoover v. Kiowa Tribe, 909 P.2d 59 (Okla. 1995) (Hoover I), reversed the Oklahoma County District Court's grant of summary judgment for the Kiowa Tribe and remanded the case back to Oklahoma County District Court for further proceedings. The district court granted Hoover's motion for summary judgment, and the Kiowa Tribe appealed. That appeal was decided by the Oklahoma Supreme Court in Hoover v. Kiowa Tribe, 957 P.2d 81 (Okla. 1998) (Hoover II). Coincidentally, because Hoover II was decided immediately before the Manufacturing Technologies decision, the Hoover II decision was not directly reversed, questioned, or discussed and in fact was vacated and remanded back to the Supreme Court of Oklahoma by the United States Supreme Court in late Oct. 1998, in light of Manufacturing Technologies. See Kiowa Tribe v. Hoover, 119 S.Ct. 32, 32 (1998). The Oklahoma Supreme Court subsequently remanded the case to the trial court with the direction to order judgment in favor of the tribe. See Hoover v. Kiowa Tribe, No. 87,139, 1999 Okla. LEXIS 76, at *1 (Okla. June 29, 1999). The Hoover case arose, as did the Manufacturing Technologies case, out of a single bundle of transactions entered into by the Kiowa Tribe of Oklahoma. See supra note 60.
Part II of this Note touches on the background of tribal sovereign immunity. Part III reviews the Manufacturing Technologies decision. Part IV analyzes seven issues: (1) the strength of precedent relied upon in Manufacturing Technologies; (2) the concept of inherent sovereignty in relation to tribal sovereign immunity; (3) the expansion of sovereign immunity to off-reservation commercial activity; (4) the doctrine of preemption as a sword to attack a sovereign immunity defense; (5) the differences between state/federal immunity and tribal immunity; (6) the justifications for the new broad doctrine of tribal immunity; and (7) the injustices created by the judicial expansion of tribal immunity. Part V recommends to Oklahoma practitioners and businesses an approach to forming legal relationships with Indian tribes in a climate where, after Manufacturing Technologies' cynical treatment of tribal immunity, the doctrine teeters on the brink of nonexistence.7

II. Brief History of Tribal Sovereign Immunity

Tribal sovereign immunity has been described as a remnant of the inherent tribal sovereignty that Indian tribes possessed prior to the European discovery of North America.8 The United States Supreme Court has repeatedly recognized the inherent sovereignty of Indian tribes.9 The doctrine of sovereign immunity, meaning the "king could do no wrong," has its roots in feudal Europe.10 The doctrine allows a government to protect itself from suit for harm caused by governmental activities.11 Generally, the state and federal governments have since waived sovereign immunity for numerous causes of action.12

The first judicial recognition of sovereign immunity in Indian law occurred in 1919 in Turner v. United States.13 Although courts have questioned the circumstances under which this doctrine was recognized,14 the United States Supreme Court

7. See infra notes 95-97 and accompanying text.
11. See infra notes 114-19 and accompanying text.
12. See, e.g., ALASKA STAT. § 09.50.250 (1999) (waiving state sovereign immunity for limited contract and tort actions against state); COLO. REV. STAT. § 4-160 (1998) (waiving state sovereign immunity upon authorization of state Claims Commissioner for suits where, were the state a private person, they would be liable); Oklahoma Governmental Tort Claims Act, 51 OKLA. STAT. § 153 (Supp. 1998) (waiving state sovereign immunity for losses resulting from torts of the state, or torts of state employees acting within the scope of employment); see also WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUT SHELL 88 (1998). William Canby is a judge for the Ninth Circuit Court of Appeals.
13. 248 U.S. 354 (1919). In Turner, the plaintiff filed suit against the Creek Nation for "actions of the mob which resulted in the destruction" of a fence. Id. at 357. The Court noted that neither the tribe, nor the officials (except for the treasurer) had anything to do with the destruction of the personal property. Id. at 356.
14. Turner represented, at best, an implication that immunity existed. "Turner is but a slender reed
implied that a defense of sovereign immunity could be used in a tort action against the Creek Nation. The doctrine was revisited in 1940 in *United States v. United States Fidelity & Guaranty Co.* The USF&G Court, relying on *Turner*, held that, as a matter of federal law, an Indian tribe is subject to suit only where authorized by Congress. These general holdings in *Turner* and *USF&G* have since been extended by circuit courts to allow tribes to expressly waive immunity to suit. The doctrine of sovereign immunity for tribes has been readdressed many times by the United States Supreme Court in the last twenty years.

In 1977, in *Puyallup Tribe, Inc. v. Department of Game*, the Court held that the doctrine of sovereign immunity barred an action by Washington in state court against the Puyallup Tribe to regulate fishing activities. Similarly, the *Santa Clara Pueblo v. Martinez* Court in 1978 held that a suit asserting a violation of the Indian Civil Rights Act against Santa Clara Pueblo was barred by the tribe's sovereign immunity. In 1986, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, the United States Supreme Court held that the tribe's sovereign immunity was not subject to general diminution by the State, when North Dakota required that the tribe consent to suit in any civil action before being allowed access to state court. The 1991 *Blatchford v. Native Village of Noatak* for supporting the principle of tribal sovereign immunity." Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751, 757 (1998).

15. See *Turner*, 248 U.S. at 358.
16. 309 U.S. 506 (1940). In *USF&G*, the United States sought to set aside a state court ruling issuing a credit against the Indian tribes in favor of surety of obligations between the United States, on behalf of the Indian tribes, and a company leasing certain lands from the tribes. *Id.* at 510-11. The court noted that a sovereign should not be subject to cross-claims away from its own forum just because a debtor is unavailable within its own jurisdiction.
17. See *id.* at 512.
18. Although *Turner* spoke only of congressional consent to validate a waiver of tribal sovereign immunity, several circuits have since held that a tribe can expressly waive immunity. See *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d 560 (8th Cir. 1995); *Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980); *Federico v. Capital Gaming Int'l, Inc.*, 888 F. Supp. 354 (D.R.I. 1995). To a larger extent, courts have debated the standard for an express waiver of immunity. See, e.g., *Florida v. Seminole Tribe*, 181 F.3d 1237, 1243-44 (11th Cir. 1999) (holding that a tribe does not waive sovereign immunity by engaging in gaming activity regulated under the Indian Gaming Regulatory Act); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1380 (8th Cir. 1985) (holding that a provision in a promissory note providing for recovery of attorneys fees and choice of law does not constitute waiver of immunity); *Buchanan v. Sokaagone Chippewa Tribe*, 40 F. Supp.2d 1043, 1047 (E.D. Wis. 1999) (holding that a tribal ordinance containing a clause granting the tribe the authority to waive sovereign immunity was not an express waiver of immunity by the tribe); *GNS, Inc. v. Winnebago Tribe*, 866 F. Supp. 1185, 1189 (N.D. Iowa 1994) (finding that an arbitration clause does not necessarily waive tribal sovereign immunity).
19. See infra notes 20-33 and accompanying text.
21. See *id.* at 172-73.
23. See *id.* at 59.
24. 476 U.S. 877.
25. See *id.* at 890. The Court further held, however, that by accessing state courts, the Tribe's
Court reaffirmed the judicial doctrine of tribal sovereign immunity in a discussion of state sovereignty. The Court distinguished states from tribes in a discussion of mutuality of concession. The Blatchford Court noted that although states can sue each other, tribes are different, and no mutuality exists as to actions arising between a tribe and a state. In 1991, the Court held in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe that an action by Oklahoma to collect taxes on cigarettes sold on land held in trust by the United States was barred by the doctrine of sovereign immunity. Most recently in 1997, the Court in Idaho v. Coeur d'Alene Tribe recognized tribal immunity from suit by a state as a derivative of a state's immunity from suit by a tribe. Each decision provides support for judicial recognition of a tribe's sovereign immunity from suit absent express abrogation by Congress.

