

Tribal Sovereignty & Tribal Responsibility

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Introduction

- Disclaimer
- Juxtapose Two Different Perspectives on (1) Dispute Resolution and (2) Sovereignty
 - Tribal Perspective
 - Western Perspective
- Goals
 - Sovereignty & Sovereign Immunity are not the same thing
 - Excessive use of Tribal Sovereign Immunity is not a traditional native concept and hurts tribal communities both internally and externally

Baseline

- Pre-contact governance
 - Tribes “governed” by various forms of councils and leadership, either ascribed (inherited), acquired (from clan, society, etc.) or selected (e.g. Clan Mothers selecting leader of Haudenosaunee)
 - Spokesperson role
 - No command authority

Baseline

- Pre-contact dispute resolution
 - Peacemaking
 - Elements of Peacemaking
 - Orchestrated by leader or elder or clan
 - Every side or interested in party in community IS HEARD
 - Facilitated by “talking stick” or other emblem of having the floor
 - Respectful listening
 - Resolution **necessary** for good of community – how to move forward

Sovereignty

- While Indian tribes pre-contact clearly were independent nation-states, the concept of sovereignty, as we understand it, had never entered their language or political organization. They lived by traditional, customary law, not legal commands of a sovereign.
- Where did the concept of sovereignty come from?

Sovereignty



Sovereignty

- Sovereignty derives from the top-down feudal system of political organization of Europe
- Two elements of English notions of sovereignty infected American law
 - The Crown's (Sovereign's) writ runs throughout the realm
 - The Crown (Sovereign) cannot be sued in his or her own Court

Sovereign Immunity

- Twin maxims of English common law on sovereign immunity
 - The Crown cannot be sued in his own Courts
 - origin of sovereign immunity
 - The Crown can do no wrong – the Crown therefore has an obligation to make all wrongs right
 - With sovereignty goes responsibility
 - Sovereign has a responsibility to provide a remedy

Sovereign Immunity

- Crown's obligation to make wrongs right
 - English solution: Petition to the king's council for redress or sometimes to Attorney General for permission to file a Petition of Right or sue government officials
 - In US
 - First Amendment – right to “petition the government for redress of grievances” – a right included in the Indian Civil Rights Act and some tribal constitutions
 - Pre-Civil War: Private Bill
 - Used for most Indian claims until Congress passed the Indian Claims Commission Act of 1948 which waived federal sovereign immunity over some Indian claims

General Waivers of Sovereign Immunity

- Most modern American governments except Indian Nations assume the responsibility to make good any harm they cause by passing general statutes waiving sovereign immunity
- Federal Government examples
 - Tucker Act of 1887, 25 USC sec. 1491
 - Federal Tort Claims Act of 1946
 - Administrative Procedure Act
 - Indian Claims Commission Act, 25 USC sec. 1505

General Waivers of Sovereign Immunity

- State examples
 - Most states, including New Mexico, have a state tort claims act waiving sovereign immunity, e.g. NM Stat. Art. 4
 - Some states have general statutes waiving sovereign immunity for certain contract, property or administrative claims
- Federal and state officers and employees generally not governed by sovereign immunity
 - Special official immunity affirmative defenses
 - Indemnification statutes

General Waivers of Sovereign Immunity

- Critical Question: Are federal or state governments any less sovereign because they have enacted various statutes waiving sovereign immunity?
- A decision to waive sovereign immunity is a sovereign choice, just the same as a decision to assert it
- SOVEREIGNTY and SOVEREIGN IMMUNITY are not the same thing!
 - Too many tribal leaders, tribal judges, and tribal members wrongly think they are synonymous

General Waivers of Sovereign Immunity

- Common elements of waiver statutes
 - Rapid formal notice requirement
 - Informal resolution first
 - Limitation of maximum liability
 - Express exclusion of certain types of claims
- Are the federal government or the states any less sovereign because they have enacted general statutory waivers of sovereign immunity?

Tribal Approaches to Sovereign Immunity

- Most Indian nations have taken the opposite approach
 - Tribal statutory, or sometimes constitutional, limitations assert sovereign immunity and make finding waivers hard
 - Most tribes by tribal law extend sovereign immunity to officers and employees – a broader claim than available to federal or state employees
 - Very few general tribal ordinances like the Mashantucket Pequot Tort Claims Act waiving sovereign immunity for claims

Tribes Do Regularly Waive Sovereign Immunity

- Tribal waivers of sovereign immunity often done by contract as a necessity of securing financing or otherwise doing business
 - Often part of an agreement to arbitrate
- Adverse consequences to Tribe's approach

Tribal Approach to Sovereign Immunity

- Waivers take place for large lenders, vendors, or contractors but no one else
- Who loses?
 - Tribal members – contract, civil rights, tort and other claims
 - Tribe's Indian and non-Indian customers, patrons, and employees
 - Smaller Indian and non-Indian businesses supplying goods or services to the Nation

Tribal Waivers of Sovereign Immunity to Support Arbitration

- No other sovereign waives its sovereign immunity to a tribunal other than its own courts
- Arbitration may not sound like state court but it is functionally equivalent to it since arbitrators rarely know, care about, or enforce basic federal Indian concepts
- Tribes need general ordinance forbidding the Nation to waive sovereign immunity to any tribunal other than the tribal courts
 - Limit Tribal Attorney contacting options

Why is Any of This Important?

