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## Sovereign Immunity: Should the Sovereign Control the Purse?

Thomas P. Schlosser

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# SOVEREIGN IMMUNITY: SHOULD THE SOVEREIGN CONTROL THE PURSE?

Thomas P. Schlosser\*

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### I. *What Is Sovereign Immunity?*

The topic of sovereign immunity is too varied and too large to be fully covered here. This broad topic has become even more volatile because of the efforts of Sen. Slade Gorton (R.-Wash.) to alter or abrogate tribes' sovereign immunity in various legislative proposals, as well as the efforts of other members of Congress to counteract those proposals. Accordingly, this paper endeavors to set out major principles on the sovereign immunity of the United States and of Indian tribes and to apply those principles to current federal legislation concerning Indian tribes.

#### A. *Historical Roots*

Sovereign immunity is an expression of the lawmaking power of government and reflects judgments concerning how public resources should be distributed. As Alexander Hamilton famously observed: "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the

exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union."<sup>1</sup>

The inability of courts to enforce a judgment was a basis for the doctrine of sovereign immunity noted in *Chisholm v. Georgia*.<sup>2</sup> That case held a state liable to suit by a citizen of another state or foreign country and created such a shock that the Eleventh Amendment was at once proposed and adopted. Sovereign immunity is also justified on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>3</sup> A further basis for the doctrine is avoidance of interference with governmental functions and with the government's control of its instrumentalities, funds and property.<sup>4</sup>

### *B. The Public Treasury or Domain*

The doctrine of sovereign immunity is critically important *where* it truly applies — to suits against the sovereign. But how does one determine if a suit is against the sovereign? The simple answer is that a suit is against the sovereign *if* "the judgment sought would expend itself on the public treasury or domain."<sup>5</sup>

In many cases the rule can be difficult to apply because the sovereign acts through human individuals, and these agents are often the named defendants. Sovereign immunity does not prevent suits challenging the acts of individuals who violate federal or other applicable law. For this reason, a careful distinction must be drawn between suits against officers of a government and suits against the government itself. Although sovereign immunity provides limited protection of the public treasury or domain, it does not generally protect the *officers* of the sovereign.

Like states, tribes cannot clothe their officers with immunity to protect them from the supreme law of the land. The landmark case of *Ex parte Young*,<sup>6</sup> which established that states cannot authorize officials to enforce a tax that violates the Constitution or laws of the United States, was recognized as applying to Indian tribal officials in *Puyallup Tribe v. Washington Department of Game*,<sup>7</sup> and has been expressly cited in *Santa Clara Pueblo v. Martinez*,<sup>8</sup> as well as elsewhere.

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1. THE FEDERALIST NO. 81, at 130 (Henry S. Commager ed., 1949).

2. 2 U.S. 419, 478 (1793).

3. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.).

4. See generally *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

5. *Land v. Dollar*, 330 U.S. 731, 738 (1947) (holding that suit to compel U.S. Maritime Commission to return pledged stock was not a suit against the sovereign).

6. 209 U.S. 123 (1908).

7. 433 U.S. 165, 171-73 (1977).

8. 436 U.S. 49, 59 (1978).

*Burlington Northern Railroad Co. v. Blackfeet Tribe*,<sup>9</sup> stated: "[S]overeign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute . . . [T]ribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law."<sup>10</sup>

Despite this broad language, simply claiming that a tribal official's authority is unconstitutional does not answer the sovereign immunity question. Instead a court will look to the essential nature and effect of the relief sought to determine whether the tribe "is the real, substantial party in interest."<sup>11</sup> Applying this rule, the Supreme Court instructed that:

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic & Foreign Corp.*, [337 U.S. 682,] 704 [(1949)] . . . .<sup>12</sup>

In *United States v. Lee*,<sup>13</sup> an action of ejectment was brought by Lee and others to recover land claimed by the United States. The suit was brought against officers of the United States occupying and in charge of the land. The Court said that "the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."<sup>14</sup> The dissent, however, noted:

The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, by execution or other judicial process, is to invade the possession of the sovereign, and to disregard the fundamental maxim that the sovereign cannot be sued.<sup>15</sup>

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9. 924 F.2d 899 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992).

10. *Id.* at 901.

11. *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945).

12. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

13. 106 U.S. 196 (1882).

14. *Id.* at 207-08.

15. *Id.* at 226.

The dissent is a more accurate statement of sovereign immunity; the doctrine usually protects property of the sovereign that is occupied by the sovereign's authorized agents.

*United States v. Lee* was narrowed in subsequent cases. *Larson v. Domestic & Foreign Commerce Corp.*<sup>16</sup> involved the sale of Army surplus coal. The purchaser sued in federal court to restrain the War Assets Administrator from transferring the coal to others, allegedly in breach of plaintiff's contract. The Supreme Court directed that the complaint be dismissed on the ground of sovereign immunity. The Court said plaintiff could proceed if it was asserting that the defendant was seeking to enforce an unconstitutional enactment or "acting in excess of his authority or under an authority not validly conferred."<sup>17</sup> The Court stated:

[T]he action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.<sup>18</sup>

In *Larson*, the War Assets Administrator had authority to sell the property; plaintiffs simply wanted the government's coal.

### C. Officer's Suits Regarding Land

In *Malone v. Bowdoin*,<sup>19</sup> plaintiffs sued for ejection of a forest service officer claiming they were the rightful owners of certain land. The United States Supreme Court held that the suit was against the sovereign and tried to cut through the confusion in prior case law:

While it is possible to differentiate many of [the cases following *United States v. Lee*] upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task.

The Court's 1949 *Larson* decision makes it unnecessary, however, to undertake that task here. For in *Larson* the Court, aware that it was called upon to "resolve the conflict in doctrine" (337 U.S., at 701), thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents . . . .

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16. 337 U.S. 682 (1949).

17. *Id.* at 691.

18. *Id.* at 701-02.

19. 369 U.S. 643 (1962).

. . . .

While not expressly overruling *United States v. Lee, supra*, the Court in *Larson* limited that decision . . . . [in] [p]ointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land . . . . So construed, the *Lee* case has continuing validity only "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation."<sup>20</sup>

The Fifth Amendment to the U.S. Constitution is now understood as being self-executing and as furnishing plaintiff a right to compensation in a broad spectrum of cases.<sup>21</sup>

To limit other effects of federal sovereign immunity in cases involving government land, in 1972 Congress passed the Quiet Title Act (QTA).<sup>22</sup> The QTA gives the United States' limited consent to be named as a party in actions concerning disputed real property, *except* trust or restricted Indian land. In *Block v. North Dakota*,<sup>23</sup> the Supreme Court rejected North Dakota's contention that it could exceed the scope of the waiver in the Quiet Title Act "by the device of an officer's suit."<sup>24</sup> The Court said:

If North Dakota's position were correct, all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown v. GSA*, 425 U.S. 820, 833 (1976).

If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory. The United States could also be dispossessed of the disputed property without being afforded the option of paying damages . . . .<sup>25</sup>

The principles described above regarding federal sovereign immunity are also generally applicable to questions of state and tribal sovereign immunity. Thus, when an individual tries to capture monies or property owned by a tribe in its governmental capacity, sovereign immunity may protect the tribe unless there is an exception, of which there are many.

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20. *Id.* at 646-48.

21. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946).

22. 28 U.S.C. § 2409a (1994).

23. 461 U.S. 273 (1983).

24. *Id.* at 284.

25. *Id.* at 284-85.

Several cases illustrate the application of these principles to conflicts involving tribal land. In *Carlson v. Tulalip Tribes of Washington*,<sup>26</sup> an action was brought to quiet title to certain waterfront lands within an Indian reservation. Plaintiffs claimed that the tribe's asserted ownership of tidelands clouded the title to their fee property. The United States refused to consent to suit; the case was dismissed for failure to join an indispensable party.<sup>27</sup>

*Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes*<sup>28</sup> involved non-Indian property within a reservation that for eighty years had been served by a small access road across an allotment. The tribal council directed that the road be blocked to shut down a new development. Plaintiffs were refused access to the tribal court but obtained a temporary restraining order from the federal court. A jury entered a damages judgment against the tribe. Shortly thereafter the Supreme Court ruled in *Santa Clara Pueblo v. Martinez*<sup>29</sup> that the Indian Civil Rights Act of 1968 did not expressly waive tribal sovereign immunity from suit in federal court or create a substantive claim that could be asserted in federal court. Nevertheless, the court of appeals reversed the lower court's dismissal of the action on sovereign immunity grounds, holding "[t]here must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy."<sup>30</sup> (In *Ramey Construction Co. v. Apache Tribe*<sup>31</sup> the same court essentially limited *Dry Creek* to its facts. In *White v. Pueblo of San Juan*<sup>32</sup> the court distinguished *Dry Creek* because the plaintiff in *White* had not sought a remedy in a tribal forum open to him. *Dry Creek* has been read as applying to a narrow set of circumstances in other federal circuits as well.)<sup>33</sup>

In *Imperial Granite Co. v. Pala Band of Mission Indians*,<sup>34</sup> plaintiff sued a tribe, its officers, and all members of the tribe when the tribe halted access to a road used for over 50 years that crossed a portion of the reservation.<sup>35</sup> The court of appeals upheld dismissal on sovereign immunity grounds.<sup>36</sup> Although *Imperial* correctly noted that tribal officials are not necessarily immune from

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26. 510 F.2d 1337 (9th Cir. 1975).

27. See also *Minnesota v. United States*, 305 U.S. 382, 385 (1939).

28. 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981).

29. 436 U.S. 49 (1978).

30. *Dry Creek*, 623 F.2d at 685.

31. 673 F.2d 315, 319 n.4 (10th Cir. 1982).

32. 728 F.2d 1307, 1312 (10th Cir. 1984).

33. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996); *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389 (E.D. Wis. 1995); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979 (9th Cir. 1983); *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999).

34. 940 F.2d 1269 (9th Cir. 1991) (Canby, J.).

35. *Id.* at 1270.

36. *Id.* at 1271.



suit, the plaintiff there failed to show that tribal officials had acted outside of their authority.<sup>37</sup>

The complaint alleges no individual action by any of the tribal officials named as defendants. As far as we're informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury.<sup>38</sup>

Judge Canby went on to note cases holding that property rights in trust property cannot be acquired by prescription nor are easements available by reason of necessity.

*Rowland v. Hoopa Valley Tribe*<sup>39</sup> involved a request that the tribal court grant a temporary restraining order requiring the Tribe to provide access to gravel which plaintiff was storing on tribal land. Plaintiff had been trespassing on tribal land for a number of years, allegedly with verbal approval from a Hoopa tribal employee.<sup>40</sup> The tribal court denied the temporary restraining order on the ground that plaintiff showed little likelihood of success on the alleged right of access to the tribal land where plaintiff's gravel was stored. The Hoopa court of appeals affirmed principles of tribal sovereign immunity but held plaintiff entitled to a preliminary injunction allowing removal of the gravel conditioned upon posting a bond for the value of the gravel removed.

While that case was pending, plaintiff brought a separate action in federal district court, alleging that the tribal council exceeded its authority by exercising jurisdiction over a nonmember and alleging federal jurisdiction on the basis of *National Farmers Union Insurance Co. v. Crow Tribe of Indians*.<sup>41</sup> The district court rejected the tribe's argument that the council was acting solely in a proprietary capacity, as owner of the land, and held that federal question jurisdiction existed to determine whether the tribe had exceeded its authority over a non-Indian under the circumstances, following exhaustion of tribal court remedies.<sup>42</sup>

These cases generally follow the rules described above for determining whether a suit is truly against a sovereign. When the real party in interest in a suit is an Indian tribe, because the judgment sought would reach the tribe's

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37. *Id.*

38. *Id.* at 1271.

