NOTES

The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*

This note considers the waiver of Alaskan Native governments' sovereign immunity status through arbitration clauses and similar contractual provisions. While avoiding the larger debate over whether Native Alaskan communities constitute sovereign entities, the Alaska Supreme Court has expanded on a 1981 Ninth Circuit holding to find, in a series of cases, that Native groups, through ambiguous contractual clauses, have waived any claim to sovereign immunity. This note argues that these rulings are contrary to Ninth Circuit (and, arguably, United States Supreme Court) holdings that a waiver of tribal sovereign immunity must be express and unequivocal. In addition, this note provides suggestions to practitioners, representing Native and non-Native groups, for negotiating the perils of the sovereign immunity doctrine.

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I. INTRODUCTION

Over the last decade, the Alaska Supreme Court has seriously eroded the potential protection provided to Native groups by the doctrine of sovereign immunity. It is well established that Indian tribes, like other governmental entities, enjoy the protection of sovereign immunity until it is waived.[1] The United States Supreme Court has held that in order for such a waiver to be effective, it ""cannot be implied but must be unequivocally expressed.""[2] In the 1981 case of *United States v. Oregon*,[3] the Ninth Circuit Court of Appeals held that an Indian tribe had effectively waived its immunity both by voluntarily intervening in a proceeding before the federal district court and by signing a consent decree that explicitly granted the district court jurisdiction over disputes resulting from that agreement.[4] The Alaska Supreme Court has extended the *Oregon* holding through a series of cases[5] in which it has held that various contractual clauses resulted in waiver of a Native group's claim to immunity. These holdings have come despite seeming disapproval by the Ninth Circuit[6] and criticism from commentators.[7] Assuming arguendo that Alaskan Native groups are entitled to sovereign status, these Alaska Supreme Court rulings undermine congressional policy and frustrate efficient operation of the commercial market.

This note details the history of this questionable line of cases and provides recommendations for practitioners concerned with transactions involving Native groups. Part II provides an explana-

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1. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 172 (1977); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) (citing Turner v. United States, 248 U.S. 354, 358 (1919)).

2. *Santa Clara Pueblo*, 436 U.S. at 59 (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

3. 657 F.2d 1009 (9th Cir. 1981).

4. *Id.* at 1014.

5. Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992); Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751 (Alaska 1992); Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983).

6. *See* Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989).

7. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 341 (3d ed. 1991) ("In *Native Village of Eyak v. GC Contractors*, . . . the Alaska Supreme Court found a waiver on rather dubious grounds, as being implicit in a contractual provision submitting disputes to arbitration.") (citing *Eyak*, 658 P.2d at 756).

tion of the doctrine of sovereign immunity, its roots and its application to Indian tribes. In order to provide the necessary background for understanding modern Native organizations, part III details the distinction between governmental and corporate entities, as established by two key provisions of the Indian Reorganization Act ("IRA"),[8] with particular emphasis on the Alaska Supreme Court's interpretive analysis in *Atkinson v. Haldane*.[9] Part IV discusses the apparent divergence between the Ninth Circuit and Alaska Supreme Court cases. Part V concludes that the Ninth Circuit has taken the better reasoned of the two positions, and argues that the Alaska Supreme Court's analysis undermines congressional policy goals and, through potential frustration of the intent of the contracting parties, interferes with market operations. Finally, part VI provides suggestions for both Native entities and other interested parties for dealing with the hazards of the sovereign immunity doctrine in the contractual context.

II. THE DOCTRINE OF SOVEREIGN IMMUNITY AND ITS ROOTS

Sovereignty, the concept that a group of individuals enjoys an inherent right to self-government,[10] flows from natural law. Sixteenth century Spanish scholar Francisco de Vitoria advanced the view "that certain basic rights inhere in men *as men*, not by reason of their race, creed, or color, but by reason of their humanity."[11] Vitoria also offered one of the first articulations of the principle of tribal self-government in observing "'a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion.'"[12] A more poignant modern-day formulation was provided by an Alaska Native who explained:

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8. Indian Reorganization Act of 1934, ch. 576, §§ 1-19, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1988 & Supp. III 1991)) (also known as the Wheeler-Howard Act).

9. 569 P.2d 151 (Alaska 1977).

10. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 66 (2d ed. 1988).

11. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11-12 (1942).

12. *Id.* at 13 (quoting VITORIA, DE INDIS ET DE JURE BELLI REFLECTIONES § 1, para. 23 (Nys' ed. 1917)).

> "[W]e call ourselves a sovereign people . . . . [B]ecause we don't have to ask anybody, we going to hunt on our land or to get timber to build our cabins. We go out and do it without any waste, and we have our own laws that follow, that's been in existence before the White man law came into the village, came into the country. And we still follow that. That's a traditional law."[13]

Vitoria's ideas indirectly influenced the federal government's interaction with Indians. Noted Indian scholar Felix Cohen argued that both the United States and Britain adopted Vitoria's notions in order to appeal to the Indians, who initially represented a powerful military force in the New World.[14] Spain offered respect for tribal autonomy and security for Indian lands, and to compete for the favor of the Natives (and their military power), the United States and Britain followed suit.[15] The Northwest Ordinance of 1787, which predates the United States Constitution by two years, also reflects Vitoria's notions.[16] The Constitution itself bears the imprimatur of notions of tribal independence, as the Indian Commerce Clause[17] "recognizes . . . exclusive federal authority in . . . Indian affairs and categorizes tribes with other sovereigns for [commerce purposes]."[18]

Although the United States Supreme Court did not directly cite Vitoria in any of its early opinions, it did utilize the ideas of other scholars who drew upon his works.[19] In three seminal Indian Law cases,[20] Chief Justice John Marshall etched into American jurisprudence the "core doctrines of aboriginal title, the dependent status of

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13. THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 142 (1985) (quoting Larry Williams of the Native Village of Venetie).

14. Cohen, *supra* note 11, at 20.

15. *Id.*

16. *See id.* at 12.

17. This clause forms part of the general Commerce Clause, through which Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes.*" U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

18. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (Rennard Strickland et al. eds., 1982 ed.).

19. *See* Cohen, *supra* note 11, at 17; Blythe W. Marston, *Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test*, 17 CORNELL INT'L L.J. 375, 376 n.17 (1984).

20. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

Native tribes, and the inherent sovereignty of those tribes subject only to the control of the federal government."[21] More specifically, the opinions resulted in a tribal relationship to the United States that "resembles that of a ward to his guardian."[22] That relationship, however, "did not abolish preexisting tribal powers or make the tribes . . . dependent upon federal law for their powers of self-government."[23] Rather, powers of tribal self-government could be curtailed only by federal statutes, treaties with the federal government or restraints inherent in the relationship of the United States to the tribes as their protector.[24] Although these opinions have been altered over time, they remain the foundation for ascertaining the governmental status of tribes.[25]

Because tribal governments possess every inherent self-government power that has not been expressly extinguished, tribal powers cannot be described by reference to specific legislation.[26] Nevertheless, over time, federal law has recognized certain fundamental powers of tribal self-government: power to establish a form of government, power to determine membership, police power, power to administer justice, power to exclude persons from the reservation, power to charter business organizations and sovereign immunity.[27]

This note focuses on the last item, sovereign immunity. This doctrine "'is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued . . . without its consent and permission.'"[28] Sovereign immunity "is an amalgam of two

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21. Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 455, 475 (1990).

22. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

23. COHEN, *supra* note 18, at 233-34.

24. *Id.* at 235.

25. CANBY, *supra* note 10, at 68-69.

26. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 36 (1988) [hereinafter INDIAN TRIBES].

27. *Id.* at 36-39.

28. Nevada v. Hall, 440 U.S. 410, 437 (1978) (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857)) (Rhenquist, J., dissenting). The majority of the Court, however, required that "a claim of immunity in another sovereign's courts . . . necessarily implicates the power and authority of a second sovereign; its source must be found in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416. While the underlying theoretical basis for *tribal* sovereign immunity in federal and state courts is not clear, *see infra* text accompanying notes 38-39, the United States Supreme Court has held that it is established that "[s]uits

quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."[29]

The first portion of this amalgam developed from the structure of the feudal system and the notion that "the King can do no wrong."[30] Although the United States Supreme Court has rejected this legal fiction,[31] policy considerations of protection of the public fisc have replaced this original rationale[32] and have led to the doctrine's continuing viability.[33]

The second part of the amalgam, the bar to suits in the courts of another sovereign, originates in international law.[34] Two

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against tribes are . . . barred by sovereign immunity absent waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). Therefore, the Court acknowledges that Congress, through inaction, is consenting to the tribes' use of this doctrine.

29. *Id.* at 414.

30. *Id.* at 414-15; *see also* 3 ROSCOE POUND, JURISPRUDENCE § 71 (1959) (discussing both the origins of sovereignty in the feudal system and the notion of legal unaccountability that corresponds with the notion that "the King can do no wrong").

