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The Immunity of Tribal Business

Entities: A Survey of Tribal

Court Decisions

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This memorandum covers the area of tribal law concerning what tribal business entities are considered arms of the tribe and therefore benefit from sovereign immunity protection. Three types of entities are addressed. The first is tribal chartered businesses. The second is tribally owned businesses. The third is section 17 corporations. The final section of this memo includes tribal court opinions which do not detail the type of entity in question. The intent of this memorandum is to give a detailed and accurate examples of how tribal courts have determined which organizations are arms of the tribe and which are not. Furthermore, its specific purpose is to compare tribal court interpretation of this legal issue to the current, *Cash Advance* 11-part common law test.

## **Introduction**

Tribal Nations enjoy the benefits of sovereign immunity, which bars suit against the Tribe unless it has waived its immunity, has consented to be sued, or Congress has expressly abrogated such immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Although this is a long standing principle in Indian Law, the question raised on numerous occasions involves which tribal business entities are considered arms of the tribe and benefit from the Tribal Nation's sovereign immunity. In *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, the Colorado Court of Appeals adopted an 11-part common law test to determine when tribal business entities are considered "arms of the tribe." 205 P.3d 389 (Colo. Ct. App. 2008). This common law test was created with no reference to statutory law or prior tribal court decisions regarding similar issues.

Currently an appeal has been filed to the Colorado Supreme Court to determine whether the Court of Appeals contravened Congress's plenary power over Indian tribes by implementing its own test to determine if a tribe's commercial enterprise is sufficiently connected to the tribe such that the enterprise is protected by tribal sovereign immunity.

Additionally, the Northern Plains Intertribal Court of Appeals recently agreed with the *Suthers* court and found that the 11-part test "properly balance[d] tribal sovereign immunity and the need to maintain a distinction between tribes and separate corporations. *Estate of D.F., Jr. v. SWST Fuel Inc.*, Case No. CV-18-18-07 (N. Plains Intertribal Ct. App. July 24, 2009).

These courts and others who have created similar 5- and 3-part tests are not examining tribal statutory law; they are simply creating common law for their own purposes. As seen with

many of the tribal court opinions which follow, examining tribal statutory law may provide courts with more accurate and simplistic manner of determining “arm of the tribe” status.

### **Tribal Chartered Corporations**

According to Cohen’s Handbook of Federal Indian Law immunity is only extended to entities which are arms of the tribe, not tribally chartered corporations that are completely independent of the tribe. *Federal Indian Law*, Cohen, § 7.05[1][a].

The Creek Tribal Court held that Creek Indian Enterprises, a tribally chartered Enterprise of the Poarch Band of Creek Indians that operates as the principal economic development and management arm of the Tribe, was immune from suit. Furthermore, the court determined that because it functions as a holding company that operates the Tribe's business enterprises and P.C.I. Gaming is a tribally chartered subsidiary enterprise of Creek Indian Enterprises that operates the Tribe's gaming activities, both Creek Indian Enterprises and P.C.I. Gaming are wholly owned by the Poarch Band of Creek Indians. Therefore, the Tallapoosa Entertainment Center is not a separately chartered tribal enterprise and is the business name under which P.C.I. Gaming operates the gaming facility. Therefore, sovereign immunity had not been waived or abrogated, and the Center was immune from suit. *Powell v. Tallapoosa Entertainment Center*, 2007 WL 439057, \*1 (Creek Tribal Ct., 2007).

Additionally, the Grand Traverse Tribal Court held that their casino, a tribally chartered corporation, benefited from sovereign immunity and was therefore protected from a terminated employee’s claim for back wages in the absence of a waiver of immunity by either the tribe or the casino, an arm of the tribe. *Yannett v. Grand Traverse Band Economic Development Authority, Inc.*, 2005 WL 6300971, \*1 (Grand Traverse Tribal Ct., 2005).