It is important to note that sovereign immunity for tribes generally has never been legislated by Congress. The lack of legislative sources of tribal sovereign immunity is troubling. A judicially created doctrine is constantly under scrutiny from later courts, and lacks the affirmative strength that a law passed by the legislature can furnish. However, implied ratification by Congress has provided added strength to the doctrine of tribal sovereign immunity. In several instances, Congress has enacted legislation that limited tribal immunity from suit, or shielded Indian tribes from the effect of federal statutes by disclaiming any statutory effect on tribal sovereign immunity.

Prior to Manufacturing Technologies, the Supreme Court had not addressed, as it relates to tribal sovereign immunity, the significance of where tribal activities occur, or the significance of whether those tribal activities are more commercial or governmental in nature. However, several lower courts discussed these concepts. The concept of immunity extending to off-reservation activities was noted by the
Ninth Circuit in *In re Greene.* Greene involved repossession of furniture by a tribally owned furniture store. In a bankruptcy action to recover the furniture from the tribe, the tribe asserted the defense of tribal immunity. The Greene Court held that even though the repossession took place off of reservation land, Congress' apparent inaction, in light of the Foreign Sovereign Immunities Act, showed that Congress intended to allow tribes to retain sovereign immunity, including its extraterritorial component. Similarly, the Tenth Circuit held in *Sac and Fox Nation v. Hanson* that a tribe does not waive its sovereign immunity either by engaging in commercial activities or acting outside of the reservation.

However, all jurists are not willing to concede that tribal sovereign immunity extends off the reservation. In his concurring opinion in *Potawatomi,* for example, Justice Stevens questioned whether tribal sovereign immunity extends to commercial activity outside of the tribe's territory.

Moreover, some states have held that sovereign immunity is an invalid defense for business conduct that takes place off reservation. The New Mexico Supreme Court in *Pueblo of Acoma v. Padilla* relied primarily on *Nevada v. Hall,* where the United States Supreme Court held there is no federal law prohibiting a state's exercise of jurisdiction over sovereign sister states. The Padilla Court reasoned that if there is no law prohibiting such exercise, then jurisdiction over a foreign sovereign is solely a matter of comity. Since New Mexico opened itself up to suit for claims similar to those in Padilla, then so too could New Mexico assert jurisdiction over those claims when a foreign sovereign acted within New Mexico. This jurisprudence proved to be a critical element in Oklahoma's justification for limiting tribal sovereign immunity for off-reservation activities.

Prior to *Hoover II,* Oklahoma maintained that suits against tribes were proper for activities taking place off the reservation and that sovereign immunity was not a defense. In *Hoover I,* the Oklahoma Supreme Court, relying solely on Padilla and Hall, determined that tribal immunity was limited in nature and that only those activities withdrawn by Congress are outside of state jurisdiction. Several cases prior to and since *Hoover I* have addressed and limited tribal sovereign immunity.

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36. 980 F.2d 590, 594 (9th Cir. 1992).
39. 47 F.3d 1061 (10th Cir. 1995).
40. *See id.* at 1065. In Hanson, the tribe sought to be enjoined as a third party in state court by the board that the tribe created to oversee large manufacturing plants.
44. *See id.* at 424.
45. *See Padilla,* 754 P.2d at 850.
46. *See id.*
48. *See id.*
in Oklahoma. In Hoover II, the Oklahoma Supreme Court resurrected an argument used by the Oklahoma courts in State ex rel. May v. Seneca-Cayuga Tribe. The Hoover II court distinguished Oklahoma from other states because of its unique territorial status with Indian tribes. Hoover II relied primarily on Montana v. United States, a case which primarily dealt with tribal jurisdiction over non-Indians within a tribal reservation. The Hoover II court held that tribal immunity dissipates when the tribe enters into consensual economic activity with non-tribal members, or when it engages in activity that does not directly affect specific retained tribal powers. This judicial history of tribal sovereign immunity provided the backdrop against which Manufacturing Technologies was decided.

III. Discussion of Kiowa Tribe v. Manufacturing Technologies, Inc.

The Kiowa Tribe of Oklahoma is a federally recognized Indian tribe, consisting of approximately 11,000 members. The tribal government is located in Carnegie, Oklahoma. Although, as a result of the Jerome Agreement of 1892, the Kiowa Tribe does not have a reservation, the Kiowa lands consist of some 1200 acres held in fee and additional land held in trust by the United States. The day-to-day operations are performed by an eight member Business Committee that holds executive powers under the Kiowa Constitution.


51. See id. The 1833 Indian Removal Act moved many tribes east of the Mississippi to what was regarded as Indian country in the present Oklahoma. Those tribes were permitted to exercise exclusive rights of tribal self-government until Oklahoma Territory was created, subjecting the tribes to the federal and territorial government. The Oklahoma Organic Act of 1890 divided Indian and Oklahoma Territories and permitted all Indians to participate in the territorial government as citizens of the United States, while still retaining their right to tribal government. In 1906, Congress admitted Oklahoma Territory and Indian Territory as a single state. Oklahoma tribes were excluded from the Indian Reorganization Act of 1934, an Act signifying the end of the assimilationist era in Indian policy. Oklahoma tribes were said to have advanced to a point of assimilation into the state that to allow them to organize politically would reverse the assimilatory process. See Felix Cohen, Handbook of Federal Indian Law 427-34 (Univ. of N.M. Press 1971) (1942).


53. See id. at 544.

54. See supra text accompanying note 5.


56. See id. at 4.

57. See id. at 5. The Kiowa Tribe relies primarily on the Anadarko Area Court of Indian Offenses for civil and criminal adjudication. See id.
In April 1990, the Kiowa Tribe purchased 100% of the stock of Clinton-Sherman Aviation, Inc.58 This Oklahoma corporation served as an aircraft repair center near Burns Flat, Oklahoma.59 In exchange for the stock in Clinton-Sherman Aviation, Inc., the Tribe executed promissory notes to the shareholders of the corporation.60 The Kiowa tribe gave Manufacturing Technologies a promissory note for $285,000 in exchange for Manufacturing Technologies' Clinton-Sherman stock.61 The note was due ninety days after the date on the note and was payable in two installments.62 Although reportedly signed on Indian land in Carnegie, Oklahoma, the note was delivered and exchanged in Oklahoma City.63 The note clearly stated that "nothing in this note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."64

The Kiowa Tribe never made payment on any of the promissory notes issued to the sellers of stock during the ninety day period.65 All holders of the promissory notes, except for Manufacturing Technologies, foreclosed upon the shares in Clinton-Aviation that they held as collateral and sold the shares at public auction for $1 each.66 Manufacturing Technologies filed suit in Oklahoma County District Court on the promissory note.67 In its answer, the Kiowa Tribe raised the defense of immunity.68 However, the trial court ignored the defense and issued judgment in favor of Manufacturing Technologies. On appeal, the Oklahoma Civil Court of Appeals, relying on Hoover I, affirmed the district court's decision. After the Oklahoma Supreme Court's denial of the Kiowa Tribe's petition for certiorari, the United States Supreme Court granted certiorari.