31. *Nevada*, 440 U.S. at 415.

32. Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173, 174 (1988); *see also* CLINTON et al., *supra* note 7, at 337.

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> Though the notion of sovereign immunity might seem best suited to a government of royal power, the doctrine was nevertheless accepted by American judges in the early days of the republic, and the law of the United States has ever since been that, except to the extent the government consents to suit, it is immune.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. c (1981) ("Contracts with a government or governmental agency are sometimes unenforceable under remnants of the historic English tradition that the sovereign is immune from suit.").

34. Native American groups hold a peculiar position in international law. Indian tribes "are subordinate and dependent nations, possessed of all powers as such . . . . However, they never have constituted 'nations' as that word is used by writers on international law . . . ." 41 AM. JUR. 2D *Indians* § 6 (1968).

One commentator offers the following observations on the early Indian law opinions authored by Chief Justice John Marshall:

> [They] would lead future courts to struggle with the paradoxical characterization of the relationship between the tribes and the United States as one of *independent dependence*. With such a confused theoretical background, it is little wonder that the supportive role which international law once played in preserving the doctrine of tribal sovereignty was gradually undermined as later courts hopelessly entangled themselves in the

rationales support the assertion of immunity in this context. On a metaphysical plane, international law deems sovereigns legally equal. Therefore, one sovereign cannot be subjected to the jurisdiction of another.[35] On a more practical level, comity dictates that a sovereign acts in its own best interests if it prevents its courts from entertaining an action brought against another sovereign, thereby avoiding international friction and later suits upon itself.[36]

The doctrine of sovereign immunity holds critical implications for entities interacting with Native groups. Unless waived, governmental immunity may bar the enforcement of any contract against the tribal entity.[37]

The precise theoretical foundation for tribal sovereign immunity in American jurisprudence remains unclear. One philosophy asserts that the doctrine's application to tribes stems from the groups' status as sovereign entities.[38] A competing theory suggests that tribes enjoy the protection of sovereign immunity only by virtue of their unique relationship with the United States; in other words, the tribe shares the federal government's immunity.[39]

Whatever its metaphysical grounding, courts have extended the doctrine to tribes not only for these reasons, but also because:

> [S]overeign immunity is intended to protect what assets the Indians still possess from loss through litigation. "That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments." If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated.[40]

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contradictory ramifications of precedent.

Dario F. Robertson, Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 382 (1978). The same commentator concludes that "it would appear that tribal sovereignty can no longer be vigorously defended as a doctrine owing its present validity to the law of nations." *Id.* at 385.

35. McLish, *supra* note 32, at 176.

36. *Id.*

37. *See, e.g.*, Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989) (holding that an arbitration clause failed to waive the tribe's sovereign immunity, even though this result left plaintiff without an enforceable remedy for the tribe's breach of contract).

38. *See* CLINTON et al., *supra* note 7, at 341.

39. *Id.*

40. Cogo v. Central Council of the Tlingit & Haida Indians, 465 F. Supp. 1286, 1288 (D. Alaska 1979) (citations omitted) (quoting Adams v. Murphy, 165 F. 304, 308-09 (8th Cir. 1908)).

It is this economic justification that the courts[41] and commentators[42] find particularly persuasive today.

In was in the 1940 case of *United States v. United States Fidelity & Guaranty Co.*[43] that the United States Supreme Court first unequivocally stated that Indian tribes enjoy protection of sovereign immunity until it is relinquished.[44] The Court has since reaffirmed this holding numerous times,[45] with its support evident as recently as 1991 in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe.*[46]

A waiver of sovereign immunity can be made by either Congress[47] or the tribe itself.[48] But given the importance of the policy considerations underlying the doctrine, federal courts have hesitated to find an effective waiver. "It is settled that a waiver of

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41. *Cf.* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991) (refusing to modify the long-standing principle of tribal sovereign immunity because of congressional legislation that "reflect[s] a desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development'") (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 35 (1983))).

42. Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982); *see also* INDIAN TRIBES, *supra* note 26, at 60 ("The extent to which tribes can utilize their land and other natural resources to achieve steady economic growth while preserving reservation environments will be a central determinant in the kind of societies that will exist in Indian Country in the decades to come.").

43. 309 U.S. 506 (1940).

44. The Court stated that "[t]hese Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *Id.* at 512 (footnote omitted).

45. *E.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 172 (1977).

46. 498 U.S. 505, 510 (1991).

47. *Id.*; *Santa Clara Pueblo*, 436 U.S. at 56.

48. The United States Supreme Court appears to have ruled, although by implication only, that a tribe may waive its sovereign immunity without federal approval. In Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977), the Court took pains to establish that neither Congress *nor* the tribe had waived the tribe's immunity. *Id.* at 172-73. Similarly, the Court recently stated that "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe *or* Congressional abrogation." *Oklahoma Tax Comm'n,* 498 U.S. at 509 (emphasis added). Federal appellate courts, however, have explicitly held that a tribe may waive its immunity. United States v. Oregon, 657 F.2d 1009, 1016 (9th Cir. 1981); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982).

sovereign immunity "'cannot be implied but must be unequivocally expressed.'"'[49] The United States Supreme Court has stated that when ambiguity exists in a statute alleged to waive sovereign immunity, a court must resolve any ambiguities in favor of the Indians.[50] Similarly, in considering a tribe's waiver of sovereign immunity, federal appellate courts have held that the consent must be strictly construed and applied.[51]

Although this note assumes for the purpose of argument that Native Alaskan groups have sovereign immunity, uncertainty surrounds this point. A marked schism divides the Ninth Circuit and Alaska courts on the issue of whether Native Alaskan organizations even qualify as aboriginal groups that enjoy sovereign status. The federal court has been more willing to recognize the sovereign status of Native Alaskan groups, while the Alaska Supreme Court has been recalcitrant.[52]

When faced with a defense of sovereign immunity, the Alaska Supreme Court has sidestepped the ultimate question of whether Native Alaskan groups constitute sovereigns. In assuming, without

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49. *Santa Clara Pueblo*, 436 U.S. at 59 (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

50. Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (citing Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918)).

51. Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982); Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth., 517 F.2d 508, 509 (8th Cir. 1975).

52. For a detailed discussion of the division between the courts and the potential entitlement of Native Alaskan groups to sovereign status, see Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991); Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229, 1234-43 (Alaska 1992) (Moore, J., concurring); Lloyd B. Miller, *Caught in a Crossfire: The Conflict in the Courts, Alaska Tribes in the Balance*, *in* 1989 HARVARD INDIAN LAW SYMPOSIUM 135; Smith & Kancewick, *supra* note 21.

The Clinton Administration, via the Department of the Interior, recently has given broad recognition to Native Alaskan groups as sovereigns. *See* Susanne Di Pietro, *Foreword to Native Law Selections: Recent Developments in Federal Indian Law as Applied to Native Alaskans*, 10 ALASKA LAW REVIEW 333, 334 (1993). This development may persuade both the federal and state courts to interpret applicable federal statutes in favor of Native Alaskan groups in many sovereignty claims. *See United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) (holding that when the Secretary of the Interior and the Commissioner of Indian Affairs have recognized a tribe's sovereign status, "it is the rule of this court to follow the action of the executive . . ., whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."); COHEN, *supra* note 18, at 3-5.

deciding, that the groups appearing before it qualified as sovereigns, the court has found that any claim to immunity had been voluntarily waived by the tribes in the particular circumstances of the cases reviewed. These holdings arise in situations that do not appear to meet the United States Supreme Court's enunciated standard in *Santa Clara Pueblo v. Martinez*,[53] "that a waiver of sovereign immunity '"cannot be implied but must be unequivocally expressed."'"[54]

III. THE INDIAN REORGANIZATION ACT—EXPLAINING THE DISTINCTION BETWEEN SECTION 16 AND 17 ENTITIES

Knowledge of the history and legislative motivation behind the passage of the 1934 Indian Reorganization Act[55] ("IRA") is important to understanding waiver of tribal sovereign immunity in the modern context for two reasons. First, many of the cases since 1934 involving the doctrine have centered on this legislation's provisions.[56] Second, consideration of Congress's reasoning in developing the IRA's provisions reveals policy concerns that serve as a foundation for the application of the sovereign immunity doctrine to Native organizations.

A. Background of the Indian Reorganization Act

The IRA, adopted in the first Congress of the Franklin Delano Roosevelt Administration, has been called "the most successful single example of Indian legislation."[57] The Act represented a dramatic shift in federal policy toward Native Americans. It assumed that Indian tribes *should* exist for an indefinite period. This new movement starkly contrasted with the immediately

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53. 436 U.S. 49 (1978).

54. *Id.* at 58 (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))). *Santa Clara Pueblo* applied the quoted language, which had earlier been used in the general context of a waiver of governmental immunity, to the sovereign immunity claim of an Indian tribe. One commentator has observed that this case "put teeth into the doctrine of sovereign immunity" in the Native law context. CLINTON et al., *supra* note 7, at 395.

