



Tribal and Tribal Council Member Liability Sovereign Immunity

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A unique feature of Indian tribes in the United States is tribal sovereign immunity. The preamble to the list of federally recognized tribes in Alaska specifically says that tribes here in Alaska have all the immunities as do other tribes in the United States. Sovereign immunity is the right not to be sued without consenting to being sued. Although federal courts have made inroads into tribal sovereign immunity, a prime example of the U.S. Supreme court upholding tribal rights of sovereign immunity is *Santa Clara Pueblo v Martinez*, 436 U.S. 49,58 (1978). The same sovereign immunity that covers tribes extends to individual tribal council members when they are acting within the scope of their authority.

Sovereign immunity plays an important role in tribal businesses. Tribal assets such as land and money may be protected from being taken through lawsuits because of tribal sovereign immunity, if tribes want that protection, and if their tribal and business documents are in order. On the other hand, banks are generally not willing to loan money to tribes when they cannot sue to regain money or other assets should the tribe default on the loan. For the same reason, private investors are hesitant to invest in businesses in Indian country and

contractors are not likely to work within Indian country if they cannot sue tribes. So, sovereign immunity may protect tribal assets, but may also reduce business opportunities unless tribes are willing to waive it in certain cases.

A waiver of sovereign immunity is a written statement giving tribal consent to be sued. Just as tribes have the power of sovereign immunity, they have the power to give it up. When tribes find it necessary to waive their sovereign immunity in order to do business, the waiver should be **very** specific. Tribes should state the conditions and details of waivers and describe assets specifically subject to taking in the event of a suit. **Tribal legal counsel should be consulted before signing business contracts that waive sovereign immunity.**

Tribal constitutions may refer to sovereign immunity. Some constitutions state that sovereign immunity cannot be waived by the tribal council without referring to a vote of the tribal membership. However, such constitutions may exempt the council from having to get tribal membership approval when waiving sovereign immunity under certain circumstances such as to satisfy conditions of state and federal grants.

While tribes may possess sovereign immunity, individual tribal government officials may or may not. In general, tribal officials have sovereign immunity while acting on tribal business within the scope of his or her office. However, tribal officials can be personally open to suit when actions go beyond the scope of their office. For example, a tribal official may have sovereign immunity in making a business decision that affects tribal investments, but may not have sovereign immunity if he or she embezzles money or property from the tribe.

Sample Sovereign Immunity Language

*Note: This is draft language that needs to be refined to fit the particular situation of the particular tribe. Tribes should consult with tribal legal counsel in drafting immunity language.

Nothing in this Constitution **[could substitute 'Tribal Code' here]** shall be deemed, interpreted or construed to be a waiver of any immunity from suit or execution against tribal property that the _____ Tribe possesses under tribal, state or federal law, provided however, that persons subject to the jurisdiction of the Tribe may bring claims against the Tribe in the _____ Tribal Court, arising under the terms of the Indian Civil Right Act.

The Council may enact resolutions to waive any immunity from suit or execution subject to the terms of this section. A resolution waiving any immunity from suit or execution shall be passed by an affirmative vote of at least ____ **[should be a higher number than the usual quorum number]** Council members, and evidenced by a written document contemporaneously signed by Council members voting in favor of passage. Any resolution waiving any immunity from suit for claims by a non-governmental entity over \$150,000 **[or some other dollar figure]** in value, or claim by any entity seeking execution against tribal lands shall be approved by an affirmative vote of 51% **[or some other number]** of the qualified tribal voters. The Council shall not enact any waiver of immunity for claims by a governmental entity, except for the purposes of satisfying the conditions or requirements of a grant, contract or compact, which are generally applicable.

Waivers of immunity shall not be general, but must specify the parties who may bring an action against the Tribe, duration for bringing a cause of action, the amount of funds or other property upon which execution may be had, the nature of the transaction giving rise to claims, and any other limitations deemed appropriate by the Council. Upon adoption of this Constitution **[or Tribal Code]**,

all prior waivers of immunity to suit or execution of the _____ Tribe shall be void, unless claims arising under such waivers are brought within two years of adoption of this Constitution **[or Tribal Code]** or such waivers comply with this section. This section shall be strictly construed and ambiguities as to the terms of any waiver shall be construed in favor of finding immunity of the Tribe.