A petitioner brought suit against the defendant AHA MACAV Power Service (AMPS) and AVI Casino Enterprise (AVI) for unjust enrichment in the Fort Mojave Indian Reservation Tribal Court. *Sturgeon Electric Company, Inc. v. AHA MACAV Power Service, et al.*, 26 Indian L. Rep. 6026, 6026 (Ft. Mojave Ct. Ap., 1998). The court determined that these business entities are enterprises established by the Fort Mojave Indian Tribe through corporate charter and that therefore, the entities possess immunity from suit. *Id.* at 6027. Specifically the court held that although the entities had immunity, there was a waiver by inclusion of the “sue and be sued” clause in the organizational documents which consented to suit.

Furthermore, the Three Affiliated Tribes of the Fort Berthold Reservation Tribal Court held that The Fort Berthold Community College (FBCC) is a tribally chartered corporation that “is a Tribal entity...protected by the doctrine of sovereign immunity...” *Wells v. Fort Berthold Community College*, 24 IRL 6157, 6157 (Ft. Berthold Tr. Ct., 1997). However, similar to the court in *Sturgeon* the court determined that the “sue and be sued” clause in the charter was a waiver of the immunity from suit. *Id.*

Finally, in *Eggers v. Stiff*, a civil jurisdiction case, the Crow Court of Appeals held that Little Big Horn College (“LBHC”) in Crow Agency is chartered pursuant to the Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. § 1801, *et seq.* 2001 Crow 9, 17 (Mont. Crow Tribe, 2001). Additionally, “[a]s a Tribal community college, LBHC is an arm of the Tribal government and entitled to invoke the Tribe's sovereign immunity. *See Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000).” *Id.*

### **Businesses Owned by the Tribe**

The Grand Traverse Tribal Court looked to precedent to determine that the waiver of immunity by the Tribal Council which predated the effective date of the Tribal Constitution

continued to be in effect after the Constitution was adopted. However, in relation to whether the Housing Authority was a tribal business enterprise which was an arm of the tribe and therefore protected by sovereign immunity, Chief Judge Petoskey provides a common sense analysis as to what is considered an arm of the tribe. He states that as a tribal business enterprise, the Housing Authority leases land, constructs housing on the leased land, rents the housing to tribal members, collects rent from the tenants, and manages and maintains the enterprise for the Tribe. *Hueter v. Grand Traverse Band Housing Authority*, 1998 WL 35289047, \*2 (Grand Traverse Tribal Ct., 1998). Additionally, the activity of the Authority is replete with a variety of business transactions. Therefore, “[t]he common sense maxim comes to mind: If it looks like a fish, smells like a fish and feels like a fish, then it is a fish.” *Id.*

In a manner similar to many other tribal courts the Navajo Nation looked to the Nation’s Code to determine whether a business entity was an arm of the tribe. *Blaze Const., Inc. v. Crownpoint Institute of Technology*, 1 Am. Tribal Law 470, 474 (Navajo, 1997). The Court held that The Navajo Nation Code differentiates between the terms enterprise and entity, and because these terms are not interchangeable within the Sovereign Immunity Act, the educational center, a tribal entity which was a predecessor of an entity of the tribe, was not a tribal enterprise that was entitled to immunity under the Sovereign Immunity Act. *Id.*

Similarly, the Turtle Mountain Tribal Court of Appeals determined that the Turtle Mountain Tribal Housing Authority (TMHA) is a tribal entity which was developed under the Turtle Mountain Tribal Code and therefore as a tribal agency is “immune from suit unless there is an express waiver of that immunity in writing.” *Laverdure v. Turtle Mountain Housing Authority, et al.*, 35 Indian L. Rep. 6131, 6131 (Turtle Mt. Tri. Ct. Appeals, 2008).

Furthermore, the Spirit Lake Tribal Court agreed that the Fort Totten Indian Housing Authority, “established by a tribal council pursuant to its powers of self-government, is a tribal agency.” *Laducer v. Fort Totten Housing Authority*, 26 Indian L. Rep. 6101, 6101 (Spirit Lake Tribal Ct., 2000). The Housing Authority was created under a tribal council resolution similar to that found in the Spirit Lake Tribal Code. Therefore the Housing Authority is “a tribal entity entitled to avail itself to the defense of tribal sovereign immunity...” *Id.*

### **Section 17 Corporations**

No tribal court opinion relating to sovereign immunity as an arm of the tribe identified a Section 17 Corporation as a business entity in question.