39. 21 Indian L. Rep. 6087 (Hoopa Ct. App. 1992).

40. *Id.* at 1271-72.

41. 471 U.S. 845, 850-53 (1985).

42. *Rowland v. Hoopa Valley Tribal Council*, No. C 92-2910 SAW (N.D. Cal. Aug. 2, 1993).

property, sovereign immunity cannot be evaded by naming tribal officials as defendants.<sup>43</sup>

Tribal governments act through officials and other individuals, just as all other governments do. Sovereign immunity protects the public domain and treasury from unauthorized suits; it neither authorizes nor protects persons who violate the rights of another. Sovereign immunity does not permit wrongdoers to continue their misconduct.

## *II. Federal and State Sovereigns Continue to Define Forums, Procedures, and Limits to Suits Against Themselves*

Senator Gorton has often claimed that Indian tribal governments are the only governments in the United States that maintain and assert sovereign immunity. This assertion is wrong. It is also said that tribal sovereign immunity is coextensive with that of the United States. That assertion, too, is incorrect. Sovereign immunity is best understood as the power of a government to define the forum, procedure, and limits to be placed upon suits against itself. In other words, sovereign immunity legislation and litigation mainly concerns the scope of *waivers* of that immunity. As discussed below, there are many different waivers of sovereign immunity at the federal, state, and tribal level. The scope of these waivers varies greatly.

### *A. Except as Provided by Statute, the United States Retains Sovereign Immunity*

The United States has limited its sovereign immunity in several major steps, but sovereign immunity remains a ubiquitous issue in litigation against the federal government.

Congress created the Court of Claims in 1855 to hear claims against the United States and report its findings to Congress. At the urging of President Lincoln, Congress granted the court authority to enter final judgments against the United States, subject to the right to appeal to the Supreme Court, in the Act of March 3, 1863.<sup>44</sup> In 1867, the Tucker Act, now codified at 28 U.S.C. § 1491, greatly expanded the jurisdiction of the Court of Claims to include virtually all legal claims except tort, equitable, and admiralty claims against the United States.

In *United States v. Mitchell*,<sup>45</sup> the Supreme Court explained that if a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.<sup>46</sup> That rule does not mean, however, that all such claims are

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43. *Shermoe v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) (holding that suit challenging act that divided land and funds among tribes impermissibly sought tribal property protected by sovereign immunity).

44. Ch. 92, § 5, 12 Stat. 765, 766.

45. 463 U.S. 206 (1983).

46. *Id.* at 215.

compensable.<sup>47</sup> For example, it would appear that many breach of trust claims fail as do many other assertions that the Tucker Act applies to a case. Mitchell sued over breaches of trust in connection with federal management of forest resources on allotted lands of the Quinault Indian Reservation.<sup>48</sup> Because the particular statutes and regulations at issue could fairly be interpreted as mandating compensation by the federal government for violations of its fiduciary responsibilities in the management of Indian property, money damages could be awarded.<sup>49</sup>

The federal waiver of immunity as to tort claims came much later, in 1946. While the Federal Tort Claims Act (FTCA)<sup>50</sup> is riddled with exceptions, it lays down a general policy of responsibility for torts of governmental employees — "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>51</sup> We discuss the scope of the FTCA below.

Apart from the Tucker Act and the FTCA, the United States could not generally be sued in its own name until 1976; instead declaratory and injunctive relief had to be sought by suing federal officials. In 1976 Congress amended the Administrative Procedure Act. The amendment added a provision that, where a federal court action seeks relief other than money damages and states a claim that a federal agency or officer acted or failed to act in an official capacity or under color of legal authority, such a claim "shall not be dismissed nor relief therein be denied on the ground that [the suit] is against the United States or that the United States is an indispensable party."<sup>52</sup>

The purpose of the section 702 amendment was to remove the defenses of indispensability and sovereign immunity as a bar to judicial review of federal administrative action.<sup>53</sup> Most importantly, section 702 provides that:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.<sup>54</sup>

In other words, the limitations placed elsewhere on a waiver of sovereign immunity in a particular case will still apply. The interplay of sovereign

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47. *Id.* at 216.

48. *Id.* at 210.

49. *Id.* at 228.

50. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680 (1994 & Supp. IV 1998)).

51. 28 U.S.C. § 1346(b)(1) (Supp. IV 1998).

52. 5 U.S.C. § 702 (1994).

53. H.R. REP. NO. 94-1656, 94th Cong., at 1, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6129.

54. *Id.*

immunity waivers is illustrated by *FDIC v. Meyer*.<sup>55</sup> Meyer was fired as a senior management employee shortly after the Federal Savings and Loan Insurance Corporation (FSLIC) took over a failing savings and loan association. Meyer claimed that his summary discharge deprived him of a property right to continued employment without due process of law.<sup>56</sup> When Congress created the FSLIC in 1934 it empowered the agency "[t]o sue and be sued, complain and defend, in any court of competent jurisdiction."<sup>57</sup> The agency argued that the FTCA limited the waiver of immunity contained in the agency's "sue-and-be-sued clause," as the FTCA states in 28 U.S.C. § 2679(a).<sup>58</sup>

Since the United States' liability under the FTCA is the same as the liability that a private person would have under the law of the place where the act or omission occurred,<sup>59</sup> a constitutional tort claim such as Meyer's could not contain such an allegation. Accordingly, the FTCA did not apply and did not protect the agency.<sup>60</sup> Did the FDIC lose? No. Although Meyer had a right to sue the FDIC, he sought to impose on the agency a form of tort liability — tort liability arising under the Constitution — that generally does not apply to private entities and which the court concluded cannot apply to acts of federal agencies themselves.<sup>61</sup> Thus although *Bivens v. Six Unknown Federal Narcotics Agents*<sup>62</sup> created a cause of action for damages against federal agents who allegedly violate the federal Constitution, that cause of action does not exist against an agency of the federal government.

#### *B. State Sovereign Immunity Can Be Superseded by Other States but Not in Federal Court*

Unlike the sovereign immunity of the federal government, the scope of the sovereign immunity of each of the States varies significantly, depending upon each State's definition and waivers of its immunity in its constitution and statutes. A discussion of state sovereign immunity is thus beyond the scope of this paper. Accordingly, the following discussion highlights the effects of the Eleventh Amendment and the *Ex parte Young* doctrine.

States have waived their sovereign immunity in widely varying degrees, as illustrated by *Nevada v. Hall*.<sup>63</sup> In *Hall*, California residents sued in California state court for damages resulting from injuries caused when a Nevada-owned vehicle on official business collided with them on a California highway. The trial court dismissed the case, but the California Supreme Court reversed and

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55. 510 U.S. 471 (1994).

56. *Id.* at 474.

57. *Id.* at 476.

58. *Id.*

59. 28 U.S.C. § 1346(b)(1) (Supp. IV 1998).

60. *Meyer*, 510 U.S. at 474.

61. *Id.* at 485.

62. 403 U.S. 388 (1971).

63. 440 U.S. 410 (1979).

held Nevada amenable to suit in California courts. A jury awarded Hall \$1.2 million despite Nevada's claim that, under the full faith and credit clause of the United States Constitution, a Nevada statute limiting any tort award against Nevada to \$25,000 should apply.

In *Hall*, the United States Supreme Court held that a state is not constitutionally immune from suit in the courts of another state. The Court discussed the history of the sovereign immunity doctrine and its early development in American law. The debate about the suability of the states initially focused on the scope of the judicial power of the United States authorized by Article III of the Constitution. The powers of federal courts to entertain suits against a state were limited by the Eleventh Amendment. The early cases concern questions of federal court jurisdiction and the extent to which the states, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts.

These decisions do not answer the question whether the Constitution places any limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III . . . or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case.<sup>64</sup>

Nevada argued that its statutory waiver of immunity consents to tort suits only in its own courts; it contended that because the maximum allowable recovery in Nevada court was \$25,000, the suit in California should be subject to the same limitation. The Supreme Court rejected that argument, holding that by entering into the Union, the states agreed to respect the sovereignty of each other and limited their ability to treat other states as unfriendly nations. The Court noted: "[t]he people of Nevada have consented to a system in which their State is subject only to limited liability and tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect."<sup>65</sup>

*Idaho v. Coeur d'Alene Tribe*<sup>66</sup> explains the relationship between officer's suits against a State and state sovereign immunity as embodied in the Eleventh Amendment to the U.S. Constitution.<sup>67</sup> The Eleventh Amendment, which was adopted in 1798, provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or

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64. *Id.* at 421.

65. *Id.* at 426.

66. 521 U.S. 261 (1997).

67. *Id.* at 267.

Subjects of any Foreign State."<sup>68</sup> *Nevada v. Hall* teaches us that the Eleventh Amendment does not protect a State against suits in the courts of a sister state; instead it limits the jurisdiction of federal courts only. Probably no state courts, other than those of Idaho, would have had jurisdiction over the claims in *Idaho v. Coeur d'Alene Tribe*. In that case the Coeur d'Alene Tribe and its members filed suit in federal court against the State of Idaho, various state agencies and numerous state officials in their individual capacities, alleging ownership in the bed of Lake Coeur d'Alene and certain rivers within the original boundaries of the Coeur d'Alene Reservation.<sup>69</sup> The tribe sought a declaratory judgment establishing exclusive use and occupancy and the right to quiet enjoyment of the submerged land, together with declarative and injunctive relief concerning the invalidity of Idaho laws purporting to regulate those lands.<sup>70</sup>

The district court dismissed, but the Ninth Circuit held that, under the officer's suit doctrine of *Ex parte Young*,<sup>71</sup> the tribe could proceed with its claim that state officials were unlawfully interfering with tribal rights in the lake.<sup>72</sup> The United States Supreme Court reversed.<sup>73</sup>

Justice Kennedy wrote most of the opinion for the Court, holding that the State's Eleventh Amendment immunity in suits by tribes, recently affirmed in *Blatchford v. Native Village of Noatak*,<sup>74</sup> barred the case unless it fell within the *Ex parte Young* doctrine, which permits declaratory and injunctive relief against state officials in their individual capacities. Although a request for prospective relief from an ongoing federal law violation is usually sufficient to invoke the *Young* doctrine, the Court determined that the tribe's claims to the lakebed were the functional equivalent of a quiet title action and implicated special sovereignty interests.<sup>75</sup>

An interesting aspect of the Supreme Court's ruling in *Idaho v. Coeur d'Alene Tribe* is the extensive discussion of *Ex parte Young* in a portion of Justice Kennedy's opinion in which only Justice Rehnquist joined. That part of Justice Kennedy's opinion advocates a case-by-case approach to the *Ex parte Young* doctrine that would greatly restrict the courts' power to protect federal rights. A concurrence by Justice O'Connor explains that Justice Kennedy's theory — that federal jurisdiction was proper in early *Ex parte Young* cases principally because no state forum was available to vindicate a plaintiff's claim there — is actually unprecedented. Even Justice Kennedy's opinion concedes that in recent cases the *Ex parte Young* doctrine has been applied although there was an effective remedy in state court. Justice O'Connor concludes:

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68. U.S. CONST. amend. XI.

69. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 264-65.

70. *Id.* at 265.

71. 209 U.S. 123 (1908).

72. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 269.

73. *Id.* at 281-88.

74. 501 U.S. 775 (1991).

75. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 281.

The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands — in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands — it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case.<sup>76</sup>

The principles of *Idaho v. Coeur d'Alene Tribe* are fully applicable to tribal sovereign immunity. However, *Nevada v. Hall*, discussed above, is not.