The United States Supreme Court, in an opinion authored by Justice Kennedy,69 specifically held that tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."70 The Court reached this conclusion after a detailed review of previous judicial decisions concerning tribal immunity, dating back to Turner.71 The Manufacturing Technologies Court recognized tribal sovereign

58. See id.
59. See id.
61. See Brief for Petitioner at 7, Manufacturing Techs. (No. 96-1037).
62. See id.
63. See id.
64. Id.
65. See id.
66. See id.
67. See id. at 8.
68. See id.
69. Justice Kennedy was joined by Justices Rehnquist, O'Connor, Scalia, Souter, and Breyer.
71. 248 U.S. 354 (1919).
immunity as a judicial doctrine, one that lacked the support of positive law by the 
United States Congress. Recognizing tribal sovereign immunity developed almost 
by accident, the Court noted that Turner is "but a slender reed" in support of tribal 
sovereign immunity. Based on this original source of the doctrine and continued 
United States Supreme Court reliance on Turner, the Manufacturing Technologies 
Court continued its support — although skeptically — of sovereign immunity. The Court noted that Congress had many opportunities to limit or eliminate tribal 
sovereign immunity as a source of power for the tribes under the plenary power 
doctrine. Congress chose not to address tribal sovereign immunity, and in some 
cases, legislated specific acts to not affect the doctrine of sovereign immunity. 
This legislative deference to not disturb the doctrine of tribal sovereign immunity, 
the Court reasoned, is founded on a congressional intent to "promote economic 
development and tribal self-sufficiency." The Court, while recognizing for long-standing judicial doctrine, expressed 
reluctance to offer continued support for the doctrine. The majority maintained 
that tribal immunity has outgrown what was needed to "safeguard tribal self-govern-
ance." Particularly, the Court identified the growing rate of economic develop-
ment by Indian tribes across the country. Justice Kennedy wrote that tribes now 
engage in a variety of enterprises including casinos, resorts, tobacco sales, and 
manufacturing. The majority opinion went as far as suggesting that the presence 
of these now substantial economic endeavors by Indian tribes favors abrogation, or, 
at least, limitation of the broad doctrine of tribal immunity. Justice Kennedy 
noted (and the dissent reiterated) that tribal immunity is a doctrine that is potentially 
harmful to those unaware of the status of those with whom they are dealing or 
unaware of the doctrine of tribal immunity. The majority concluded by stating 
that individuals — especially tort victims — have no choice in the application of 
tribal immunity.

Justice Stevens, in a vigorous dissent joined by Justices Ginsburg and Thomas, 
attacked the source of tribal immunity as weak and misplaced. The dissent 
continued by opining that the doctrine was unjust in its commercial application.

72. See Manufacturing Techs., 523 U.S. at 756-57.
73. See id. at 757.
74. See infra notes 78-84 and accompanying text.
75. See id. at 759.
76. See id. at 758-59.
77. Id. at 757 (citing Oklahoma Tax Comm'n v. Citizens Band Potawatomi Tribe, 498 U.S. 505, 510 (1991)).
78. See id. at 758.
79. Id.
80. See id.
81. See id.
82. See id.
83. See id. at 758, 766.
84. See id. at 758.
85. See id. at 762 (Stevens, J., dissenting).
86. See id. at 766.
Justice Stevens declared that many of the previous acts of Congress and decisions of the Supreme Court had narrowed the doctrine of tribal immunity as applied to Manufacturing Technologies.87

IV. Manufacturing Technologies, An Analysis

A. Turner and Judicial Deference

Manufacturing Technologies stands in part for judicial legislation, and in part, paradoxically, for judicial deference. The Manufacturing Technologies Court recognized that the Supreme Court itself created this powerful tribal doctrine.88 Justice Stevens noted repeatedly in his dissent that tribal sovereign immunity was an illegitimate doctrine, borne of unreasoned precedent. He noted that there is no federal statute or treaty that extends immunity to Indian tribes' commercial activities off the reservation.89 Justice Stevens urged that the Supreme Court should not "extend the judge-made doctrine" of sovereign immunity in order to preempt state authority to provide immunity as a matter of comity.90 He noted, as did the majority, that Turner is a weak case for tribal immunity and at most should "extend only to federal cases in which the United States is litigating in behalf of the Tribe."91

Only recently have Indian tribes delved into the masses of litigation without the support of the United States on the litigation team. Although Indian tribes, pursuant to federal statute, can choose to request that the United States represent their tribal interests,92 Indian tribes have gained much of the economic and legal resources necessary to represent tribal interests alone. This codified right suggests that the holding in Turner indeed was narrow, representing a time in which a party would be barred from bringing suit against the United States under traditional principles of sovereign immunity, even though the United States was acting in the interest of the tribe.

However, the United States Supreme Court in Manufacturing Technologies correctly noted that the precedent for tribal immunity not only had been established in Turner, but had been followed and relied upon by courts nationwide for over fifty years.93 The Court recognized that Congress has been well aware of this doctrine, has been free to enact legislation to the contrary, and has done nothing to abrogate the general doctrine adopted by the Supreme Court.94 It has long been held that the Supreme Court should grant deference to Congress in activities that are political in nature.

87. See id. at 765.
88. See id. at 761.
89. See id. at 760.
90. Id.
91. Id. at 762.
94. See id. at 758-59.
In *Manufacturing Technologies*, the majority yielded to Congress to legislate that which Congress had done periodically with tribal immunity.\(^9\) Congress has addressed tribal sovereign immunity in various forms has proposed legislation that would allow those with civil disputes with Indian tribes to sue in federal court.\(^9\)

\(^{95}\) See *supra* note 37.

\(^{96}\) See Donnelly, *supra* note 10. Sen. Slade Gorton (R.-Wash.) introduced the following legislation before the 105th Congress. Although the bill died at the end of the 105th term, it gives an interesting example of not only Congressional recognition of the doctrine of tribal sovereign immunity, but the extent by which some legislators seek to extinguish the protective doctrine. Senate Bill 1691, presented on February 27, 1998, read as follows:

Section 1 (b) Congress finds that —

(1) a universal principle of simple justice and accountable government requires that all persons be afforded legal remedies for violations of their legal rights;

(2) the fifth amendment of the Constitution builds upon that principle by guaranteeing that "... no person shall be deprived of life, liberty, or property without due process of law";

(3) sovereign immunity, a legal doctrine that has its origins in feudal England when it was policy that the "King could do no wrong," affronts that principle and is incompatible with the rule of law in democratic society;

(4) for more than a century, the Government of the United States and the States have dramatically scaled back the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies;

(5) the only remaining governments in the United States that maintain and assert the full scope of immunity from lawsuits are Indian tribal governments;

(6) according to the 1990 decennial census conducted by the Bureau of the Census, nearly half of the individuals residing on Indian reservations are non-Indian;

(7) for the non-Indian individuals referred to in paragraph (6) and the thousands of people of the United States, Indian and non-Indian, who interact with tribal governments everyday, the rights to due process and legal remedy are constantly at risk because of tribal immunity;

(8) by providing a complete shield from legal claims, the doctrine of sovereign immunity frustrates justice and provokes social tensions and turmoil inimical to social peace;

(9) the Supreme Court has affirmed that Congress has clear and undoubted constitutional authority to define, limit, or waive the immunity of Indian tribes; and

(10) it is necessary to address the issue referred to in paragraph (9) in order to —

(A) secure the rights provided under the Constitution for all persons; and

(B) uphold the principle that no government should be above the law.

