

# Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know

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## I. INTRODUCTION

The increase in tribal economic recovery and development over the last thirty years has, in many ways, been distinctly positive for numerous Tribes.<sup>1</sup> As tribal economies have recovered and developed and their tribal financial resources correspondingly increased, these Tribes have become better able to exercise their sovereignty and self-determination. However, an insidious erosion of tribal sovereignty has sometimes shadowed tribal economic development. This Article provides practical approaches to the resultant dilemma that Tribes face—how to engage in commerce while simultaneously protecting and advancing their sovereignty. Part II provides general background information on the intersection between tribal sovereignty and economic development and the rights and powers of tribes and tribal businesses. Part III discusses the importance of laying a strong foundation for the day-to-day exercise of sovereignty through thoughtful and sound laws, regulations, business structures, and policies. Part IV suggests approaches for some of the areas of day-to-day business affairs in which mindfulness of tribal sovereignty and consistency and fairness in employee and vendor relation-

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1. It must be strongly emphasized that this is not the case for all tribes. STEPHEN CORNELL & MIRIAM JORGENSEN, *THE NATURE & COMPONENTS OF ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 7 (2007), available at <http://nni.arizona.edu/whatwedo/pdfs/CornellJorgensen.pdf> (noting that although the overall trend for tribal economic development is positive, things are not improving equally throughout Indian Country and Indian Country as a whole remains impoverished).

Moreover, economic development may or may not lead to significant economic growth. *Id.* at 2 (discussing the difference between economic development and growth). Although some Tribes have experienced dramatic economic growth, many other Tribes have experienced moderate or little economic growth. And although the overall trend for incomes in Indian Country is positive, incomes in Indian Country as a whole remain low. JONATHAN B. TAYLOR, *DETERMINANTS OF DEVELOPMENT SUCCESS IN THE NATIVE NATIONS OF THE UNITED STATES* 1-2 (2008) (discussing tribal economic growth but noting that Indians living on reservations had incomes that were about one-third of the U.S. average in 2000).

ships are particularly essential. Part V highlights the importance of having effective mechanisms in place for handling disputes, which will inevitably arise.

## II. TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT

As governments pre-existing the United States, Tribes retain inherent powers of sovereignty that have not been extinguished.<sup>2</sup> This Part discusses the scope of tribal authority and examines the interrelationship of tribal sovereignty and economic development.

### A. *Basic Legal Principles for Tribal Officials and Employees*

In order to take a successful proactive approach to the protection and assertion of tribal sovereignty in the commercial context, the people who are actually responsible for developing and implementing that approach on a daily basis must have, at a minimum, a basic understanding of the scope of tribal authority. They must also have a basic understanding of the extent of federal and state authority in Indian Country. Tribes should accordingly provide the information and training necessary for their officials and employees to develop this understanding. The following overview of basic legal principles provides a starting point by discussing issues relevant to the remainder of the Article, but is by no means an exhaustive discussion of these complex areas of the law.

#### 1. The Scope of Tribal Authority

Tribal authority was long viewed as being territorial in nature, meaning that Tribes have jurisdiction over their members and over their territories, including jurisdiction over nonmembers in their territories.<sup>3</sup> This is, in large part, still true today. Tribes have jurisdiction over their

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2. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008) (discussing the governmental powers of tribes, which include powers over their land and tribal members, as well as certain powers over nonmembers); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (describing tribes as “separate sovereigns pre-existing the Constitution” and “retaining their original natural rights in matters of local self-government”) (internal quotations omitted). Generally speaking, Indian Tribes retain all “aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

3. See, e.g., *United States v. Mazurie*, 419 U.S. 544 (1975) (holding that a Tribe had jurisdiction to require non-Indian vendors of alcohol on the reservation to comply with tribal liquor licensing laws); *Williams v. Lee*, 358 U.S. 217 (1959) (holding that the Navajo Tribal Court had jurisdiction over a civil action brought by a non-Indian in an Arizona state court against a Navajo family); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee Nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . .”). See generally Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 10 (1999) (discussing in detail the history and evolution of the territorial view of tribal authority).

members.<sup>4</sup> And Tribes arguably have presumptive civil jurisdiction over non-Indians on Indian land.<sup>5</sup> In the last several decades, however, the United States Supreme Court has chiseled away at tribal jurisdiction over non-Indians, particularly on non-Indian land.<sup>6</sup> In 1978, the Supreme Court divested Tribes of criminal jurisdiction over non-Indians.<sup>7</sup> Recent discourse has suggested the need for a congressional fix to this decision, but such a fix has yet to materialize.<sup>8</sup> The Supreme Court also attempted to divest Tribes of criminal jurisdiction over Indians from

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4. See generally *Montana v. United States*, 450 U.S. 544 (1981) (citing *Wheeler*, 435 U.S. 313 (discussing tribal civil and criminal jurisdiction, respectively)). Tribal jurisdiction extends beyond reservation boundaries in some instances. For example, a tribal court might have jurisdiction over an Indian Child Welfare case involving a child who resides off the reservation or over a breach of contract case in which a company located off the reservation consented to the tribal jurisdiction in some way. See 25 U.S.C. § 1911 (2006) (affirming tribal jurisdiction over certain proceedings involving children who reside off the reservation); *Montana*, 450 U.S. at 565 (stating that a Tribe may exercise jurisdiction over nonmembers who enter consensual relationship with the tribe or its members); see, e.g., 7 NAVAJO NATION CODE § 253a (2001) (Long-Arm Civil Jurisdiction and Service of Process Act of 2001), available at <http://www.navajocourts.org/Tit7R.htm>; HO-CHUNK NATION CODE tit. 2, § 15 (2009), available at <http://www.ho-chunknation.com/?PageId=254> (Long Arm Ordinance of 2005); NEZ PERCE TRIBAL CODE § 1-1-12 (2006), available at <http://www.nezperce.org/~code/index.htm> (setting forth various bases for personal jurisdiction, some of which could cause tribal jurisdiction to extend beyond the reservation boundaries).

5. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (stating that Tribes presumptively have jurisdiction over the activities of non-Indians on reservation lands); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009), cert. denied, 130 S. Ct. 624 (2009) (suggesting that land status may be dispositive on the issue of jurisdiction). Recent Supreme Court precedent and dicta have created some question as to whether a presumption of tribal jurisdiction over nonmembers on tribal land still exists. See *Plains Commerce Bank*, 128 S. Ct. at 2720 (suggesting in dicta that a general presumption against tribal jurisdiction over nonmembers might exist); *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (holding that because Tribes lack legislative authority to regulate the ability of state officials to investigate off-reservation violations of state law, they also lack adjudicative authority over claims that state officials violated tribal law in the performance of their duties on tribal land). However, the only Supreme Court case that actually dealt with Indian land was *Hicks*, and the holding in *Hicks* was highly fact-specific. 533 U.S. at 358 n.2 (“Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”). *Plains Commerce Bank* actually dealt with the sale of non-Indian fee land to other non-Indians. 128 S. Ct. at 2711. Therefore, the question presented in *Plains Commerce Bank* was not whether the Tribe had jurisdiction over nonmembers on Indian land, but rather whether it had jurisdiction over nonmembers on non-Indian land. *Id.* at 2714. The Supreme Court has never applied a presumption against tribal jurisdiction in a case involving Indian land. Furthermore, if there was such a presumption, the Court would not have had to treat a right-of-way running through Indian reservation land as non-Indian fee land in order to reach the conclusion that the tribal court did not have jurisdiction in the case of *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). See *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (making the same point). Even if it were true that Tribes presumptively lack jurisdiction over nonmembers on Indian land, the status of the land would remain an extremely important, if not dispositive, factor in the jurisdictional analysis. *Plains Commerce Bank*, 128 S. Ct. at 2725 (noting the “critical importance of land status” and not rejecting the possibility of land status being determinative of tribal jurisdiction over nonmembers).

6. For a detailed analysis of the gradual judicial divestiture of tribal authority over non-Indians, see Frickey, *supra* note 3.

7. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

8. See, e.g., Eileen Shimizu, *Blackfeet Want Remedy for Oliphant v. Suquamish*, INDIAN COUNTRY TODAY, Mar. 20, 2009, available at <http://www.indiancountrytoday.com/national/41568937.html>; AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE UNITED STATES (2007), available at <http://www.amnestyusa.org/women/maze/report.pdf> (recommending that “Congress should recognize that tribal authorities have jurisdiction over all offenders who commit crimes on tribal land, regardless of their indigenous or other identity”).

other Tribes,<sup>9</sup> but Congress subsequently corrected that situation.<sup>10</sup> More importantly for economic development, the Supreme Court has created a purported presumption against tribal jurisdiction over non-Indians on non-Indian land within the reservation.<sup>11</sup> This purported presumption has become known as the *Montana* rule, after the case in which it was first set forth. Two exceptions to the *Montana* rule delineate the circumstances in which a Tribe *does* have jurisdiction over non-Indians on non-Indian land.<sup>12</sup> First, a Tribe “may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>13</sup> Second, a Tribe may “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>14</sup> Although the scope of tribal adjudicative authority over non-Indians on non-Indian land remains an open question,<sup>15</sup> the Supreme Court has since applied the *Montana* analysis in cases involving the exercise of tribal judicial authority over non-Indians on non-Indian land as well.<sup>16</sup>

Nonmembers who are sued in tribal court sometimes challenge the tribal court’s jurisdiction over them. But the federal courts generally require them to exhaust all of their tribal remedies before doing so.<sup>17</sup> There are certain limited exceptions to this requirement, such as when “an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court’s jurisdiction.”<sup>18</sup> Mere allegations of bias or incompetence, without more, are not within these exceptions.<sup>19</sup> Thus, exhaustion is required in most cases. Even after a litigant has exhausted all tribal remedies, a federal

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9. *Duro v. Reina*, 495 U.S. 676 (1990).

10. 25 U.S.C. § 1301(2) (2006) (reaffirming tribes’ inherent criminal jurisdiction over all Indians).

11. *Montana v. United States*, 450 U.S. 544, 565 (1981) (analyzing the scope of a tribe’s authority over the activities of non-Indians on non-Indian land and referring to the “general proposition that the inherent sovereign powers of an Indian tribe do not extend” to such activities).

12. *Id.* at 565-66. Some have questioned the characterization of these “exceptions” to a general “rule.” See, e.g., Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 452.

13. *Montana*, 450 U.S. at 565.

14. *Id.* at 566.

15. *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001).

16. See *id.*; see also *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2727 (2008).

17. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985).

18. *Iowa Mut.*, 480 U.S. at 19 n.12 (quoting *Nat’l Farmers*, 471 U.S. at 856 n.21).

19. *Id.* at 18-19.

court normally will not permit re-litigation of issues raised in the tribal court unless it finds that the tribal court did not have jurisdiction.<sup>20</sup>

So, Tribes can make laws and regulations governing, and can exercise judicial authority over, their members, their tribal businesses, and businesses owned by tribal members on the reservation. They can also generally make laws and regulations governing, and exercise judicial authority over, non-Indians, including non-Indian businesses and their employees, and non-Indian employees of businesses owned by the Tribe or tribal members. To the extent non-Indians are on Indian land, this is particularly true.<sup>21</sup> It is also true for non-Indians on non-Indian land, provided one of the *Montana* exceptions is satisfied.

## 2. The Extent of Federal Authority over Tribes

Tribes are not subject to the full panoply of U.S. constitutional limitations, rights, and remedies, both because tribal governments pre-existed the Constitution and because they were not a part of the Constitutional Convention.<sup>22</sup> Congress has subsequently acted to prohibit Tribes from infringing on a list of basic individual rights enumerated in the Indian Civil Rights Act (ICRA).<sup>23</sup> These provisions of the ICRA are similar, but not identical, to those contained in the U.S. Constitution's Bill of Rights. Tribal members and nonmembers alike sometimes seek relief from perceived wrongs allegedly committed against them by a tribal government or department thereof. The only relief available in federal court under the ICRA, however, is habeas corpus relief.<sup>24</sup> Courts have, therefore, routinely dismissed other ICRA actions brought against Tribes in the federal courts.<sup>25</sup>

The Supreme Court has repeatedly found that Congress has plenary power over tribes and, accordingly, can pass legislation applicable to Tribes.<sup>26</sup> In some cases, federal laws are expressly applicable to

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20. *Id.*

21. *See supra* note 5 and accompanying text (discussing the arguable presumption of tribal jurisdiction over non-Indians on Indian land).

22. *See, e.g.,* Talton v. Mayes, 163 U.S. 376, 384-85 (1896) (holding that the Cherokee Nation is not subject to the Fifth Amendment of the U.S. Constitution).

23. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2006).

24. *Id.* § 1303; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

25. *But see* Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). In *Dry Creek*, the United States Court of Appeals for the Tenth Circuit recognized an exception to *Martinez* by holding that federal court review other than habeas review is available in cases involving non-Indians and matters outside of internal tribal affairs when there is no tribal remedy. *Id.* at 685. The exception was subsequently limited to cases in which a tribal remedy was actually sought and refused. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). Other circuits have declined to follow *Dry Creek*. *See, e.g.,* Shortbull v. Looking Elk, 677 F.2d 645, 650 (8th Cir. 1982).

26. *See, e.g.,* Cottonwood Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989) (stating that the Indian Commerce Clause provides Congress plenary power to legislate in the field of Indian affairs); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-67 (1903) (discussing the plenary power of Congress). Not everyone agrees that Congress actually does, or should, have the power to pass legislation affecting tribes without their consent. *See, e.g.,* Alex Tallchief Skibine, *Applicability of Federal*

Tribes.<sup>27</sup> In other cases, they are expressly inapplicable to Tribes.<sup>28</sup> Courts have generally determined that branches of tribal governments, including those branches engaged in commerce, are covered by such exemptions.<sup>29</sup> In many cases, however, federal statutes are silent with regard to their applicability to Indian Tribes.<sup>30</sup> In the case of statutes of general applicability that are silent with regard to Indian Tribes, there are two schools of thought.<sup>31</sup>

The first school of thought has the distinct advantage of being both more in keeping with federal policies favoring tribal sovereignty and self-determination<sup>32</sup> and more consistent with the canon of construction that ambiguities in statutes must be construed in favor of the Tribes themselves.<sup>33</sup> Under that view, a clear expression of congressional intent is necessary in order for a federal statute to apply to Indian Tribes.<sup>34</sup> This is the view advanced by many tribes and their advocates and would seem to be the correct view for the reasons just stated. To the extent the courts have embraced this view more recently, however, they have tended to alter its formulation slightly by requiring a clear ex-

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*Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

27. See, e.g., Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-692k (2006).

28. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,111 to 12,117 (2006 & Supp. 2008).