55. Indian Reorganization Act of 1934, ch. 576, §§ 1-19, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1988 & Supp. III 1991)) (also known as the Wheeler-Howard Act). For a brief summary of the most significant provisions of this Act, see COHEN, *supra* note 18, at 148-49.

56. *See* COHEN, *supra* note 18, at 325.

57. Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 56 (1975).

preceding Allotment period,[58] "'which, in Theodore Roosevelt's words, was intended to "break up the tribal mass" by taking lands out of tribal control, thereby destroying the effectiveness of tribal government.'"[59] More specifically, the IRA represented part of Commissioner of Indian Affairs John Collier's desire "to encourage [tribal] economic development, self-determination, cultural plurality, and the revival of tribalism."[60] Thus, the legislation would serve as a mechanism for the tribe to "interact with and adapt to a modern society, rather than force the assimilation of individual Indians."[61]

However, the intent behind IRA application to Alaska was more limited, since Natives there had not suffered the loss of land and intentional destruction of tribal governments that tribes in the lower forty-eight states experienced; in Alaska, Congress intended the legislation to act primarily as "a means of providing educational and economic development assistance."[62] By the early 1970's, seventy-one Alaskan communities had organized under the IRA.[63]

B. The *Atkinson* Opinion

In *Atkinson v. Haldane*,[64] the Alaska Supreme Court was asked to interpret the crucial IRA provisions that promoted the underlying policy objective of economic development. The *Atkinson* court provided a guidepost[65] for distinguishing, for purposes of the waiver of sovereign immunity, between the entities described in section 16[66] and section 17[67] of the Act. In doing so, the court

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58. COHEN, *supra* note 18, at 127-43.

59. DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 444-45 n.75 (1984) (quoting S.L. TYLER, A HISTORY OF INDIAN POLICY 104 (1973) (quoting Theodore Roosevelt, Message to Congress (Dec. 8, 1901))).

60. COHEN, *supra* note 18, at 147 (footnote omitted).

61. *Id.*

62. Miller, *supra* note 52, at 136.

63. CASE, *supra* note 59, at 436.

64. 569 P.2d 151 (Alaska 1977).

65. The premier treatise on Federal Indian law recognizes *Atkinson* as the "most thorough analysis" of the distinction between § 16 and § 17 entities. COHEN, *supra* note 18, at 326 n.380.

66. Indian tribes are permitted to organize and adopt a constitution under § 16 of the IRA, which provides:

> Organization of Indian tribes; constitution and bylaws and amendment thereof; special election
>
> (a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or
(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and
(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any

also helped to illuminate Congress's purposes for making the distinction.

The *Atkinson* court assisted in formulating the understanding that Congress intended two conceptually separate entities to exist via sections 16 and 17, respectively. Congress designed the sections to operate in conjunction to permit tribes to enter into and compete in the private business world, while simultaneously protecting the tribal asset base by exposing only a limited amount of it to money judgements.[68] Section 16 permits a tribe to adopt a constitution in order to form a governmental body that exercises its preexisting

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amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates
In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

25 U.S.C. § 476 (1988).

67. Specifically, § 17 provides:

Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Id. § 477 (Supp. III 1991).

68. COHEN, *supra* note 18, at 325-26.

powers of self-government.[69] Therefore, by organizing under the IRA, a Native community does not appear to relinquish any powers of self-government that it may enjoy,[70] including the protection of sovereign immunity.

To be competitive in the private sector, Native community business ventures require section 17, which permits a tribe to form a corporate entity.[71] Assuming that a Native group has sovereign status, then, absent a sufficiently express and clear waiver, the corporate entity would be entitled to the protection of sovereign immunity.[72] Because such protection would prevent a creditor from reaching tribal assets in a breach of contract action, without more, Native entities would have difficulty in obtaining credit, and, therefore, competing in the marketplace. Section 17 remedies this deficiency by permitting the governmental entity to pledge a portion of the tribal assets to the separate corporate entity; the corporate entity can then make these assets available as security for transactions by executing a limited waiver of sovereign immunity that applies only to that corporate entity.[73] The rest of the tribal assets

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69. *Id.* at 326.

70. CASE, *supra* note 59, at 375. While the courts are divided on whether Native groups in Alaska are entitled to sovereign status, *see supra* note 52, communities organized under § 16 of the IRA seem to be "'recognized' as eligible for federal Native programs and services." CASE, *supra* note 59, at 375.

71. One observer has commented that "[t]he corporate form of organization lends itself to use in tribal development, since it is 'tribal' in its very nature. Incorporation creates a cognizable legal entity around which to focus community goals . . . ." Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 982 (1972).

> It is not unreasonable to suggest therefore that the Indians' long history of tribalism as a way of life makes corporate organization a particularly appropriate means of modern economic development. . . . It is also very possible that continued use of corporate organization will facilitate a greater cross-cultural understanding in our society.

Id. at 986; *see also* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 227-28 (1969) ("In the corporate structure, formal and informal, Indian tribalism has its greatest parallels[,] and it is through this means that Indians believe that modern society and Indian tribes will finally reach a cultural truce.").

72. *See* Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1136 (D. Alaska 1978) ("[T]he corporation has 'the *possibility* for waiver of [sovereign] immunity.'" (quoting Atkinson v. Haldane, 569 P.2d 151, 174-75 (Alaska 1977) (emphasis added))).

73. "It is clear and apparently undisputed that the mere fact of corporate activity or existence does not waive the sovereign immunity enjoyed by the community [i.e., corporation]." *Id.* However, one observer has argued:

remain in the possession of the section 16 governmental entity, shielded from judgment by sovereign immunity.

Prior to *Atkinson*, no judicial opinion had thoroughly examined the distinction between the two entities.[74] Later, in light of *Atkinson*,[75] one federal court remarked that both the United States Supreme Court[76] and the country's preeminent scholar on Indian Law[77] had previously misinterpreted the separate nature of the two entities.

Atkinson itself involved a suit against the Metlakatla Indian Community for the wrongful death of two individuals, which resulted from an automobile accident that community-employed police officers allegedly caused by the negligent operation of a police vehicle.[78] After concluding that the specific history of the tribe involved *did* entitle it to sovereign status,[79] the court found no waiver of sovereign immunity either by congressional legislation or by the tribe itself.[80] Specifically, in examining the purported tribal waiver, the court made its crucial holding that Congress intended that two separate entities would exist under section 16 and section 17 of the IRA.[81] The section 16 entity represented a governmental unit, while the section 17 entity embodied a corporate organization.[82] The distinction was critical because the court held that a provision in the section 17 corporate charter, a "sue and be sued" clause, represented a potential waiver that would solely pertain to the section 17 corporate body.[83] Because the alleged negligence involved only the section 16 governmental entity,

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> Just as an explicit waiver of the immunity by a section 17 corporation is permitted because parties might otherwise hesitate to deal with tribal businesses, an implied waiver [by the mere commercial activity of the corporate entity] may also help tribal businesses to compete effectively in the non-Indian business world and may further the federal goal of encouraging tribal economic development.

Note, *supra* note 42, at 1074 (citations omitted).

74. *See Parker Drilling*, 451 F. Supp. at 1132-33.

75. *Id.* at 1135.

76. *Id.* at 1133 (citing Metlakatla Indian Community v. Egan, 369 U.S. 45, 49 n.7 (1962)).

77. *Id.* at 1133 n.8 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 279 (2d prtg. 1942)).

78. Atkinson v. Haldane, 569 P.2d 151, 152 (Alaska 1977).

79. *Id.* at 156.

80. *Id.* at 175.

81. *Id.* at 174.

82. *Id.* at 174-75.

83. *Id.* at 175.

sovereign immunity protected the community's assets, as opposed to the corporation's assets, from judgment.[84]

The *Atkinson* court's reasoning rested on three sources: several opinions of the Solicitor of the Department of the Interior,[85] the legislative history of the IRA,[86] and considerations of public policy.[87] The court summarized and quoted three opinions of the Solicitor with little additional discussion, remarking only that one of the opinions "was most relevant to the issue at bar."[88] In that opinion, the Solicitor concluded:

> "The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, *the powers, privileges and responsibilities of these tribal organizations materially differ.*"[89]

In the second part of its analysis, an examination of the legislative history referred to by the Solicitor, the court noted that the original proposed legislation provided for only one type of tribal entity.[90] However, because businesses would hesitate to deal with or extend credit to tribes who could avoid liability through assertion of sovereign immunity, the bill was redrafted to provide for two entities.[91] Making a distinct division would more clearly meet the

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84. The court also ruled that the purchase of an insurance policy did not constitute a waiver of tribal sovereign immunity. *Id.* at 169.

85. *Id.* at 171 (citing Opinions of the Solicitor, Dep't of the Interior, Nos. M-36,515 (Nov. 20, 1958), M-36,545 (Dec. 16, 1958), and M-36,119 (Feb. 14, 1952)).