The 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*<sup>77</sup> provides a useful focus for current issues regarding the scope of sovereign immunity waivers and the forums in which suits can be brought. The Kiowa Tribe of Oklahoma, a federally recognized tribe, established a tribal entity called the Kiowa Industrial Development Commission. In 1990, the commission agreed to purchase stock from Manufacturing Technologies and the chairman of the tribe's business committee signed a promissory note in the name of the tribe agreeing to pay \$285,000 plus interest. The note recites that it was signed on tribal trust land, but other evidence suggested that it was signed in Oklahoma City, where the payments were to be made. In a paragraph entitled "Waivers and Governing Law," the note provided: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."<sup>78</sup>

The tribe defaulted; Manufacturing Technologies sued in state court. The Oklahoma court of appeals held that tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The United States Supreme Court reversed:

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See, e.g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (*USF&G*). To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167 (1977). We held the Tribe's claim of immunity was "well

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76. *Id.* at 296-97.

77. 118 S. Ct. 1700 (1998).

78. *Id.* at 1702.

founded," though we did not discuss the relevance of where the fishing had taken place. *Id.*, at 168, 172. Nor have we yet drawn a distinction between governmental and commercial activities of a tribe. See, e.g., *ibid.* (recognizing tribal immunity for fishing, which may well be a commercial activity); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991) (recognizing tribal immunity from suit over taxation of cigarette sales); *USF&G, supra* (recognizing tribal immunity for coal-mining lease). Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See *id.*, at 514.

The Oklahoma Court of Appeals nonetheless believed federal law did not mandate tribal immunity, resting its holding on the decision in *Hoover v. [Kiowa Tribe of] Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 517 U.S. 1188 (1996). In *Hoover*, the Oklahoma Supreme Court held that tribal immunity for off-reservation commercial activity, like the decision not to exercise jurisdiction over a sister State, is solely a matter of comity. 909 P.2d, at 62 (citing *Nevada v. Hall*, 440 U.S. 410, 426 (1979)). According to *Hoover*, because the State holds itself open to breach of contract suits, it may allow its citizens to sue other sovereigns acting within the State. We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." *Id.*, at 782; *accord Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2033-2034



(1997). So tribal immunity is a matter of federal law and is not subject to diminution by the States. *Three Affiliated Tribes, supra*, at 891; *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154 (1980).<sup>79</sup>

In *Kiowa*, the Supreme Court repeatedly noted that tribal sovereign immunity is subject to modification by Congress, as well as waiver by the tribes themselves. Accordingly, we now turn to analysis of five current topics in tribal sovereign immunity: contracts and waivers; collection of state taxes; tort claims; the effect of the Indian Civil Rights Act; and federal environmental laws. Basic principles of sovereign immunity in these topics are keenly illustrated by the efforts of Senator Gorton to alter or abrogate tribal sovereign immunity in his bills in the 105th Congress, Senate Bill 1691 and Senate Bills 2298-2302, and by Sen. Ben Nighthorse Campbell's (R.-Colo.) alternate proposal, Senate Bill 2097. Accordingly, the following sections examine the principles of sovereign immunity underlying these five areas and how the proposed legislation will alter them if enacted.

### III. Contracts and Sovereign Immunity

#### A. The Rule of Unequivocal Waiver

*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*<sup>80</sup> makes clear that, to be effective, a waiver by contract of a tribe's sovereign immunity must be clearly expressed. In *Kiowa*, the contractual language under "Waivers and Governing Law" preserved the sovereign immunity of the Kiowa Tribe of Oklahoma, although in somewhat ambiguous terms.<sup>81</sup> Plainly that language did not meet the requirement that a waiver of immunity must be unequivocally expressed; instead the Court's analysis focused on whether immunity existed at all with respect to commercial conduct outside reservations.<sup>82</sup>

The general rule remains that a waiver of sovereign immunity must be *unequivocally* expressed and cannot be implied.<sup>83</sup> "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."<sup>84</sup>

Whether and to what extent a contract clause constitutes a waiver of tribal sovereign immunity turns on the terms of that clause.<sup>85</sup> In *Rosebud Sioux Tribe*

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79. *Id.* at 1702-03.

80. 118 S. Ct. 1700 (1998).

81. *See id.* at 1705.

82. *Id.*

83. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

84. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

85. *E.g., Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989).

*v. Val-U Construction Co.*,<sup>86</sup> the Eighth Circuit considered an arbitration clause reading: "All questions of dispute under this Agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."<sup>87</sup> The court concluded that the "clause is a clear expression that the Tribe has waived its immunity with respect to claims under the contract."<sup>88</sup>

By contrast, in *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*,<sup>89</sup> the Eighth Circuit construed a promissory note signed by the tribal chairman that provided the plaintiff with several remedies upon default, including the right to charge interest on the principal balance, "in addition to such other and further rights and remedies provided by law." The note also stated that rights and obligations under the note would be subject to the law of the District of Columbia.<sup>90</sup> Nowhere did the note expressly speak to the tribe's consent to suit or to waiver of immunity from that suit. The court said it would have no difficulty implying from the language in the tribal resolution and the promissory note a waiver of sovereign immunity. However, relying upon the rule that waivers of immunity must be expressed and cannot be implied, the court rejected the claimed waiver.

Neither *Kiowa* nor *American Indian Agricultural Credit Consortium* should be read as requiring that a contract use the magic words "sovereign immunity" to accomplish an express waiver. Instead, the case law looks to whether a contract specifies a court or other forum for resolution of disputes and states what remedies, if any, are available to satisfy a judgment rendered by the dispute resolution forum with jurisdiction.<sup>91</sup>

### *B. Tailoring Contractual Limited Waivers to Fit Modern Tribal Needs*

Because waivers of sovereign immunity are strictly construed, practitioners are urged to prepare them with care. For example, in some situations a broad immunity waiver might be appropriate, such as the following:

*To the extent that the Tribe has immunity from suit to require enforcement of this agreement, it hereby affirmatively waives all such immunity and consents to resolution of disputes by arbitration in accordance with the [specific arbitration rules]. The waiver of sovereign immunity includes, without limitation, waiver of immunity as to jurisdiction and immunity from execution of any judgment to compel or enforce any arbitration award rendered.*

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86. 50 F.3d 560 (8th Cir. 1995), cert. denied, 516 U.S. 819 (1995).

87. *Id.* at 562.

88. *Id.*

89. 780 F.2d 1374 (8th Cir. 1985).

90. *Id.* at 1376 n.3.

91. *See, e.g., Maryland Casualty Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966).

*To the extent that the Tribe or its assets or property have, or may hereafter acquire, any immunity from the jurisdiction of [specified] court or from any legal process under the laws of [applicable jurisdiction], the Tribe hereby irrevocably waives such immunity with respect to the obligations arising under this contract. This provision shall not apply to any tribal lands nor to funds or other property held by the United States in trust for the Tribe or its members.*

A careful approach to preparing a waiver starts with the realization that a waiver of tribal sovereign immunity is not an all-or-nothing proposition. Although a broad waiver is what many non-Indian contractors seek, many Indian tribes agree to include more limited waivers of sovereign immunity within their contracts (rather than flatly refusing to waive immunity) to attract investors and businesses to their reservations. The potential variety of transactions in which tribes may participate requires careful legal analysis of the elements of a waiver on a case-by-case basis. This list of elements is not exhaustive, and waivers can and should be carefully tailored to the circumstances. The limitations that are appropriate in one situation may be entirely unworkable in another.

### *1. Limit Who May Bring Claim*

A waiver of tribal sovereign immunity should limit who can bring a claim to only the lender or contractor and should not extend to any other party, including any successor or assign of the lender or contractor:

*This waiver of immunity shall not extend to or be used for or to the benefit of any other person or entity of any kind or description whatsoever, including any successor or assign of lender.*

### *2. Limit Types of Claims Allowed*

A waiver of tribal sovereign immunity should also limit claims to enforcement of the contract and any disputes arising under the contract. A waiver in a contract should bar alternative theories of recovery, such as tort claims. Although contract claims would primarily consist of claims for monetary damages, they might include claims for injunctive or declaratory relief.

*This waiver of immunity is strictly limited to enforcement of the provisions of this Agreement and to any dispute that may arise under or in relation to this Agreement or operations performed under this Agreement between the parties.*

### *3. Limit Types of Relief*

A waiver of tribal sovereign immunity should limit the type of relief that may be claimed. As discussed in paragraph 2, above, claims can consist of claims for monetary damages as well as claims for injunctive and declaratory relief.

*The Tribe's waiver of immunity from suit is specifically limited to an award of monetary damages under the terms of this agreement.*

#### 4. *Limit Choice of Forum*

A limited waiver can permit suit against the waiving tribe in any forum that would otherwise have jurisdiction over the subject matter. By consenting to the jurisdiction of the federal courts (where jurisdiction exists) many non-Indian lenders and contractors may be put at ease that the tribal court is not the exclusive forum for hearing their claims. Note, however, that federal jurisdiction will not exist in many situations:

*To the extent jurisdiction obtains, this limited waiver of immunity shall be deemed a consent to the jurisdiction only of the Tribal Court and the United States District Court for this District.*

#### 5. *Limit Choice of Law*

Generally, a waiver of sovereign immunity should also include a statement specifying the choice of law to be applied by the court hearing the claim:

*The law to be applied in any action against the Tribe shall be: first, the law of the Tribe, including traditional tribal laws; second, federal law, including federal statutory and common law; and third, in the absence of appropriate tribal or federal law, the law of the State of \_\_\_\_\_.*

#### 6. *Limit Total Judgment Amount and Source from Which Judgment May Be Satisfied*

A fundamental way in which a waiver can be limited is to total judgment amount. Generally, a waiver of immunity should restrict the type of relief to the amount owed under the contract plus any interest allowed by the terms of the contract. The limitation amount may be based on a total contract amount or on some other figure.

An additional limitation is the source from which any judgment may be satisfied. In other words, it is imperative that the tribe identify project funds, a stream of revenue, an insurance policy, or other specific property or asset to be used to satisfy a judgment in order to preclude the levy of any judgment, lien, or attachment upon other property or assets of the tribe.

#### 7. *Limit Types of Damages*

If a limited waiver of sovereign immunity allows for monetary damages, the types of monetary damages can also be limited. For example, a limited waiver may permit recovery of only foreseeable damages, not lost profits, or only back pay and benefits, not front pay and emotional damages. Since many standard contracts include a provision allowing the recovery of attorneys' fees to a successful litigant under the contract, a limited waiver of tribal sovereign immunity should restrict such a recovery. Postjudgment interest should also be specifically prohibited:

*This waiver of immunity specifically does not allow for recovery of attorneys fees or postjudgment interest and does not extend to actions for declaratory*

*judgment or injunctive relief. Except as expressly provided herein, nothing in this limited waiver of immunity shall be construed as a waiver or consent to the levy of any judgment, lien, or attachment upon any property or interest in property of the Tribe. A judgment against the Tribes pursuant to this limited waiver of immunity may be satisfied only from the \_\_\_\_\_ [project funds, stream of revenue, insurance policy, or other specific property or asset of the Tribe].*

#### *8. Limit Duration of the Waiver*

A limited waiver of tribal sovereign immunity should be limited in duration. Generally, the relevant period is determined by the specific circumstances involved with the contract (e.g., service contract versus construction contract):

*Notwithstanding any applicable statute of limitations or other law, this limited waiver shall be enforceable only for [one year, six months, etc.] following the termination of this Agreement, and only as to claims arising during the effective period of this Agreement.*

#### *C. Senator Gorton's Proposals Concerning Sovereign Immunity in Contracts in Senate Bill 2299*

On February 27, 1998, Senator Gorton introduced Senate Bill 1691, the so-called American Indian Equal Justice Act. Senator Gorton withdrew the bill from further consideration on May 20, 1998, just days before issuance of the *Kiowa* opinion. Senate Bill 1691 addressed the issue of tribal sovereign immunity in contracts in two ways: First, section 4(a) proposed to amend the Tucker Act to give district courts: "[J]urisdiction 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."<sup>92</sup>

Second, Senate Bill 1691 proposed to abolish sovereign immunity in contracts in suits in state court pursuant to section 6(a), which granted federal consent to civil causes of action against a tribe in a court of general jurisdiction of a state for claims "that involve any contract made by the governing body of an Indian tribe or on behalf of an Indian tribe."