29. As to non-business entities, see *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 88 (2d Cir. 2001) (noting that a plaintiff would not be permitted to pursue relief against a tribal housing authority under Title VII); *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1125-26 (10th Cir. 1999), cert. denied, 529 U.S. 1134 (2000) (holding tribal housing authority exempt from Title VII); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998), cert. denied, 528 U.S. 877 (1999) (holding that nonprofit corporation created and controlled by two federally recognized tribes exempt from Title VII); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 374 (10th Cir. 1986) (holding that council consisting of thirty-nine Indian tribes exempt from Title VII). As to business entities, see *Thomas v. Choctaw Management/Services Enterprise*, 313 F.3d 910, 911 (5th Cir. 2002) (“Title VII’s express exemption of Indian tribes from employer status eschews subject matter jurisdiction of the federal courts to hear employment discrimination complaints . . . brought against unincorporated commercial enterprises entirely owned and operated by recognized Indian tribes.”). The *Thomas* court, apparently believing that this fact should have been quite obvious to the plaintiffs, further characterized the plaintiff’s Title VII claims as being “wholly without merit and thus legally frivolous.” 313 F.3d at 911; see also *Charland v. Little Six, Inc.*, 198 F.3d 249 (8th Cir. 1999) (affirming the dismissal for lack of jurisdiction of a suit making various claims, including a Title VII claim, against a tribal gaming enterprise).

30. Examples include the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2654 (2006); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2006).

31. For more detailed discussions of the applicability of federal statutes of general applicability to tribes, see Skibine, *supra* note 26; Fletcher, *supra* note 12.

32. See, e.g., 25 U.S.C. § 3601(3) (2006) (recognizing the “self-determination, self-reliance, and inherent sovereignty of Indian tribes”); Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970) (announcing a new federal policy, which remains the official policy of the federal government today, of promoting self-determination for tribes).

33. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (stating that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”).

34. See, e.g., *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (“General acts of congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them.”).

pression of congressional intent before a federal statute may be construed to impair tribal sovereignty.<sup>35</sup> These courts view most interference with a Tribe's ability to govern as impermissibly impairing tribal sovereignty.<sup>36</sup> Thus, the practical result is the same—it requires a clear expression of congressional intent before the courts will find that a federal statute applies to Tribes.

The second school of thought has been characterized as hostile to Tribes<sup>37</sup> and relies on a strained application of questionable dicta<sup>38</sup> from the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nation*.<sup>39</sup> In *Tuscarora*, the Court stated that “general Acts of Congress apply to [individual] Indians as well as to all others in the absence of a clear expression to the contrary.”<sup>40</sup> The United States Court of Appeals for the Ninth Circuit subsequently applied this dictum as though it were a general rule applicable to Tribes themselves (rather than individual Indians) and created a number of exceptions thereto in *Donovan v. Coeur d'Alene Tribal Farm*.<sup>41</sup> A number of lower courts have since applied the *Tuscarora-Coeur d'Alene* approach, coming to differing conclusions under the test as to whether the statutes in question apply to Tribes.<sup>42</sup> Despite the highly questionable propriety of the *Tuscarora-Coeur d'Alene* approach,<sup>43</sup> various courts continue to apply it, so it can-

35. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978); *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001) (“Our conclusion is further bolstered by general acceptance of the notion that the term ‘tribal self government,’ or a similar term, encompasses a tribe’s ability to make at least certain employment decisions without interference from other sovereigns.”); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (holding that the Age Discrimination in Employment Act (ADEA) was inapplicable because enforcement of the ADEA against a Tribe would directly interfere with the Tribe’s right to self-government); see also *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (requiring clear evidence that Congress actually considered the conflict between its course of action on the one hand, and Indian treaty rights on the other hand, and chose to resolve that conflict by abrogating the Indian treaty rights). See generally *Skibine*, *supra* note 26; *Fletcher*, *supra* note 12.

36. See *supra* note 35.

37. See, e.g., *Fletcher*, *supra* note 12.

38. See, e.g., *San Manuel*, 475 F.3d at 1309 (recognizing the statement as likely being dictum); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (The court virtually conceded that the language is dictum.).

39. 362 U.S. 99 (1960).

40. *Id.* at 120.

41. 751 F.2d 1113 (9th Cir. 1985). Under *Coeur d'Alene*, federal laws of general application are presumed to apply to Indian tribes unless:

(1) the law touches “exclusive rights of self-governance in purely intramural matters”; (2) the application of the law would “abrogate rights guaranteed by Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.”

*Id.* at 1116.

42. See, e.g., *Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009); *E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989).

43. There are several significant problems with the *Tuscarora-Coeur d'Alene* approach. First, *Tuscarora* was decided at a time when the policy of the federal government towards tribes was one of assimilation and termination and should not be given much weight in a time when the stated policy of the federal government favors tribal sovereignty and self-determination. Second, the statement in question was dicta, as even the *Coeur d'Alene* court acknowledged. See *supra* note 38. Third, the statement in *Tuscarora* (and the cases cited in support thereof by the *Tuscarora* Court) actually per-

not be entirely ignored.

Regardless of the approach applied, courts considering the applicability of general federal laws to Tribes have arrived at differing conclusions.<sup>44</sup> Even a number of courts applying the *Tuscarora-Coeur d'Alene* framework have viewed various federal laws of general applicability as interfering with a tribe's right of governance. A few generalities can be deduced from the chaos. First, courts almost uniformly find that such statutes do not apply to tribes or to their governmental departments that are not engaged in commercial activities.<sup>45</sup> As to tribal governmental departments engaged in commerce, the cases are somewhat evenly split.<sup>46</sup> And although courts frequently discuss,<sup>47</sup> and appear to be

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tained to individual Indians, not to tribes, so it should only apply in cases involving individual Indians. See *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1198-99 (10th Cir. 2002) (distinguishing *Tuscarora*). Fourth, *Tuscarora* dealt with property ownership, not tribal sovereignty and is factually very dissimilar from the cases in which some of the lower courts have more recently applied it. *Id.*

44. For cases holding that statutes do not apply to tribal governments, see *Lobo v. Miccosukee Tribe of Indians of Florida*, 279 Fed. Appx. 926 (11th Cir. 2008) (affirming the dismissal of a Fair Labor Standards Act (FLSA) complaint against a Tribe because the FLSA is silent with regard to Indian Tribes and contains no indication that Congress intended to abrogate tribal sovereignty); *Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (holding that the FLSA does not apply to a governmental agency of the Navajo Nation and affirming the dismissal of an FLSA complaint against that agency); *Taylor v. Alabama Intertribal Council*, 261 F.3d 1032, 1035-36 (11th Cir. 2001), *cert. denied*, 535 U.S. 1066 (2002) (recognizing that "Congress has explicitly indicated that it does not intend for Indian tribes to be subject to disparate treatment employment discrimination suits," and noting that "courts have held that, absent some evidence of Congress's 'clear and plain intent' . . . they will not interpret federal employment discrimination statutes to cover Indian tribes' employment decisions"); *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080-82 (9th Cir. 2001) (concluding that the district court should not have enforced a subpoena issued to a tribal housing authority under the ADEA because the housing authority functioned as an arm of the tribal government and the ADEA consequently did not apply); *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490, 495-96 (7th Cir. 1993) (holding that employees of Indian agencies exercising governmental functions are exempt from the overtime requirements of the FLSA); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (holding that the ADEA does not apply to the Cherokee Nation because its enforcement would directly interfere with the right of self-government). For cases holding that statutes do not apply to tribal business enterprises, see *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (affirming the dismissal of a Family and Medical Leave Act (FMLA) claim against an Indian gaming employer); *Curtis v. Sandia Casino*, 67 Fed. Appx. 576, 577 (10th Cir. 2003) (holding that "the ADEA does not apply to Indian tribes."); *Fond du Lac*, 986 F.2d 246 (holding that the ADEA did not apply to an employment discrimination dispute between a tribal employer and a tribal member employee). For cases holding that statutes do apply to tribal governments, see *Smart*, 868 F.2d 929 (concluding that pre-amendment Employment Retirement Income Security Act (ERISA) applied to a plan established by a health care center operated by an Indian Tribe on its reservation). For cases holding that statutes do apply to tribal business enterprises, see *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007); *Florida Paraplegic Association, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999) (holding that the Americans with Disabilities Act (ADA) applied to restaurant and gaming facility owned and operated by an Indian tribe); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (applying the Occupational Safety and Health Act (OSHA) to a tribal construction business); *U.S. Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991) (applying OSHA to a timber mill owned by a Tribe and operated on a reservation with non-Indian employees selling products in interstate commerce); *Lumber Industries Pension Fund v. Warm Springs Forest Production Industries*, 939 F.2d 683 (9th Cir. 1991) (finding plan established by tribal sawmill subject to pre-amendment ERISA); *Coeur d'Alene*, 751 F.2d 1113 (applying OSHA to a tribal commercial enterprise).

45. See cases cited *supra* note 44.

46. See cases cited *supra* note 44.

47. See, e.g., *Snyder*, 382 F.3d at 896 (noting that fewer than 4% of the officers in question were non-Navajo); *Fond du Lac*, 986 F.2d at 249 (noting that the person in question was a member of the tribe); *Occupational Safety*, 935 F.2d at 183 ("As of July 31, 1988, the mill employed 327 workers. Of

somewhat concerned with,<sup>48</sup> whether employees are tribal members or nonmembers, the ultimate outcomes of these cases are also rather evenly split.<sup>49</sup>

To further complicate matters, even if a statute is found to apply, a court could still find that a tribe's sovereign immunity bars enforcement of the statute against the Tribe.<sup>50</sup> The Supreme Court treats Congress as having the power to abrogate sovereign immunity but has stated that it must do so expressly and unequivocally.<sup>51</sup>

So, Tribes do need to be mindful of the rights enumerated in the ICRA. However, allegations of violations of these rights normally cannot be brought anywhere other than in a tribal forum (which may or may not be a possibility, depending on whether such a forum exists and whether the Tribe provides a means of enforcing such rights). Tribes also need to remain aware of which federal statutes are expressly applicable and inapplicable to Tribes. When a statute does not refer to Tribes, the law is murky. In many cases, there is a valid argument to be made that such a statute is inapplicable. Whether that argument will be successful is more difficult to predict. Thus, Tribes should exercise caution in these areas. Even if such a statute is found to apply, Tribes can still argue that their sovereign immunity prevents enforcement of the statute.

### 3. The Extent of State Authority over Tribes

States generally do not have jurisdiction over Tribes or tribal terri-

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these, 132 were tribal members; 35 were married into the Tribe; 14 were Native Americans enrolled in other tribes; and 146 were non-Native Americans.") *Coeur d'Alene*, 751 F.2d at 1114 ("It employs approximately twenty workers, some of whom are non-Indians. The Farm manager is himself a non-Indian.")

48. See, e.g., *Fond du Lac*, 986 F.2d at 249, 251 (repeatedly emphasizing that the employee in question was a tribal member).

49. Courts have found statutes inapplicable to tribes both in cases involving tribal members and in cases involving nonmember employees. See cases cited *supra* note 44.

50. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with [general] laws and the means available to enforce them."); *Fla. Paralegic Ass'n*, 166 F.3d at 1130 (stating that "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions") (emphasis in original); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (stating that even though the Indian Civil Rights Act applied expressly to tribes and provided various rights and remedies, those rights were not enforceable in federal court except through habeas corpus relief because there was no waiver of sovereign immunity). Indeed, any waiver of an Indian tribe's sovereign immunity may not be implied but must be clearly and unequivocally expressed. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Martinez*, 436 U.S. at 58; see also *Lobo v. Miccosukee Tribe of Indians of Fla.*, 279 Fed. Appx. 926 (11th Cir. 2008) (affirming the dismissal of an FLSA complaint against a Tribe because the FLSA is silent with regard to Indian Tribes and contains no indication that Congress intended to abrogate tribal sovereignty); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (holding that an Indian gaming enterprise is immune from suit under the FMLA).

51. *Kiowa Tribe of Okla.*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Martinez*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (citations omitted).

tories, absent a congressional grant of jurisdiction.<sup>52</sup> In 1953, Congress complicated the jurisdictional framework when it passed Public Law 83-280 (P.L. 280).<sup>53</sup> P.L. 280 gave five—later six—States fairly broad criminal, and limited civil, jurisdiction over the Indian Country within those states.<sup>54</sup> At first, it also allowed other States unilaterally to assume jurisdiction to the same extent, but that provision was subsequently amended to require tribal consent to the assumption of jurisdiction.<sup>55</sup> P.L. 280 initially created a question as to whether the affected States then had general civil jurisdiction over the Indian Country within their boundaries.<sup>56</sup> It was more than two decades before the Supreme Court determined in *Bryan v. Itasca County*<sup>57</sup> that P.L. 280 did not grant general civil jurisdiction to those States. Approximately a decade later, the Supreme Court held in *California v. Cabazon Band of Mission Indians*<sup>58</sup> that P.L. 280 did not give a State the authority to enforce civil regulatory laws on an Indian reservation, even if there are criminal penalties for violations of the laws.<sup>59</sup> Thus, even P.L. 280 States lack civil regulatory jurisdiction in Indian Country. And when States do have civil jurisdiction under P.L. 280, their jurisdiction is concurrent with tribal jurisdiction.<sup>60</sup> Accordingly, Tribes are not precluded from exercising jurisdiction by P.L. 280. Nor does P.L. 280 waive tribal sovereign immunity or authorize States to exercise jurisdiction over Tribes themselves.<sup>61</sup>

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52. See, e.g., *Williams v. Lee*, 358 U.S. 217, 220 (1959) (reaffirming *Worcester* and noting that Congress has “acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force . . .”).

53. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321-1326 (2006); 28 U.S.C. § 1360 (2006)).

54. 18 U.S.C. § 1162 (criminal); 28 U.S.C. § 1360 (civil). Other statutes made similar grants of criminal and/or civil jurisdiction to specified states, sometimes over specified Indian Territory. See, e.g., *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 148 (8th Cir. 1978) (discussing a statute granting Iowa criminal jurisdiction over offenses committed by or against Indians on the Sac & Fox Tribe’s Settlement).

55. 25 U.S.C. §§ 1321-1322.

56. See *supra* note 53. Public Law 280 gave five—later six—states broad criminal and limited civil jurisdiction over the Indian Country within those states.

57. 426 U.S. 373 (1976).

58. 480 U.S. 202 (1987).

59. *Id.* at 211-12 (holding that California could not enforce its gambling laws on the Cabazon Band’s land).

60. “The nearly unanimous view . . . is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 560-61 (Nell Jessup Newton et al., eds., 2005 ed.) (citations omitted). There is a minority view that, to the extent P.L. 280 gave states jurisdiction, it gave them exclusive jurisdiction. See, e.g., 2004 Op. Att’y Gen. 1 (2004), available at [http://www.law.state.ak.us/pdf/opinions/opinions/opinions\\_2004/04-019\\_661040467.pdf](http://www.law.state.ak.us/pdf/opinions/opinions/opinions_2004/04-019_661040467.pdf) (taking the position that Alaska state courts generally have exclusive jurisdiction of child custody proceedings involving Indian children).

61. See, e.g., *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 892 (1986) (“We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity . . .”); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) (stating that “there is notably absent [from P.L. 280] any conferral of state jurisdiction over the tribes themselves”).