(C) PURPOSE: The purpose of this Act is to assist in ensuring due process and legal rights throughout the United States and to strengthen the rule of law making Indian tribal governments subject to judicial review with respect to certain civil matters.

. . . Sec. 6. INDIAN TRIBES AS DEFENDANTS IN STATE COURTS.

(a) CONSENT TO SUIT IN STATE COURT: Consent is hereby given to institute a civil cause of action against an Indian tribe in a court of general jurisdiction of the State, on a claim arising within the State, including a claim arising on an Indian reservation or Indian country, in any case in which the cause of action —

(1) arises under Federal law or the law of a State; and

(2) relates to —

(A) tort claims; or

(B) claims for cases not sounding in tort that involve any contract made by the governing body of an Indian tribe or on behalf of an Indian tribe.
Currently, legislation on tribal sovereign immunity, although not yet passed, is being considered by the 106th Congress. It is unlikely that Congress will alter tribal sovereign immunity drastically. Many Americans believe that there is still a great debt to be repaid to the tribes for injustices of the past. It will take repeated injustices affecting constituents' pocketbooks to influence Congress enough to eliminate tribal sovereign immunity. It is more likely that Justice Stevens will gain support among the other Justices if tribal governments continue to misuse the doctrine of tribal immunity. Ultimately, the Court probably would have no problem defeating a doctrine that lacked legislative endorsement and was a creation of a judiciary possessing limited knowledge of the scope of problems created by tribal sovereign immunity.

B. Tribal Sovereign Immunity as Inherent

In his dissent in Manufacturing Technologies, Justice Stevens' analysis of the lack of legislative support for tribal immunity conflicts with long held doctrines of deference towards Indian tribes and issues of tribal sovereignty. Tribal sovereign immunity is a remnant of inherent tribal sovereignty, and thus comes completely under the purview of the federal government acting as trustee. Absent express federal legislation, Indian tribes retain rights inherent to their existence, and a state seeking to limit or abrogate those rights would be acting either in an area contrary

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S. 1691, 105th Cong. (1998). In June 1998, Senate Bill 1691 was withdrawn and divided into five smaller bills. The applicable bill pertaining to enforcement of contracts with Indian tribes reads as follows:

Section 1362 of title 28, United States Code, is amended-

(b)(1) The district courts shall have jurisdiction of any civil action or claim against an Indian tribe . . . for liquidated or unliquidated damages for cases not sounding in tort that involve any contract made by the governing body of the Indian tribe or on behalf of an Indian tribe.

(2) To the extent necessary to enforce this subsection, the tribal immunity of the Indian tribe involved is waived.

S. 2299, 105th Cong. (1998). This bill was initially planned to be reintroduced in the 106th Congress, but has not yet been so reintroduced. Telephone Interview with spokesperson for Sen. Slade Gorton (R.-Wash.) (Oct. 25, 1999).

Currently, the 106th Congress is considering two bills broadly impacting tribal sovereignty. Senate Bill 615, 106th Cong. (1999) was introduced in March 1999. The bill, "[t]o encourage Indian economic development, to provide for a framework to encourage and facilitate intergovernmental tax agreements . . . .," provides United States consent for tribes and states to enter into compacts to ensure the collection of state tax revenue for commercial activities involving non-Indian persons occurring on Indian land. S. 615, 106th Cong. § 4. The language of the act specifically prohibits the use of tribal sovereign immunity as a defense for tribes in federal court. See S. 615, § 5(c)(2).

In addition, S. 613, 106th Cong. (1999) has passed the Senate and is now in committee before the House. The bill, "to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes," primarily requires Indian tribes to disclose, in all contracts that are subject to Secretary approval, the right of the tribe to assert tribal sovereign immunity as a defense in an action brought against the tribe, or alternatively, expressly waive tribal sovereign immunity as a defense. S. 613, § 2(c)(1)(B).

to Congress' plenary power or in an area that would be preempted by federal law. The Court in Manufacturing Technologies did not need legislative support to uphold the doctrine of tribal sovereign immunity if it would have simply recognized that the doctrine was a product of inherent sovereignty. The Court is silent as to whether tribal immunity is an inherent sovereign right, thus leaving limited judicial foundation for the future of tribal sovereign immunity.

The dissent in Manufacturing Technologies argued that Hall controlled the issues at bar — noting that states can exercise jurisdiction over Indian tribes as a matter of comity. However, as the majority in Manufacturing Technologies clearly stated, the state's right to allow other states to assert immunity in the former state's courts for activities that occur within its jurisdiction as strictly a matter of comity extends only to those parties committed to the doctrine of mutuality of concession. That doctrine was outlined in the Constitution — which was signed only by the states — and as such, the Indian tribes are not party to such a doctrine. It seems that the Hall doctrine is weak to this extent. Oddly, in the Hoover II decision, the Oklahoma Supreme Court reexamined the tribal immunity question and made no mention of Hall, which was the crux of the Oklahoma Supreme Court's immunity argument in Hoover I. It seems as though the Oklahoma Supreme Court abandoned the Hoover I holding because of the weak value of the misplaced Hall doctrine, relying instead on arguments of Oklahoma's unique relationship with Indian tribes and the Montana decision. The Hall argument was a poor precedent upon which the court relied in Hoover I, and provided an easy rebuttal for the United States Supreme Court. Unfortunately, the Montana argument against tribal immunity used in Hoover II was not part of the Hoover I decision. For now, the Montana decision remains untested by the Supreme Court as it relates to tribal sovereign immunity. Just recently, Hoover II was reversed and remanded by the United States Supreme Court, relying solely on Manufacturing Technologies.

C. Expanding the Doctrine?

The dissent in Manufacturing Technologies conceded that the Supreme Court consistently has held that tribal sovereign immunity has been extended for activities that are intratribal and "affecting matters of tribal self-government and sovereignty." The United States Supreme Court has decided separate cases that affect off-reservation activity and commercial activity. However, none of the
Supreme Court decisions prior to Manufacturing Technologies provide any direction for activities that are both off-reservation and purely commercial. If tribal sovereign immunity was limited in the past to tribal activities that were either on-reservation or were governmental in scope, it would now be obvious that after Manufacturing Technologies the doctrine extends to all tribal activities, on or off reservation, commercial or noncommercial. Indeed, Justice Stevens alluded to the ambiguity in the immunity doctrine in his concurring opinion in Potawatomi. At best, Manufacturing Technologies is a judicial extension of a doctrine that already has a questionable foundation. Unfortunately, the predictive value of the doctrine previous to Manufacturing Technologies was not strong and the interpretation for lower courts was varied. With the support of Manufacturing Technologies, the tribal immunity doctrine is broader and well grounded by the Supreme Court. There is little doubt that absent congressional action, this broader, clearer doctrine will be applied by the lower courts.