Senator Gorton's additional proposal to eliminate sovereign immunity in tribal contracts is found in Senate Bill 2299, introduced July 14, 1998. The key part of this bill is found in section 4, which would add to 28 U.S.C. § 1362 the following subsections:

(b)(1) The district courts shall have jurisdiction of any civil action or claim against an Indian tribe (including a tribal organization, as that term is defined in section 4(1) of the Indian Self-Determination and Educational Assistance Act (25 U.S.C.

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92. S. 1691, 105th Cong., § 4(a) (1998).

section 450b(1)) 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 the Indian tribe.

(2) to the extent necessary to enforce this subsection, the tribal immunity (as that term is defined in section 3 of the American Indian Contract Enforcement Act) of the Indian tribe involved is waived.<sup>93</sup>

Some tribes by resolution or ordinance have declared that they will not assert sovereign immunity with respect to claims arising from written contracts and which are brought in tribal court. Other tribes as a matter of policy do not assert immunity in tribal court in such circumstances. More generally, an express written partial waiver of a tribe's or tribal entity's sovereign immunity is common in contracts. Sovereign immunity is often waived by an arbitration clause.<sup>94</sup> Any contractor doing business with a sovereign who does not determine that remedies for a breach are available in a particular court, or through arbitration, should seek better legal advice.

Is there a need for federal district court jurisdiction for contract claims against Indian tribes? Senator Gorton's bill would address the concern of some tribes who oppose enforcement of contracts in state court but cannot demonstrate a basis for federal subject matter jurisdiction in the event of dispute, such as a refusal to arbitrate. For example, to permit a federal court to confirm an arbitration award under the Federal Arbitration Act,<sup>95</sup> a party must demonstrate an independent ground for federal subject matter jurisdiction.<sup>96</sup> Because tribes are not citizens of any state for the purposes of federal diversity jurisdiction and because a contract dispute may not present a case arising under federal law, federal jurisdiction is often unavailable.

Senate Bill 2299 would change substantive law far more drastically than authorizing a federal forum for contract disputes. Senate Bill 2299 waives tribal immunity from jurisdiction, judicial review, and "remedies," and thus eliminates the negotiations that currently occur between tribes and contractors concerning procedures applicable to disputes and assets available to satisfy claims. By contrast, when Congress authorized incorporation of tribal entities under the Indian Reorganization Act of 1934, it authorized appropriate *partial* waivers of the immunity of the tribal corporations as set forth in corporate charters. As illustrated in the case law construing 25 U.S.C. § 477, contractual waivers of immunity are ordinarily limited to particular assets.<sup>97</sup>

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93. S. 2299, 105th Cong., § 4 (1998).

94. See generally *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995).

95. 9 U.S.C. § 9 (1994).

96. See *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F. Supp. 1185, 1189 (N.D. Iowa 1994).

97. See also 25 C.F.R. § 162.12 (1999) (authorizing encumbrance of leasehold interests);

#### IV. Sovereign Immunity and Collection of State Taxes

##### A. Is Enforcement of State Taxes in Indian Country a Sovereign Immunity Issue?

Present law permits States to enforce the collection of lawful state taxes on nonmembers who purchase within Indian country, but the States have been reluctant to use available remedies, preferring instead to negotiate tax collection agreements.

In *Moe v. Confederated Salish & Kootenai Tribes*<sup>98</sup> and subsequent cases, the United States Supreme Court has held that tribes are required to collect sales taxes on nonmember purchases of cigarettes. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*,<sup>99</sup> and in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros.*,<sup>100</sup> the Supreme Court pointed out that States have several alternatives for enforcing the requirement of tribal assistance in collecting lawful state taxes, including precollecting taxes from wholesalers and the right to sue individual agents or officers of the tribe for damages caused by their neglect or refusal to carry out that duty.

In *Bogan v. Scott-Harris*,<sup>101</sup> the Supreme Court reaffirmed that local legislators may be held liable for violating a court order to levy a tax sufficient to pay a judgment. The Court noted that the order had created a "ministerial duty" on the part of the legislators and stated, "[t]he rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct."<sup>102</sup> After *Bogan*, it is clear that tribal immunity need not be modified simply to help States enforce the requirements (established by other Supreme Court cases) that tribal agents and officials create records and collect certain taxes lawfully imposed on nonmembers purchasing imported goods on Indian reservations.

##### B. Senator Gorton's Approach to Collection of State Taxes on Nonmembers in Senate Bill 1691

Section 3 of Senate Bill 1691 proposed to create federal district court jurisdiction to hear cases brought by States to compel a tribe, tribal corporation, or member of a tribe to collect state sale, use and excise taxes that are "imposed by the State on nonmembers of the Indian tribe as a consequence of the

Red Mountain Mach. Co. v. Grace Inv. Co., 29 F.3d 1408 (9th Cir.), cert. denied, 513 U.S. 1044 (1994).

98. 425 U.S. 463 (1976).

99. 498 U.S. 505 (1991).

100. 512 U.S. 61 (1994).

101. 118 S. Ct. 966 (1998).

102. *Id.* (quoting *Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870)).

purchase of goods or services by the nonmember." This language would change the substantive law concerning what state taxes may be enforced within Indian country. Is this a sovereign immunity issue?

A "member of an Indian tribe" within the meaning of Senate Bill 1691 is not now protected by tribal sovereign immunity because of the *Ex parte Young* doctrine, discussed above. Also individual Indians in many states are subject to state court jurisdiction under Public Law 280, noted below. Whether a tribal corporation can be sued varies from case to case depending upon the law creating the corporation and the corporate charter. For example, tribal entities incorporated under the Indian Reorganization Act of 1934, generally have partial waivers of the immunity of the tribal corporations set forth in the corporate charter.

Senate Bill 1691 further departs from the tribal sovereign immunity issue by changing substantive law concerning taxation within Indian country. Section 3 would create a right of enforcement of "any excise, use, or sales tax imposed by the State on nonmembers of the Indian tribe." This provision would change federal law by authorizing state taxation of all nonmember purchases of goods or services in Indian country regardless of whether that tax is expressly or impliedly preempted by other federal laws. By looking only to whether the tax is "imposed by the State," Senate Bill 1691 would override the preemptive effect of federal laws concerning Indian timber, gaming, and other areas where state taxation of non-Indian purchases or services within Indian country is precluded. Several cases illustrate the sweeping effect of section 3.

In *Warren Trading Post v. Arizona State Tax Commission*,<sup>103</sup> the Supreme Court held that federal statutes and treaties asserting sweeping and dominant control over federal Indian traders precluded the State's imposition of a gross receipts tax on nonmember business trading within the Navajo Reservation. In *White Mountain Apache Tribe v. Bracker*,<sup>104</sup> Arizona imposed on a non-Indian enterprise organized to conduct tribal logging operations a gross receipts tax, a motor carrier license tax, and a fuel tax. The Supreme Court held that the harvest and sale of Indian timber was the subject of a comprehensive federal regulatory scheme that left no room for state taxation of the non-Indian purchases and activities within Indian country. In *New Mexico v. Mescalero Apache Tribe*,<sup>105</sup> the Supreme Court rejected licensing fees sought to be imposed by the state on nonmembers who hunt and fish on that reservation. The Court noted that:

Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the

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103. 380 U.S. 685 (1965).

104. 448 U.S. 136 (1980).

105. 462 U.S. 324 (1983).



reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State. The tribal authority to regulate hunting and fishing by nonmembers, which has been repeatedly confirmed by federal treaties and laws . . . would have a rather hollow ring if tribal authority amounted to no more than this.<sup>106</sup>

In sum, Senate Bill 1691 offered the States a tool for tax collection without any showing that the tools already available will not work. Section 3 also changes substantive law to lift the preemptive effect of federal statutes and regulations that exempt from taxation the purchases of goods or services by nonmembers of a tribe under certain circumstances, such as where value generated on the reservation is intended to be preserved to accomplish federal goals.<sup>107</sup>

*C. Senator Gorton's Approach to Sovereign Immunity and State Tax Collection in Senate Bill 2300*

Section 3 of Senate Bill 1691 was reincarnated with some changes in Senator Gorton's Senate Bill 2300, introduced July 14, 1998, as the State Excise, Sales and Transaction Tax Enforcement Act of 1998. The bill provides:

**SEC. 2. FINDINGS.**

Congress finds that —

(1) a long line of decisions of the United States Supreme Court has established that States have the right to collect lawfully imposed nondiscriminatory State excise, sales, and transaction taxes on the purchase of a good or service from an Indian tribe (including a tribal government or tribal corporation) by a person who is not a member of that Indian tribe;

(2) the collection of the taxes referred to in paragraph (1) has been impeded by the assertion of tribal immunity by Indian tribes (including tribal governments and corporations) and members of an Indian tribe as a defense in an action in a Federal court that is necessary to enforce the collection of the State taxes that apply to the sales referred to in paragraph (1); and (3) the failure of an Indian tribe (including a tribal government or tribal corporation) or a member of an Indian tribe to act as an agent of a State to collect a State tax referred to in paragraph (1) —

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106. *Id.* at 338.

107. See *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) (holding that State could not impose timber yield tax against non-Indian companies purchasing tribal timber due to federal preemption).

(A) unlawfully deprives that State of essential tax revenues needed for infrastructure improvement and ensuring the health and welfare of all of the citizens of that State; and

(B) creates a disadvantage for law-abiding businesses that are not associated with the Indian tribe and that fulfill their obligation to act as an agent of the State, and, as a result of that disadvantage, some of those businesses may be forced out of business.

### SEC. 3. COLLECTION OF STATE TAXES.

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

(1) by inserting "(a) In General. —" before "The district courts";

(2) by inserting "(referred to in this section as an 'Indian tribe')" after "Interior"; and

(3) by adding at the end the following:

"(b) Collection of Qualified State Taxes by Indian Tribes. —

"(1) Definitions. — In this subsection:

"(A) Good or service. — The term 'good or service' includes any tobacco product or motor fuel (within the meaning of the Internal Revenue Code of 1986).

"(B) Qualified state tax. —

"(i) In general. — The term 'qualified State tax' means any lawfully imposed, nondiscriminatory excise, sales, or transaction tax imposed by a State on a purchase of a good or service from a tribal retail enterprise by a person who is not a member of that Indian tribe.

"(ii) Exceptions. — The term does not include any State tax —

"(I) imposed on the sale of a good or service by a tribal retail enterprise to a person who is not a member of an Indian tribe with respect to which, as of the date of enactment of the State Excise, Sales, and Transaction Tax Enforcement Act of 1998, the tribal retail enterprise is exempted under the law of that State from collecting and remitting because the Indian tribe associated with that tribal retail enterprise imposes and collects an equivalent tax on such sale in an amount equal to the tax that would otherwise be imposed by the State;

"(II) imposed on the sales of a tribal retail enterprise if, as of the date of enactment of the State Excise, Sales, and Transaction Tax Enforcement Act of 1998, the State has waived the applicability of that tax to the purchase of a good or service from that tribal retail enterprise by a person who is not a member of the Indian tribe of the owner or operator of that tribal retail enterprise;

"(III) that is the subject, as of the date of enactment of the State Excise, Sales, and Transaction Tax Enforcement Act of 1998, of an agreement between a tribal retail enterprise and a State that exempts that tribal retail enterprise from collecting and remitting that tax; or

"(IV) with respect to which the incidence of the tax falls on an Indian tribe (including a tribal government or tribal corporation) or member of an Indian tribe.