*B. The Intersection of Tribal Sovereignty and Tribal Economic Development*

Tribal Nations have always engaged in various forms of commerce.<sup>62</sup> For many years, however, federal policies suppressed tribal sovereignty and self-determination and had the effect of inhibiting tribal economic development.<sup>63</sup> With the Indian Reorganization Act of 1934 (IRA),<sup>64</sup> Congress began to encourage, at least in theory, tribal economic development through the restructuring of tribal governments and the establishment of tribal corporations. But a period during which the federal government's policy was one of assimilation and the termination of tribal governments, soon followed. As the federal government thereafter made a stated commitment to a policy of tribal self-determination in the 1960s and 1970s, Tribes also increasingly exercised their inherent sovereign powers. Among these powers are a number of rights and protections that have proven beneficial for tribal economic development.<sup>65</sup>

For one thing, Tribes enjoy a number of tax advantages. They are not subject to federal or state income tax, nor to a variety of other taxes.<sup>66</sup> And they are treated favorably for tax purposes in several ways under the Indian Governmental Tax Status Act of 1982.<sup>67</sup>

For another thing, Tribes enjoy sovereign immunity from suit.<sup>68</sup> Among other things, this immunity helps them protect their treasuries and resources by avoiding the hassle and expense of lawsuits. Tribes can waive their sovereign immunity from suit, and the Supreme Court has recognized that Congress can abrogate tribal sovereign immunity.<sup>69</sup> But in either case, the waiver or abrogation must be express and unequivocal.<sup>70</sup> The sovereign immunity of Tribes extends to their govern-

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62. See generally Angelique A. EagleWoman (Wambdi A. WasteWin), *Tribal Nation Economies: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383 (2008) (discussing tribal commerce throughout history and today). Tribal Nations have not always operated within a Euro-American business framework. *Id.*

63. COHEN'S, *supra* note 60, at 1279.

64. 25 U.S.C. §§ 461-479 (2006).

65. "[T]he sovereign status of tribes offers distinct legal and economic market opportunities, from reduced tax and regulatory burdens for industry to unique niches for gaming and the commercial use of wildlife." Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 14 (Steven Cornell & Joseph P. Kalt eds., 1992). "Sovereignty is one of the primary development resources tribes now have . . ." *Id.*

66. COHEN'S, *supra* note 60, at 674, 693.

67. 26 U.S.C. § 7871 (2006).

68. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (stating that Tribes retain "the common-law immunity from suit traditionally enjoyed by sovereign powers").

69. *Kiowa*, 523 U.S. at 754; *Martinez*, 436 U.S. at 58.

70. *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 418 (2001); *Martinez*, 436 U.S. at 58.

mental agencies, including their commercial enterprises.<sup>71</sup> It also extends to tribal officials, including the employees of governmental agencies and commercial enterprises.<sup>72</sup> Included in the protection of sovereign immunity is the protection from court processes, such as subpoenas.<sup>73</sup> This is one tool that Tribes and tribal businesses can use to protect information they wish to keep confidential.

One of the most beneficial aspects of Tribes' retained inherent powers has been the general freedom from state civil jurisdiction, which was confirmed by the *Bryan* and *Cabazon* decisions.<sup>74</sup> These decisions came at a time when Tribes were already exercising increased self-determination and the seeds for the approaching wave of economic development had already been planted.<sup>75</sup> By the time *Cabazon* was decided, Tribes were already earning an estimated \$100-500 million per year in gaming revenues alone.<sup>76</sup> Some Tribes were earning substantial amounts from non-gaming activities as well.<sup>77</sup> By confirming the right of Indian Tribes to conduct gaming and other activities free from State interference, *Cabazon* "ignited an explosion."<sup>78</sup> In the wake of these two decisions, numerous Tribes exercised their inherent sovereignty by establishing both gaming enterprises and a wide variety of other enterprises.<sup>79</sup> These tribal businesses have sparked a resurgence of economic

71. See, e.g., *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (holding that a tribal casino "enjoys the Tribe's immunity from suit"); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) ("It is also undisputed that a tribe's sovereign immunity may extend to tribal agencies.").

72. See, e.g., *Martinez*, 436 U.S. 49; *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304-05 (10th Cir. 2001) (holding that claims against employees of a tribal social service agency in their official capacities were barred by sovereign immunity); *Dry v. United States*, 235 F.3d 1249 (10th Cir. 2000) (holding that various tribal officials, including the tribe's general legal counsel, prosecutor, director of law enforcement, and seven other law enforcement personnel were immune from suit); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (holding that claims against various tribal officials were "barred by the Tribe's sovereign immunity").

73. See *infra* notes 241-246 and accompanying text (discussing sovereign immunity from subpoenas).

74. See *supra* notes 57-61 and accompanying text (discussing the *Bryan* and *Cabazon* decisions).

75. See Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919, 958 (2008) ("At a time of great progress in tribal governance on reservations, *Bryan* seems to have spurred even more creative thinking about tribal economic development.").

76. *Id.* at 921.

77. See, e.g., *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 183 (9th Cir. 1991) (describing a tribal sawmill with 327 employees as of 1988 and total sales of \$33,595,361 in 1987).

78. Washburn, *supra* note 75, at 964.

79. An estimated 400 Indian gaming enterprises, operated by 240 tribes, bring in more than \$25 billion a year. Press Release, National Indian Gaming Commission, NIGC Announces 2008 Revenues (June 3, 2009), available at <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR113062009/tabid/918/Default.aspx>. Tribes operate many other types of enterprises as well, including: tourism and recreation, fisheries, forestry, leasing and grazing of land, agricultural production, manufacturing, retail, technology, and banking enterprises. See, e.g., COHEN'S, *supra* note 60, at 1279; CORNELL & JORGENSEN, *supra* note 1, at 4-5 (describing a wide variety of economic activities engaged in by tribes, including: forest management, growing beef and vegetables and selling them in a tribal grocery store, building a shopping center, raising buffalo, and running a telecommunications company); REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE & DEVELOPMENT 3, 39 (Miriam Jorgensen, ed., 2007) (describing the Citizen Potawatomi Nation's portfolio of diversified

recovery and development throughout Indian Country.<sup>80</sup> Numerous Tribes, including some who first established gaming enterprises, have now diversified their economies as well, thus, laying the groundwork for continued development and growth.<sup>81</sup> Research indicates that the rate of economic growth in Indian Country has exceeded the rate of non-Indian economic growth,<sup>82</sup> although per capita incomes in Indian Country are still substantially lower than the U.S. average.

This wave of economic development has given many Tribes the resources for increased exercises of sovereignty and self-determination.<sup>83</sup> With new sources of income, Tribes have developed and improved their organizational and physical infrastructures and the tribal services they provide. Among many other things, they have: drafted or revised tribal codes; taken control of (and often supplemented or improved) Indian Health Services and Department of Health and Human Services programs previously administered by the federal government; created or improved tribal court systems and law enforcement agencies; established or refined policies governing their growing numbers of employees; lobbied federal and state governments to further their interests; and hired legal counsel to protect and advance their sovereignty both in their business operations and in the courtroom.<sup>84</sup> Even Tribes who have experienced less economic growth have benefited to some extent from other Tribes' successes in litigation and lobbying, as favorable laws and legal precedents are often applied to Tribes in general.<sup>85</sup> Thus, tribal economic development has been distinctly positive, in many ways, for the advancement of tribal sovereignty.

As Tribes have become increasingly successful at conducting busi-

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businesses, including: a bank, golf course, casino, restaurants, large discount food retail store, tribal farm, and a radio station, not to mention scores of independent businesses; and describing the businesses of Ho-Chunk, Inc., which include: hotel, dot-com, house manufacturing, fuel and tobacco distribution, used car, venture capital, telecommunications, and other businesses).

80. JONATHAN B. TAYLOR & JOSEPH P. KALT, *AMERICAN INDIANS ON RESERVATIONS: A DATABASE OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES* (2005) (discussing the socioeconomic progress evident in both gaming and non-gaming tribes).

81. *Supra* note 79.

82. TAYLOR & KALT, *supra* note 80, at 8. This is true for both gaming and non-gaming tribes.

83. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."); Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV 398, 399 (2009) (stating that the success of gaming "engendered a profusion of tribal lawmaking and a dynamic exercise of tribal sovereignty both within and beyond the reservation.").

84. CORNELL & JORGENSEN, *supra* note 1, at 5 (providing examples of how various Tribes have used the revenues from their economic development to fund language and culture revitalization; law enforcement, paramedic, and fire services; the repurchase of land; economic diversification; health care; education; housing; natural resource development; court systems; constitutional reform; and more); TAYLOR & KALT, *supra* note 80, at vii; REBUILDING NATIVE NATIONS, *supra* note 79, at 3 (describing how the Citizen Potawatomi Nation invests its revenues into health and wellness care, education, child development support, pharmacy, small business development, and land purchases).

85. Of course, this is a double-edged sword because unfavorable laws and precedents are often applied across the board as well.

ness within the Euro-American business framework, however, they have sometimes found their sovereignty under attack.<sup>86</sup> Congress, the federal courts, and federal administrative bodies have repeatedly limited tribal sovereignty, particularly in the business context. Examples include: courts finding waivers of sovereign immunity when there were no express waivers;<sup>87</sup> the imposition of federal regulations on Tribes and tribal businesses;<sup>88</sup> the application of federal labor, employment, and

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86. Commentators have theorized that this shift is attributable, in part, to the difficulty some individuals seem to have with reconciling the notion of Tribes engaging in modern business with a stereotypical, static concept of "Indian-ness." See generally Daan Braveman, *Tribal Sovereignty: Them & Us*, 82 OR. L. REV. 75, 101 (2003). Case law provides some support for this proposition. See, e.g., *Kiowa Tribe of Ok. v. Mfg. Tech., Inc.*, 523 U.S. 751, 757-58 (1998) ("The rationale [for tribal sovereign immunity], it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 447 (1989) (treating two areas of land differently with respect to tribal authority over non-Indians because one area had "lost its [tribal] character," whereas the other had not). Similarly, compare the outcome of *Williams v. Lee*, 358 U.S. 217 (1959), which upheld Navajo (the largest tribe, with a relatively low population of non-Indians within its borders) jurisdiction over nonmembers, with *Oliphant v. Suquamish Indian Tribe*, 436 U.S. 191 (1978), in which the Court stripped tribes of criminal jurisdiction over non-Indians after noting that the reservation in question contained 2,928 non-Indians and only fifty tribal members. See Frickey, *supra* note 3, at 30, 36-37, 45. As Cornell and Jorgensen, aptly put it:

When poverty was the big story in Indian Country, few outsiders criticized tribal economic development. This is no longer the case. From calls in Congress to means testing of federal spending on trust and treaty-guaranteed programs, to pundits' claims that gaming tribes don't deserve any "special rights," the critique and resentment of tribal economic successes has become vocal. While it may not be widespread, there is a sense in some of the non-Indian discussions today that a rich Indian is somehow an undeserving Indian—or at least an unfortunate outcome of recent changes in Indian Country. As Lance Morgan (2001) put it in an op-ed piece in *Indian Country Today*, "a strange new brand of economic racism—"jealousism"—has taken hold.

The viewpoint Morgan describes ignores the fact that both American wealth and Indian poverty have roots in the historic expropriation of Indian economic resources. It also ignores the fact that, despite recent successes, the Indigenous population of the United States remains among the poorest of the poor.

CORNELL & JORGENSEN, *supra* note 1, at 16-17.

87. See, e.g., *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001). In *C & L Enterprises*, the Tribe entered into a construction contract for a commercial building it owned off the reservation. *Id.* at 414-15. The contract contained no express waiver of sovereign immunity but did contain an arbitration provision, a governing law provision, and other related provisions. *Id.* at 415. Although the long-established rule is that waivers of tribal sovereign immunity must be express and unequivocal in order to be effective, the Court nevertheless construed the agreement to waive sovereign immunity. *Id.* at 418-19. One might speculate whether the results would have been the same if the Tribe had not been engaged in off-reservation, commercial enterprise. Similarly, contravening Indian law canons of construction, some courts have held that the Bankruptcy Code waives tribal sovereign immunity, even though it does not expressly refer to tribes. See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871 (2004). But see *In re Mayes*, 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003) (concluding that the Bankruptcy Code probably does not waive tribal sovereign immunity); *In re Nat'l Cattle Congress*, 247 B.R. 259 (Bankr. N.D. Iowa 2000) (same). And although the United States Supreme Court long ago held that Tribes do not waive their sovereign immunity by bringing suit, *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), some courts have held that the bringing of a claim by a Tribe may operate as a limited waiver of the tribe's immunity from suit. See *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1246 (8th Cir. 1995); *United States v. Oregon*, 657 F.2d 1009, 1014-15 (9th Cir. 1981). But see *Okla. Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 509-10 (1991); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1345 (10th Cir. 1982); *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982).

88. See, e.g., Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006) (placing regulations on tribal gaming, and requiring Tribes to compact with states in order to engage in Class III gaming); see also the amendments to the Internal Revenue Code (IRC) and ERISA contained in the Pension Protection Act of 2006, Pub. L. No. 109-280 § 906(a), 120 Stat. 1051 (2006) (codified at 26 U.S.C. §

benefit laws to tribal businesses;<sup>89</sup> and the subjection of Tribes and tribal businesses to state interference.<sup>90</sup> The Supreme Court has even gone so far as to question the continued viability of tribal sovereign immunity, particularly when Tribes are operating in the commercial arena.<sup>91</sup>

Thus, the economic development, to which Tribes' exercise of their inherent sovereignty gave rise, has paradoxically resulted, to some extent, in an erosion of tribal sovereignty. If the exercise of sovereignty can potentially lead to its erosion,<sup>92</sup> then an economic development di-

414(d) (2006); 29 U.S.C. § 1002(32) (2006)) (clarifying that certain benefit plans established and maintained by a Tribe for its employees who perform essential governmental functions are considered governmental plans exempt from Subchapter I of ERISA and from certain requirements of the IRC, but expressly excluding from the definition of governmental plans those plans established and maintained by a Tribe for its employees who perform commercial activities); 25 C.F.R. § 543 (2009) (establishing minimum internal control standards for the conduct of Class II bingo and other similar games). The effective date for Part 543 is currently October 13, 2010. Minimum Internal Control Standards for Class II Gaming, 74 Fed. Reg. 52,138 (Oct. 9, 2009) (codified at 25 C.F.R. pts. 542-43).

89. See cases cited *supra* note 44 and accompanying text (discussing cases applying federal employment and labor laws to tribes and tribal businesses); *supra* note 88 (discussing the 2006 amendments to ERISA and the IRC).