D. Preemption

What becomes of the preemptive analysis used by states to tax and regulate Indian tribes for activity that takes place outside of Indian country? The Supreme Court has ruled in two different cases that Indians are subject to nondiscriminatory state law when traveling outside of a reservation.

However, the Supreme Court clearly stated in Potawatomi and Manufacturing Technologies that the right to demand compliance with state laws and the right to enforce them judicially are separate issues. Although a state might demand that all cigarette sales be taxed, a state would have no means available to collect those taxes from tribal governments, absent seizure of unstamped cigarettes, negotiation, or actions against wholesalers.

The outcome of Manufacturing Technologies combined with Potawatomi is troublesome. States have the power to subject Indian tribes to nondiscriminatory state laws when outside of the reservation, but the state has no remedy against the Indian tribes because of immunity. Feasibly, Indian tribes could gain increasing economic power outside of the reservation where they would be subject to nondiscriminatory state taxation. Nevertheless, the state could lose substantial revenues and subsequently lose the power to act as a sovereign over its citizens.

(1991) (extending sovereign immunity for tribes to cigarette sales); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) (recognizing sovereign immunity for tribes for a lease on a coal mine operation).


111. See Potawatomi, 498 U.S. at 514. The other deceptively obvious choice would be to enforce actions in tribal court. However, tribal courts are bound by tribal laws that can limit their subject matter jurisdiction. See infra text accompanying notes 154-55.
The power to tax is the power to destroy. It also seems clear that when balancing the power of the state to tax with the combination of the preemptive shield tribes use to guard against discriminatory state tax and inherent sovereignty as it could apply to tribal immunity, the Indian tribes would win most cases, including those involving activities taking place off reservation.

E. Tribal v. State and Federal Immunity

The dissent in Manufacturing Technologies criticizes the rule presented by the majority in Manufacturing Technologies as "anomalous." Tribal immunity is broader than state or federal sovereign immunity, primarily because most states have explicitly waived immunity from suits for certain types of claims. In addition, the United States has waived its immunity for certain tort actions arising out of commercial applications. Congress and the United States Supreme Court have also addressed immunity as to commercial activities of foreign sovereigns. Both the Tate Letter and later the Foreign Sovereign Immunities Act denied immunity for the commercial acts of a foreign nation. And clearly, after Hall, a state may be sued in the courts of another state. Virtually all other sovereign governments are now limited in immunity from suits. Yet, it is curious that Indian tribes, as domestic dependent nations, continue to exercise full immunity from suit. One commentator noted that Indian tribes are unique because, unlike most federal, state, and local governments, Indian tribes frequently enter into commercial activities normally left to the private sector. Tribal governments, handicapped with an additional burden of acting as an economic conduit between the United States and the individual members of the tribe, are forced to act differently than any other identifiable sovereigns. This dependent domestic nation idea is perhaps the backdrop

116. See Letter from Jack Tate, Acting Legal Advisor, Department of State to Acting Attorney General Phillip Perlman (May 19, 1952), reprinted in 26 DEPT OF STATE BULL. 984-85 (1952). The Tate Letter served as notice to the Attorney General's office that the State Department would begin notifying the Attorney General's office of all requests for immunity by foreign governments. The State Department believed that "the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government . . . subjecting itself to suit in these same courts in both contract and tort . . ." Id. In addition, the State Department noted that the "widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Id.
117. See Verlinden, 461 U.S. at 480.
for the unique issues facing Indian tribes, including the use of sovereign immunity to protect tribal economic growth.

In addition, the idea of inherent sovereignty introduced in the line of cases following *Ex parte Crow Dog*\(^\text{121}\) and *Talton v. Mayes*\(^\text{122}\) as predating the Constitution provides some insight into why tribal immunity still exists for Indian tribes and why Congress now retains the power of controlling that sovereign immunity. Uniquely, while states and the federal government control the future of immunity as to their own sovereigns, Congress still has the power to abrogate tribal sovereign immunity completely.\(^\text{123}\) Perhaps in light of this risk, Indian tribes should be allowed an opportunity to exercise an "anomalous" right to be immune from suit.

Tribal sovereign immunity as a doctrine may well be "anomalous" and still be justified as a tool of economic development. While states and the federal government have found it prudent to limit the use of the doctrine of sovereign immunity for economic, political, and legal reasons, Indian tribes have not yielded this tool for the same reasons. It is quite foreseeable that eventually Indian tribes will move beyond a broad application of sovereign immunity to a general waiver of immunity for different claims. These actions by Indian tribes will likely be in response to economic and political changes that take place within the relationships Indian tribes develop with those outside of the Indian community. Indian tribes that are in different stages of socioeconomic development could address immunity as to the particular needs of each individual tribe, unless Congress addresses tribal sovereign immunity first.

F. Tribal Sovereign Immunity — Justifications?

In *Manufacturing Technologies*, Justice Stevens suggests that there are no legitimate grounds for such gracious amenities for Indian tribes in the United States.\(^\text{124}\) However, as the majority and many commentators have stated, tribal sovereign immunity is retained for economic and tribal self-governance considerations.\(^\text{125}\) The purpose of sovereign immunity in modern times is a function of public policy.\(^\text{126}\) The Clinton Administration recently stated that limiting tribal sovereign immunity would curtail economic development of federally recognized Indian tribes.\(^\text{127}\) In addition, many legislators fear that exposing Indian tribes to suit would threaten tribal economic development.\(^\text{128}\) Perhaps it should be noted that...

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121. 109 U.S. 556 (1883).
122. 163 U.S. 376 (1896).
123. *See supra* note 75.
125. *See Manufacturing Techs.*, 523 U.S. at 1704; *see also infra* text accompanying notes 126-40.
128. *See Chris Casteel, Senator Withdraws Bill to Limit Indian Tribes' Immunity*, DAILY
Congress' ability to limit tribal sovereign immunity in amendments that were made to sections 16 and 17 of the Indian Reorganization Act in fact ratified by implication that tribal sovereign immunity is still important for Indian economic development.\(^{129}\)

Perhaps the biggest part of economic development for Indian tribes is the natural resources that many Indian tribes retain, particularly land and mineral rights. "Sovereign immunity is intended to protect what assets the Indians still possess from loss through litigation."\(^{130}\) The doctrine protects a limited number of resources from rapid depletion.\(^{131}\) For many tribes, natural resources remain the source of future economic potential.\(^{132}\) If a tribe's natural resources become depleted because of lawsuits by non-tribal entities, tribes would be left without any economic foundation.

One commentator believes that unsophisticated Indian tribes require protection under the immunity doctrine primarily because they lack the financial and governmental resources to make long-range economic decisions.\(^{133}\) Oklahoma tribal governments in particular have limited resources to fund all the services that tribal members require.\(^{134}\) Tribal governments do not have the advantage of a large tax base to replace the assets from natural resources.\(^{135}\) Tribal immunity provides tribes a shield from non-Indian seizure of a limited supply of those assets.\(^{136}\) Whether tribal resources are in the form of natural resources or tribal coffers, certainly the resources do not compare to those proffered by state or federal governments that benefit from large populations and economic stability.

Tribal sovereign immunity could be seen as a remnant of the Indian self-determination era ushered into our society thirty years ago. The modern application of sovereign immunity is to promote "tribal self-sufficiency and economic development."\(^{137}\) One commentator suggests that tribal sovereign immunity is the

\(^{129}\) See Pettit, supra note 126, at 394.

\(^{130}\) See id.