### **Non Specified Tribal Entities**

Tribal Courts often look to tribal codes and resolutions already in existence to determine what entities are arms of the tribal government. For example the Oneida Tribal Court determined that the Oneida Personnel Commission (OPC) was a Tribal Entity and that a suit against them cannot be maintained because of sovereign immunity. *Bain v. Oneida Personnel Com'n*, 2005 WL 6425730, \*1 (Oneida Trial Ct., 2005). The court reached this holding by looking to the Oneida Nation Code of Law, Sovereign Immunity Ordinance, Chapter 14.3-1(d) which defines a Tribal entity as:

[a] corporation or other organization which is wholly owned by the Oneida Tribe of Indians of Wisconsin, is operated for governmental or commercial purposes, and may through its charter or other document by which it is organized be delegated the authority to waive sovereign immunity. *Id.*

Additionally, the court considered Chapter 14.4-2 which defines Sovereign Immunity of Tribal Entities as:

The sovereign immunity of Tribal Entities, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any tribal proceeding, may be instituted or maintained against a

Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any tribal proceeding, may be instituted or maintained against officers, employees or agents of Tribal Entity for actions within the scope of their authority, unless the Tribe or Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding. *Id.*

Moreover, the Mashantucket Pequot Tribal Court referenced the Tribal Council's resolution which established the Gaming Enterprise as an arm of the tribal government to determine that the Enterprise shares the sovereign immunity of the Tribal Nation in order to conduct the gaming operations of the tribe. *Pazienza v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. Rep. 279, 283 (Mash. Pequot Tribal Ct., 1996).

Few tribal courts use a specific test to determine what business entities are considered arms of the tribe, for example, the Mohegan Gaming Tribal Court simply stated, "it is clear that the Mohegan Tribal Gaming Authority is an entity of the Mohegan Tribe of Indians of Connecticut and possesses sovereign immunity in connection with claims against it unless there has been a clear and unequivocal waiver of that immunity." *Collins v. Mohegan Tribal Gaming Authority*, 4 Am. Tribal Law 513, 514 (Mohegan Gaming Tribal Ct., 2002).

Furthermore, in *Sandell v. Little Traverse Bay Bands of Odawa Indians* the court determined that "Tribal sovereign immunity covers subordinate entities and enterprises owned by tribes. The cases involving subordinate tribal entities and enterprises have all re-stated the long-standing principle that without Congressional approval, tribes are immune from suit and it follows that subordinate entities and enterprises are also immune." 2006 WL 6369538, \*1 (Little Traverse Trib. Ct., 2006). See *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) and *White Mountain Apache v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971).

Additionally, in a 1996 appeal on the termination of employment by the Mashantucket Pequot Gaming Enterprise, the Tribal Court held the Tribal Council formed the Gaming



Enterprise, as ‘an arm of the Tribal government’, to conduct the gaming operations of the Pequot Tribe. M.P.T.O. #022591-02, para. 1. *Johnson v. Mashantucket Pequot Gaming Enterprise*, No. 1 MPR 15 (1996) (06/11/1996). “As an integral part of the Pequot Tribe's governmental activities, the Gaming Enterprise would possess the same immunity as the Pequot Tribe from suit by patrons or employees, absent a clear waiver of immunity by the Pequot Tribe.” *Id.*; *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991).