90. The Supreme Court has upheld certain state taxes on tribes. See, e.g., *Okla. Tax Comm'n*, 498 U.S. at 509-10 (holding that the State of Oklahoma could tax a Tribe's sales of cigarettes to nonmembers but also holding that the Tribe enjoyed sovereign immunity from Oklahoma's suit to collect unpaid taxes); *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) (holding that the State of Washington could tax a Tribe's sale of cigarettes to nonmembers and also impose certain regulatory requirements on the Tribe). Congress has ostensibly required Tribes to choose between participating in state unemployment compensation systems and giving up a clear exemption from the Federal Unemployment Tax Act (FUTA). 26 U.S.C. §§ 3301-3311 (2006). Some courts have interpreted *Rice v. Rehner*, 463 U.S. 713 (1983) (holding that an Indian-owned business located on a reservation had to obtain a state liquor license) to require Tribes and tribal businesses to obtain state licenses and submit to state regulatory schemes in order to sell alcohol, even though the business that was the subject of *Rice* was not owned by the Tribe but by an individual. *Citizen Band Potawatomi Indian Tribe of Okla. v. Okla. Tax Comm'n*, 975 F.2d 1459, 1461 (10th Cir. 1992); *Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 719-20 (9th Cir. 1986). Congress has subjected tribes to certain state interference in the gaming context. See, e.g., 25 U.S.C. § 2710(d)(1) (2006) (stating that certain Indian-gaming activities are lawful only if conducted in conformance with a tribal-state compact, among other things). States, in turn, have used looming gaming compact negotiations as leverage in other matters, such as to pressure tribes to agree to state tax agreements impacting tribal businesses for fear of the state letting a gaming compact expire. They have also sought to re-negotiate their gaming compacts with tribes in order to get a cut, or a bigger cut, of the profits, and have gone so far as to devise ways to pressure tribes into re-negotiating compacts even when the compacts are perpetual. In Minnesota, for example, where the compacts have no termination dates and the tribes agreed to pay only nominal annual administration fees to the state, there have been repeated proposals for a non-tribally owned "racino" in the Twin Cities metro area, which would likely have a negative impact on business at the tribally-owned casinos in the area.

91. *Kiowa*, 523 U.S. 751, 758 ("There are reasons to doubt the wisdom of perpetuating the doctrine . . . [particularly] when tribes take part in the Nation's commerce.").

92. Indeed, it is often the case that stronger assertions of sovereign authority precede subsequent erosions of tribal sovereignty. The exercise of jurisdiction over nonmembers is a particularly strong exercise of sovereignty, for example, and one to which the Supreme Court has not reacted particularly favorably. See *supra* notes 6-16 and accompanying text (discussing the judicial divestiture of tribal authority over non-Indians). The establishment of tribal businesses and the consistent assertion that those businesses share the tribes' rights and privileges, such as sovereign immunity and freedom from state jurisdiction is another strong show of sovereignty. That, in turn, has been followed by things like courts finding waivers of sovereign immunity by tribal enterprises when there were no express waivers; courts questioning the continued viability of tribal sovereign immunity, particularly as applied to tribal business enterprises; Congress imposing increased federal regulations on tribes; and Congress and the courts subjecting tribes to increased state interference. See *supra* note 87-91 and accompanying text. Likewise, when Tribes have made a strong show of sovereignty by employing growing numbers of people, including non-Indians, and implementing their own labor and employment regulations, Congress and the courts have increasingly applied federal labor, employ-

lemma for tribes is how to engage in business without risking this erosion. This Article proposes a relatively cautious approach to the problem, to be used when Tribes wish to avoid direct challenges to their sovereignty and the concurrent risk of losing such challenges, thereby furthering the erosion of tribal sovereignty. There are certainly bolder approaches, which may have far greater results for the protection and advancement of tribal sovereignty, given the right times and circumstances. However, the federal government's treatment of Indian Tribes has often been described as a pendulum, swinging between a relative respect and a complete disrespect for tribal sovereignty and self-determination.<sup>93</sup> When the pendulum is closer to the disrespectful end of the spectrum, the risk of creating sovereignty-eroding precedent can be high, and some Tribes may wish to avoid that risk. This Article provides concrete and practical suggestions that will help such Tribes protect their sovereignty in their day-to-day business operations, regardless of where the proverbial pendulum is on the spectrum.

The premise of this Article is that, in their business operations, Tribes wishing to be cautious should exercise their sovereignty, and various aspects thereof, such as sovereign immunity, in a selective manner.<sup>94</sup> It should be asserted and advanced consistently, of course, but strategically, without making it a central issue whenever possible. And it should be protected consistently, of course, but proactively whenever possible, through strong laws, policies, and practices, and the consistent application thereof, rather than reactively in the courts or other adversarial situations. In this way, Tribes can often avoid direct challenges to their sovereignty and the concurrent risk of losing such challenges.

The successful implementation of such an approach requires the comprehension and cooperation of certain key players within Tribes and tribal businesses, including tribal governing bodies, tribal rule-makers, the officers and high-level executives of tribal businesses, departmental directors, and various other employees. This Article outlines the basic information these key players need to know to protect tribal sovereignty on a daily basis. To that end, the remainder of this Article covers a variety of topics, including: considerations for tribal laws and regulations; the organization and structure of tribal businesses; purchasing and con-

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ment, and benefit laws to Tribes and tribal businesses. *See supra* note 88-89 and accompanying text.

93. *See generally* COHEN's, *supra* note 60, at 5-113 (summarizing 500 years of Indian policy and the many changes of attitudes and circumstances that have occurred during that time).

94. *See* Kunesh, *supra* note 83, at 400 ("Tribal sovereign immunity from suit, a vital element of tribal sovereignty, is most susceptible to judicial curtailment, especially when haphazardly deployed in circumstances where tribes compete in the national economic mainstream."); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 791 (2006) ("Militant and inflexible assertions of tribal sovereignty may be emotionally satisfying . . . [and] more consistent with fundamental notions of truth and justice . . . [but] a flexible and more practical approach may sometimes be useful as long as Congress yields plenary power and the Court wields the doctrine of implicit divestiture.").

tracting; employment and labor relations; and the handling of disputes. Regardless of whether it is an approach of this nature or some other approach that is successful, the protection of tribal sovereignty will aid continued economic recovery and development,<sup>95</sup> which will, in turn, further the revitalization of self-determination, tribal sovereignty, and tribal communities.<sup>96</sup>

### III. LAYING THE FOUNDATION: STRONG LAWS, STRUCTURES, AND POLICIES

Tribal governments and tribal governmental agencies play a vital role in ensuring the successful implementation of a day-to-day approach to protecting tribal sovereignty. The importance of laying a strong foundation through effective laws, business structures, and policies, cannot be overemphasized.<sup>97</sup> Effective tribal laws and regulations establish the framework pursuant to which business must be conducted on the reservation by both tribal businesses and non-tribal businesses. Appropriate tribal business structures will both protect tribal assets and facilitate tribal business' dealings with vendors and others. And good tribal business policies and practices will help to ensure that tribal businesses run smoothly and lessen the risk of problems arising that could negatively impact the Tribe's sovereignty or that of a tribal business enterprise.

#### *A. Tribal Laws and Regulations*

##### 1. Tribal Laws

Tribal laws vary from Tribe to Tribe and may be written or oral. This Article does not presume to say what the substance of tribal laws should be or what form those laws should take. Instead, it suggests general principles that Tribes may wish to consider when enacting or amending laws that may impact their business dealings. Some of these considerations involve analyzing the potential impact of such laws on non-tribal members. This is by no means to suggest that Tribes should

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95. See CORNELL & JORGENSEN, *supra* note 1, at 6 (stating that economic development is only likely to occur when Tribes exercise sovereignty and self-determination); TAYLOR & KALT, *supra* note 80, at 6 ("Thus, the growth of Indian incomes in the 1990s is reasonably attributed to the economic successes arising out of greater self-determination."). See generally Cornell & Kalt, *supra* note 65 (discussing the importance of tribal sovereignty and self-determination for tribal economic development).

96. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."); CORNELL & JORGENSEN, *supra* note 1, at 6 ("Without economic development, the promise of self-determination is likely to remain hollow.").

97. CORNELL & JORGENSEN, *supra* note 1, at 10-11 (discussing the importance of establishing a strong legal and political infrastructure).

develop their laws according to external standards. Indeed, outside influences have long held tribal economic development back, whereas the increased exercise of self-determination has furthered tribal economic development.<sup>98</sup> As a practical matter, however, laws affecting tribal business dealings will have significantly more impact on nonmembers than many other areas of tribal law do.<sup>99</sup> Tribes may, therefore, find it beneficial to consider how nonmembers might perceive or be impacted by tribal laws.<sup>100</sup> By thinking prospectively in this way, Tribes can identify areas of potential confusion or conflict and determine how they wish to address those areas. Those Tribes who wish to avoid direct challenges to their tribal sovereignty can determine how best to reduce the risk of conflict, while consistently asserting their sovereignty.

*a. Avoiding Conflict of Laws Without Conceding the Applicability of Federal Laws*

One of the strongest ways in which Tribes exercise their sovereignty is by creating, applying, and enforcing tribal law. Tribal common law (including unwritten law) is often an important part of tribal legal structures.<sup>101</sup> A Tribe's governing body can also enact tribal laws, codes, or ordinances that further develop the framework for the Tribe's consistent exercise of its sovereignty. The enactment of written laws on certain subjects, such as business, employment, tax, and dispute resolution, may be particularly useful for economic development.<sup>102</sup> It may also protect the Tribe's sovereignty by discouraging the federal courts from applying certain federal laws to businesses operating on the reservation.<sup>103</sup> Notably, the potential for challenges to tribal sovereignty in

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98. REBUILDING NATIVE NATIONS, *supra* note 79, at 21-22 (describing how, as Tribes have taken greater control over their affairs, they have improved business operations and governmental services).

99. Some areas of tribal law, such as tribal laws governing membership, elections, domestic relations, housing, children, etc. will normally have relatively little impact on nonmembers. In the business context, however, laws are much more likely to impact nonmembers. A business or employment code, for example, might apply to non-tribal businesses, employers, and employees. A tax or license code might impact non-tribal businesses, vendors, and customers. A dispute resolution code might govern the resolution of disputes involving nonmembers.

100. It might be unreasonable, for example, to impose requirements on non-tribal businesses that are incompatible with the requirements placed on those businesses by applicable federal or state laws.

101. REBUILDING NATIVE NATIONS, *supra* note 79, at 68 (describing the common law as an "often unwritten set of rules derived from culture, history, established practice, tradition, or the gifts of spiritual beings"). A nation's courts may also create written common law.

102. *See, e.g., id.* at 182 (noting the importance to economic development of laws such as commercial codes, tax codes, personnel grievance procedures, zoning codes, and environmental regulations).

103. *See, e.g., Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) ("Because the Puyallup Tribe has not enacted wage and hour laws, the holdings of the cases discussed above lead this court to conclude that the overtime provisions of the FLSA apply [to a reservation-based business operated by tribal members.];" *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (holding that the National Labor Relations Act (NLRA) did not preempt a Tribe from enacting its right-to-work ordinance and entering into a lease agreement pursuant thereto; also stating that *Tuscarora* does not ap-

some of these areas is relatively high. For instance, non-tribal businesses might challenge their regulation by Tribes, or disgruntled employees might file suit against a Tribe or tribal business under federal employment or labor laws. Should either of these situations, or ones similar to them, come before the courts, it is not always clear how the courts would resolve them. In recent years, the Supreme Court has struck down various exercises of tribal jurisdiction over non-Indians.<sup>104</sup> Depending on the facts of the case, then, a court could conceivably determine that the Tribe does not have the authority to regulate a non-Indian business.<sup>105</sup> Similarly, while some federal employment laws expressly do not apply to Tribes, courts have reached differing conclusions as to whether other federal employment and labor laws apply to Tribes.<sup>106</sup> In so doing, they often take note of whether the employees in question are tribal members or nonmembers.<sup>107</sup> Although this factor does not serve as a very useful predictor of the ultimate outcome of the case, it does appear to influence the decisions of some courts.<sup>108</sup> Any tribal laws that conflict with federal law or do not provide rights and remedies at least somewhat similar to those provided under federal law accordingly carry an inherent risk of direct challenges to tribal sovereignty—the outcomes of which are not so easy to predict.

This does not mean that Tribes must provide all (or any, for that matter) of the rights and remedies provided under federal laws whose applicability to Tribes has not been determined, but simply that they must remain aware of the risk of challenges to tribal sovereignty and make conscious decisions regarding how to handle that risk. When considering legislation on business-related issues, particularly those that are likely to impact nonmembers, Tribes may accordingly wish to keep the pertinent provisions of federal law in mind. In doing so, Tribes may often find that the rights and remedies they already provide, or are contemplating providing, in accordance with their own values, are similar to those provided under federal law. For instance, a Tribe might value family relationships, and, therefore, require employers to give employees time off when they have new babies or sick relatives. It might also be in keeping with the Tribe's values to require employers to pay employees a reasonable living wage. In that case, there is a good chance that the Tribe already requires employers to provide, or would consider

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ply when an Indian Tribe has exercised its authority as a sovereign, such as by enacting a labor regulation).

104. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

105. For example, tribal regulation of a non-Indian business on non-Indian fee land within the boundaries of a reservation might give a court relatively unversed in federal Indian law pause in light of recent Supreme Court dicta. *See* cases cited *supra* note 104.

106. *See* cases cited *supra* note 44.

107. *See supra* notes 47-49 and accompanying text.

108. *See supra* notes 47-49 and accompanying text.

it perfectly appropriate to require employers to provide, leave similar to the leave other employers are required to provide under the federal Family and Medical Leave Act<sup>109</sup> and a minimum wage similar to the minimum wage other employers are required to pay under the federal Fair Labor Standards Act.<sup>110</sup>

By enacting reasonable standards and requiring tribal employers to treat their employees in accordance with the Tribe's values and laws, the Tribe reduces the likelihood that an employee will feel disadvantaged as a result of working for the Tribe and accordingly reduces the risk of a complaint by the employee. By imposing these requirements on non-Indian businesses operating on the reservation, the Tribe can also offer its members and others employed on the reservation protections consistent with tribal values and laws. If the requirements of tribal law are reasonable and do not conflict with those of federal law, non-Indian businesses will likely find it easier to comply with tribal law, which might also reduce the risk of challenges to tribal sovereignty.

There is certainly no need for tribal laws to mirror federal laws exactly or even to follow them very closely at all.<sup>111</sup> Indeed, following federal law *too* closely could create the appearance that a Tribe concedes the applicability of federal law, which would not be an advisable thing to do for a Tribe interested in protecting and asserting its sovereignty. Moreover, as a general matter, tribal laws should reflect the tribe's values, not merely echo the policies set by the federal government.<sup>112</sup> What tribal lawmakers who want to avoid direct challenges to sovereignty would be well advised to do, however, is to avoid creating a legal framework that conflicts with federal law. They may also wish to provide certain tribal rights and remedies similar to those provided under federal law. In this way, they can lessen the risk of a situation developing in which conflict in the laws cause the businesses or employees that the Tribe seeks to regulate to cry foul and seek relief under federal law.<sup>113</sup>

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109. Family and Medical Leave Act of 1993, 28 U.S.C. §§ 2601-2654 (2006); *see, e.g.*, Tribal Employment Rights Ordinance of 2009, HO-CHUNK NATION CODE tit. 6, § 5 (2009) (setting forth leave policies that are often more generous than those set forth in federal law).

110. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2006); *see also* HO-CHUNK NATION CODE tit. 6, § 5 (stating that the minimum wage is determined by the legislature).

111. *But see* Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*, 26 ARIZ. J. INT'L & COMP. L. 779 (2009) (suggesting that Tribes need to exercise caution in the law they apply to nonmembers if they wish to avoid results similar to those in *Hicks* and *Plains Commerce*).

112. Research shows this is essential to tribal economic development. *See generally* REBUILDING NATIVE NATIONS, *supra* note 79 (discussing this from various angles).