\(^{131}\) See id.

\(^{132}\) See id.

\(^{133}\) See id.

\(^{134}\) See id.

\(^{135}\) See Pettit, supra note 126, at 394.

\(^{136}\) See id.

"last stronghold of the promise of self-determination that has not been removed or effectively gutted.\textsuperscript{138} If, in fact, tribal sovereign immunity has been maintained as an element of self-determination, then Indian tribes should use sovereign immunity as a negotiating tool in economic development to sustain tribal government and to reduce dependency on federal funding.\textsuperscript{139} The Eighth Circuit noted that "[a]s rich as the Choctaw Nation is said to be in lands and in money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it."\textsuperscript{140}

However, tribal sovereign immunity has been seen as debilitating for both Indian tribes and states. Several legal and economic factors lead to the conclusion that tribal immunity can restrict economic development for Indian tribes.\textsuperscript{141} Transaction costs of businesses and Indian tribes restrict the ability of parties to bargain out of or waive sovereign immunity.\textsuperscript{142} Potentially, every transaction would require negotiation to waive or limit sovereign immunity of the Indian tribes. The additional time, legal cost, or administrative cost would make transactions with relatively low profit margins unaffordable. Now that tribal sovereign immunity extends to off-reservation activities of Indian tribes, all transactions made off reservation land without an express waiver of tribal sovereign immunity from the Indian tribe will be unenforceable in state and federal courts, forcing businesses to question the risk involved in entering the transaction.

Some commentators note that reliance on tribal immunity results in resentment and missed opportunities for tribal economic development.\textsuperscript{143} Media accounts of tribal injustice reflect the notion that tribal immunity hurts Indian tribes.\textsuperscript{144} Sen. Ben Nighthorse Campbell (R.-Colo.), the only Indian in the Senate, has characterized tribal immunity as an obstacle for states and persons with civil actions against Indian tribes.\textsuperscript{145} Attorneys have advised businesses to treat Indian tribal accounts differently than other accounts, citing the inability to enforce judgments against the Indian tribes for nonpayment.\textsuperscript{146} One tribe noted in recent testimony to the Senate that sovereign immunity should never be used for "economic misjudgments," and that Indian tribes must continue to allow limited waivers of immunity to facilitate economic development.\textsuperscript{147} The economic development of

\textsuperscript{138} Vicki J. Limas, Sovereignty as a Bar to Enforcement of Executive Order No. 11,246 in Federal
\textsuperscript{139} See id.
\textsuperscript{140} id. v. Choctaw Tribe of Indians, 66 F. 372, 376 (8th Cir. 1895).
\textsuperscript{141} See Donnelly, supra note 10.
\textsuperscript{142} See Raymond Cross, De-Federalizing American Indian Commerce: Toward a New Political
COMMN ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT
OF THE UNITED STATES, PART I (1984)).
\textsuperscript{143} See Donnelly, supra note 10.
\textsuperscript{144} See id.
\textsuperscript{145} See Castell, supra note 128, at 3.
\textsuperscript{146} See Martin Paskind, Indian Tribes and Sovereign Immunity, ALBUQUERQUE J., July 6, 1998,
\textsuperscript{147} See Economic Development: Hearing on S. 1691 Before the Committee on Indian Affairs, 105th
Indian tribes now relies so much on off-reservation transactions for land, supplies, banking, etc., that tribal governments will continue to struggle to find businesses that will enter into transactions without waivers of immunity.

Congress has attempted to address concerns about tribal sovereign immunity. The legislative history of the Indian Reorganization Act reveals that two types of tribal entities were created so that tribal interests could be protected as section 16 corporations, while section 17 corporations would be open to limited liability. Section 16 organizations recognize the political organization of a tribe and are used to facilitate tribal government. Section 17 organizations allow tribes to operate as a corporation authorized by the United States Government. Many section 17 entities contain "sue or be sued" clauses. Courts are generally split on whether "sue or be sued" clauses constitute a waiver of sovereign immunity. This arrangement was done partly to facilitate businesses that would otherwise be reluctant to extend credit to tribal entities that could assert a defense of sovereign immunity. However, this assumes that businesses are aware of the doctrine of sovereign immunity and its specific application to the Indian tribe with which they are dealing. One commentator stated that because the doctrine of tribal sovereignty is so engrained in our legal system, "if a non-Indian business knowingly enters into a contract without a waiver, the court should determine that the business has deemed the particular venture worth the risk."

The only option available for businesses seeking remedies are tribal courts. Many non-Indian businesses are reluctant to become involved in the tribal court system. Tribal courts, unless acting as federal courts under delegated power, do not provide the Constitutional protections found in state and federal courts. Congress must consider that if businesses must bring redress in tribal courts, then those tribal courts must provide these basic constitutional judicial protections to plaintiffs.

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148. See Pettit, supra note 126, at 378-79.

149. See id.

150. See id.

151. See CANBY, supra note 12, at 94.

152. See Pettit, supra note 126, at 378-79.


154. See Vetter, supra note 114, at 192.

155. The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, provides substantial guarantees similar to those provided under the Bill of Rights. However, several key provisions are missing, including a bar from establishment of religion and the right to free counsel. The United States Supreme Court limited the force of the Indian Civil Rights Act in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978), holding that the sole remedy for redress under the Indian Civil Rights Act was a writ of habeas corpus.

156. The Indian Civil Rights Act was enacted to address many of these concerns relating to tribal government action. However, the extent to which courts interpret the rights extended through the ICRA as being identical to those of the United States Constitution is questionable. For example the Ninth Circuit has stated that "due process concepts are not readily separated from [the tribe's] attendant cultural baggage." Randall v. Yskima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988). This example illustrates the trouble courts will have separating contemporary Anglo-American due process concerns
State courts have, at times, looked at the fallacies of tribal immunity. In *Dixon v. Picopa Construction Co.*, the Arizona Supreme Court stated that limiting sovereign immunity in off-reservation activities would further tribal economic development.\(^{157}\) One commentator suggests that limiting tribal sovereign immunity will protect contract rights and build long term economic relationships between tribal governments and non-Indian businesses. Limitations on tribal immunity will also increase economic development in Indian government, further tribal self-determination, and strengthen tribal courts.\(^ {158}\)

Economic relationships are built on equity and fairness, and if one party is bound while another is not, those at higher risk will limit their interaction with the low-risk party. If the playing field is leveled, then businesses can come to the table with Indian tribes understanding that both are at the same risk in the transaction; both seek to gain or to lose. Under these conditions, the value of the transaction will most likely reflect the risks to both parties. This balanced risk will force Indian tribes to make conservative, well-planned economic decisions, thus furthering the goal of self-determination. Strong economic development and balanced risk, along with federally legislated judicial protections, will provide parties on both sides an opportunity to use tribal courts as an alternative forum to which the parties come with even interests, and thus build respect for tribal court verdicts.