"(C) Tribal immunity. — The term 'tribal immunity' means the immunity of an Indian tribe (including a tribal government or tribal corporation) from jurisdiction of the Federal courts, judicial review of an action of that Indian tribe, and other remedies.

"(D) Tribal retail enterprise. — The term 'tribal retail enterprise' includes any entity that —

"(i) is owned or operated by an Indian tribe (including a tribal government or tribal corporation) or member of an Indian tribe; and

"(ii) engages in the business of the wholesale or retail sales of a good or service.

"(2) Collection of qualified State taxes. — Subject to paragraph (3), the owner or operator of a tribal retail enterprise shall collect and remit such qualified State taxes as the owner or operator of the tribal retail enterprise is required to collect and remit.

"(3) Conflict resolution. —

"(A) Declaratory judgments. — A State may bring an action for a declaratory judgment under section 2201 of this title in a district court of appropriate jurisdiction concerning the applicability or lawfulness of a qualified State tax referred to in paragraph (2).

"(B) Actions. — A State may bring an action against a tribal retail enterprise, or the Indian tribe (including a tribal government or tribal corporation) or member of an Indian tribe that owns or operates the tribal retail enterprise in a district court of appropriate jurisdiction to enforce the collection or remittance of a qualified State tax under paragraph (2).

"(C) Waiver of tribal immunity. — In an action referred to in subparagraph (A) or (B), to the extent necessary to obtain a judgment in that action, the tribal immunity of the Indian tribe (including a tribal government or tribal corporation) or member of the Indian tribe is waived."<sup>108</sup>

As can be seen, Senate Bill 2300 does respond to criticism, leveled at Senate Bill 1691 during committee hearings, that Senator Gorton's earlier bill overrode the efforts of a number of tribes and States to negotiate tax collection and revenue sharing agreements. Senate Bill 2300 also acknowledges the fact that some States have chosen not to impose a tax on reservation transactions where the tribe collects an equivalent tax on such sales.

A key ambiguity in Senate Bill 2300 is found in the definition of "good or service" that "includes any tobacco product or motor fuel." What else does it

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108. S. 2300, 105th Cong. §§ 2-3 (1998).

"include?" To the extent that Senate Bill 2300 could be construed to authorize state tax collection on value generated on reservations, and in particular, sales of tribal natural resources, Senate Bill 2300 would drastically alter federal law that preempts state taxation in order to achieve the federal goal of tribal self-sufficiency and economic self-determination.

*D. Senator Campbell's Approach to State Tax Collection Issues in Senate Bill 2097*

On May 20, 1998, Senator Campbell, Chairman of the Senate Indian Affairs Committee, introduced Senate Bill 2097, the Indian Tribal Conflict Resolution, Tort Claims, and Risk Management Act of 1998. Senate Bill 2097's approach to state tax collection issues is straightforward: intergovernmental agreements (compacts). Section 101 would authorize intergovernmental compacts regarding collection and payment of retail taxes. Section 102 proposes intergovernmental negotiations and establishes procedures. Section 103 would create an intergovernmental alternative dispute resolution panel. Section 104 would allow judicial enforcement and provides: "Each compact or agreement entered into under this title shall specify that the partner consent to litigation to enforce the agreement, and to the extent necessary to enforce the agreement, each party waives any defense of sovereign immunity."<sup>109</sup> Senate Bill 2097 would also create a joint tribal-federal-state commission on intergovernmental affairs and provide funding for administration of tax collection compacts. The tort claims and risk management provisions of Senate Bill 2097 are discussed in section V.E. below.

*V. Tribal Sovereign Immunity and Tort Claims*

*A. Because of the Indian Self-Determination Act, the Federal Tort Claims Act Applies to Many Tort Claims Against Tribes*

Most, if not all, activities of tribal governments are the subject of compacts and contracts under the Indian Self-Determination and Educational Assistance Act of 1975 (ISDA).<sup>110</sup> The ISDA enables tribes to carry out governmental functions that would otherwise be performed by the federal government and allows reallocation of limited federal funds, supplemented by tribal funds, to carry out governmental priorities selected by the tribe.<sup>111</sup>

Under present law, while carrying out an ISDA-authorized activity, tribal employees are:

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109. S. 2097, 105th Cong. § 104(a)(2) (1998).

110. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C.).

111. See 25 U.S.C. §§ 450f, 458cc (1994 & Supp. IV 1998).

[D]eemed employees of the Bureau or Service while acting within the scope of their employment . . . [and] claims . . . shall be deemed to be . . . against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.<sup>112</sup>

The regulations for implementing coverage under the Federal Tort Claims Act (FTCA) illustrate its applicability to Indian tribes: "Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract? Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract."<sup>113</sup> Under the 1994 amendments to Pub. L. 93-638, Title I ISDA contracts have many of the features of Title IV Self-Governance compacts. In both instances tribes may redirect contract funds to better meet tribal needs. In the case of self-governance compacts, section 2 of the Annual Funding Agreement (AFA) typically specifies the programs, activities, functions and services to be provided under the self-governance compact. A tribe applies funds from the AFA and funds available from other sources to carry out these activities. All activities performed in carrying out the functions specified in the AFA are protected by the FTCA just as if they were being carried out by a federal employee. As the proposed rules to implement the Tribal Self-Governance Act state, at section 1000.250: "Is the FTCA the exclusive remedy for a tort claim arising out of the performance of a self-governance AFA? Yes."<sup>114</sup>

Congress has moved carefully and incrementally to insure liability coverage for activities carried out by Indian tribes. When the ISDA was initially enacted in 1975, Congress authorized the Secretary of the Interior to require any tribe to obtain liability insurance as a prerequisite to exercising the authorities of the Act. Congress also prohibited insurance carriers from using tribal sovereign immunity to defeat claims within the coverage of the policy. In 1990, Congress required the Secretary of the Interior to obtain or provide liability insurance or equivalent coverage on the most cost-effective basis for tribes carrying out contracts and agreements.<sup>115</sup> Ultimately, in 1993, the language quoted above was made generally applicable. This makes it clear that the FTCA applies to Indian tribes carrying out functions under the ISDA.

*B. Like the FTCA, State Tort Claims Acts Continue to Protect State Governments from Tort Claims Arising from Normal Governmental Functions and Exercises of Discretion*

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112. Act of Nov. 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60, amended by Act of Nov. 11, 1993, Pub. L. No. 103-138, Title III, § 308, 107 Stat. 1379, 1416.

113. 25 C.F.R. § 900.197 (1998).

114. 63 Fed. Reg. 7201, 7245 (Feb. 12, 1998).

115. 25 U.S.C. § 450f(c)(1) (1994 & Supp. IV 1998).

Like the FTCA, most state tort claims acts expressly immunize the State from claims arising from normal governmental functions and exercises of discretion. A few cases from the California courts of appeals illustrate this. In *Cairns v. County of Los Angeles*,<sup>116</sup> plaintiffs' homes were damaged by a fire. California retains a statutory governmental immunity for failure to provide fire protection service.<sup>117</sup> But plaintiffs contended that a dangerous condition on public property was actually the cause of their damages, specifically the closure of a road which made it impossible for fire fighters to respond to the emergency.<sup>118</sup> The court noted that under the California Tort Claims Act, a public entity is not liable for an injury unless that act specifically allows for that liability. In addition, the liability of a public entity is subject to immunities provided by statute.<sup>119</sup> In *Cairns*, the county's failure to repair a damaged road simply amounted to a failure to provide fire protection, a situation in which the county is statutorily protected by immunity.<sup>120</sup>

Like counties, of course, Indian tribes provide fire protection within the limit of government resources and require immunity in connection with those activities.

In *Weaver v. State of California*,<sup>121</sup> a passenger in a car pursued by police officers sought damages for his injuries in the accident. The court rejected the claim, noting that California Vehicle Code section 17004.7 "was enacted in 1987 to provide immunity to governmental entities which previously had enjoyed only limited immunity while their police officer employees were entirely immune."<sup>122</sup>

Indian tribes, like states, provide police protection and, in the normal operation of police activities, injuries occur. As discussed below, some injuries are now covered by the FTCA.<sup>123</sup> However, the remedies available to injured parties do not and should not permit them to reach the public treasury or domain of tribal governments.

### *C. Senator Gorton's Approach to Tribal Tort Liability in Senate Bill 1691: A Claims Procedure Without Defenses*

Senate Bill 1691 would strip tribes of their present coverage under the FTCA. Senate Bill 1691 would also transfer from the federal government to tribes the cost of compensating persons entitled to damages under the FTCA. There is no obvious policy justification for transferring to tribes the burden of defending against claims and paying for injuries that result from carrying out

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116. 72 Cal. Rptr. 2d 460 (1997).

117. CAL. GOV. CODE §§ 850, 850.2, 850.4 (West 1999).

118. *Cairns*, 72 Cal. Rptr. 2d at 461-62.

119. *Id.* at 462.

120. *Id.* at 463.

121. 73 Cal. Rptr. 2d 571 (1998).

122. *Id.* at 280 (quoting *Colvin v. City of Gardena*, 11 Cal. App. 4th 1270, 1277 (1992)).

123. See 28 U.S.C. § 2680(h) (1994).

functions that would otherwise be performed by the federal government. Yet that is the effect of these sections of Senate Bill 1691.

Sections 4 and 5 of Senator Gorton's Senate Bill 1691 supposedly parallel the Tucker Act and the FTCA. In fact, sections 4 and 5 would essentially eliminate the role of tribal courts under existing law and, unlike those acts, would deny Indian governments the statutory protection for discretionary functions and the procedural protections of an administrative claims process that currently exist under the FTCA.

Sections 4 and 5 give federal district courts original jurisdiction in civil actions arising under federal law. Under current law, Indian tribal courts exercise jurisdiction over such claims and, if a tribal court exceeds its authority, jurisdiction exists in federal district court under 28 U.S.C. § 1331. Thus, these provisions of Senate Bill 1691 would reverse the Supreme Court's rulings in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,<sup>124</sup> and subsequent cases, which require that such claims first be presented in Indian tribal courts:

Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.<sup>125</sup>

In *FMC v. Shoshone-Bannock Tribes*,<sup>126</sup> and in *Mustang Production Co. v. Harrison*,<sup>127</sup> federal courts of appeals have ruled that, while federal courts may be guided by a tribal court's expertise they have no obligation to defer to a tribal court's decision, and thus legal questions are reviewed *de novo*. These cases address whether a tribe had authority over a non-Indian employer on reservation and whether federal laws limited tribal authority to tax certain lands. Because tribal courts have the most expertise concerning controversies arising on their reservations, there is no good policy reason to change the requirement that parties in civil actions exhaust available tribal court remedies. However, elimination of the exhaustion requirement for claims against tribes or tribal members appears to be a principal intent and effect of these provisions of Senate Bill 1691.

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124. 471 U.S. 845 (1985).

125. *Id.* at 856 (footnotes omitted).

126. 905 F.2d 1311 (9th Cir. 1990).

127. 94 F.3d 1382 (10th Cir. 1996).