113. Avoiding conflicts with state law may also be a consideration, albeit to a lesser extent. While state civil regulatory law generally does not apply to Tribes, vendors and employees may not understand that, and may erroneously believe that they have certain rights enforceable against a Tribe or tribal business under state law. In such situations, it is distinctly unlikely that the courts would agree with them. Instead, the goal in avoiding overt conflicts with state law would be to avoid the hassle of dealing with potential claims and the negative publicity that could result therefrom.

*b. Making the Requirements of Tribal Laws Fair and Reasonable*

Just as enacting laws that do not conflict with federal laws can help reduce the likelihood of problems, so, too, can simply enacting reasonable laws. For instance, a Tribe might enact a business code, tax code, or other code that imposes certain requirements on all entities doing business on the reservation.<sup>114</sup> Non-Indian businesses, in particular, may initially balk at being subjected to these requirements, thereby creating a challenge to tribal authority which will need to be either somehow defused or tackled head-on. One way to reduce the likelihood of this happening is to ensure that the requirements are reasonable and not overly burdensome. It is particularly important that requirements be reasonable and well thought out when businesses must comply with requirements with which they may not be accustomed to dealing. Indian preference requirements,<sup>115</sup> for instance, may be unfamiliar to employers who have not previously done much business on or near reservations. They may even initially (and erroneously) view such requirements as running counter to equal employment opportunity requirements that are normally imposed on most non-tribal employers under federal and/or state law.<sup>116</sup> Ensuring that such requirements are reasonable may help these employers adapt to, and comply with, the potentially unfamiliar law. Some considerations might be whether to provide an exemption for very small employers who are unable to hire additional employees, what type of recruitment efforts might be appropriate to require, and similar practical considerations.

Although saying that laws should be reasonable seems rather obvious, anyone who has encountered a complex regulatory scheme in any jurisdiction knows that this ostensibly obvious concept is not always put into practice effectively. In *Rebuilding Native Nations*, for example, the authors describe one complex regulatory scheme set up by a tribal government that required would-be business owners to navigate a site-leasing process that includes more than a hundred steps and takes more

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(which could subsequently be utilized by those who lobby against tribes).

114. See, e.g., CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE, tit. 6, ch. 6-4 (2008), available at <http://www.ctclusi.org/ctclusinew/TribalCodeOrdinances/EnactedTribalCodeOrdinances/tabid/151/Default.aspx>; WARM SPRINGS TRIBAL CODE ch. 700 (2010), available at [http://www.warmsprings.com/warmsprings/Tribal\\_Community/Tribal\\_Government/Current\\_Governing\\_Body/Tribal\\_Code\\_Book/](http://www.warmsprings.com/warmsprings/Tribal_Community/Tribal_Government/Current_Governing_Body/Tribal_Code_Book/).

115. See, e.g., COLVILLE TRIBES LAW & ORDER CODE ch. 10-1 (2008), available at <http://code.amend.colvilletribes.com/current.htm>; HO-CHUNK NATION CODE, tit. 6, § 3; MASHANTUCKET PEQUOT TRIBAL LAWS tit. 33, §§ 1-12 (2008), available at <http://www.mptnlaw.com/Tribal%20Laws.htm>; NEZ PERCE TRIBAL CODE ch. 9 (2006).

116. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2006). To the contrary, it is perfectly legal for employers doing business on or near reservations to give preferential treatment to Indians, provided certain minimal requirements are met. Title 42 U.S.C. § 2000e-2(i) states:

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

than twelve months to complete.<sup>117</sup> Overly burdensome requirements such as this would likely have a dampening effect on economic development.

*c. Strategically Asserting and Protecting Tribal Sovereignty in Tribal Laws*

In addition to using strategic thinking to reduce the likelihood of direct challenges to their sovereignty, as discussed above,<sup>118</sup> Tribes must consider how best to both assert and protect their sovereignty in their laws. To whom should the laws apply, for example? The strongest exercise of sovereignty would apply the laws to the broadest scope of people and property possible. Yet external limitations beyond the Tribes' control are sometimes placed on the scope of the Tribes' jurisdiction. The precise scope of tribal jurisdiction over non-Indians is presently somewhat uncertain, for example.<sup>119</sup> And a broad application of laws, particularly to non-Indians, logically increases the likelihood of challenges to the Tribe's authority. As a practical matter, moreover, Tribes may not always have the resources or the desire to exercise the fullest extent of their authority. Tribes can reconcile these issues by making their laws broadly applicable.<sup>120</sup> They might also consider enumerating some of the factors that will be deemed, for jurisdictional purposes, to create a consensual relationship between a nonmember and the Tribe or its members.<sup>121</sup> Within the broad scope of authority they have thus reserved for themselves, they can then create, apply, and enforce their laws as they see appropriate, given factors such as the availability of resources for enforcement and the current legal and political climate.

A statement that nothing in the laws limits or waives a Tribe's sovereign immunity may also be advisable.<sup>122</sup> To the extent any laws provide a right with a remedy against the Tribe, a provision of this nature is particularly advisable. Setting forth specific procedures that must be

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117. REBUILDING NATIVE NATIONS, *supra* note 79, at 204.

118. See *supra* notes 98-116 and accompanying text.

119. See *supra* Part II.A.1 (discussing the Supreme Court's recent decisions regarding tribal jurisdiction over nonmembers).

120. See SOUTHWEST CENTER FOR LAW & POLICY, 2008 FINAL REPORT: CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY 18-19 (2008), available at <http://www.swclap.org/pdfs/Creative%20Civil%20Remedies%20Against%20NonIndian%20Offenders%20In%20Indian%20Country.pdf> (suggesting that Tribes make their codes broadly applicable); see also NEZ PERCE TRIBAL CODE ch. 9, § 9-1-3 (stating that the Tribe has authority to apply its Indian preference requirements to "every contractor and employer within its jurisdiction," mandating their application to all construction and forestry-related contractors, and authorizing their application to other employers, "taking into consideration the size of the employer or contract and the resources available" to the Tribal Employment Rights Office).

121. SOUTHWEST CENTER FOR LAW & POLICY, *supra* note 120, at 18-19; see, e.g., HO-CHUNK NATION CODE tit. 2, § 15 (2009) (enumerating various factors that will give rise to tribal jurisdiction); NEZ PERCE TRIBAL CODE § 1-1-12 (2006) (same).

122. See, e.g., NEZ PERCE TRIBAL CODE § 1-1-47 (retaining sovereign immunity except when expressly waived).

followed in order for a waiver of sovereign immunity to be effective can also help to protect the Tribe from inadvertent or unauthorized waivers of its sovereign immunity.<sup>123</sup> As discussed in more detail below, it may be to a tribe's advantage to provide certain procedures for the resolution of disputes involving the Tribe.<sup>124</sup> Yet these must be clearly limited and the Tribe's sovereign immunity clearly retained.

*d. Working Effectively with Legal Counsel*

Legal counsel can be invaluable to tribal lawmakers. The role of legal counsel must be clear and separate from the role of the lawmakers, however. This is another statement that might seem rather obvious, but the reality is that the appropriate separation of roles has not always been observed.<sup>125</sup> The lawmakers must be the ones to determine what the law is. They are the ones chosen by their communities for this purpose. Indeed, this may well be necessary for tribal economic development. Research shows that when tribal governments are firmly in control and create laws that are a good cultural fit, they tend to be more financially successful.<sup>126</sup> Legal counsel can identify important legal considerations, including those discussed above, and help to frame tribal lawmakers' discussions of those issues. Legal counsel can also provide lawmakers with the legal information they need to be able to make informed decisions and suggest various options and the potential ramifications thereof. If legal counsel drafts the language of the laws, tribal lawmakers should subsequently review the draft language and determine whether it accurately reflects their intentions. Ideally, tribal lawmakers and tribal legal counsel would work closely through several drafts and revisions until the lawmakers are satisfied with the substance of the laws and legal counsel is satisfied that all legal issues have been adequately addressed.

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123. *Id.* (setting forth certain requirements for a waiver of sovereign immunity to be effective); see WARM SPRINGS TRIBAL CODE ch. 30 (2010) (setting forth extremely specific requirements for a waiver of sovereign immunity to be effective, including requirements that certain language be used, and that various governmental bodies be notified of the proposed waiver at least twenty days in advance).

124. See *infra* Part V.A (discussing tribal dispute resolution systems).

125. REBUILDING NATIVE NATIONS, *supra* note 79, at 51 (stating that "from 1948 to 2001 the Crow Tribe operated under a constitution drafted with significant non-Native legal advice"); Barbara Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 595 (2000) (noting that tribal codes were often drafted by non-Indian attorneys). With rapidly growing numbers of Native attorneys, it is now more common for tribal attorneys to also be tribal members. Even so, their role must be that of a legal advisor, not a legislator.

126. See *supra* note 98 and accompanying text; REBUILDING NATIVE NATIONS, *supra* note 79, at 47-53.

*e. Applying and Enforcing Tribal Laws Fairly and Consistently but Not Inflexibly*

While enacting tribal laws is a strong exercise of tribal sovereignty, laws do not mean much if they are not consistently applied and enforced. Fair and consistent enforcement is important for a number of reasons. The consistent enforcement of business licensing and tax laws, for example, can provide additional sources of governmental revenue for a Tribe. It also provides a tangible demonstration of the extent of a tribe's authority. By enforcing certain laws, a Tribe may additionally bolster the case for tribal jurisdiction in the event of a dispute. An entity that signs a business license application and pays a license fee, for example, would subsequently find it more difficult to argue that the Tribe did not have jurisdiction to regulate its business activities or that the tribal court did not have jurisdiction to adjudicate a dispute arising out of those activities.<sup>127</sup> Furthermore, the fair and consistent application and enforcement of tribal laws lessens the likelihood that someone will feel he or she is being treated unfairly and challenge the Tribe's exercise of authority.

Some strategic thinking must go into the application and enforcement of tribal laws, however. Inflexible assertions of tribal authority may be preferable in theory but are, as a practical matter, more likely to result in direct challenges to tribal sovereignty.<sup>128</sup> In certain (hopefully limited) instances, a cost-benefit analysis may lead to the conclusion that enforcement is not the best option. For instance, if a Tribe decides to begin charging business licensing fees and issuing business licenses to businesses operating on its reservation, it may encounter resistance from one of the businesses it seeks to regulate. A standoff on this issue could easily lead to litigation, which would be expensive and time-consuming. In that light, collecting a relatively small license fee might not seem worth the risk. Other factors might even heighten the risk—the resistant business might have the resources to engage in protracted litigation or might provide essential services to tribal members that the Tribe does not wish to put in jeopardy, for instance. But the principle is also important, and the Tribe may not wish simply to abandon its business-licensing scheme, even in just one instance. Ultimately, the Tribe might decide that enforcement is not the best option in this particular instance. In that event, the Tribe might look for a creative solution—perhaps the code contains an exemption that could arguably apply to the resistant business, for example. In any case, the Tribe should consider setting forth in a letter to the resistant business the legal basis for the Tribe's

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127. *Montana v. United States*, 450 U.S. 544, 565 (1981) (stating that Tribes have jurisdiction over non-Indians who enter into consensual relationships with the Tribe or its members).

128. See Washburn, *supra* note 94, at 791.

jurisdiction to impose its licensing scheme on the business and the Tribe's right to withdraw the exemption in the future.

Is this the ideal solution? To the extent the Tribe does not exercise the full extent of its authority, the solution is not ideal. But to the extent the Tribe avoids having to litigate the issue in an uncertain political and legal climate<sup>129</sup> while simultaneously delineating, and reserving the right to exercise the full extent of its authority, the solution may be the best one under the circumstances. The Tribe binds its own hands, but avoids any actual erosion of its sovereignty and lays the groundwork to be able to revisit this situation in the future, perhaps when the legal and political climate is more predictable.

*f. Promoting Accessibility and Stability in Tribal Laws*

Although some Tribes publish written laws, others may choose not to codify their laws, not to publish their laws, or not to make them readily available to nonmembers. There may be quite legitimate reasons for these decisions. Moreover, written laws can never cover every possible scenario, and some flexibility in the law can be necessary or desirable.<sup>130</sup>

Particularly when a Tribe intends to apply its laws to nonmembers, however, there must be some way for the nonmembers to know what the laws are. Otherwise, how can they be expected to comply with the laws? Furthermore, if nonmembers have the impression that tribal law is unknown or inaccessible, they may mistrust tribal law. The distrust of tribal law can be an obstacle to economic development.<sup>131</sup> It can also be a significant obstacle to the exercise of adjudicatory jurisdiction over nonmembers.<sup>132</sup> Not only can it lead nonmembers to challenge the exercise of jurisdiction, but it can lead federal courts to disapprove of the exercise of jurisdiction.<sup>133</sup>

The codification of tribal laws pertaining to certain subjects, such as business, tax, zoning, employment rights, and rules of court procedure, can contribute to tribal economic development by promoting stability and encouraging investment.<sup>134</sup> Particularly when the Tribe intends to

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129. Various commentators have noted the uncertainty of the current legal and political climate with regard to tribes. See generally Kunesh, *supra* note 83; Washburn, *supra* note 94.

130. See, e.g., REBUILDING NATIVE NATIONS, *supra* note 79, at 182.

131. *Id.* at 182-83 (discussing how uncertainty in the law can discourage potential investors and how clear and predictable rules, together with an independent dispute resolution forum that can fairly and quickly address questions and disputes, is likely to accelerate economic development).

132. Sixkiller, *supra* note 111, at 813.

133. *Id.* at 807 (discussing this subject in general and also noting that Justice Roberts raised a number of questions at the *Plains Commerce Bank* oral argument about the accessibility of tribal law); *Nevada v. Hicks*, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring) (noting that tribal law may sometimes be unwritten and stating that the law applied in tribal courts is a "complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out").

134. REBUILDING NATIVE NATIONS, *supra* note 79, at 182-83.

apply its laws to nonmembers, the codification of those laws can also help to protect and advance tribal sovereignty by facilitating the Tribe's exercise of authority over the nonmembers and reducing the likelihood that nonmembers subjected to the law seek remedies in another forum.<sup>135</sup>

In the hypothetical case of a disgruntled ex-employee who feels he was wrongly terminated, for instance, there may well be a tribal-grievance procedure available to him under tribal law. If he is made aware of the procedure, and is able to obtain a written version of the applicable current law without difficulty, and can see that the law is fair and provides a satisfactory process of some sort, he may be more likely to avail himself of the correct procedure. He might obtain a favorable result, in which case there would be no reason for him to seek relief elsewhere. Even if the result is not favorable, however, he might not attempt to seek relief in another forum if he feels he was treated fairly in the tribal forum. More importantly, if he did seek relief elsewhere, a court of another jurisdiction should be less likely to entertain his claim.<sup>136</sup> If the ex-employee is unaware of the applicable tribal law, on the other hand, or is unable to obtain easily a current copy of laws in which a reasonable procedure is clearly spelled out, or encounters other obstacles to availing himself of the procedure, he may well decide to proceed, instead, to state or federal court. At that point, there is a direct challenge to the tribe's sovereignty and the concurrent possibility that the outcome might not be favorable for the Tribe.