**G. Tribal Sovereign Immunity — An Injustice**

One commentator described Native American tribes as "mini-Soviet Unions" which provide no legal remedy for wrongs committed.\(^ {159}\) This bold statement is quite similar to the views held by Justice Stevens. Justice Stevens in his dissent in *Manufacturing Technologies* starkly stated that the doctrine of tribal sovereign immunity is unjust and that "governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct."\(^ {160}\) Unfortunately, a business relationship without a remedy is usually a relationship entered into with high risk and little choice. Sovereign immunity "is enjoyed at the pleasure of the holder," and to the detriment of those dealing with the holder.\(^ {161}\) An official of the Arizona Gaming Department recently stated that customers of Indian casinos should be aware that their rights are "left at the boundary when they enter the reservation."\(^ {162}\) The reality of that statement might not be very far from the truth. Those dealing with Indian tribes off the reservation are without remedy, whether or not knowledge of the tribe’s immunity exists. Certainly, our country should afford those unjustly injured a place in a court of equity, if no cause of action existed at law. Unfortunately, the laws of equity do not play out when Indian tribes are

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158. *See Cross, supra* note 142, at 452.
159. *See Donnelly, supra* note 10.
161. *Pettit, supra* note 126, at 393.
involved. Indian tribes are free to breach every contract, or cause every tortuous injury, no matter how far they are from the reservation, and never answer for their actions in state or federal court.

However, the National American Indian Court Judges Association recently stated at a Senate hearing on tribal sovereign immunity that complaints on tribal immunity are "based largely on anecdotal complaints from disgruntled individuals who did not get their way in a particular tribal forum, or merely dislike a proposed tribal project."\(^{163}\) Proponents of tribal sovereign immunity continue by saying that limiting tribal immunity punishes Indian tribes for the federal government's failure in its role as guardian to provide appropriate resources to develop tribal governments and court systems.\(^ {164}\)

However, it is naive for courts and Indian tribes to assume that all who enter into business transactions enter as sophisticated business persons with "eyes open." Although each party is responsible for the terms of the contract, it is hardly just for one to be responsible for something of which he has no notice. The doctrine of constructive notice would seem to be insufficient to bind a business which operates in reliance on a tribe's representations.

Lack of contractual remedies, loss of personal rights, and restriction of economic development are all consequences of the doctrine of tribal sovereign immunity. The effects of dealing with Indian tribes and the doctrine of tribal sovereign immunity can be dramatic. To enter into relationships with Indian tribes requires an appreciation and respect for the current state of sovereign immunity.

Indian tribes lack large land bases and access to tribal banks, and have limited on-reservation resources to facilitate running a government. In addition, most Indian tribes also are without adequate infrastructure to develop utilities, transportation and other public services.\(^ {165}\) As a result, most tribal transactions occur off-reservation.\(^ {166}\)

The policies behind tribal immunity must be considered as a whole because of this reality. As Indian tribes are forced off the reservation to trade, businesses must consider the policy and legal implications behind dealing with Indian tribes in order to make appropriate economic and social decisions in considering the transaction.


\(^ {164}\) See id.


\(^ {166}\) See id.
V. Current Climate in Oklahoma

Ironically, in Oklahoma, especially after Hoover I in 1995, the legal climate was such that businesses knew Oklahoma would enforce contracts made off-reservation by Indian tribes. Prior to Manufacturing Technologies, businesses in Oklahoma relied on knowing that there would be an appropriate remedy for any actions against an Indian tribe if the activities in which the business engaged were off-reservation. Today, businesses in Oklahoma no longer enjoy the ability to bring Indian tribes into state court for common law suits against tribes.\(^{167}\) In addition, federal courts are also unavailable for suits against Indian tribes unless jurisdiction is expressly provided by federal law.\(^{168}\) Businesses in Oklahoma must rewrite their policies dealing with tribal governments so as to avoid legal relationships that afford no remedy for non-Indian parties.

It is critical that the legal status of any Indian-related entity be determined before entering into a commercial relationship.\(^{169}\) Businesses must know the nature of the entity with which they are contracting prior to engaging in a legal relationship. Sovereign immunity extends only to tribal governments and their sub-entities. Immunity does not extend to members of the Indian tribes or to government officials acting outside of the scope of their duties within the tribal organization.\(^{170}\)

Similarly, it is important to recognize whether the party with which one is doing business is acting under the tribal government. Some tribal organizations operating off-reservation might represent that they are not acting as the tribe, but several factors are critical in determining whether in fact they are acting as the tribe. Factors that courts have considered include: whether the organization is organized as a subordinate economic organization to the tribe without a separate board of directors;\(^{171}\) whether the organization has purchased general liability insurance or created a limited liability clause in the corporate charter to limit tribal assets;\(^{172}\) whether the organization was formed to carry out tribal government functions;\(^{173}\) whether the organization is wholly owned by the tribal government;\(^{174}\) whether the organization is created under the tribal constitution or bylaws;\(^{175}\) whether the organization holds itself out as a business entity separate and distinct from the tribe;\(^{176}\) whether the organization's management functions are or could be deter-

\(^{167}\) See supra text accompanying note 2.
\(^{168}\) See supra text accompanying note 2.
\(^{169}\) See Vetter, supra note 114, at 193.
\(^{172}\) See Dixon, 772 P.2d at 1109-110.
\(^{173}\) See id. at 1110.
\(^{175}\) See S. Unique, 674 P.2d at 1379.
\(^{176}\) See White Mountain Apache Indian Tribe v. Shelley, 480 P.2d 654, 656 (1971).
mined by the tribe;[177] whether the organization's purchases are in accordance with tribal purchasing policies;[178] whether the tribe has the power to dismiss employees of the organization;[179] and whether or not the organization is exercising governmental power.[180] Although this list is not exhaustive, it is extremely important that businesses evaluate these factors prior to entering into what potentially could be an unenforceable contract.

Organizations, upon identifying the type of entity with which they are dealing, should note the options available to avoid a lack of remedy for activities performed outside of Indian country. Businesses and their counsel must remember that Indian tribes regard tribal sovereign immunity as just another variable in negotiating business transactions.[181] Counsel must also note that tribal assets are for the benefit of all tribal members. Most Indian tribes are reluctant to waive sovereign immunity and expose those assets to suit.[182] This is because Indian tribes rarely have a large tax base or large enough property holdings to run tribal government services without federal support.[183]

The most significant tactic in reducing risk in transactions with Indian tribes is to secure a waiver of tribal immunity.[184] Case law has progressively moved from

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177. See Shelley, 440 P.2d at 656.
178. See id.
179. See id.
181. See Pettit, supra note 126, at 396.
183. See id.
184. Specific examples of waivers include:

Example A

The Tribe for itself and for the Enterprise waives its sovereign immunity and that of the Enterprise in favor of the Manager and its successor in interest to the full extent necessary for the performance of this Contract, the Loan Documents and any Collateral Agreements required to be approved in connection with the Enterprise. This waiver is a limited waiver of sovereign immunity as to such matters only, and does not extend beyond such matters, and therefore is limited to revenues, cash or other income derived from the Enterprise. The Tribe for itself and for the Enterprise hereby agrees not to take any action which would result in the revocation or modification of the limited waiver contemplated by this Section.