86. *Id.* at 172-73 (citing S. REP. NO. 1080, 73d Cong., 2d Sess. (1934)).

87. *Id.* at 174.

88. *Id.* at 172 (citing Opinions of the Solicitor, Dep't of the Interior, No. M-36,515 (Nov. 20, 1958)).

89. *Id.* (quoting Opinions of the Solicitor, Dep't of the Interior, No. M-36,515 (Nov. 20, 1958)) (emphasis added).

90. *Id.* (citing H.R. 7902, 73d Cong., 2d Sess. (1934); S. 2755, 73d Cong., 2d Sess. (1934)).

91. *Id.* (citing Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 962 (1972)).

realities of Indian problems. The Senate Report on the redrafted bill "distinguished the purposes of stabilization of tribal governmental organization and modernization of tribal economic activities through the corporate structure."[92]

Finally, after reviewing what it termed the "paucity of decisional authority" on the matter,[93] which it later dismissed as being either not persuasive or distinguishable from the instant case,[94] the *Atkinson* court concluded that a construction that recognized two entities would accord with "sound public policy."[95] Otherwise, the court explained, strict immunity application would inhibit tribal economic growth in the business world.[96] Recognition of two entities would place the assets of the corporation at risk, "[y]et some of the tribal property could be kept in reserve, safe from a judgment execution which could destroy the tribe's livelihood, in recognition of the special status of the Indian Tribe."[97]

While Justice Rabinowitz's opinion in *Atkinson* provided clarification of legislation that had existed for more than forty years, it did not fully address several troubling questions regarding the separate nature of the entities. Because the alleged negligence involved only the section 16 governmental entity, sovereign immunity protected the community's assets from judgment. The court did not consider the corporate charter's "sue and be sued" clause[98] to constitute a waiver with respect to the *governmental* activities that were the subject of the suit.[99] Thus, *no* tribal assets were subject to judgment.[100] But had the action been applicable

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92. *Id.* (citing S. REP. NO. 1080, 73d Cong., 2d Sess. (1934)). This revision of the initial IRA legislation to allow for two entities, one of which would be able to obtain credit, has also received attention from other Indian Law commentators. *See* COHEN, *supra* note 18, at 325-26.

93. *Atkinson,* 569 P.2d at 173.

94. *Id.* at 175 n.83.

95. *Id.* at 174.

96. *Id.*

97. *Id.* at 175.

98. Tribes electing to form a § 17 corporate organization receive a Bureau of Indian Affairs drafted charter, which often contains these clauses that allow the corporation to sue and be sued. COHEN, *supra* note 18, at 326.

99. *Atkinson,* 569 P.2d at 175.

100. There is a split among the courts as to whether a "sue and be sued" provision in the § 17 entity's charter constitutes a waiver of *tribal* (i.e., governmental) immunity. Several courts have found that such a provision is an authorized waiver of tribal immunity. *See, e.g.,* Fontenelle v. Omaha Tribe, 430 F.2d 143, 147 (8th Cir. 1970); Martinez v. Southern Ute Tribe, 374 P.2d 691, 694 (Colo. 1962).

to the section 17 corporate entity, how far would the waiver have reached? How would a court distinguish corporate holdings from "tribal property [that] could be kept in reserve, safe from a judgment execution which could destroy the tribe's livelihood"?[101]

Some commentators have opined that assets remain the property of the section 16 entity until the tribe transfers them to the section 17 corporation.[102] In a recent opinion, the Alaska Supreme Court clearly adopted this position.[103] Also, the *Atkinson* court apparently took this view as it approvingly quoted a Department of the Interior Solicitor Opinion that states:

> "If [the asset in question] has not been effectively transferred or conveyed to the tribal corporation, it is not a corporate asset, and remains the property of the constitutional organization of the tribe. . . . Ordinarily it is safe to assume that a transaction of a so-called 'organized tribe' is a transaction of the tribal municipal corporation, which may have as broad or broader economic powers as its business corporation counterpart. *Unless documentary evidence such as a conveyance to the business corporation or contractual agreement, by resolution or otherwise, gives the business corporation an agency or proprietary relationship to certain property, it can be assumed that the corporation is not directly involved.* Where the property or funds involved are created by the tribal corporation then transactions involving such resources are governed by the provisions of the charter. Since many constitutions and charters incorporate by reference the provisions of each other, the appropriate power is often similar for both legal entities."[104]

This Solicitor's opinion seems to serve as a portion of the basis for the *Atkinson* court's belief that a portion of the tribal assets could remain protected from a judgment execution, in recognition of the tribe's special fragile financial status.[105]

Others, like *Atkinson*, have held that the waiver applied only to economic dealings for which the corporation was formed. *See* Boe v. Fort Belknap Indian Community, 455 F. Supp 462, 463-64 (D. Mont. 1978); *cf.* Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1131 (D. Alaska 1978) (stating that if the enterprise had clearly been operated by a § 17 entity only, a "sue and be sued" clause would not affect the § 16 entity's sovereign immunity).

101. *Atkinson*, 569 P.2d at 175.

102. COHEN, *supra* note 18, at 326.

103. Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751 (Alaska 1992). *See infra* text accompanying notes 169-173.

104. *Atkinson*, 569 P.2d at 171-72 (quoting Opinions of the Solicitor, Dep't of the Interior, No. M-36,545 (Dec. 16, 1958)) (emphasis added).

105. *Id.* at 175.

One federal court drawing upon the *Atkinson* opinion specifically noted and emphasized that an earlier, non-quoted portion of the same Solicitor's opinion stated that whether the section 16 or 17 entity held the assets in question "is determined by the facts of each case."[106] With some frustration, that court noted that in the case before it, the loss of many corporate and governmental documents and the confusion of the defendant as to the distinction between the two entities raised "considerable doubt" as to ownership of the assets at issue.[107] Still other federal cases have caused commentators to observe that "[c]omplications in determining the waiver can arise from the fact that many tribes have not clearly separated the activities of their section 16 tribal governments from the section 17 business corporations."[108]

IV. THE DIVISION BETWEEN THE COURTS

A. *United States v. Oregon*: The Basis for the Division

The division between the Ninth Circuit and the Alaska Supreme Court over the waiver of sovereign immunity in the contractual context had its genesis in the 1981 Ninth Circuit case of *United States v. Oregon*,[109] in which the court confronted the issue of whether the Yakima Indian Tribe had consented to suit.

In *Oregon*, the Yakima Tribe and the State of Washington had both intervened in a proceeding that centered on a conservation

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106. Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1135 (D. Alaska 1978) (quoting Opinions of the Solicitor, Dep't of the Interior, No. M-36,545 (Dec. 16, 1958)).

107. *Id.* The court also noted that the roles of the plaintiff and the defendant were reversed from the ones usually encountered in corporate law. Normally, the plaintiff seeks to show confusion and intermingling of assets in order to "pierce the corporate veil," while the defendant would be attempting to demonstrate that all activities were corporate. *See generally* Philip R. Strauss, Note, *Control and/or Misconduct: Clarifying the Test for Piercing the Corporate Veil in Alaska*, 9 ALASKA L. REV. 65 (1992) (for general discussion on piercing the corporate veil in Alaska). In this case, the defendant tribe desired to show intermingling, since assets found to belong to the § 16 governmental entity would be protected by sovereign immunity, while § 17 corporate assets would be available for judgment due to a "sue and be sued" clause in the corporate charter. *Parker Drilling*, 415 F. Supp. at 1134 n.14.

108. COHEN, *supra* note 18, at 326 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 n.13 (1973)).

109. 657 F.2d 1009 (9th Cir. 1981).

decree governing Indian fishing rights.[110] Both of these intervenors had applied successfully to the district court for modification of the compact.[111] Still later, the original parties and the intervenors signed a five-year conservation agreement.[112] The new agreement explicitly stated that during the plan's life, any dispute incapable of negotiated resolution would be submitted to the federal court.[113] When a disagreement eventually arose, the State of Washington successfully sought an injunction in the district court, per the agreement's terms, against the Yakimas' fishing.[114] The tribe appealed and alleged, among other claims, that it was immune from suit.[115]

United States Supreme Court Justice Anthony Kennedy, then a member of the Ninth Circuit Court of Appeals, wrote the majority opinion in *Oregon*, which held that the Tribe could waive its own immunity[116] and, in fact, that it had effectively done so.[117] The court based its conclusion on two premises, both of which it termed "sound": that the tribal intervention and the later agreement to submit all disputes to the Oregon district court each amounted to consent to suit.[118] With regard to the intervention, the court noted that the tribe had initially entered the proceedings to guard its fishing rights.[119] If the original decree had found the contract's specified fish species in peril, the tribe could not have obtained immunity from the injunction.[120] The court reasoned:

> Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit. . . . By seeking equity, this Tribe assumed the risk that any equitable judgment secured could be modified if warranted by changed circumstances . . . and that the Tribe itself would be bound by an order it deemed adverse.[121]