Senate Bill 1691's failure to recognize normal governmental immunities from tort claims could produce disastrous effects. Sections 4 and 5 of Senate Bill 1691 would make a tribal government liable for injury or loss of property or death under circumstances in which "a private individual or corporation" would be liable. By contrast, the Federal Tort Claims Act preserves the "judicial or legislative immunity" defense to the United States<sup>128</sup> and has a series of itemized exceptions and defenses of the United States in 28 U.S.C. § 2680. Those defenses are currently available to most tribal employees because of the present applicability of the FTCA.

Whether a FTCA claim against the federal government is barred by the discretionary function exception is determined by tests announced in *Berkovitz v. United States*.<sup>129</sup> In general, administrative judgments involving the allocation and deployment of limited governmental resources are immunized from suit by the discretionary function exemption.<sup>130</sup> Such administrative decisions are made by Indian tribal governments just like any other government.

Section 5 of Senate Bill 1691 will also treat tribes less fairly than the federal government or the States. For example, the bill does not propose anything comparable to the FTCA procedure that requires submission of a claim to the federal agency involved and compliance with strict time deadlines in order for persons to recover.<sup>131</sup> Also, unlike the FTCA, the bill would not give tribes the benefit of the exclusiveness of remedy provisions that protect the United States and its employees.<sup>132</sup> In addition, the bill lacks the FTCA limitation on attorney fees, which Congress imposed to discourage the filing of non-meritorious claims.<sup>133</sup>

#### *D. Senator Gorton's Proposal Concerning Sovereign Immunity from Tort Claims in Senate Bill 2302*

Senator Gorton reincarnated the tort provisions of Senate Bill 1691 in Senate Bill 2302, which he introduced July 14, 1998, the so-called American Indian Tort Liability Insurance Act. This bill provides:

### SEC. 2. AMERICAN INDIAN TORT LIABILITY INSURANCE.

#### (a) Findings. — Congress finds that —

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128. 28 U.S.C. § 2674 (1994) ("United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim").

129. 486 U.S. 531, 536 (1988).

130. *See, e.g., Dalehite v. United States*, 346 U.S. 15 (1953); *General Dynamics Corp. v. United States*, 139 F.3d 1280 (9th Cir. 1998); *Kiehn v. United States*, 984 F.2d 1100, 1107 (10th Cir. 1993).

131. *See* 28 U.S.C. § 2675 (1994) (disposition by federal agency is a prerequisite to claim).

132. *See id.* § 2679.

133. *See id.* § 2678.



(1) *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. \_\_\_\_ (1998), recognized the increasing interaction between tribal governments, tribal corporations, or individual members of Indian tribes with individuals who are not members of an Indian tribe, on and off Indian reservations (including property held in trust for Indian tribes) in the areas of economic development and commerce;

(2) the interaction referred to in paragraph (1) may lead to disputes that could include claims by individuals against tribal governments or tribal organizations as a result of injury in tort;

(3) as Justice Kennedy stated in his opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the doctrine of tribal immunity asserted by the governing bodies of Indian tribes to shield the Indian tribes from court actions that are necessary to recover for the liability of the governing bodies or tribal organizations of Indian tribes, can "harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims"; and

(4) in order to provide protection for individuals interacting with tribal governments or organizations —

(A) Indian tribes should maintain tort liability insurance; and

(B) tribal immunity should not be used as a basis for the denial of a claim under that tort liability insurance.

(b) Definition. — In this section:

(1) Indian tribe. — The term "Indian tribe" has the meaning given that term in sections 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(2) Secretary. — The term "Secretary" means the Secretary of the Interior.

(3) Tribal immunity. — The term "tribal immunity" means the immunity of an Indian tribe from —

(A) jurisdiction of the courts; and

(B) judicial review of an action of that Indian tribe and other remedies.

(4) Tribal organization. — The term "tribal organization" has the meaning given that term in sections 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).

(5) Tribal priority allocation. — The term "tribal priority allocation" means an allocation to a tribal priority account of an Indian tribe by the Bureau of Indian Affairs to allow that Indian tribe to establish program priorities and funding levels.

(c) Indian Tribes as Defendants in Tort Disputes. — sections 1362 of title 28, United States Code, is amended by —

- (1) inserting "(a)" before "The district courts";
  - (2) inserting "(referred to in this section as an 'Indian tribe')"
- after "Interior"; and

- (3) adding at the end the following:

"(b) Subject to the provisions of chapter 171A, the district courts shall have jurisdiction of civil actions in claims against an Indian tribe for money damages, accruing on or after the date of enactment of this subsection for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of an Indian tribe (including a tribal organization) under circumstances in which the Indian tribe, if a private individual or corporation would be liable to the claimant in accordance with the law of the State where the act or omission occurred.

"(c) Subject to the provisions of chapter 171A, to the extent necessary to enforce this section, the tribal immunity of the Indian tribe involved is waived."

- (d) Tort Liability Insurance. —

- (1) In general. —

(A) Insurance. — Except as provided in paragraph (2), not later than 180 days after the enactment of this Act, the Secretary shall obtain or provide tort liability insurance or equivalent coverage, on the most cost-effective basis, for each Indian tribe that receives a tribal priority allocation.

(B) Coverage. — The insurance obtained under subparagraph (A) for an Indian tribe shall cover the governing body of the Indian tribe, each tribal organization, of that Indian tribe and each contractor or employer of that Indian tribe, within the scope of that contractor or employer. The coverage shall become effective on the date on which that coverage is obtained.

(2) Exception. — If the Secretary determines that an Indian tribe described in paragraph (1) has obtained liability insurance in an amount and of the type that the Secretary determines to be appropriate (including meeting the requirement of paragraph (4)) by the date specified in paragraph (1), the Secretary shall not be required to provide additional coverage for that Indian tribe.

(3) Tribal immunity may not be asserted to deny claims. — Under the liability insurance obtained under paragraph (1) or that the Secretary determines to be appropriate under paragraph (2), tribal immunity may not be asserted by the insurer as a reason for denying a claim for damages resulting from the tort liability of an Indian tribe.

(4) Amount of coverage. — In carrying out this subsection, the Secretary shall ensure that each Indian tribe obtains, or is provided, in accordance with this subsection, a sufficient amount of insurance

coverage to cover tort liability of the Indian tribe, under chapter 171A of title 28, United States Code.

(e) Funding of Tort Liability Insurance. —

(1) Initial payment of insurance premiums. — For the initial payment of insurance premiums for insurance obtained or provided by the Secretary under subsection (d), the Secretary shall take such action as may be necessary to ensure the payment of premiums by the Indian tribe, including adjusting the amount of the tribal priority allocation made to the Indian tribe to cover the cost of the initial payments.

(2) Subsequent payments. —

(A) In general. — After an initial payment under paragraph (1), and before the Secretary makes a tribal priority allocation for an Indian tribe, the Secretary shall verify that the Indian tribe —

(i) has insurance coverage that meets the requirements of subsection (d); and

(ii) has made such payments for premiums of that insurance as are necessary to provide insurance coverage for the fiscal year for which the tribal priority allocation is to be made.

(B) Payment required as a condition to receiving tribal priority allocation. — Notwithstanding any other provision of law, if the Secretary determines under subparagraph (A) that an Indian tribe has not made the payments described in subparagraph (A)(ii), the Secretary shall withhold the tribal priority allocation of that Indian tribe until such time as those payments are made.

(f) Jurisdiction of District Courts. — Notwithstanding any other provision of law, the district courts shall have jurisdiction over any action concerning the tort liability of an Indian tribe that is covered under insurance that meets the requirements of subsection (d), and a case to recover damages through an insurer that provides coverage under subsection (d) may be brought without regard to whether remedies under otherwise applicable tribal law have been exhausted.

(g) Regulations. — To carry out this section, as soon as practicable after the date of enactment of this section, the Secretary shall issue regulations that —

(1) provide for the amount of insurance coverage or equivalent coverage needed to protect an Indian tribe for the liabilities that may be subject to a claim under chapter 171A of title 28, United States Code;

(2) establish a schedule of premiums to be assessed against an Indian tribe that is provided liability insurance under subsection (d); and

(3) establish a means to verify the amount, maintenance, and funding of insurance of Indian tribes that obtain and maintain insurance under subsection (d)(3).

(h) Indian Tort Claims Procedure. —

(1) In general. — Part 6 of title 28, United States Code, is amended by inserting after chapter 171 the following:

"CHAPTER 171A — INDIAN TORT CLAIMS PROCEDURE

"Sec.

"2691. Definitions.

"2692. Liability of Indian tribes.

"2693. Exceptions; waiver.

"Sec. 2691. Definitions

"In this chapter:

"(1) The term 'employee of an Indian tribe' includes —

"(A) an officer or employee of an Indian tribe (including an officer or employee of a tribal organization); and

"(B) any person acting on behalf of an Indian tribe in an official capacity, temporarily or permanently, whether with or without compensation (other than an employee of the Federal Government or the government of a State or political subdivision thereof who is acting within the scope of the employment of that individual).

"(2) The term 'Indian tribe' has the meaning given that term in sections 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

"(3) The term 'tribal immunity' means the immunity of an Indian tribe from —

"(A) jurisdiction of the courts; and

"(B) judicial review of an action of that Indian tribe and other remedies.

"Sec. 2692. Liability of Indian tribes

"(a) Subject to the limitations under subsection (c), an Indian tribe (including a tribal organization) shall be liable for the actions of the employees of that Indian tribe (or tribal organization), relating to tort claims, in the same manner and to the same extent, as a private individual or corporation under like circumstances, but shall not be liable for interest before judgment or for punitive damages.

"(b) Subject to the limitations under subsection (c), in any case described in subsection (a) in which a death was caused and the law of the State where the act or omission complained of occurred provides for punitive damages, the Indian tribe shall, in lieu of being liable for punitive damages, be liable for actual or compensatory damages resulting from that death to each person on behalf of whom action was brought.

"(c)(1) The liability of an Indian tribe or tribal organization may not exceed —

"(A) \$500,000 for each claim made under this chapter; or

"(B) in any case in which more than 1 claim arises from the same occurrence for damages for a tortious act or omission, an aggregate amount equal to \$1,000,000 for those claims.

"(2) If the Secretary of the Interior determines that a limitation on the amount of liability of an Indian tribe under subparagraph (A) or (B) is appropriate, the Secretary of the Interior shall submit to Congress proposed legislation to provide for that increase.

"Sec. 2693. Exceptions; waiver

"(a) The provisions of this chapter and sections 1362(b) shall not apply to any case relating to a controversy relating to membership in an Indian tribe.

"(b) With respect to an Indian tribe, to the extent necessary to carry out this chapter, the tribal immunity of that Indian tribe is waived."<sup>134</sup>

As one can see, Senate Bill 2302 takes a substantially different approach to tort liability but fails to address several issues raised above concerning Senate Bill 1691. Senate Bill 2302 would still transfer from the federal government to tribes the cost of compensating persons now entitled to redress under the Federal Tort Claims Act. Instead of expanding the coverage of the FTCA or simplifying the process by which a tribe operating under a Self-Governance compact or an Indian Determination Act contract may bring its activities under the aegis of the FTCA, Senator Gorton proposes to force the purchase of private insurance that would be funded solely by tribes.

Section 2(f) of Senate Bill 2302 also makes clear that suits could be brought "without regard to whether remedies under otherwise applicable tribal law have been exhausted." This provision would overrule *National Farmers Union* and frustrate the efforts of tribal governments to provide alternatives for alternative systems for compensating tort claimants.

#### *E. Senator Campbell's Tort Liability Proposal in Senate Bill 2097*

Senate Bill 2097, introduced by Senator Campbell on May 20, 1998, contains a more refined approach to the tort liability issue. It states:

##### **SEC. 201. LIABILITY INSURANCE, WAIVER OF DEFENSE.**

(a) Tribal Priority Allocation Defined. — The term "tribal priority allocation" means an allocation to a tribal priority account of an Indian tribe by the Bureau of Indian Affairs to allow that Indian tribe to establish program priorities and funding levels.