Thus, Tribes taking a proactive approach to the protection and advancement of their sovereignty should consider reducing at least certain laws to writing and making them accessible to members and nonmembers alike. This is particularly true with regard to laws likely to impact economic development and nonmembers. Stability in the laws is also important so that tribal members, employees, businesses, and vendors can rely upon the laws.<sup>137</sup> Although amendments should certainly be made as necessary, they should be made in accordance with established procedures and not too frequently.<sup>138</sup> A person should be able to go to the tribal government center or tribal court, or other appropriate location, and easily obtain the most current version of a given law without hassle or delay. If tribal laws are available online, as are those of a number of Tribes, so much the better.<sup>139</sup>

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135. Kunesh, *supra* note 83, at 416-17 (suggesting that tribal sovereign powers are dependent, at least in part, on the consistent exercise of that power with fairness, responsiveness, and transparency).

136. *See supra* note 103 and accompanying text.

137. *See, e.g.*, REBUILDING NATIVE NATIONS, *supra* note 79, at 182-83.

138. *Id.*

139. *See, e.g.*, COLVILLE TRIBES LAW & ORDER CODE ch. 10-1 (2008); CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE, tit. 6, ch. 6-4 (2008); HO-CHUNK

## 2. Tribal Regulations

The governmental agencies<sup>140</sup> of Tribes also play a role in laying the framework for the Tribe's consistent and effective exercise of its sovereignty. Not only are they responsible for carrying out and enforcing tribal law, but tribal law may also confer rule-making authority on tribal governmental departments. Although laws create the general framework, rules, regulations, and policies add important details and dimensions to a government's policies and procedures, subject, of course, to the applicable laws. Like tribal laws, tribal regulations can apply to both members and nonmembers, including: businesses operating on the reservation; vendors doing business with the Tribe; employees of the Tribe; businesses owned by the Tribe or tribal members; and businesses owned by nonmembers.

Many of the considerations discussed above with respect to tribal law-making<sup>141</sup> apply to tribal rule-making as well. Thus, rule-makers would do well to consider ways to reduce the likelihood of overt challenges to tribal sovereignty. Some of the ways rule-makers, like law-makers, can do so are: (1) by drafting regulations and policies that do not conflict with federal law without conceding the applicability of federal law; (2) by making their regulations reasonable, clear, accessible, and stable;<sup>142</sup> (3) by working effectively with legal counsel to develop regulations and policies; (4) by thinking strategically and remaining vigilant about consistently asserting and protecting their sovereignty in the most appropriate manner; and (5) by fairly and consistently, but not inflexibly, enforcing their regulations.

Tribal rule-makers can also play an important part in strengthening a tribe's sovereignty. They can prescribe procedures and the use of forms that would bolster the case for the Tribe's jurisdiction in the event of a subsequent dispute. A business license application form, for exam-

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NATION CODE tit. 2, § 15 (2009); MASHANTUCKET PEQUOT TRIBAL LAWS tit. 33, §§ 1-12 (2008); NEZ PERCE TRIBAL CODE § 1-1-12 (2006); WARM SPRINGS TRIBAL CODE ch. 700 (2010); *see also* Native American Rights Fund, <http://www.narf.org/nill/triballaw/onlinedocs.htm> (compiling tribal codes) (last visited Apr. 16, 2010); Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/codes.htm> (same) (last visited Apr. 16, 2010); University of Oklahoma Law Center, <http://thorpe.ou.edu/codes.html> (same) (last visited Apr. 16, 2010). Some tribal codes and case law, such as the Navajo Nation Code, are now available on Westlaw.

140. Governmental agencies are divisions of the tribal government that perform specified governmental functions. Examples of governmental agencies include tribal housing authorities, tribal colleges, and law enforcement agencies, to name just a few. Tribal governments often have business arms as well. Congress and the courts have sometimes declined to treat commercial enterprises as governmental agencies of tribes. *See supra* notes 44 and 88 and accompanying text. Nonetheless, it remains the more commonly held view that tribal commercial enterprises share the rights and privileges of the tribe's sovereignty. *See supra* note 71 and accompanying text.

141. *See supra* Part III.A.1.

142. Although there may be specific requirements for amending regulations, amendments to regulations normally do not need to be approved by the tribe's governing body as a whole. Thus, it may be somewhat easier to amend regulations than it is to amend laws. Still, regulations should not be so frequently amended that they lack stability.

ple, could contain a statement that the applicant agrees to comply with tribal law and consents to the jurisdiction of the tribal court. If there is a code or ordinance the Tribe is particularly concerned with enforcing against the applicant, such as a Tribal Employment Rights Ordinance, the rule-makers could require the applicant to acknowledge that ordinance specifically. Similarly, the rule-makers might mandate that all tribal employees expressly consent to tribal jurisdiction. They can also protect tribal sovereignty in a variety of other ways by promulgating and implementing regulations for things like meaningful dispute resolution processes, confidentiality requirements, and so forth.

In addition to having a basic understanding of key legal principles, such as those discussed above,<sup>143</sup> tribal rule-makers must have a clear understanding of their role. First, they must understand that their agencies are departments of the tribal government and, accordingly, share the rights and privileges of the Tribe, including sovereign immunity.<sup>144</sup> As agency officials of a tribal government, the rule-makers themselves also share the tribe's sovereign immunity from suit.<sup>145</sup> However, rule-makers must understand that they and their agencies are subordinate to, and subject to the control of, the tribal government. They must act within the scope of authority conferred upon them, meaning, among other things, that they must act in accordance with tribal law.

Although law-trained individuals generally understand how to promulgate regulations consistent with applicable law, that concept may not be quite as obvious to non-law-trained individuals. Thus, tribal rule-makers may need to be familiarized with the scope of their rule-making authority so that they neither exceed their authority nor hesitate to act within the scope of their authority. First, rule-makers must understand that they cannot promulgate rules that are inconsistent with tribal law. In order to avoid doing so, they need to become intimately familiar with the applicable tribal law and learn how to draft regulations that remain within the framework established by the applicable law. Without such an understanding, rule-makers may inadvertently promulgate regulations that are inconsistent with tribal law, such as regulations permitting certain tribal revenues to be used in ways that are not permissible under the applicable tribal law. Second, rule-makers must understand that they have fairly broad rule-making authority as long as they are working within the law. Without such an understanding, they may be hesitant to act within the scope of their authority and create new regulations, procedures, and policies, even if they are eager to do so. For example, they might want to expand on a provision in tribal law that they view as im-

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143. *See supra* Part II.A.

144. *See supra* note 71 and accompanying text.

145. *See supra* note 72 and accompanying text.

portant for their agency. But they might be uncertain about how much they can expand on the provision or what relationship and resemblance the regulations or policies they draft should have to other regulations or policies of the Tribe pertaining to the same topic. In most cases, a bit of training and perhaps some technical assistance from legal counsel will be all it takes for tribal rule-makers to learn how to promulgate effective regulations and procedures that are consistent with tribal law and maximize their contribution to the Tribe's legal framework for the exercise of its sovereignty.

### *B. The Organization and Structure of Tribal Businesses*

In addition to laying a strong foundation of laws and regulations applicable to the Tribe and others, it is important for Tribes to establish and maintain appropriate organizations and structures for their own business operations. Determining the appropriate organization and structure for tribal businesses involves considerations of sovereign immunity and separation of business from politics, among other things.

#### 1. Options for Tribal Business Organizations

Tribes have a number of options for how to organize their business entities. Tribal business entities may be formed under tribal, federal, or state law. Many Tribes now prefer to organize their businesses under tribal law, which is by far the strongest exercise of sovereignty among the three choices. Incorporation under state law is probably not advisable, both for tax reasons<sup>146</sup> and because Tribes interested in asserting and protecting their sovereignty generally try to avoid submitting themselves to any state regulatory schemes whenever possible.

In the past, many Tribes established corporations under federal law pursuant to the IRA.<sup>147</sup> This is still an option for tribal business entities today. Tribes that established an IRA corporation early on are likely to have adopted a corporate charter based on a model provided by the Bureau of Indian Affairs (BIA).<sup>148</sup> The early model made many of the actions of tribal corporations subject to the approval of the secretary of the interior.<sup>149</sup> Newer charters make fewer of the tribal corporation's actions subject to secretarial approval.<sup>150</sup> Nevertheless, the IRA struc-

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146. A tribal corporation incorporated under state law may not be exempt from federal income tax. COHEN'S, *supra* note 60, at 675 (citing Rev. Rul. 94-16, 1994-1 C.B. 19).

147. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

148. See William V. Vetter, *Doing Business with Indian Tribes and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 175 (1994).

149. See, e.g., Corporate Charter of the Omaha Tribe of Nebraska (1936) [hereinafter Omaha Charter].

150. See, e.g., *id.*

ture is rather cumbersome. The process for establishing an IRA corporation involves a number of steps and ultimately requires the approval of the secretary.<sup>151</sup> Once in force, a charter cannot be revoked or surrendered, except by act of Congress.<sup>152</sup> Although non-Indian entities might perceive this limitation as a stabilizing factor, it probably has little practical effect. There is nothing to prevent a Tribe from simply allowing its IRA corporation to lie dormant without revoking or surrendering its charter. Indeed, some IRA corporations have been non-functioning for years, even since their inception.<sup>153</sup> Moreover, the charter can only be amended pursuant to certain procedures, which are quite cumbersome and often require the secretary's approval as well.<sup>154</sup> This cumbersome process for amending a corporate charter may be one of the IRA's primary advantages in the view of non-Indians considering doing business with a Tribe because it indicates that the charter will not be casually amended. Some Tribes may themselves appreciate the insulation from politics that the process provides. However, other Tribes may perceive the cumbersome process as a distinct disadvantage. It certainly does give the Tribe less autonomy, which runs contrary to modern ideas of tribal self-determination.

Not surprisingly, many Tribes have decided to forego this process and to organize their businesses under tribal law instead. Like all tribal law, the tribal laws governing the organization of businesses vary from Tribe to Tribe. But there are two important considerations that Tribes establishing businesses under tribal law should address. First, Tribes should consider whether to permit their businesses to waive sovereign immunity. Second, Tribes should consider whether to separate the business from the control of the tribe's governing body.

## 2. To Waive or Not to Waive Sovereign Immunity?

Whether Tribes organize their businesses pursuant to the IRA or pursuant to tribal law, they must consider the issue of sovereign immu-

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151. The Tribe must circulate a petition and gather enough signatures to support asking the secretary of the interior to issue a charter of incorporation to the Tribe. 25 U.S.C. § 477 (2006). Then there is a formal petition process that must be followed. 25 C.F.R. §§ 82.1-.11 (2009). The Tribe must also draft the charter of incorporation, which must be approved and issued by the secretary. 25 U.S.C. § 477. Finally, the charter must be ratified by the governing body of the tribe. *Id.*

152. 25 U.S.C. § 477.

153. *See, e.g.,* S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty., 674 P.2d 1376, 1382 (Ariz. Ct. App. 1983) (describing an IRA corporation chartered more than forty years previously as merely a "shell" because it had no officers, directors, bank accounts, assets, or property).

154. Charters are amended pursuant to the provisions of 25 C.F.R. §§ 81.1-.24 (2009). The Tribe must cause the secretary to call an election regarding the proposed amendment. This can be accomplished in one of two ways—either by request of the tribal government or by receipt of a petition bearing the signatures of at least 60% of the tribe's adult members. *Id.* § 81.5(b). Again, there are specific procedures for the petition process. *Id.* §§ 82.1-.11. Approval of the amendment requires a majority vote in favor of its approval with at least 30% of eligible voters voting. *Id.* § 81.7. In most cases, the amendment also requires the secretary's approval in order to become effective. *Id.*

nity. Tribal business arms generally share the Tribe's sovereign immunity from suit.<sup>155</sup> This can make some people hesitant to do business with a tribal business for fear that they will have no recourse if something goes wrong in the business relationship. There are two primary considerations with respect to waivers of sovereignty. First, will the business' organizing documents contain a "sue and be sued" clause? If so, what will be the substance of this provision? And second, assuming the business' organizing documents do not contain an outright waiver of sovereign immunity, what will be the tribe's policy regarding waivers of sovereign immunity by the business?

The early model for IRA corporations contained a sue and be sued clause that has occasionally been construed to waive sovereign immunity.<sup>156</sup> On the other hand, it limited the property of the Tribe that could be vulnerable to the execution of a judgment.<sup>157</sup> Some Tribes that have established IRA corporations in more recent years have used language that makes the power to sue and be sued conditional, thereby reducing or eliminating the possibility that the clause would be interpreted as a waiver of sovereign immunity.<sup>158</sup> The newer charters also expand the protections of the early model limiting the property of the Tribe that could be vulnerable to the execution of a judgment.<sup>159</sup> Even businesses organized under tribal law, rather than under the IRA, sometimes have sue and be sued clauses in their organizing documents and may also have provisions limiting the property of the business that could be subject to execution of a judgment.<sup>160</sup> Depending on how it is drafted, a sue and be sued clause may be more or less likely to be construed as a gen-

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155. See *supra* note 71 and accompanying text.

156. See, e.g., Omaha Charter, *supra* note 149, § 5(i); see also COHEN'S, *supra* note 60, at 256; Vetter, *supra* note 148, at 175-81.

157. COHEN'S, *supra* note 60 at 257; Vetter, *supra* note 148, at 175. The model charter stated in section 5(1) that the corporation has the power to:

sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the said Tribe, or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Vetter, *supra* note 148, at 179-80; see also Omaha Charter, *supra* note 149, § 5(i).

158. For example, the Corporate Charter of the Citizen Potawatomi Nation [hereinafter Citizen Potawatomi Charter] states that the Business Committee shall have the power:

to sue and allow the Incorporated Tribe or its agents to be sued by granting an express and unequivocal waiver of sovereign immunity; to complain and defend in any court at its discretion; provided, that however, the grant or exercise of such power shall not be deemed a consent by the tribe or by the United States to the levy of any judgment lien or attachment upon the property of the Tribe or the Incorporated Tribe other than income or chattels specially pledged or assigned subject to the consent of the Tribe.

*Id.* art. III(b). This clause gives the corporation the *ability* to waive its sovereign immunity, but it could not be interpreted as making a waiver of sovereign immunity.

159. *Id.* The modern clause provides additional protection by specifying that both the assets of the Tribe and the corporation are protected and by making the pledge of income or chattels subject to the consent of the Tribe.

160. See, e.g., SILETZ TRIBAL CODE § 15.006 (2007), available at <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/STBC%20Charter%2002-16-07.pdf> (including a sue and be sued provision in the Siletz Tribal Business Corporation Charter).

eral waiver of sovereign immunity.<sup>161</sup>

In the event that a court contrues a sue and be sued clause to waive sovereign immunity, the assets of the business might be at risk. On the other hand, a sue and be sued clause might make outsiders more comfortable doing business with the Tribe. Tribes may choose different approaches to this issue. If a Tribe does choose to include a sue and be sued clause in the organizing documents of its business, however, the Tribe should consider: (1) using language that makes the power to sue and be sued conditional; and (2) clearly limiting any waiver to the assets of the business and only certain assets at that. This will help to protect both the assets of the business and those of the Tribe.