In support of its holding, the court also provided a brief two paragraph passage that cited the language of the later conservation

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110. *Id.* at 1011.
111. *Id.*
112. *Id.*
113. *Id.* at 1016.
114. *Id.* at 1011-12.
115. *Id.* at 1012.
116. *Id.* at 1013.
117. *Id.* at 1014.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 1014-15.

agreement, which stated that "'[i]n the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of *U.S. v. Oregon* . . . .'"[122] The Ninth Circuit deemed the dispute to be the type of disagreement envisioned at the time the parties signed the contract.[123] Without further elaboration, the Court summarily stated that "[c]onsequently, the Tribe may not at this stage renege on its earlier agreement."[124]

B. *Native Village of Eyak v. GC Contractors*: The Alaska Supreme Court Extends *Oregon*

Two years later, the Alaska Supreme Court, in citing *Oregon*, embarked on a departure from the requirement that a tribal waiver of sovereign immunity requires "unequivocal expression." *Native Village of Eyak v. GC Contractors*[125] involved a suit by a contractor to enforce payments due under an agreement for the construction of a community center. The building contract included an arbitration clause that provided:

> "[Certain disputes relating to a breach of contract] shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise . . . . The foregoing agreement to arbitrate and any other agreement to arbitrate with an additional person or persons duly consented to by the parties to the Owner Contractor Agreement shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."[126]

Upon completion of the facility, the Village maintained that it did not owe the full amount the contractor asserted. The parties ultimately submitted the dispute to arbitration, where the contractor received an award of approximately $13,750.[127] Eyak refused to

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122. *Id.* at 1016 (quoting agreement between Yakima Tribe, United States, State of Oregon and State of Washington).

123. *Id.*

124. *Id.*

125. 658 P.2d 756 (Alaska 1983).

126. *Id.* at 758 (quoting contract's arbitration clause).

127. *Id.* at 757.

pay, contending that it was immune from suit. The superior court rejected this assertion, ruling that Eyak had failed to establish its status as an "Indian tribe."[128] Upon appeal, the *Eyak* court found it unnecessary to decide whether the Village constituted an "Indian tribe" entitled to immunity, because even if it were, the group had waived that immunity by way of agreement to an arbitration clause.[129]

The Village contended that the arbitration clause lacked enough specificity to constitute an effective waiver, because "a waiver of sovereign immunity ""cannot be implied but must be unequivocally expressed."""[130] The supreme court flatly rejected this argument.[131] Specifically, the court reasoned that arbitration could not resolve any contractual dispute if one of the parties intended to assert the sovereign immunity defense. In citing cases from other states, the *Eyak* court held that "[t]o the extent possible, all provisions in a contract should be found meaningful" and that the arbitration clause would be meaningless if it did not constitute a waiver of any existing Eyak immunity.[132] Therefore, inclusion of the arbitration clause in the agreement had to constitute a tribal waiver of immunity. By resorting to principles of contract law to yield a construction that indicated a waiver, however, the Alaska Supreme Court essentially found the waiver by *implication.* Such a process does not comport with the unequivocal expression that the United States Supreme Court demands before an effective waiver of sovereign immunity can be established.

The court followed this discussion with a separate rationale for why a waiver was present. The agreement at issue specified that judgment could be entered on the arbitration result "'in accordance with applicable law in any court having jurisdiction thereof.'"[133] The supreme court read this language to further evince the Village's consent to waive its immunity. However, the court, in finding an effective waiver, overlooked the fact that "applicable law" would necessarily embrace the well-established doctrine of tribal sovereign

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128. *Id.*

129. *Id.* at 761.

130. *Id.* at 760 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969)))).

131. *Id.*

132. *Id.*

133. *Id.* at 760-61 (quoting contract's arbitration clause).

immunity. Therefore, "applicable law" would insulate a sovereign entity from judgment.

For the Native entity to prevail, it is not even necessary to find this argument fully persuasive, but merely plausible. If the alternate view suggested has merit, the agreement term can be deemed "ambiguous."[134] According to the Ninth Circuit, in Indian law all ambiguities must be resolved in favor of the tribes[135]—a position the Alaska Supreme Court now accepts as "settled principle."[136] The result would be a finding that given the two meritorious interpretations of the agreement, the one that must be accepted is the view that preserves the protection afforded by sovereign immunity.

C. *Pan American Co. v. Sycuan Band of Mission Indians*: The Ninth Circuit Responds

The Ninth Circuit's view of this treatment of both established Indian law doctrine and its *Oregon* reasoning became evident in *Pan American Co. v. Sycuan Band of Mission Indians*.[137] *Pan American* also involved an arbitration clause, but in a very different context. The case concerned the tribal government's enactment of an ordinance that imposed licensure and work permit requirements on reservation bingo game operators. Pan American alleged that the ordinance, which levied an $80,000 expense on the company, amounted to a breach of an existing agreement that authorized the entity to conduct bingo games on the reservation.[138] This agreement included a clause that provided:

> "[In] the event a dispute arises between its parties . . . either party may seek arbitration of said dispute and both parties do hereby subject themselves to the jurisdiction of the American

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134. "Ambiguity" (or "ambiguous") is defined as "[d]uplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument. . . . Ambiguity exists if reasonable persons can find different meanings in a statute, document, etc., [or] *when good arguments can be made for either of two contrary positions as to a meaning of a term in a document.*" BLACK'S LAW DICTIONARY 79-80 (6th ed. 1990) (citations omitted) (emphasis added).

135. Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1140 (D. Alaska 1978) (citing Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975)).

136. Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751, 757 n.10 (Alaska 1992) (citing *Santa Rosa*, 532 F.2d at 660); *In re* City of Nome, 780 P.2d 363, 367 (Alaska 1989) (citing *Parker Drilling*, 451 F. Supp at 1140).

137. 884 F.2d 416 (9th Cir. 1989).

138. *Id.*

> Arbitration Association and do agree to be bound by and comply with its rules and regulations as promulgated from time to time."[139]

Pursuant to this provision, Pan American submitted the dispute to arbitration. When the arbitrator dismissed the claims as non-arbitrable, Pan American sought relief from the federal district court. The district court dismissed the claim for lack of jurisdiction because the Band had not "'expressly waived its sovereign immunity to uncontested suit.'"[140] Pan American ultimately appealed the decision to the Ninth Circuit, alleging, inter alia, that the arbitration clause constituted an explicit waiver of the Band's sovereign immunity.

Despite Pan American's claim that the clause "would otherwise 'merely be a trap for the unsuspecting' and leave [the company] without judicially enforceable remedies for the Band's alleged breach of contract,"[141] the Ninth Circuit refused to imply a waiver of sovereign immunity. In reaffirming the principle that tribal consent to suit must be unequivocally expressed, the court reasoned that "Indian sovereignty . . . is not a discretionary principle subject to the vagaries of the commercial bargaining process or equities of a given situation."[142]

The court immediately followed with what seems to be a strongly worded response to the Alaska Supreme Court's treatment of *Oregon*. In relying upon the United States Supreme Court's statement in *Santa Clara Pueblo v. Martinez*[143] that "[i]t is settled that a waiver of sovereign immunity '"cannot be implied but must be unequivocally expressed[,]"'"[144] the Ninth Circuit reasoned that "[c]onsent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*. Our decision in *United States v. Oregon* . . . in no way lessens the fundamental principle that tribal sovereign immunity remains intact unless surrendered in express and unequivocal terms."[145] In what could be viewed as criticism of the

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139. *Id.* at 419 (quoting agreement between Sycuan Band and Pan American Co.).

140. *Id.* at 417 (quoting district court order).

141. *Id.* at 419.

142. *Id.* (citing United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940)).

143. 436 U.S. 49 (1978).

144. *Id.* at 58 (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

145. *Pan Am. Co.*, 884 F.2d at 419 (citations omitted).