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134. S. 2302, 105th Cong. § 2 (1998).

(b) Insurance. —

(1) In general. — Except as provided in paragraph (3), not later than 2 years after the date of enactment of this Act, the Secretary shall obtain or provide tort liability insurance or equivalent coverage for each Indian tribe that receives a tribal priority allocation from amounts made available to the Bureau of Indian Affairs for the operation of Indian programs.

(2) Cost-effectiveness. — In carrying out paragraph (1), the Secretary shall —

(A) ensure that the insurance or equivalent coverage is provided in the most cost-effective manner available; and

(B) for each Indian tribe referred to in paragraph (1), take into consideration the extent to which the tort liability is covered —

(i) by privately secured liability insurance; or

(ii) chapter 171 of title 28, United States Code (commonly referred to as the "Federal Tort Claims Act") by reason of an activity of the Indian tribe in which the Indian tribe is acting in the same capacity as an agency of the United States.

(3) Limitation. — If the Secretary determines that an Indian tribe, described in paragraph (1), has obtained liability insurance in an amount and of the type that the Secretary determines to be appropriate by the date specified in paragraph (1), the Secretary shall not be required to provide additional coverage for that Indian tribe.

(c) Requirements. — A policy of insurance or a document for equivalent coverage under subsection (a)(1) shall —

(1) contain a provision that the insurance carrier shall waive any right to raise as a defense the sovereign immunity of an Indian tribe with respect to an action involving tort liability of that Indian tribe, but only with respect to tort liability claims of an amount and nature covered under the insurance policy or equivalent coverage offered by the insurance carrier; and

(2) not waive or otherwise limit the sovereign immunity of the Indian tribe outside or beyond the coverage or limits of the policy of insurance or equivalent coverage.

(d) Prohibition. — No waiver of the sovereign immunity of a Indian tribe under this section shall include a waiver of any potential liability for —

(1) interest that may be payable before judgment; or

(2) exemplary or punitive damages.

(e) Preference. — In obtaining or providing tort liability insurance coverage for Indian tribes under this section, the Secretary shall, to the greatest extent practicable, give preference to coverage underwritten by Indian-owned economic enterprises, as defined in

section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452), except that for the purposes of this subsection, those enterprises may include non-profit corporations.

(f) Regulations. — To carry out this title, the Secretary shall promulgate regulations that —

(1) provide for the amount and nature of claims to be covered by an insurance policy or equivalent coverage provided to an Indian tribe under this title; and

(2) establish a schedule of premiums that may be assessed against any Indian tribe that is provided liability insurance under this title.

#### SEC. 202. STUDY AND REPORT TO CONGRESS

(a) In General. —

(1) Study. — In order to minimize and, if possible, eliminate redundant or duplicative liability insurance coverage and to ensure that the provision of insurance of equivalent coverage under this title is cost-effective, before carrying out the requirements of sections 201, the Secretary shall conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study.

(2) Contents of study. — The study conducted under this subsection shall include —

(A) an analysis of loss data;

(B) risk assessments;

(C) projected exposure to liability, and related matters; and

(D) the category of risk and coverage involved which may include —

(i) general liability;

(ii) automobile liability;

(iii) the liability of officials of the Indian tribe;

(iv) law enforcement liability;

(v) workers' compensation; and

(vi) other types of liability contingencies.

(3) Assessment of coverage by categories of risk. — For each Indian tribe described in sections 201(a)(1), for each category of risk identified under paragraph (2), the Secretary, in conducting the study, shall determine whether insurance coverage other than coverage to be provided under this title or coverage under chapter 171 of title 28, United States Code, applies to that Indian tribe for that activity.

(b) Report. — Not later than 3 years after the date of enactment of this Act, and annually thereafter, the Secretary shall submit a report to Congress concerning the implementation of this title, that contains any legislative recommendations that the Secretary

determines to be appropriate to improve the provision of insurance of equivalent coverage to Indian tribes under this title, or otherwise achieves the goals and objectives of this title.<sup>135</sup>

A principal difference between Senator Campbell's and Senator Gorton's approaches to insurance can be seen in sections 201(b)(2) of Senate Bill 2097. This is the "cost-effectiveness" provision, which requires that the Secretary's determination of a tribe's tort liability insurance must take into consideration the extent to which the tort liability is covered by: "Chapter 171 of title 28, U.S. Code (commonly referred to as the "Federal Tort Claims Act") by reason of an activity of the Indian tribe in which the Indian tribe is acting in the same capacity as an agency of the United States."<sup>136</sup> This provision, while potentially narrowing the scope of FTCA coverage presently available under the Indian Self-Determination Act, at least adverts to the possibility that the FTCA is a sufficient source of tort liability coverage.

*F. The Indian Tribal Tort Claims and Risk Management Act of 1998<sup>137</sup>*

Senator Campbell's tort liability study proposal in Senate Bill 2097 was enacted substantially verbatim as part of the massive Omnibus Consolidated and Emergency Appropriations Act for the fiscal year ending September 30, 1999, which was signed into law on October 21, 1998.<sup>138</sup> There are two significant differences between the statute as enacted and Senator Campbell's proposal. First, only findings 10-13 of Senate Bill 2097, sections 2(a) were enacted, thus omitting proposed findings concerning inherent tribal sovereignty and the need for inter-governmental dispute resolution. Most of the omitted findings, however, related to Senator Campbell's approach to state tax collection issues, noted above.

The second change from Senate Bill 2097 found in the public law is that instead of allowing the Secretary of the Interior three years following enactment to submit a report concerning implementation of legislative recommendations, sections 704(b) provides:

(b) Report. — Not later than June 1, 1999, and annually thereafter, the Secretary shall submit a report to Congress that contains legislative recommendations that the Secretary determine to —

(1) be appropriate to improve the provision of insurance coverage to Indian tribes; or

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135. S. 2097, 105th Cong. §§ 201-202 (1998).

136. *Id.* § 202(b)(2).

137. Pub. L. No. 105-277, Div. A, § 101(e), 112 Stat. 2681-335 (1998).

138. *See* 25 U.S.C.A. 450f note (West 1999).



(2) otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.<sup>139</sup>

As one might guess, the Secretary of the Interior was unable to complete the required risk assessment study by June 1, 1999. Indeed the Department's survey of tribal insurance coverages did not begin until May 1999.

## VI. Tribal Sovereign Immunity and Appeals from Rulings Concerning the Indian Civil Rights Act of 1968

### A. The Indian Civil Rights Act and Waivers of Tribal Sovereign Immunity

In *Santa Clara Pueblo v. Martinez*,<sup>140</sup> a case that would be overturned by Senate Bill 1691, the Supreme Court carefully construed the terms and legislative history of the Indian Civil Rights Act and concluded that the Act did not authorize actions for declaratory or injunctive relief in federal court against either the tribe or its officers. The Court found an implied waiver of sovereign immunity particularly inappropriate in the area of tribal membership decisions.

In *National Farmers Union Insurance Co. v. Crow Tribe*,<sup>141</sup> the Court clarified that federal courts have jurisdiction under 28 U.S.C. § 1331 to hear claims that a tribe has exceeded its authority, provided that tribal court remedies are first exhausted.

These cases have had two effects: (1) caselaw has developed within tribal courts to enforce the Indian Civil Rights Act; and (2) a broad right of federal court review is recognized concerning tribal court decisions challenged by nonmembers of the tribe who assert tribal authority is limited by a provision of federal law, including the Indian Civil Rights Act.<sup>142</sup>

Tribal courts now generally apply the Indian Civil Rights Act notwithstanding sovereign immunity claims. Developments in the Hoopa Valley Tribal Court in California illustrate that meritorious claims are being handled justly and on their merits.

The Hoopa Tribal Court has long recognized the doctrine of *Ex parte Young*<sup>143</sup>, that sovereign immunity does not give officials the power to violate or ignore federal or other applicable law. For example, *Marshall v. Colegrove*,<sup>144</sup> involved the claim that the tribal chairman enjoyed unauthorized salary increases and received reimbursement for unauthorized travel. The court

139. *Id.*

140. 436 U.S. 49 (1978).

141. 471 U.S. 845 (1985).

142. See *Burlington Northern Ry. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir.), *vacated*, 118 S. Ct. 37 (1997), *appeal after remand*, 196 F.2d 1059 (9th Cir. 1999), *opinion amended on denial reh'g*, Nos. 98-35502, 98-35539, 98-35541, 1999 WL 1293020 (9th Cir. 1999).

143. 209 U.S. 123 (1908).

144. No. C-89-003 (Hoopa Valley Tr. Ct. Sept. 19, 1990).

noted the doctrine of sovereign immunity but held that "the immunity is lost when the tribal official is acting outside the course and scope of his official capacity."

*Gray v. Hoopa Valley Tribal Election Board*,<sup>145</sup> involved an election appeal. The court construed *Santa Clara Pueblo v. Martinez*,<sup>146</sup> as affirming tribal court exclusive jurisdiction to construe the tribal constitution and to enforce the Indian Civil Rights Act "where tribal agencies or officers act outside the scope of their authority." The court rejected defendant's claim of sovereign immunity and the argument that the tribal constitution made decisions of the tribal election board unreviewable.

Sovereign immunity is also not a bar to recovery of "back pay" or damages from the tribe and its departments if they engage in unlawful employment practices.<sup>147</sup> It is thus clear under Hoopa tribal law that sovereign immunity will not prevent the enforcement of rights guaranteed by the Indian Civil Rights Act nor will it shield tribal officials who act outside of their lawful authority under tribal or federal law. Hoopa tribal law may well be typical of the law applied in Indian tribal courts and points away from directing all such cases to federal district court.

As noted above, the Supreme Court has ruled that after a party exhausts tribal court remedies, federal courts have jurisdiction under 28 U.S.C. § 1331 to determine whether a tribe has been divested of authority over the matter in issue. Because nonmembers generally argue that a tribal court has no jurisdiction over them, the only parties who may have difficulty establishing federal question jurisdiction are tribal members themselves.<sup>148</sup> For that reason, the Hoopa Valley Tribal Council and the Saginaw Chippewa Tribal Council have endorsed the following provision:

Any case in the highest court of an Indian tribe may be reviewed at the discretion of the Court of Appeals for the circuit in which the Indian tribal court is located, by writ of certiorari granted upon the petition of any party to the case after rendition of final judgment, where a claim or defense arises under the Constitution, laws or treaties of the United States; provided, however, that applicable tribal custom or tradition shall be given due consideration.<sup>149</sup>

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145. No. C-97-036 (Hoopa Valley Tr. Ct. Mar. 25, 1997).

146. 436 U.S. 49 (1978).

147. See *Ames v. Hoopa Valley Tribal Council*, 21 Indian L. Rep. 6039 (Hoopa Ct. App. 1991); *Hoopa Valley Indian Hous. Auth. v. Gerstner*, 22 Indian L. Rptr. 6002 (Hoopa Ct. App. 1993); *Tribal Educ. Dep't v. Nixon*, 25 Indian L. Rptr. 6005 (N.W. Regional Tribal Sup. Ct. for Hoopa Valley Tribal Ct. App. 1997).

148. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

149. Resolution of the Hoopa Valley Tribe, No. 98-41 (Apr. 17, 1998); Resolution of the Saginaw Chippewa Indian Tribe of Michigan.