The issue of waivers of sovereign immunity also comes up in specific transactions. It is not uncommon for vendors and others doing business with tribal businesses to seek a contractual waiver of sovereign immunity. Unless this issue is fully addressed by the business' governing documents, Tribes need to determine whether they will authorize their business arms to waive sovereign immunity in specific transactions and, if so, by what method and to what extent. Some Tribes are more lenient about waivers of sovereign immunity than others. So, although some tribal businesses never, or almost never, waive sovereign immunity, others apparently do so on a fairly regular basis.<sup>162</sup> To the extent a Tribe does allow its tribal businesses to waive sovereign immunity from suit in certain circumstances, the Tribe should require the businesses to follow a clearly defined procedure in order to make an enforceable waiver. Approval from specific, high-level officials should be necessary, among other things.<sup>163</sup> Codifying such a procedure will help to ensure consistency and protect the business from inadvertent waivers of sovereign immunity.

Similarly, Tribes may wish to provide some direction to tribal businesses regarding the use of policies or practices that potentially conflict with federal law. Claims that a tribal business' policies or practices violate federal law have sometimes led courts to conclude that the federal laws in question apply to the tribal business.<sup>164</sup> Considering that tribal business arms are often the economic engines of Tribes, this has serious implications for tribal sovereignty and self-determination. A tribal business code might already effectively address this issue (for example, by imposing the Tribe's required employment practices on employers). But if the issue is not already adequately addressed by tribal law, the

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161. *Cf. supra* note 156 and accompanying text.

162. Kunesh, *supra* note 83, at 406 (stating that some "tribes regularly consent to be sued").

163. *See, e.g.*, SILETZ TRIBAL CODE § 15.007 (requiring Tribal Council approval for waivers of sovereign immunity and pledges of \$100,000 or more of the tribal business' assets).

164. *See* cases cited *supra* note 44 (discussing cases holding that federal laws applied to tribal businesses).

Tribe may wish to provide further direction regarding how the policies and practices of tribal businesses should relate to federal law and whether tribal businesses must obtain approval from the tribal government if they intend to implement policies or practices that potentially conflict with federal law or are otherwise likely to result in challenges to tribal sovereignty.

### 3. Separation of Business from Politics

Whether Tribes organize their businesses pursuant to the IRA or pursuant to tribal law, they should also consider whether and, if so, how to separate control of the business from the Tribe's governing body. Indeed, clear separation of business and politics appears to be a primary factor in the success of tribal businesses.<sup>165</sup> Cultural fit is important too, however, so that may also be a consideration in determining the most appropriate structure for the business.<sup>166</sup> In some instances, the organizing documents of tribal businesses name the governing body of the Tribe as the governing body of the business as well.<sup>167</sup> This leaves the corporation potentially susceptible to political influences and instability.<sup>168</sup> Accordingly, other Tribes have structured their businesses in such a way that the corporation is run by a politically autonomous body, such as a board of directors that is separate from the tribal governing body.<sup>169</sup> Both IRA corporations and tribal businesses organized under tribal law can be structured this way.

If a tribal business is run by the same individuals who serve as the tribe's governing body, they should be vigilant about making a clear dis-

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165. Indeed, businesses in Indian Country, regardless of their form, are much more likely to be successful if they are insulated from political influence. Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?* 11 KAN. J.L. & PUB. POL'Y 441, 449-50 n.131-37 (2002); see also REBUILDING NATIVE NATIONS, *supra* note 79, at 191 (stating that "council involvement in business tends to weaken corporate performance").

166. REBUILDING NATIVE NATIONS, *supra* note 79, at 47-53 (discussing the importance of cultural match and how tribes whose organizational structures better match their traditional tribal structures may be more financially successful than those whose organizational structures do not match their traditional tribal structures).

167. See, e.g., Citizen Potawatomi Charter, *supra* note 158, art. II & III (granting the business committee, which comprises the officers of the tribe, the corporate powers of the corporation); Omaha Charter, *supra* note 149, § 4 (stating that the Tribal Council shall exercise the corporate powers of the corporation); SILETZ TRIBAL CODE § 15.002 (stating that the board of directors of the corporation shall be the Tribal Council); see also COHEN'S, *supra* note 60, at 256 (noting that "tribal governments and section 17 corporations may have identical governing bodies, with the elected tribal council also serving as the corporate board of directors").

168. See *supra* note 165 and accompanying text; REBUILDING NATIVE NATIONS, *supra* note 79, at 176-80 (discussing the problems that can arise from role confusion and failure to observe appropriate boundaries).

169. See, e.g., Press Release, The Harvard Project on American Indian Development, Honoring Nations: 2005 Honoree, Siyeh Corporation, Blackfeet Nation (2005) [hereinafter Siyeh Corporation Profile], available at [http://www.ksg.harvard.edu/hpaicd/hn/hn\\_2005\\_Siyeh.htm](http://www.ksg.harvard.edu/hpaicd/hn/hn_2005_Siyeh.htm) (stating that Siyeh Corporation, an IRA corporation of the Blackfeet Nation, is run by a board of directors that is separate from the Tribal Council).

inction between their dual roles, not only in theory, but also in practice.<sup>170</sup> If the same individuals serve on a Tribal Council and on the board of directors of the Tribe's business arm, for example, then each of them has two "hats"—a councilor hat and a director hat. They must remain cognizant at all times of the capacity in which they are acting.<sup>171</sup> When handling Tribal Council business, they must put on the councilor hat, which enables them to take actions on behalf of the Tribe. If they are voting on a resolution of the Tribal Council, signing a contract or intergovernmental agreement (as a member of the Tribal Council) on behalf of the tribe, or voting on a matter brought before the Tribal Council, they must do so in their councilor capacity. When handling company business, on the other hand, they must take off the councilor hat and put on the director hat. Then, and only then, can they take actions on behalf of the business enterprise, such as signing its contracts (as a member of the board), voting on resolutions of the business enterprise, or considering other matters pertaining to the business enterprise. This sounds simple, but in the hustle and bustle of daily affairs, it is sometimes easier said than done.<sup>172</sup> It is all too easy inadvertently to execute a contract in one's councilor capacity when it should have been executed in one's director capacity or vice versa. Although a mistake of this nature may not always have catastrophic results, it can raise questions as to whether an action was duly authorized or whether a contract was executed by someone duly authorized to execute it. Inconsistencies in records of this nature can cause concern in entities considering doing business with the Tribe or its business enterprise, among other things. Even more seriously, a court could conceivably impute a tribal business's waivers of sovereign immunity to the *Tribe* itself (although one would hope that any such decision would be quickly overruled).<sup>173</sup> When there is overlap

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170. See generally REBUILDING NATIVE NATIONS, *supra* note 79, at 184-95 (discussing the need to identify various roles).

171. Councilors and directors in such a situation must also remain mindful of what interests they represent in each of their capacities. The Tribal Council and the board of directors should each think carefully about their roles and determine what powers and obligations they want each to have. See generally *id.* at 184-95 (discussing the same). They should then adhere to those determinations. *Id.* at 292-93 (describing how this was put to the test in one case, but the proper roles were maintained, with favorable result).

172. In the author's experience, while some Tribes maintain an impeccable distinction between their tribal governing bodies and the governing bodies of their tribal businesses, others are not quite as vigilant. The business records of one gaming enterprise that the author reviewed were often executed by the Tribal Council, when they should have been executed by the board of directors, who were one and the same. The records went back over fifteen years in this manner. See also Vetter, *supra* note 148, at 175-79 (discussing the lack of separation between some tribes and their tribal business entities and citing additional examples of such inconsistencies in records).

173. See, e.g., *Morgan Blgs. & Spas, Inc. v. Iowa Tribe of Okla.*, No. CIV-09-730-M, 2010 WL 597125 (W.D. Okla. Feb. 16, 2010) (denying a Tribe's motion to dismiss on the basis of sovereign immunity because the court determined that there was a factual question as to whether the business enterprise was the alter ego of the Tribe and stating that, if so, the contract at issue waived the Tribe's immunity). This statement is, quite arguably, incorrect, but it nevertheless demonstrates the risks of failing to observe separations between the Tribe and its business arm in practice. See generally Vetter, *supra* note 148, at 175-79 (discussing other problems that can arise when inconsistencies

between the membership of the Tribal Council and the board of directors, it can be difficult to maintain a clear delineation between the councilor and director roles, but it is doubly important to do so.

### *C. Policies*

Tribal businesses themselves play a crucial role in laying the framework for the consistent assertion and protection of tribal sovereignty. The day-to-day aspects of this role are discussed further below.<sup>174</sup> But the development of appropriate and effective employment and labor policies is another important aspect of the role tribal businesses play in the protection and assertion of sovereign immunity. One of the areas most at risk for intrusions on tribal sovereignty is the area of employee and labor relations.<sup>175</sup> As Tribes have employed increasing numbers of nonmembers and exercised authority over those nonmembers, the courts (and sometimes Congress) have whittled away at the scope of Tribe's authority over non-Indians.<sup>176</sup> Disgruntled employees are apt to file claims. And if they file claims in federal venues seeking to secure rights they might otherwise have enjoyed, but for the fact that they work for a tribal employer, there is a distinct risk of the courts viewing that as an invitation to vindicate the employee's perceived rights.<sup>177</sup> Tribal businesses should, therefore, take a particularly careful approach when addressing the applicability of federal laws. They should also draft thoughtful policies regarding discipline, grievances, and other key issues.

#### 1. Addressing the Applicability of Federal Laws

As discussed above,<sup>178</sup> courts generally hold that tribal businesses share Tribes' express exemptions from federal laws.<sup>179</sup> Certain federal statutes, such as the Employee Retirement Income Security Act,<sup>180</sup> might apply to tribal businesses, but it is still arguable that sovereign immunity protects Tribes from the enforcement of those statutes.<sup>181</sup> But whether other federal employment and labor laws apply to tribal businesses is unclear, and the courts have reached divergent views on their applicability.<sup>182</sup> To further complicate matters, if a court does find that

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of this nature are present).

174. *See infra* Part IV.

175. *See supra* notes 44-49 and accompanying text.

176. *Id.*; *see supra* notes 6-16 and accompanying text.

177. *See, e.g.*, cases cited *supra* note 44.

178. *See supra* Part II.A.2 (discussing the scope of federal authority over tribes).

179. *See supra* notes 28-29 and accompanying text.

180. 29 U.S.C. §§ 1001-1461 (2006).

181. *See supra* notes 50, 88 (discussing amendments to ERISA and the difference between the applicability and enforceability of a statute).

182. *See* cases cited *supra* note 44 and accompanying text.

such a statute applies, it could still find that the statute is unenforceable against a tribal business.<sup>183</sup> The outcome of any given case at any given time is, therefore, difficult to predict, and litigation of such a matter brings with it inherent risks, not to mention expense. Thoughtful policies can reduce the likelihood of having to litigate such matters, however.

The considerations discussed above with respect to drafting tribal laws and tribal regulations apply to tribal business' drafting of employment and labor policies as well.<sup>184</sup> It may behoove tribal businesses to pay additional attention to federal employment and labor laws in drafting their employment and labor policies. Although there are a number of cases finding that federal employment laws did not apply to Tribes or tribal businesses, the cases in which courts found that employment and labor laws *did* apply nearly all involved tribal businesses, as opposed to tribal governments or other agencies of tribal governments.<sup>185</sup> Congress has given indications of moving in that direction as well.<sup>186</sup> Thus, the business arms of tribal governments may be more at risk of being subjected to federal employment and labor laws that do not specifically apply to them than are tribes themselves or other departments of tribal governments.

What is a tribal business to do, then? For now, the safest approach for those seeking to avoid challenges to tribal sovereignty seems to be to deny consistently the applicability of federal employment laws as a matter of sovereignty but to conduct their business and affairs in a manner that does not conflict with federal law. Like tribal law-makers, tribal businesses should apply the Tribe's own values and law to draft policies that voluntarily provide their employees with various employment benefits as a matter of tribal law.<sup>187</sup> They should consider whether the policies would conflict with the pertinent federal employment and labor laws and, if so, how best to address the conflict.<sup>188</sup> The Tribes might impose certain limitations in this regard.<sup>189</sup> Also like tribal law-makers, tribal businesses may find that the rights, remedies, policies, and practices they would provide anyway, in accordance with tribal law and values, are at least somewhat similar to those provided under federal law.<sup>190</sup> If tribal businesses find that they can accordingly follow a set of policies and procedures somewhat similar to those an employer subject

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183. See *supra* note 50.

184. See *supra* Part III.A.

185. See cases cited *supra* note 44.

186. See, e.g., *supra* notes 88-89 and accompanying text (discussing recent amendments to ERISA and the IRC that draw a distinction between tribal commercial activities and other governmental activities).

187. See *supra* Part III.A.

188. See *supra* Part III.A.

189. See *supra* Part III.A.

190. See *supra* Part III.A.

to federal law would follow,<sup>191</sup> the likelihood of challenges to tribal sovereignty will be reduced because individuals will not be able to claim they are being denied rights they would otherwise have, and they may be less likely to file claims against the tribal business. In the event of a claim, the tribal business will have preserved its ability to argue that the federal laws are not applicable by consistently denying their applicability. In the event a court determines that a federal law is applicable, the tribal business will have hopefully protected itself from liability by providing rights and remedies and following procedures and practices that are consistent with tribal law and values, but that do not conflict with federal law.

The message that a tribal business ultimately needs to get through to its employees is that the tribal business is voluntarily providing them certain rights and benefits and that although some of those rights and benefits may resemble those provided by other employers under federal or state law, the rights and benefits are in fact being provided pursuant to the Tribe's own laws and policies. At a minimum, this message should be clearly reflected in all written policies, such as employee policy manuals. Policies should also contain a clear statement of the position that many federal and state employment and labor laws are inapplicable. Tribal businesses should avoid using the exact titles and provisions of federal laws to refer to the similar rights and benefits being provided under tribal law, as that could cause confusion and the appearance that the employer concedes the applicability of those laws. Likewise, a tribal employer might not wish to post notices regarding the rights to which employees would be entitled under federal or state law if they worked for other employers.

Areas with respect to which problems often arise and to which particular attention should be paid include leave, wage and hour, and labor policies. Labor relations are of heightened concern to many Tribes as of late. Prior to 2004, the National Labor Relations Board (NLRB) consistently took the position that it did not have jurisdiction under the National Labor Relations Act (NLRA)<sup>192</sup> over on-reservation commercial enterprises operated by Tribes.<sup>193</sup> In *San Manuel Indian Bingo & Casino*,<sup>194</sup> however, the NLRB changed course and did assert jurisdiction over an Indian gaming enterprise. On appeal, the United States Court

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191. See *supra* Part III.A.

192. 29 U.S.C. §§ 151-169 (2006).

193. S. Indian Health Council, Inc., 290 N.L.R.B. 436 (1988) (holding that a mining company located on a reservation was a "governmental entity" and analogous to political subdivisions which are excluded from coverage); Fort Apache Timber Co., 226 N.L.R.B. 503 (1976). In later cases, the NLRB held that certain tribal-owned businesses operated off-reservation were employers subject to the NLRA. Yukon Kuskokwim Health Corp., 328 N.L.R.B. 761 (1999) (involving a health clinic operated by a consortium of tribes); Sac & Fox Indus., Ltd., 307 N.L.R.B. 241 (1992) (involving a manufacturing plant).