Alaska Supreme Court, the Ninth Circuit specifically noted that *Eyak* had relied on *Oregon* in interpreting contractual arbitration provisions as immunity waivers.[146] However, while the Ninth Circuit offered no further specific comment,[147] the opinion continued by distinguishing *Oregon* from *Pan American* on the grounds that in the former case, the tribe had "*explicitly* agreed to be bound by whatever resolution ordered by the *district court.*"[148]

In a similar spirit, the *Pan American* court also emphasized that "the [*Oregon*] conservation agreement occurred . . . in the context of an ongoing legal dispute in which the tribe had *already* submitted to the jurisdiction of the district court—as an intervening party subject to the ongoing enforcement of the district court's original decree—before becoming a signatory to the agreement."[149] The court finally underscored the restricted reach of its earlier opinion by stating that "*Oregon*'s finding of waiver probably tests the outer limits of *Santa Clara Pueblo*'s admonition against implied waivers."[150]

D. *Hydaburg Cooperative Ass'n v. Hydaburg Fisheries*: *Eyak*'s Affirmation

Despite the Ninth Circuit's *Pan American* opinion, in 1992 the Alaska Supreme Court again looked to the meaningful contractual provision rationale in deciding *Hydaburg Cooperative Ass'n v. Hydaburg Fisheries.*[151] The *Hydaburg* agreement contained a clause providing that if any dispute arose, "'the matter shall be settled in accordance with the Uniform Arbitration Act of the State of Alaska.'"[152] When the parties to the agreement ultimately

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146. *Id.*

147. *Id.* The court noted that two state courts had relied on *Oregon* in interpreting contractual arbitration clauses as sovereign immunity waivers. In addition to *Eyak*, the court cited Val/Del, Inc. v. Superior Court. *Id.* (citing Val/Del, Inc. v. Superior Court, 703 P.2d 502 (Ariz. Ct. App. 1985), *cert. denied*, 474 U.S. 920 (1985)). The *Val/Del* court explicitly agreed with the *Eyak* reasoning; it quoted from the portion of the *Eyak* opinion citing *Oregon* and indicating that all contractual provisions should be found meaningful. *Val/Del,* 703 P.2d at 508-09 (citing Native Village of Eyak v. GC Contractors, 658 P.2d 756, 760 (Alaska 1983)).

148. *Pan Am. Co.*, 884 F.2d at 420 (emphasis added).

149. *Id.*

150. *Id.*

151. 826 P.2d 751 (Alaska 1992).

152. *Id.* at 752 (quoting agreement between Hydaburg Cooperative Association and Hydaburg Fisheries).

came into conflict, Hydaburg Fisheries sued the Native Association for, among other things, violation of the Alaska Partnership Act and breach of contract.[153] In response, the Native Association successfully moved the court to order arbitration.[154] The arbitrators levied an award of over $200,000 against the Native Association, which subsequently asserted a sovereign immunity defense in refusing to pay.[155] On appeal, after concluding that the Association had not offered evidence of tribal status and entitlement to sovereign immunity,[156] the *Hydaburg* court enforced the award and concluded that even assuming sovereign immunity applied, it had been waived by the arbitration clause.[157] In doing so, the court relied on *Eyak's* holding that a "contractual agreement to arbitrate waives any immunity from suit."[158] However, the Ninth Circuit's holding in *Pan American* made it necessary for the *Hydaburg* court to distinguish the situation it faced from the facts of that case.

Despite the Ninth Circuit's admonition in *Pan American*, the Alaska Supreme Court differentiated the disputes by noting that *Pan American* did not involve a suit to compel arbitration or enforce an arbitration award, but instead represented a direct attack on the tribe's authority to regulate affairs on its reservation.[159] Ultimately, the court opined that "[a]rguably, even under *Pan American* an agreement to arbitrate disputes arising out of a contract constitutes a tribe's consent to suit for the limited purposes

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153. *Id.* at 753.

154. *Id.*

155. *Id.*

156. The court specifically stated that Village reorganization under § 16 of the IRA alone was not adequate to establish tribal status for purposes concerning the sovereign immunity doctrine. *Id.* at 754.

157. *Id.*

158. *Id.* (citing Native Village of Eyak v. GC Contractors, 658 P.2d 756, 760 (Alaska 1983)). The court also reasoned that principles of international law held that in an action to compel arbitration, an agreement to arbitrate is a waiver of immunity. While recognizing that federal courts have held that Indian tribes are not foreign states, the court summarily stated, citing no support, that "[n]evertheless the rationale of cases relating to the waiver of immunity by foreign sovereigns is equally applicable . . . [to] Indian tribes." *Id.* at 754-55. Chief Justice Rabinowitz characterized this reliance on international law as "misplaced" and "inapplicable" in the tribal sovereign immunity context because sovereign powers of Indian nations have long been differentiated from those of other sovereign nations. *Id.* at 759 (Rabinowitz, C.J., concurring in part, dissenting in part); *see also supra* note 34.

159. *Hydaburg*, 826 P.2d at 754.

of compelling arbitration or enforcing an arbitration award."[160] The *Hydaburg* court further attempted to distinguish the facts of the instant case from *Pan American* through the specific provisions of the arbitration clauses. The *Pan American* clause gave jurisdiction to the American Arbitration Association, while the *Hydaburg* agreement looked to settlement in accordance with the Uniform Arbitration Act of the State of Alaska. The Alaska Supreme Court noted that, among other provisions, the Act gave the state superior court jurisdiction to order arbitration and enter judgment on its resulting awards.[161]

These differences, while accurate, do not suffice to constitute a waiver of sovereign immunity in the federal courts. In *Pan American*, the Ninth Circuit specifically emphasized the long-standing principle that a waiver of sovereign immunity must have clear and unequivocal expression. The added warning that Indian sovereignty should not fall "subject to the vagaries of the commercial bargaining process or equities of a given situation"[162] further underscores the stringent standard of this court. In discussing *Oregon*, the Ninth Circuit found it worth repeating that the Tribe had "*explicitly* agreed to be bound by whatever resolution ordered by the *district* court."[163]

The fact that the parties had agreed to resort to Alaska's Uniform Arbitration Act does not "unequivocally" indicate the Native Association had "expressly" intended to relinquish sovereign

160. *Id.*

161. *Id.* at 755 (citing ALASKA STAT. § 09.43-170 (1992)). The *Hydaburg* court also found a waiver of sovereign immunity by reasoning that in this case, unlike *Pan American*, the Native Association itself actively sought arbitration. *Id.* This reasoning seems to be compatible with a portion of the Ninth Circuit's rationale in *Oregon*. In *Oregon*, in addition to finding a waiver in the text of the conservation agreement, the Ninth Circuit held that the tribe had waived sovereign immunity by intervening in a proceeding already before the district court. United States v. Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981). A later Ninth Circuit opinion verified the separate identity of the two rationales and stated that *Oregon* "must be viewed as establishing that Indian tribes may, in certain circumstances, consent to suit by participation in litigation." McClendon v. United States, 885 F.2d 627, 630-31 n.2 (9th Cir. 1989).

162. Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989) (citing United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940)).

163. *Id.* at 420 (emphasis added).

immunity[164] under the Ninth Circuit's rigorous requirement. The Association's waiver can be found only through reference to one of many provisions in the Act, and not through the express acquiescence in the agreement to the jurisdiction of a court.

Once more, if this argument has even a minimal degree of merit, the agreement's terms are "ambiguous." The Alaska Supreme Court has held that all ambiguities must be resolved in favor of the Indians.[165] Therefore, in *Hydaburg*, the Alaska Supreme Court ignores the Ninth Circuit's warning against implying a waiver through "the vagaries of the commercial bargaining process."[166]

One member of the *Hydaburg* court acknowledged that the majority's rationale might exceed the "outer limits" of *Santa Clara Pueblo* as described in *Pan American*. In his dissenting and concurring opinion,[167] Chief Justice Rabinowitz deemed the court's discussion of contractual arbitration provisions "superfluous." He noted that *Pan American* had rejected the idea that contractual arbitration provisions constitute a waiver of sovereign immunity, and also that the Ninth Circuit had deliberately corrected the "misconception that *Oregon* supported such a result."[168]

Hydaburg's influence on the ramifications of the sovereign immunity doctrine in Alaska, however, did not end with its disposition of the contractual arbitration provision's effect. Because the Native Association organized both IRA section 16 and section 17 entities, the court was required to delineate between the corporate assets subject to judgment and judgment-proof tribal funds. The court held that deciding which entity owns the assets is

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164. This position was taken by Chief Justice Rabinowitz in his concurring and dissenting opinion in *Hydaburg*. *Hydaburg*, 826 P.2d at 758-59 (Rabinowitz, C.J., concurring in part, dissenting in part).

165. *In re* City of Nome, 780 P.2d 363, 367 (Alaska 1989); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1140 (D. Alaska 1978) (citing Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975)).

166. *See Pan Am. Co.*, 884 F.2d at 419 (citing United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940)).

167. Chief Justice Rabinowitz agreed with the portion of the majority opinion that held that the Native group, by requesting the superior court to order arbitration, had consented to the court's jurisdiction and waived its immunity. *Hydaburg*, 826 P.2d at 758 (citing Washington v. Confederated Bands of Yakima Indian Nation, 439 U.S. 463 (1979)) (Rabinowitz, C.J., concurring in part, dissenting in part).