- It is about basic tribal values and the responsibility and fairness of the manner in which an Indian Nation appears to exercise its sovereignty
- In most Tribes the sovereignty of the Tribe rests with the People who delegate certain limited powers to the Tribal Council and sometimes constitutionally to a tribal court system.
 - It is the People of the Tribe (the Nation as a whole) who are sovereign, not the Tribal Council

Why is Any of This Important?

- While Tribal Council makes the laws, it generally is the Tribal Courts that enforce them in the individual case
- The *face of tribal sovereignty* that many people dealing with the Nation see is the Tribal Court and its decisions in individual cases, not the Tribal Council
- The fairness and responsibility of the manner in which a Tribe exercises its sovereignty often is judged by the decisions of the Tribal Court

Why is Any of This Important?

- Let's take two examples:
 - Tribal member who believes that his politically-motivated firing as Gaming Manager in preference to a non-Indian violated due process, equal protection, and the Nation's TERO ordinance
 - Non-Indian businessman who pursuant to a contract with the Nation invested \$1 million in a business as a part of a tribal destination resort project who found his contract summarily cancelled and his investment confiscated without compensation when he got politically cross-ways with the Nation for failure to support their position on a dispute about the development with an unconnected third party

Examples of the Problem

- If there is no general ordinance waiving sovereign immunity and if no contract contains a waiver, when each party sues in Tribal Court, the Tribal Attorney will assert sovereign immunity.
- Given the structure of most tribal law, the Tribal Court will be *required* to dismiss each case on tribal sovereign immunity grounds without ever hearing the merits of the dispute

Examples of the Problem

- Dismissals based on sovereign immunity
 - Always makes the Tribal Attorney look good
 - Fails to permit the Petitioner to tell their story and be heard
 - Fails to heal the dispute in any fashion that lets the parties move forward productively together
- Assertion of Tribal Sovereign Immunity is ***Inconsistent*** with traditional tribal values of respectful listening, fairness, and healing fostered by peacemaking

Examples of the Problem

- Dismissals based on tribal sovereign immunity by the Tribal Court makes the Tribe's assertion of sovereignty look both unfair and irresponsible to *both* tribal members and to outsiders
 - How do you think the Tribal Member fired as a Gaming Manager is going to think about the fairness of his own Tribe's sovereignty and government when he cannot even be heard in his own Tribal Court due to tribal sovereign immunity?
 - What do you think the Developer who willingly worked with the Tribe and other potential business partners might think about the Tribe when the Developer loses \$1 million investment without any recourse or even opportunity to be heard?
 - Winning the case may be counterproductive for the Nation

Examples of the Problem

- Dismissals based on tribal sovereign immunity without providing any alternative remedy are even inconsistent with and a perversion of the western origins of the notion of sovereign immunity
 - The King can do no wrong
 - The Sovereign has an obligation to make wrongs right by providing a remedy

Need for Aggressive Assertion of Sovereign Immunity Ended

- In the 1970s perhaps aggressive assertions of Tribal Sovereign Immunity may have been necessary to prevent wiping out the Nation's entire budget from one lawsuit
 - Annual tribal budgets might have been in 5 figures
- Today fear of excessive judgments wiping out the Tribe's budget
 - Can be legally controlled by corporate structures and legal limits on liability
 - Tribes today can afford to be responsible sovereigns but many are not doing so

Solutions

- Pass general waivers of sovereign immunity ordinances for torts, contracts, and takings
 - Waive to Tribal Court, *not* arbitration
 - Tribe can impose short notice time limitations
 - Tribe can impose maximum recovery limitations for torts – limitation to insurance coverage
 - Make such statutes exclusive remedies so tribal officers and employees are not sued

Solutions

- Liability Insurance
 - Bonds for contracts
 - Liability Insurance for personal injury and related losses
 - Legally limit by tribal ordinance liability to the maximum of the insurance coverage
 - Gives the Nation a known risk exposure and cost (the insurance premium)
- Insurance policy *must* include a rider that prevents the insurance carrier from asserting tribal sovereign immunity as a defense
 - Otherwise the Tribe is paying premiums for no benefit

Solutions

- Some of my proposals derive directly from the solution hashed out between the AZ Indian Nations and the State of AZ in the AZ form gaming compacts for patron tort claims
 - Liability insurance with max cap of \$1 million per incident
 - Rider preventing assertion of sovereign immunity to the limits of the policy
 - Idiotic provision saying nothing waived tribal sovereign immunity
- Approach can be generalized into a Tribal Ordinance

Conclusion

- What is the take-away from this rant about tribal sovereignty and sovereign immunity?
 - 1. Tribal sovereignty and tribal sovereign immunity are *not* the same thing
 - 2. Tribes can and do waive sovereign immunity without losing any part of their sovereignty
 - 3. Tribal sovereignty often is judged by the fairness and effectiveness of the Tribal Courts in hearing and healing disputes
 - 4. Asserting tribal sovereign immunity as a defense to every dispute is neither traditional nor fair and responsible and reflects poorly on the Nation with both its members and the business community with whom it deals
 - 5. To gain internal and external respect Indian nations need to join the federal and state governments in making remedies generally available by passing carefully tailored waiver statutes