Example B

A-By this Agreement, the Tribe does not waive, limit or modify its sovereign immunity from unconsented suit except as specifically provided in this Section.
B-The Tribe does grant a limited waiver of its sovereign immunity as to any claim if, and only if, each and every one of the following four conditions is met:
A. The claim is made by the Contractor, or a party to which the Contractor has assigned or sold its interest under this Agreement;
B. The claim alleges a breach by the Tribe of one or more of the specific obligation or duties expressly assumed by it under the terms of this Agreement;
C. The claim is first presented in writing to the Tribal Council, which will have 15 days to act on such claim before the waiver becomes effective; and
D. The claim seeks either:
requiring congressional consent to waive tribal immunity to the tribe's freedom to expressly waive tribal sovereign immunity.\textsuperscript{185} Although tribal governments have generally been known to have the right to waive sovereign immunity, the United States Supreme Court has held that waivers of sovereign immunity must be unequivocally expressed.\textsuperscript{186} Waiver of tribal immunity must be a tribal or congressional statement that explicitly consents to suit.\textsuperscript{187}

Tribes in Oklahoma are specifically exempted from the Indian Reorganization Act as passed in 1934.\textsuperscript{188} In 1936, Congress passed a similar bill specifically for Oklahoma titled the Oklahoma Indian Welfare Act, which essentially provided that tribes would enjoy any "rights or privileges secured to an organized Indian tribe" under the Indian Reorganization Act, including the specific sections detailing section 16 and 17 entities.\textsuperscript{189} If a tribe expressly waives immunity as a section 16 entity, it is particularly important that the assets available for remedy are identified. However, courts have noted that Indian tribes that organize under both IRA sections 16 and 17, and which lack an adequate firewall between the tribal government and the tribal corporation can have assets assigned to the section 17 entity vulnerable to the assets set up within the section 16 entity.\textsuperscript{190} Parties dealing with tribal entities must be sure to determine what entities have control over any assets to which access in the event of a default would be adequate.\textsuperscript{191} "It is clear that the waiver of sovereign immunity by the section 17 corporation does not waive

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A. Some specific action, or discontinuance of some action, by the Tribe, to bring the Tribe into full compliance with the duties and obligations expressly assumed by the Tribe in this Agreement; or

B. Money damages for such non-compliance only, which will be payable only from the Tribe's revenues derived from the operation of the casino and not from any other source or other asset or property of the Tribe.

C-Under this limited waiver of sovereign immunity, any suit or proceeding brought hereunder may be brought in any federal or state court of competent jurisdiction and both parties irrevocably submit to the jurisdiction of such court and agree to give full legal effect to any order or judgment resulting therefrom; provided, however, that no suit or proceeding may be brought hereunder in any state court unless and until a federal court shall have determined that it lacks subject matter jurisdiction over the suit or proceeding.

D-The parties hereby agree that under the limited waiver of sovereign immunity provided for herein, the assumption of jurisdiction by any federal or state court of competent jurisdiction shall not be delayed or curtailed by any doctrine requiring exhaustion of tribal court remedies, there being no tribal court remedies available to the Contractor.


188. \textit{See} COHEN, \textit{supra} note 51, at 455.


immunity of the section 16 tribal government."\textsuperscript{192} Businesses negotiating with tribes should also be aware of assets that could be held as inaccessible during a lawsuit because of unclear distinctions between section 16 and section 17 entities.\textsuperscript{193}

There has been some question as to whether "sue or be sued"\textsuperscript{194} clauses act as waivers of tribal immunity. Generally, courts have held that absent clear delineation between tribal entities, these clauses do not meet the express standard outlined in Santa Clara.\textsuperscript{195} Waivers of sovereign immunity must be unequivocally expressed and cannot be implied.\textsuperscript{196} In addition, tribal organizations incorporated under state law have also been held to be immune from suit despite "sue or be sued" clauses in the state law.\textsuperscript{197}

Tribes are limited in their ability to waive tribal immunity in matters affecting Indian land held in trust by the United States Government. Any waivers affecting trust land are required to have approval of the Secretary of Interior.\textsuperscript{198}

Several other alternatives exist to protect businesses. Aside from negotiating a waiver of immunity from a tribe, businesses can use terminable contracts based on monthly performance for small transactions or performance that takes place simultaneously. Businesses can require that tribes perform contract provisions first.\textsuperscript{199} By requiring tribes to perform first, the non-tribal business can reduce the risk created by not negotiating a waiver of sovereign immunity.\textsuperscript{200} The parties can also escrow the tribe's performance.\textsuperscript{201} By having a third party hold assets required for performance, the tribe is protected without requiring it to waive sovereign immunity, and the non-tribal business is allowed to continue performance with an assurance that the tribe cannot default.\textsuperscript{202} Businesses can also require a waiver of immunity for a particular transaction. In limited waivers, Indian tribes can limit exposure of certain assets from suit.\textsuperscript{203} As stated earlier, general waivers are impracticable for Indian tribes and most waivers will pertain strictly to the legal relationship created. Waivers must be express and clear to bind the tribe.

In addition to a waiver, businesses can negotiate with tribes to have tribal courts or administrative agencies adjudicate or enforce any issues arising under the agreement between the tribe and the business. This affords the tribe an opportunity

\textsuperscript{192} Mark K. Ulmer, The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs, 13 AM. INDIAN L. REV. 109, 138 (1988).
\textsuperscript{193} See Pettit, supra note 126, at 397.
\textsuperscript{194} "Sue or be sued" clauses are typically used to negotiate the right of a party both to hold himself out for suit, or to sue the contracting party in a particular forum.
\textsuperscript{196} See id.
\textsuperscript{199} See Jarboe, supra note 191, at 178.
\textsuperscript{200} See id.
\textsuperscript{201} See id. at 198.
\textsuperscript{202} See id.
\textsuperscript{203} See id. at 200.
to "play on its own turf" while allowing a business to negotiate the terms and conditions that tribal courts, administrative agencies, or tribal dispute resolution services will employ to resolve any disputes in the agreement. 204 One drawback to this approach is that there is no assurance that other tribal entities will perform the obligations of a contract nor is there any non-tribal remedy. The result puts a business back into the position of having no remedy against Indian tribes that have breached an agreement.

Several tribes are beginning to adopt their own tribal commercial codes that are used to enforce and regulate transactions with both non-Indians and Indians. However, businesses should be cautioned that the existence of a UCC-style code does not afford a business any more of a remedy for a breach than existed prior to the establishment of the tribal legislation.

Finally, an arbitration clause has been held not to be an express waiver of tribal immunity. 205 However, the Eighth Circuit held that an arbitration clause that called for decisions based on the American Arbitration Association was a clear waiver of sovereign immunity. 206

This list of possible approaches for organizations dealing with Indian tribes is certainly not exhaustive. However, each negotiated transaction with an Indian tribe should take into account the underlying premise of these approaches, that is, to limit an organization's exposure to unnecessary and sometimes unexpected financial risk.

VI. Conclusion

It is obvious that the transaction costs of conducting business with Indian tribes for activities that take place off-reservation will increase, but the risk of doing business without a remedy can be more costly. There will be cases in which businesses find that the transaction costs will not outweigh the benefit of performance and resultant risk of nonperformance, but these instances seem to be uncommon. Until Congress accepts the Supreme Court's invitation to limit or abrogate tribal immunity, businesses in Oklahoma must continue to alter legal relationships with Indian tribes that conduct activities outside of Indian country. Tribal sovereign immunity is a doctrine that was judicially created to provide for economically developing Indian tribes, but after Manufacturing Technologies, the doctrine may be broadening to the extent of altering traditional transaction risk analysis of businesses operating in Oklahoma.

David B. Jordan

205. See Vetter, supra note 114, at 183 (citing Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989)).
206. See Arbitration Clause Ruled a Wavier of Tribal Sovereign Immunity, 50 SEP DISP. RESOL. J., July 1995, at 89.