

Jurisdiction 101 Case Study:
The Answers

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An Indian tribe and a General Contractor enter into an agreement to construct a building. A dispute arises over delays and workmanship. The tribe withholds payment from the General Contractor based on the tribe's complaints.

1. Can the General Contractor sue the Tribe for contract damages?

(a) Tribes recognized by the federal government (on a list published by the U.S. Department of the Interior, more or less annually in the Federal Register) are immune from suit in state or federal court, unless immunity is abrogated by Congress or waived by the tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Sovereign immunity "is a necessary corollary to Indian sovereignty and tribal self-governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Regarding tribal sovereign immunity generally, see 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).

(b) Tribal sovereign immunity extends to commercial as well as governmental activities. *Kiowa*, 523 U.S. at 752-54; *Doe v. Oneida Indian Nation*, 278 A.D.2d 564, 565 (3d Dept. 2000).

(c) Tribal sovereign immunity does not depend on whether the site of the construction is reservation land or non-reservation land purchased by the tribe for commercial purposes. *Kiowa*, 523 U.S. at 754-56.

(d) Even if the tribe has waived sovereign immunity, the waiver can be limited and can define who can sue, and where, including requiring that suit be brought in tribal court. See *Demontiney v. United States*, 255 F.3d 801, 812 (9th Cir. 2001) (tribe's limited waiver authorized suit only in tribal court).

(e) A state or federal court may also be required to abstain from adjudicating a dispute until tribal remedies have been exhausted. *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 79 (2d Cir. 2001); *Basil Cook Ent. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997). The courts are divided about whether exhaustion is limited to tribal proceedings that are already underway. *Garcia*, 268 F.3d at 89 (noting majority rule in the federal circuits is that exhaustion requirement is not so limited); *Seneca v. Seneca*, 293 A.D.2d 56 (4th Dept. 2002).

2. What constitutes a waiver of tribal sovereign immunity?

(a) A waiver of sovereign immunity must be "clear." *C & L Ent., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001). An agreement to arbitrate, coupled with a

provision identifying an Oklahoma court as “having jurisdiction,” is a waiver of sovereign immunity, at least in a contract prepared by the tribe. *Id.* The Supreme Court held that an agreement to arbitrate is an agreement to have the arbitration effectuated through periodical enforcement of the arbitration award.

(b) A “sue and be sued” clause is not a waiver of tribal sovereign immunity to suit in state or federal court. *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 86-87 (2d Cir. 2001); *Ransom v. St. Regis Mohawk Educ. and Communit*, 86 N.Y.2d 553, 562-64 (1995).

(c) A forum selection clause alone is not enough to waive sovereign immunity – at least in a boilerplate commercial agreement. *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985); *Danka Funding Co. v. Sky City Casino*, 329 N.J. Super 357, 368 (N.J. Super. Law Div. 1999).

(d) That fact that a contract is governed by a particular state’s law is not a waiver of sovereign immunity. *Sungold Gaming USA, Inc. v. United Nation of Chippewa, Ottawa*, 2002 WL 522886 (Mich.App.,2002); *James Joseph Morrison Consultants, Inc. v. Sault Ste. Marie Tribe*, 1998 WL 1031492 (W.D.Mich.,1998).

(e) Only Congress, which has exclusive and plenary authority over Indian tribes, can abrogate tribal sovereign immunity. A state cannot abrogate tribal immunity or burden its exercise by, for example, denying a tribe access to its courts unless it agrees to waive sovereign immunity. *Three Affiliated Tribes of Ft. Berthold Reservation*. The federal law conferring state court jurisdiction over civil disputes involving tribal members, 25 U.S.C. 233, did not abrogate tribal sovereign immunity. *Ransom v. St. Regis Mohawk Educ. and Community*, 86 N.Y.2d 553, 560 n.3 (1995).

3. Can the General Contractor assert a mechanics lien on the Tribe’s property?

(a) Absent a waiver of tribal sovereign immunity in the contract, a lien against tribal property cannot be enforced and must be dismissed. *Ledford v. Housing Auth. Of Sac and Fox Tribe of Missouri*, 609 F.Supp. 211 (D. Kan. 1985) (finding waiver); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (same).

4. Can the General Contractor avoid tribal immunity by suing tribal officials or tribal entities?

(a) Tribal officials are immune to suit when acting in their official capacity. *Zeth v. Johnson*, 309 A.D.2d 1247, 1248 (4th Dept. 2003); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn. 1996), *aff’d*, 114 F.3d 15 (2d Cir. 1997). A tribal official acting outside his or her tribal authority in violation of federal law can be “stripped” of immunity. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359-60 (2d. Cir. 2000).

(b) Tribal instrumentalities, including tribal businesses have sovereign immunity, even when they are incorporated under state law. *Ransom v. St. Regis Mohawk Educ. and Communit*,

86 N.Y.2d 553, 560 & n.3 (1995) *Worrall v. Mashantucket Pequot Gaming Ent.*, 131 F. Supp.2d 328 (D. Conn. 2001).

5. If the Tribe sues, can the General Contractor counter-sue?

(a) The tribe retains sovereign immunity, even to compulsory counterclaims. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

(b) Tribal sovereign immunity does not ban claims for recoupment, that is, a counterclaim that would reduce the tribe's recovery and that arises out of the same transaction or occurrence as the tribe's suit. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).