168. *Id.* at 758-59 (Rabinowitz, C.J., concurring in part, dissenting in part).

a factual issue, with the burden of proof resting upon the Native group. Among other arguments to support this point,[169] the court noted that debtors who claim exemptions from judgment bear the burden of proof.[170] In taking this position, the *Hydaburg* court claimed it was not rejecting the *Atkinson* position[171] that the governmental unit owns the assets of the Native group.[172] The majority also asserted that this rationale operated consistently with the accepted rule of Indian law that all ambiguities must be resolved in favor of the Indians.[173] In reconciling these basic tenets of Indian law with their holding, the majority simply stated, with no authoritative support, that "[t]he normal presumption in favor of a Native group is inapplicable when such group is claiming an exemption from debt."[174]

Chief Justice Rabinowitz, the author of the *Atkinson* opinion, took exception to this rationale. He asserted his belief that assets are presumed exempt from execution "unless specifically conveyed or set aside to the section 17 corporation" and that such conveyance or segregation must be affirmatively shown.[175]

E. *Nenana Fuel Co. v. Native Village of Venetie*

Later in 1992, the Alaska Supreme Court again found a waiver of sovereign immunity through a contractual provision. In *Nenana Fuel Co. v. Native Village of Venetie,*[176] the plaintiff brought a breach of contract action, alleging that the Native entity had refused to make payment for goods delivered under an agreement between the two parties. The *Nenana Fuel* court held that a Remedies on Default clause constituted an express waiver of the Village's sovereign immunity. The clause provided:

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169. *Id.* at 757. The court also claimed that this treatment was consistent with the "rule that a Native entity asserting sovereign immunity bears the burden of proving it is a tribe." *Id.* (citing Board of Ketchikan v. Alaska Native Bhd. & Sisterhood, No. 14, 666 P.2d 1015, 1023 (Alaska 1983) (Rabinowitz, J., concurring)). The court further noted the policy of placing the burden on the party who controls the evidence. *Id.* (citing Sloan v. Jefferson, 758 P.2d 81, 83 (Alaska 1988)).

170. *Id.*

171. This discussion addresses some of the uncertainty remaining after *Atkinson. See supra* notes 98-105 and accompanying text.

172. *Hydaburg,* 826 P.2d at 757 n.10.

173. *Id.*

174. *Id.*

175. *Id.* at 759-60 (Rabinowitz, C.J., concurring in part, dissenting in part).

176. 834 P.2d 1229 (Alaska 1992).

> "On the occurrence of a default and after any notice required . . . and in addition to any remedies described in the Note, [Nenana Fuel] . . . may:
>
> (a) bring an action upon the Note;
>
> . . . .
>
> (d) dispose of the collateral in any commercially reasonable manner and, in the event of a deficiency, bring an action against Debtors for that deficiency;
>
> . . . .
>
> (f) invoke any other remedy provided by law or this agreement; and
> (g) invoke any combination of these remedies allowable under Alaska law."[177]

In reviewing this language, the court cited *Eyak's* holding that a "tribe waives its sovereign immunity by agreeing to contract terms inconsistent with sovereign immunity."[178] Again, the Alaska Supreme Court distinguished *Eyak* from *Pan American* on the basis that the latter did not involve a suit to compel arbitration or to enforce an arbitration award.[179] Once more, the court proffered that "'[a]rguably, even under *Pan American* an agreement to arbitrate disputes arising out of a contract constitutes a tribe's consent to suit.'"[180] Ultimately, the *Nenana Fuel* court read "the Remedies on Default clause as expressly waiving any sovereign immunity which Venetie might possess, and referring actions based upon the contract to the Alaska courts for application of Alaska law."[181]

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177. *Id.* at 1232 (quoting agreement between Native Village of Venetie and Nenana Fuel Co.) (omissions in original).

178. *Id.* (citing Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983)).

179. *Id.* at 1233.

180. *Id.* (quoting Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751, 754 (Alaska 1992)). The court also noted the *Hydaburg* opinion's comparison of tribes to foreign sovereigns. *Id.*; *see supra* note 158.

181. *Nenana Fuel Co.*, 834 P.2d at 1233. The Village had organized both governmental and corporate entities under § 16 and § 17 of the IRA, respectively. Each had signed the agreement at issue. *Id.* at 1230. Because the court found the Remedies on Default clause to be a waiver of sovereign immunity, the majority did not consider it necessary to determine if the Village constituted a sovereign, or to consider the nature and effect of a "sue and be sued" clause in the § 17 corporate charter. *Id.* at 1233. Chief Justice Rabinowitz again dissented. After finding Venetie was entitled to sovereign status, *id.* at 1245 (Rabinowitz, C.J., dissenting), the Chief Justice stated that the Remedies on Default clause did not constitute an express waiver of sovereign immunity. Therefore, no waiver was present for the § 16 entity. *Id.* at 1249 (Rabinowitz, C.J., dissenting). Additionally, he would have deferred to the tribal forum for determination of the extent and effect of waiver

Because the *Nenana Fuel* opinion relied almost exclusively on the *Hydaburg* logic, it remains subject to the same flaws analyzed above.[182] The clause made no reference to any specific court to which the Native group would submit itself to jurisdiction. Assuming that an Alaskan Native entity is entitled to the protection of sovereign immunity, then Alaska law, as referenced in the agreement, would not permit assertion of a claim against the group absent an *express* waiver. Again, all that is required for the Native entity to prevail is that this argument be plausible and, accordingly, the agreement be deemed ambiguous. As all ambiguities must be resolved in favor of the Indians, this Alaska Supreme Court decision joins *Eyak* and *Hydaburg* in exceeding the "outer limits" of *Santa Clara Pueblo.*

V. LEGAL CONCLUSIONS

Commentators have observed a recent general trend in courts away from applying the doctrine of sovereign immunity to governmental entities.[183] Nevertheless, a counter-trend runs against finding a waiver of a government's sovereign immunity through implication.[184] Commentators have declared that "[i]t is clear from an examination of state laws that the doctrine of sovereign immunity is far from dead, although to a considerable degree it is now being retranslated as a 'discretionary function' immunity."[185] That is, sovereign immunity is enjoyed at the pleasure of the holder.

In 1991, the United States Supreme Court held that a statutory waiver of a state's immunity must be "exercised with unmistakable clarity" by Congress in order to be effective.[186] Likewise, in the Native law context, the Court has held that a statutory waiver of

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upon the § 17 entity. *Id.* at 1249-51 (Rabinowitz, C.J., dissenting).

182. *See supra* notes 162-168 and accompanying text. Additionally, in *Nenana Fuel*, there was no affirmative act (e.g., consenting to a court's jurisdiction) that accompanied the alleged textual waiver, as there had been in *Hydaburg*, 826 P.2d at 755, and *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981).

183. *See, e.g.*, KEETON et al., *supra* note 33, § 131, at 1055.

184. "[T]here is a recent line of cases that hold a waiver of sovereign immunity must be expressed unequivocally." 14 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3655, at 37 (West Supp. 1993).

185. Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 188 (1984) (footnote omitted).

186. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991).

tribal sovereign immunity "'"cannot be implied but must be unequivocally expressed."'"[187]

The doctrine of sovereign immunity arose, in part, from the legal fiction that "the King can do no wrong." But over the years, the doctrine also came to be applied as a matter of policy, to protect the public fisc. In Native law, the doctrine serves a similar purpose: to guard a largely non-replenishable asset base from rapid erosion. Unlike the federal and state governments, Native groups cannot simply refill coffers for community expenditures by increasing taxes; often individual Natives are too impoverished to act as a source of additional revenue.[188] Furthermore, in addition to their ability to spread losses better, larger governments also are more capable of foreseeing and preventing losses through enhanced in-depth planning—an advantage that Native groups frequently do not enjoy.[189] Quite simply, the sovereign immunity "doctrine prevents burdensome losses that could seriously impair or destroy [Native] governmental operations."[190]

In passing the IRA, Congress recognized the need to mitigate the effects of sovereign immunity to allow Native entities to compete effectively in the commercial arena.[191] Nevertheless, Congress elected not to eliminate the doctrine entirely. In the past five years, Congress has amended both section 16[192] and section 17[193] of the IRA, but has not chosen to modify the doctrine of tribal sovereign immunity as developed and applied by the courts since the IRA's enactment. The United States Supreme Court in 1991 refused "to modify the long-established principle of tribal sovereign immunity"[194] and recognized:

> Congress has always been at liberty to dispense with such tribal immunity or limit it. . . . Instead, Congress has consistently

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187. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

188. Johnson & Madden, *supra* note 185, at 171.

189. *Id.* at 190.

190. *Id.* at 171.

191. *See* text accompanying *supra* notes 68-73 and 85-97.

192. Act of Nov. 1, 1988, Pub. L. No. 100-581, tit. I, § 101, 102 Stat. 2938 (codified as amended at 25 U.S.C. § 476 (1988)).

193. Act of May 24, 1990, Pub. L. No. 101-301, § 3(c), 104 Stat. 207 (codified as amended at 25 U.S.C. § 477 (Supp. III 1991)).

194. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991).

> reiterated its approval of the immunity doctrine. [A number of legislative] Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[195]

For the same reasons that courts have applied the doctrine in the past to young or fragile governments on the basis of policy considerations, sovereign immunity in the Native law context acts as a protective device that promotes policy goals. While application of the doctrine may occasionally lead to results that seem unfair, it does serve purposes that, in the view of Congress, "override" other policy concerns, such as potentially detrimental effects of unenforceable arbitration clauses.