This determination was upheld in an action for damages for injuries suffered as a result of the alleged sexual harassment of the plaintiff by her supervisor, the Mashantucket Pequot Tribal Court held “[i]t is well established in Mashantucket Pequot tribal caselaw that the Mashantucket Pequot Tribe ‘possesses the common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Usenia v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. 103, 104 (1998) (quoting *Jenkins v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 7, 8 (1993)). Therefore, the Gaming Enterprise is an arm of the tribal government, and it shares the Tribe's sovereign immunity unless that immunity has been waived. *Id.*

The Mashantucket Pequot Tribal Court once again relies on tribal case law in 1999 when it determined that that the Mashantucket Pequot Tribe possesses the common-law immunity from suit traditionally enjoyed by sovereign powers and that their Gaming Enterprise is an arm of the tribal government. The court held that it shares the Tribe's sovereign immunity unless that immunity has been expressly waived. *Schock v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. Rep. 129, 135 (Mash. Pequot, Tribal Ct., 1999).

In *MacLean v. Office of Director of Regulation*, the Mohegan Tribal Court takes a broad approach, stating that “the Gaming Disputes Court has always held, that the Mohegan Tribe

possesses all inherent sovereign rights and powers of an independent, indigenous sovereign nation. As such, the Mohegan Tribe, the Mohegan Tribal Gaming Authority, and the Tribe's other enterprises or political subdivisions possess the “common-law immunity from suit traditionally enjoyed by sovereign powers.” 5 Am. Tribal Law 273, 275 (Mohegan Gaming C.A. 2004).

A similar approach was taken in *Executive Committee of Wichita Tribe v. Bell*. When the Wichita Executive Committee was sued directly in its official capacity, the court simply held that the Committee was functioning as an arm of the Tribe and because nothing in the record reflected that the Tribe had explicitly waived its sovereign immunity, the tribe was immune from suit. 2 Okla. Trib. 107, 113 (Wichita.CIA, 1990).

### **Sisseton Tribal Council Resolution**

Concerned for the impact in which the adoption of the *Suthers* 11-part test would have on the state of Tribe's sovereign immunity, the Sisseton-Wahpeton Oyate Tribal Council passed a resolution to correct the decision by the Northern Plains Intertribal Court of Appeals. *The Sovereign Immunity of the Tribe and its Entities under Tribal Law*, Tribal Council Resolution No. SWO-10-023, March 17, 2010. The Tribal Council did not agree with the court's adoption of the 11 point *Cash Advance* test when determining whether a corporation organized under the laws of the Tribe is entitled to sovereign immunity on account of the corporation being wholly owned by the Tribe and the Tribe having conferred upon the corporation of such immunity.

The Tribal Council stated that the tribal business entity's Articles of Incorporation were drafted with great care and addressed in detail the entities possession of immunity from suit. *Tribal Council Resolution* at 3. Additionally, “[I]ike Federal common law, judicial decisions issued by the SWO Tribal Court or the Northern Plains Intertribal Court of Appeals are subject to

revision or amendment by legislation enacted by the Tribal Council; and,” and therefore the 11 factor test cannot be applied when the Tribe’s governing body has “expressly conferred its immunity upon an entity of the Tribe.” *Id.*

Furthermore, in the future, when determining whether an entity shares the Tribe’s sovereign immunity from suit, courts should first determine if the Tribal Council has “delegated or otherwise conveyed the Tribe’s sovereign immunity upon the Tribal entity.” *Id.* at 4. Finally, if the Tribal Court is unable to determine if immunity has been delegated, the Tribal Court shall liberally interpret the scope of the sovereign immunity of the Tribe and its business entities and determine that the entity shares in the Tribe’s immunity from suit by applying the following factors; “(1) the entity reports to the Tribal Council or the General Council, or (2) receives funding directly or indirectly from the Tribe, including federal funds through the Tribe, or (3) consists of Tribal employees, or (4) is chartered, sponsored, or organized by the Tribe.” *Id.*

### **Conclusion**

In conclusion, rather than creating a common law test similar to the 11 point test developed in *Cash Advance* most tribal court systems will look to the documents which created the tribal business entity, such as article of incorporation, tribal codes, statutes, or tribal resolutions which include the contour of immunity to determine what tribally related business entities are considered arms of the tribe. These documents provide the direct intent of the Tribal Council at the time of entity creation and provide for a clear interpretation in determining whether an entity is an “arm of the tribe”.