Tribal courts have been vigilant in enforcing the Indian Civil Rights Act to protect both members and nonmembers, and have little to fear from the fact that federal court reviews sometimes occur. However, it is important that federal courts avoid intruding into areas governed by tribal custom and tradition or the tribal self-definition process that occurs in tribal enrollment.

*B. Senator Gorton's Proposed Overruling of Santa Clara Pueblo v. Martinez in Senate Bill 1691 and His Approach to Appeals from Tribal Court ICRA Decisions in Senate Bill 2298*

Section 7 of Senate Bill 1691 would have given federal district courts broad jurisdiction to hear cases asserting that the Indian Civil Rights Act of 1968 had been violated. This provision, retained in Senator Gorton's other proposed legislation, is not justified by present law.

Senate Bill 2298 was introduced by Senator Gorton on July 14, 1998, as the so-called Indian Civil Rights Enforcement Act. This bill provides as follows:

**SEC. 2. FINDINGS.**

Congress finds that —

(1) title II of the Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.) (commonly known as the "Indian Civil Rights Act") was enacted to protect the civil rights of individuals who interact with tribal governments and other tribal organizations;

(2) individuals who interact with tribal governments and other tribal organizations continue to suffer civil rights abuses, including unfair dismissals from employment with a tribal government or other tribal organization, election irregularities, and improper use of law enforcement authority;

(3) a 1991 report of the United States Commission on Civil Rights found that the enforcement of rights guaranteed by the Act commonly known as the "Indian Civil Rights Act" continued to be impeded by reluctance among Indian tribes to waive tribal immunity;

(4) Congress has considered the impediments to enforcing the Act commonly known as the "Indian Civil Rights Act" for a period preceding the date of enactment of this Act of more than 10 years;

(5) under article III of the Constitution of the United States, individuals have the opportunity to seek action in a district court of the United States after exhausting remedies in tribal courts for enforcement of the Act commonly known as the "Indian Civil Rights Act"; and

(6) to provide for the opportunity referred to in paragraph (5), tribal immunity should be waived.

**SEC. 3. DEFINITIONS.**

In this Act:

(1) Indian tribe. — The term "Indian tribe" means any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.

(2) Tribal government. — The term "tribal government" means a governing body of an Indian tribe referred to in paragraph (1).

(3) Tribal immunity. — The term "tribal immunity" means the immunity of an Indian tribe from jurisdiction of the courts, judicial review of an action of that Indian tribe, and other remedies.

(4) Tribal organization. — The term "tribal organization" has the meaning given that term in sections 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).

#### SEC. 4. INDIAN CIVIL RIGHTS ACT ENFORCEMENT.

Title II of the Civil Rights Act of 1968 (commonly known as the "Indian Civil Rights Act") (25 U.S.C. 1301 et seq.) is amended by adding at the end the following:

##### "SEC. 204. ENFORCEMENT.

"(a) In General. — The district courts of the United States shall have jurisdiction in any civil rights action alleging a failure to comply with rights secured by the requirements of this title.

"(b) Compliance. — Upon exhaustion of remedies in a tribal court of appropriate jurisdiction (if any) to seek compliance with rights secured under this title as are timely and reasonable, an aggrieved individual may bring an action against an Indian tribe (including a tribal organization (as that term is defined in section 4(l) of that Act (25 U.S.C. 450b(l)) or official of that Indian tribe)) in a district court of the United States, or the Attorney General of the United States may bring such an action against an Indian tribe for —

"(1) a declaratory judgment; or

"(2) equitable relief (including injunctive relief) against an Indian tribe, to the extent necessary to enforce the rights secured under this title.

"(c) Treatment of Findings of Tribal Court. —

"(1) In general. — In a civil action brought under subsection (b), the district court shall adopt any findings of fact made by the tribal court involved (if any) with respect to the action, unless the district court determines that —

"(A) the tribal court did not operate independently from the legislative or executive authority of the Indian tribe involved;

"(B) the tribal court was not authorized to determine matters of law and fact, or the tribal court did not fully determine those matters;

"(C) the tribal court permitted a person or entity subject to this title to assert a defense of immunity in a declaratory action or an action to seek equitable relief;

"(D) the tribal court failed to resolve the merits of the factual dispute involved;

"(E) the tribal court employed a factfinding procedure that was not adequate to afford a full and fair hearing;

"(F) the tribal court did not adequately develop facts that are material to the case;

"(G) the tribal court failed to provide a full, fair, and adequate hearing; or

"(H) the factual determinations of the tribal court are not fairly supported by the record.

"(2) De novo review. — In any action described in paragraph (1), if the court finds that a condition described in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of that paragraph applies, the district court shall conduct a de novo review of the allegations contained in the complaint.

"(d) Waiver of Tribal Immunity. — To the extent necessary to enforce this title, the tribal immunity (as that term is defined in section 3 of the Indian Civil Rights Enforcement Act) of an Indian tribe subject to an action under subsection (b) is waived."<sup>150</sup>

Unlike Senator Gorton's other bills, Senate Bill 2298 expressly provides for exhaustion of remedies in tribal court. Nevertheless, there are crucial differences between the bill and the federal court review provision endorsed by some tribes. Senate Bill 2298 provides for district court jurisdiction.<sup>151</sup> The tribal proposal provides for discretionary review by the federal court of appeals by writ certiorari. In addition, the tribal provision provides for consideration of an "applicable tribal custom or tradition."<sup>152</sup> There is no counterpart in Senate Bill 2298.

## VII. Sovereign Immunity and Federal Environmental Laws

### A. Application of Federal Environmental Statutes to Indian Tribes

In environmental statutes such as the Resource Conservation and Recovery Act of 1976 (part of the Solid Waste Disposal Act),<sup>153</sup> Congress has expressly waived tribal sovereign immunity. *Blue Legs v. Bureau of Indian Affairs*,<sup>154</sup>

150. S. 2298, 105th Cong. §§ 2-4 (1998).

151. S. 2298, 105th Cong. § 204(a) (1998).

152. Resolution of the Hoopa Valley Tribe, No. 98-41 (Apr. 17, 1998).

153. 42 U.S.C. §§ 6901-6992k (1994).

154. 867 F.2d 1094 (8th Cir. 1989).

found a waiver of sovereign immunity in civil suits because tribes are specifically included in the statutory definition of municipality.

The National Environmental Policy Act of 1969 (NEPA)<sup>155</sup> does not expressly refer to Indian tribes. However, because NEPA applies to federal agencies that often have permitting or approval authority for land use on reservations, NEPA applies indirectly.<sup>156</sup> More recent environmental statutes, such as the Clean Water Act,<sup>157</sup> the Clean Air Act,<sup>158</sup> and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>159</sup> have specific provisions concerning Indian tribes.

*B. Senator Gorton's Current Proposal Concerning Application of Federal Environmental Laws in Senate Bill 2301*

Congress' generally careful treatment of Indian tribes in environmental acts would be radically restructured by Senator Gorton's Senate Bill 2301, introduced July 14, 1998, the so-called Tribal Environmental Accountability Act. Senator Gorton's proposed language provides:

**SEC. 2. FINDINGS.**

Congress finds that —

- (1) Federal environmental laws are in effect for the benefit of the citizens of the United States, including members of Indian tribes;
- (2) certain Federal environmental laws allow citizens to initiate an action to provide for enforcement, including, in some cases, injunctions to prevent a proposed activity from occurring until such time as certain procedural and substantive requirements are met; and
- (3) the assertion of tribal immunity used to shield an Indian tribe from remedies necessary to achieve compliance with Federal environmental laws impedes the application of those laws for the purpose specified in paragraph (1).

**SEC. 3. DEFINITIONS.**

In this Act:

- (1) Federal environmental law. — The term "Federal environmental law" means any Federal law affecting the environment, fish and wildlife conservation, or the use of land or water.
- (2) Indian tribe. — The term "Indian tribe" has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

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155. 42 U.S.C. §§ 4321-4370a (1994).

156. *E.g.*, *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

157. 33 U.S.C. §§ 1251-1387 (1994).

158. 42 U.S.C. §§ 7401-7671q (1994).

159. 42 U.S.C. §§ 9601-9675 (1994 & Supp. IV 1998).

(3) Tribal immunity. — The term "tribal immunity" means the immunity of an Indian tribe from jurisdiction of the courts, judicial review of an action of that Indian tribe, and other remedies.

(4) Tribal organization. — The term "tribal organization" has the meaning given that term in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).

#### SEC. 4. APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

(a) In General. — An Indian tribe (including a tribal organization) shall be subject to any requirements that are applicable to any other governmental entity for any action that is subject to the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.).

(b) Waiver of Tribal Immunity. — To the extent necessary to enforce this section, the tribal immunity of an Indian tribe is waived.

#### SEC. 5. CERTAIN CIVIL ACTIONS.

(a) In General. — A person or entity may commence a civil action against an Indian tribe under any provision of any Federal environmental law that authorizes a civil action by that person or entity against that Indian tribe.

(b) Waiver of Tribal Immunity. — With respect to a civil action commenced under subsection (a) —

(1) the tribal immunity of the Indian tribe involved is waived; and

(2) that Indian tribe may not assert tribal immunity as a defense.

#### SEC. 6. APPLICABILITY.

(a) National Environmental Policy Act of 1969. — Section 4 applies to any action described in section 4(a) with respect to any project or activity of an Indian tribe that has not been completed as of the date of enactment of this Act.

(b) Civil Actions. — Section 5 applies to any civil action described in that section commenced on or after the date of enactment of this Act.<sup>160</sup>

The fundamental confusion of Senate Bill 2301 is found in section 4 which would make a tribe "subject to any requirements that are applicable to any other governmental entity for any action that is subject to" NEPA.<sup>161</sup> Perhaps the intent of that section is to deem tribes to be federal agencies within the meaning of NEPA. Because NEPA is not designed for applicability outside of the federal government, it is unclear that the statute would function in a rational way. An

160. S. 2301, 105th Cong. §§ 2-6 (1998).

161. *Id.* § 4.

additional consequence of this provision would be to override or duplicate tribal environmental review processes that are currently in place.

The reach of section 5 of Senate Bill 2301 is also unclear. Section 5(a) authorizes civil actions against tribes "under any provision of any federal environmental law that authorizes a civil action by that person or entity against that Indian tribe."<sup>162</sup> On its face, this provision appears to restate the waiver of tribal sovereign immunity that exists in certain federal environmental laws. It might be construed to create such a waiver in other federal environmental laws which cannot currently provide for one.

Senate Bill 2301 is a poorly drafted bill that takes no notice of the complex law and facts regarding land, water and air use on Indian reservations. Instead of being entitled the Tribal Environmental Accountability Act, it is better read simply as the "Anti-Muckleshoot Amphitheater Act."

### VIII. Conclusion

Sovereign immunity is misunderstood, less far reaching than often believed, and greatly limited throughout the twentieth century by the doctrine of *Ex parte Young*. Maintaining a functioning government requires protecting the public treasury and domain. Yet people demand remedies for government-caused injuries. These are provided by all levels of government, including tribes, through thoughtful administrative or judicial claims procedures and dispute resolution sections in contracts.

Senator Gorton's spate of bills in the 105th Congress sought to capitalize on anti-Indian sentiment and root out not only extreme uses of sovereign immunity, but also the protections that make government itself possible to tribes. The Senator's efforts show an unscrupulous willingness to take political advantage where possible.

Sovereign immunity has become a lightning rod for political and economic forces that oppose the continued existence of American Indian tribes. Nevertheless the United States Supreme Court has continued to uphold the sovereign immunity of governmental entities — tribal, state, and federal. The legislative attacks of Sen. Slade Gorton and others during the 105th Congress failed. But the struggle over the sovereign's purse is not over.

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162. *Id.* § 5(a).