Furthermore, it is far from clear that such unenforceable contract provisions result in unfair outcomes, even in business dealings. In a leading case on the application of tribal sovereign immunity, the Eighth Circuit held that especially "in such [commercial] enterprises and transactions[,] . . . the Indian tribes and Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need."[196] The Ninth Circuit has recognized that "'[t]ribes and persons dealing with them long have known how to waive sovereign immunity when they so wish.'"[197] Therefore, the Ninth Circuit has reasoned that, "[g]iven that the courts have consistently required express and unequivocal waiver of sovereign immunity," if a party doing business with the Native group desires such a waiver, he should negotiate to obtain a sufficiently specific provision.[198] Otherwise, "considerations of equity are not in [his] favor."[199] In a similar vein, one commentator argues that, due to the well-established status of the doctrine of tribal sovereign immunity, "if a non-Indian business knowingly enters into a contract without a waiver, the court should determine that the business has deemed the particular venture worth the risk."[200]

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195. *Id.* (citations omitted) (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

196. Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517, 521 (8th Cir. 1966).

197. McClendon v. United States, 885 F.2d 627, 631 (9th Cir. 1989) (quoting Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8th Cir. 1985)) (alteration in original).

198. *Id.* at 632.

199. *Id.*

200. Recent Case, 102 HARV. L. REV. 533, 561-62 n.43 (1988). In fact, Native

Indeed, a Native group can "bargain away" sovereign immunity both institutionally and through specific transactions. One commentator observes that by permitting a Native group organized under section 17 of the IRA to waive immunity for corporate dealings, Congress has created a market mechanism for parties to deal with tribal sovereign immunity.[201] The tribe can easily remove the doctrine's protective barrier in business transactions through the inclusion of a "sue and be sued" clause in the corporate charter. Tribes have an economic incentive to take such an action, as it will make them a more attractive entity for business relationships.[202] Similarly, a tribe may waive sovereign immunity with respect to an individual transaction through the agreement's terms. Since the parties may modify the negotiated terms to reflect the existence and scope of the doctrine's waiver, the doctrine provides Native groups with a bargaining chip that they can surrender in exchange for other valuable consideration.[203] Finally, if the Native group does not waive sovereign immunity, the doctrine will provide the tribe with greater negotiating strength should the disagreement be submitted to alternative dispute resolution forums.[204] These perspectives treat sovereign immunity like most other variables of a business transaction: it is simply open to negotiation.

Professors Prosser and Keeton note that "[t]he reasons of policy given in support of any particular immunity are apt to be grounded in values and perceptions of the times, and with the change in values and perceptions, the immunity itself is likely to undergo change as well."[205] Recently, both the Congress, the body with plenary authority over Indian matters, subject to constitutional limits,[206] and the United States Supreme Court have declined to abrogate tribal sovereign immunity in the commercial context. Thereby, Congress seems to have made, as confirmed by the

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groups offer unique advantages as business partners. Most important among these benefits is the fact that Native groups often control scarce resources. They also may offer "technical assistance, tax advantages, abundant labor [and] a nonunionized workplace." Frank Pommersheim, *Economic Development in Indian Country: What are the Questions?*, 12 AM. INDIAN L. REV. 195, 205 (1984).

201. Recent Case, *supra* note 200, at 560-61.

202. *Id.*

203. Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419, 474 (1993).

204. *Id.*

205. KEETON et al., *supra* note 33, § 132, at 1032.

206. COHEN, *supra* note 18, at 219.

Supreme Court, the judgment that the position of Native groups in our society still merits the doctrine's protection. Additionally, market mechanisms exist that will deal with any perceived inequities that may result from the protection sovereign immunity provides. The Alaska Supreme Court, however, has willingly found an effective waiver in situations where it is not clear that the tribe has consented to suit. In doing so, the Alaska Supreme Court thus undermines worthy congressional policy goals and interferes with market operation by potentially frustrating the contracting parties' expectations.

VI. PRACTITIONER CONSIDERATIONS

The distinction between the IRA section 16 and section 17 entities, as discussed in *Atkinson*, holds lessons for both Native groups organized under the IRA and the parties that do business with them. Alaska[207] and federal[208] courts have both recognized the distinction between the section 16 governmental unit and the section 17 corporate organization. However, this line has proven difficult to draw in practice with regard to the ownership of assets.

Native governments can assist themselves greatly by being aware of the distinction and clearly delineating the differentiation in organizational documents. This precaution will assist in preventing the presence of a "sue and be sued" clause in the corporate charter from exposing assets that the Native group intended for the use of the governmental entity only. The *Atkinson* court apparently envisioned this separation when it commented that "some of the tribal property could be kept in reserve, safe from a judgment execution which could destroy the tribe's livelihood."[209] Organizations engaging in transactions with Native groups would also be well-advised to consider these distinctions. Assets that may initially appear available as security for a transaction may not be as accessible as they first seem.

For Native groups, avoiding the intermingling of both assets in day-to-day operations will assist the court in determining which IRA entity claims ownership of the property being sought in judgment. Many Alaska communities may have an especially difficult time

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207. *E.g.*, Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 826 P.2d 751 (Alaska 1992); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977).

208. *E.g.*, Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978).

209. *Atkinson*, 569 P.2d at 175.

making the distinction regarding separate operations, because often the same individuals occupy the leadership positions in both the governmental and business entities.[210] Native groups can assist in clarifying the nature of the transaction in question and the entity to which it applies by thoroughly documenting the capacity in which individuals act.

A Native group may also limit its liability by specifically pledging enumerated assets, rather than providing a general sovereign immunity waiver, as security in a business transaction.[211] Such a practice will also assist non-Native enterprises doing business with Native entities in avoiding excessive uncertainty and confusion over exposure to potential loss.

In addition to quantitative restrictions, the Native group may place qualitative limits on the immunity waiver. These limitations include restrictions to specified types of actions (e.g., liability for breaches of contract, but not for torts)[212] or on the type of relief that may be obtained (e.g., declaratory instead of damages).[213]

The line of Ninth Circuit and Alaska Supreme Court cases emanating from *Oregon* also contain implicit cautionary items for parties on both sides of transactions involving Native groups. Because the Alaska Supreme Court has been willing to find an effective waiver of sovereign immunity when the text of the contractual agreement did not clearly indicate a waiver, Native entities must be wary of unintentionally surrendering the protection of sovereign status through contractual provisions. Particularly with respect to arbitration clauses, the Native group may need to insert additional language indicating that sovereign immunity is not waived, or at least specifying the precise extent to which it is relinquished.

Conversely, parties doing business with Native entities must concern themselves with alternative interpretations of these contractual provisions. If a dispute were to make its way into the federal courts, the absence of a sufficiently express waiver of sovereign immunity may result in the court labeling the provision "ambiguous," with the ambiguity being resolved in favor of the

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210. CASE, *supra* note 59, at 465.

211. CLINTON et al., *supra* note 7, at 341; Karen L. Swaney, Note, *Waiver of Indian Tribal Sovereign Immunity in the Context of Economic Development*, 31 ARIZ. L. REV. 389, 401-02 (1989).

212. *See Parker Drilling*, 451 F. Supp. at 1137.

213. CLINTON et al., *supra* note 7, at 341.

Native party. In *Nenana Fuel*, counsel for the Village argued that other tribal contracts had used the express language "waiver of sovereign immunity," demonstrating that when the tribal government intended a waiver, it knew how to accomplish it.[214] Although the argument failed to convince the Alaska Supreme Court, such an assertion may well persuade the Ninth Circuit.[215] Therefore, if a party doing business with a Native group desires the "waiver of sovereign immunity," those exact words should appear in the applicable contractual provision. In addition, to ensure meeting the Ninth Circuit's rigorous standard, any waiver should also explicitly grant jurisdiction to a specified court.[216]

Although practitioners need to consider the various subtleties of dealing with sovereign immunity, they should also be mindful that these issues remain mere derivatives of the larger question that the Alaska Supreme Court continues to dodge: do Alaskan Native groups qualify as sovereign entities? Congress could intervene and finally declare that Alaskan groups deserve full consideration as sovereigns. However, Congress has yet to make such an absolute statement. As it stands, the Alaska Supreme Court's line of cases displays a disturbing readiness to erode sovereign immunity through waiver. Full congressional recognition of Native Alaskan sovereignty would give these cases even greater importance, changing them from a political back door to the dangerous frontlines of precedent. Armed with such authority, aggressive, sophisticated parties could launch further damaging attacks on the non-replenishable public fiscs of Native Alaskan groups.

Kenton Keller Pettit

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214. Appellees/Cross-appellants's Brief at 34-35, Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992) (Nos. S-3709, S-3721).

215. "'[T]ribes and persons dealing with them long have known how to waive sovereign immunity when they so wish.'" McClendon v. United States, 885 F.2d 627, 631 (9th Cir. 1989) (quoting Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8th Cir. 1985)).

216. *See* Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 n.11 (9th Cir. 1989) (quoting Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986)).