194. 341 N.L.R.B. 1055 (2004).

of Appeals for the D.C. Circuit upheld this decision.<sup>195</sup> More litigation on this issue is certain to follow.<sup>196</sup>

Although Tribes may not have control over the ultimate resolution of these issues, there are certain things that tribal businesses can do to head off labor disputes in the first place and, thus, avoid even the possibility of being held subject to the jurisdiction of the NLRB. The pragmatic approach would be to adopt policies that will protect the tribal business in the event a court did apply the NLRA to it. It is important to establish clear policies, and to have these policies in place *before*, rather than after, an issue arises because the policies and procedures that are in place at the time are what the NLRB would use to make its determinations about whether it did assert jurisdiction. In these policies, tribal businesses should avoid the appearance of discriminating against union activity. For example, a policy prohibiting the posting of union-related materials, or even limiting the posting of materials in such a way that it has the effect of restricting the posting of union-related materials, could cause problems.<sup>197</sup> A policy prohibiting the posting of *all* materials, on the other hand, may lead to some grumbling amongst employees but should serve to prevent claims of disparate treatment. Similarly, a policy allowing some groups, but not others, to solicit could easily be problematic.<sup>198</sup> So, too, could be a policy banning the wearing of union insignia, unless the policy prohibits the wearing of all insignia, and there is good reason for it.<sup>199</sup> By being proactive and adopting policies

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195. *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007) (applying the NLRA to tribal casino operating on reservation land that employs mostly non-Indians and caters primarily to non-Indians).

196. *See, e.g., N.L.R.B. v. Fortune Bay Resort Casino*, No. 08-0065, 2010 WL 681663 (D. Minn. Feb. 25, 2010).

197. *Roadway Express, Inc. v. N.L.R.B.*, 831 F.2d 1285 (6th Cir. 1987) (upholding a finding that the removal of employee bulletin boards after the posting of union-related materials violated the NLRA); *N.L.R.B. v. Honeywell, Inc.*, 722 F.2d 405 (8th Cir. 1983) (upholding the NLRB's determination that the employer's policy of allowing company-approved organizations and individuals to post messages unfairly discriminated against labor organizations).

198. Allowing any outside organizations, including charitable groups, to solicit employees while restricting union solicitation may create an appearance of impermissible discriminatory intent towards the union. *See Am. Cast Iron Pipe, Co. v. N.L.R.B.*, 600 F.2d 132, 135-36 (8th Cir. 1979). The safest thing is to prohibit all solicitation. However, an employer may permissibly allow "a small number of isolated 'beneficent acts' [i.e., solicitations by charities] as narrow exceptions to a no-solicitation rule." Memorandum from Barry J. Kearney, Assoc. General Council to Dorothy Moore-Duncan, Regional Dir. (Apr. 23, 2001) (citing *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, n.4 (1982)).

199. Although employees generally have a right to wear union insignia under the NLRA, there are recognized exceptions to this right, one of which includes circumstances in which the "display of union insignia may 'unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees.'" *Lee v. N.L.R.B.*, 393 F.3d 491, 495 (4th Cir. 2005) (internal citation omitted); *see also Burger King Corp. v. N.L.R.B.*, 725 F.2d 1053, 1055 (6th Cir. 1984) (finding a restaurant's consistent and nondiscriminatory enforcement of a policy that its employees who have contact with the public may only wear authorized uniforms constitutes "special circumstances" that justifies the banning of buttons, including union buttons); *Fabritek, Inc. v. N.L.R.B.*, 352 F.2d 577 (8th Cir. 1965) (finding that an employer's need for a distraction-free work environment constituted a special circumstance justifying a prohibition on large union buttons, although perhaps not all union buttons); *N.L.R.B. v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964) (finding a casino's broad anti-adornment policy permissible and justified by the casino's interest in its

on these and similar issues and by remaining vigilant for signs of potential trouble, tribal businesses may be able to head problems off before they arise, while also protecting themselves in case they are subjected to the NLRB's jurisdiction.

## 2. Other Policies

Drafting well-thought-out policies on other key issues is important as well. Although the nature and content of policies will naturally vary from one tribal business to another, the following discussion highlights some considerations that will help tribal business protect themselves.

One policy that can go a long way towards protecting tribal sovereignty is a purchasing policy. Such a policy might require the routing of all purchases and contracts through a centralized purchasing department. As discussed below, individuals in the purchasing department can be specially trained to identify problematic provisions in contracts and can work closely with legal counsel to ensure that the tribal business is placed in the best position possible in all contracts.<sup>200</sup> As an added level of protection, a purchasing policy might require contracts over a specified dollar amount to be approved by a high-level officer or the board of directors. This provides additional oversight for situations in which significant assets of the tribal business could potentially be placed at risk if care is not exercised.

Also, establishing a disciplinary process can help tribal employers ensure fair and consistent treatment of employees. Like other employers, Tribes might want to pair any disciplinary procedure with an at-will employment provision (if at-will employment is the Tribe's policy). Moreover, they might avoid language that would bind them to follow a specific procedure in all cases. They can do so by expressly reserving the right to diverge from the process, including the right immediately to terminate an employee and by placing qualifications on certain provisions. Although tribal sovereign immunity should protect a tribal employer from claims that it improperly deviated from a promised disciplinary procedure, it is nevertheless a good idea to clarify that the employer reserves these rights.

Tribal businesses might also consider adopting a grievance procedure in order to provide an outlet for employees to air grievances, rather than taking them to federal or state court. A statement containing several key points could appropriately accompany any such grievance procedure, indicating that: (1) the employer has voluntarily established the procedure; (2) the procedure does not alter the at-will nature

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public image).

200. See *infra* Part IV.A.

of the employment relationship (if at-will employment is the tribe's policy); (3) the procedure does not *require* the employer or the Tribe to take any action, even action consistent with the procedure; and (4) the employer and the Tribe expressly reserve sovereign immunity from suit.

A grievance procedure normally consists of two or more levels of review. Depending on the organization's structure, the grievance may first be brought to a supervisor, or a departmental director, or some other managerial level employee. The next level(s) of review may be to a high-level officer and/or a panel of some sort.<sup>201</sup> Some Tribes also permit certain claims to be appealed to a tribal court or other tribal forum once an employee has exhausted administrative remedies.<sup>202</sup> At a minimum, any grievance procedure should be understandable to employees and clearly communicated to them. Deadlines should be clearly stated, and it is good practice to require complaints to be submitted in writing. The process should be fair, reasonable, and sufficiently structured. The review should be meaningful, so that the aggrieved employee feels he has actually had an opportunity to air his grievance. Employees should be referred, preferably in writing, to the procedure whenever a grievance is likely to arise, such as when an employee is disciplined or terminated. Any such written notice should also re-state the applicable deadlines and perhaps re-state the employer's position regarding the applicability of federal and state laws, so the employee does not neglect to file a grievance with the Tribe because he is counting on being able to bring a claim in federal or state court. Similar written notices should be given to the aggrieved employee at the conclusion of every step in the review process. So, if the outcome of one level of review is unfavorable to the aggrieved employee, then notice of the unfavorable decision should be provided together with a notice that the employee may appeal the decision to the next level within a designated time limit.

Finally, on a more basic level, simply having reasonable, well-thought-out policies in place, and affording employees reasonable rights and benefits can go a long way towards heading off potential problems. If employees do not feel disadvantaged by reason of working for a Tribe, they will be less likely to bring claims against the employer. And if they have an outlet for airing their grievances, and the process seems fair, they may not feel the need to seek relief elsewhere.

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201. *See, e.g.*, HO-CHUNK NATION CODE tit. 6, § 5(33) (2009) (describing a grievance board made up of employees and supervisors with grievance experience).

202. *See, e.g., id.* (allowing employees to appeal select grievances to the Ho-Chunk Nation Tribal Court); CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE tit. 9, § 9-4 (2008) (permitting the appeal of final employment decisions to the tribal court).

#### IV. MINDFULNESS IN DAY-TO-DAY AFFAIRS: CONSISTENT EMPLOYEE AND VENDOR RELATIONS

This Part suggests approaches for some of the areas of day-to-day business affairs in which mindfulness of tribal sovereignty and consistency and fairness in employee and vendor relationships are particularly essential.

##### *A. Protecting Sovereignty in Purchasing and Contracting*

An efficient and cost-effective way for Tribes to protect their sovereignty is through vigilance in the purchasing and contracting process. If all contracts and purchases of goods and services must be routed through a centralized purchasing department, then the individuals in the purchasing department can be specially trained to identify problematic provisions and to work closely with tribal attorneys. If resources permit, tribal businesses might consider having tribal attorneys review every contract to ensure maximum protection. This is by far one of the more cost-efficient legal services of which Tribes can avail themselves. Attorneys who handle a large volume of vendor contracts for Tribes can develop standard agreements and provisions that can be modified for use in various situations. Thus, they do not need to approach every agreement from scratch and can make rather quick work of protecting sovereign immunity and placing the Tribe in the best possible position. Even if resources do not permit the use of attorneys for every contract, key people in the purchasing department can learn how to remove appropriately or modify problematic provisions if circumstances permit or to identify the more complex agreements needing legal attention and send those to the attorneys for review. As with many things, consistency is crucial. Employees throughout the organization need to know that routing their purchases through the purchasing department is an absolute requirement, with no exceptions. Otherwise, it is almost inevitable that contracts containing waivers of sovereign immunity and other problematic provisions will be signed, thereby opening the door for serious challenges to tribal sovereignty.

Tribal businesses might wonder whether they can realistically expect vendors to agree to modify contracts. The answer is yes. Almost every vendor will negotiate—even the largest companies and companies that use standard form agreements. In several years of reviewing numerous contracts per week for Tribes and tribal businesses, the author has encountered only one vendor, an extremely large internet company, who absolutely refused to negotiate and walked away from the table. Another relatively small percentage of vendors initially balked at certain changes but were willing to negotiate and eventually signed

amended agreements (none of which waived sovereign immunity) that were acceptable to both the vendor and the Tribe. The vast majority of vendors, though, quickly agreed to sign modified contracts. Tribal businesses should not hesitate, then, to push for more favorable contracts that will protect their sovereign immunity and other interests. There are certain areas in which to be particularly vigilant.

Above all, tribal businesses must watch for, and ideally avoid, waivers of sovereign immunity. It is not uncommon for vendors to include express waivers of sovereign immunity in the contracts they present to tribal businesses. Luckily, these are easy to identify and remove for attorneys and non-attorneys alike.

It is even more common for contracts to contain provisions that could potentially be construed as waivers of sovereign immunity. These are not quite as easy to identify, and their removal can sometimes be more complicated. For example, after *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>203</sup> an arbitration provision with a governing law provision is, practically speaking, the equivalent of an express waiver of sovereign immunity.<sup>204</sup> But it might not be appropriate simply to remove an arbitration provision. Some other dispute resolution provision may need to be inserted in its place. Or there may be other provisions of the contract that reference the arbitration provision that would also need to be amended.

Similarly, it is fairly common for agreements to contain references to federal or state laws and a provision stating that the tribal business agrees to comply with the specified laws. Vendors who include these provisions in their agreements often do so because they themselves are bound by certain requirements. A provider of credit information, for example, may need some assurance that its clients will not use the information provided for purposes that are impermissible under state or federal law. These vendors might, understandably, be reluctant to remove such provisions. If the Tribe places importance on its sovereignty and is not willing to agree to comply with state or federal law, then some sort of creative compromise will be necessary.

In light of *C & L Enterprises*, it is by no means inconceivable that a court could construe other provisions, independently or collectively, to waive sovereign immunity.<sup>205</sup> Thus, arbitration provisions and govern-

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203. 532 U.S. 411 (2001).

204. See *supra* note 87.

205. See, e.g., *Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Okla.*, No. CIV-09-730-M, 2010 WL 597125, at \*1 (W.D. Okla. Feb. 16, 2010).

If [the tribe] and [its business enterprise] are the same entity or if [the business] is the alter ego of [the tribe], [the tribe] has waived its tribal sovereign immunity based upon the "Controlling Law and Exclusivity of Venue" provision of the subcontract entered into between Morgan and [the tribal business].

*Id.*; see also *Prescott v. Little Six, Inc.*, 284 F. Supp. 2d 1224, 1231-32 (D. Minn. 2003), *rev'd on other grounds*, 387 F.3d 753 (8th Cir. 2004) (holding that similar language, including the phrase "you may

ing law or choice of law provisions are red flags, as should be venue and forum provisions, consent to jurisdiction clauses, and any agreement to be bound by federal or state laws or regulations. Key purchasing employees can be trained to identify and address problematic provisions or, preferably, if resources permit, to refer them to tribal attorneys.

Perhaps not surprisingly, vendors who include waivers of sovereign immunity in their contracts are often initially reluctant to remove such waivers for fear they will be left with no remedy. In such circumstances, further inquiry into the vendor's actual concerns and some creative thinking may reveal alternative approaches that would satisfy the vendor's concerns without waiving sovereign immunity. Further inquiry might reveal, for instance, that a vendor's true concern is the possibility of being haled into tribal court in the event of a dispute. If it is relatively unlikely that the tribal business would want or need to sue the vendor in tribal court, tribal attorneys might be able to address the vendor's concern without a waiver of sovereign immunity by inserting a provision clarifying that the vendor does not consent to be sued in a tribal forum and agreeing that the tribal business will not bring suit against the vendor in a tribal forum.

In another instance, further inquiry might reveal that a vendor's true concerns are that the tribal business might not make agreed-upon payments or reimbursements and that others who find themselves without recourse against the tribal business might try to sue the vendor, even if the law does not provide a remedy against the vendor. Tribal attorneys might address these concerns to the vendor's satisfaction, without a waiver of sovereign immunity, by: (1) identifying other provisions in the agreement that effectively limit the vendor's potential loss in the event of non-payment; (2) offering to deposit an agreed-upon pre-paid amount in an account that the vendor could draw upon to cover that limited loss in the event of non-payment; and (3) agreeing to indemnify the vendor in the event others whose recourse might otherwise be against the tribal business attempt to sue the vendor without a legal basis. Similarly, establishing escrow accounts is often a satisfactory solution, even in multi-million dollar transactions such as large construction projects. Thus, by thinking creatively and looking for alternative ways to address vendors' concerns, tribal businesses can often negotiate the removal of provisions that would waive sovereign immunity.

In the event a tribal business does decide to waive its sovereign immunity, such a waiver should be clearly limited, as should the assets from which a judgment could be enforced. Tribal businesses that

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file suit in federal court," was a waiver of sovereign immunity). Although such decisions may be reversed on appeal, as was the *Prescott* decision, they nevertheless highlight the importance of exercising care in contracting.

choose to make it a policy to rarely waive, if ever, sovereign immunity, should then be consistent in refusing to waive sovereign immunity or to accept any provisions that could conceivably be construed as waiving sovereign immunity or to agree to the applicability of federal or state law. Not only does this provide the most complete protection, but it also makes the negotiation of contracts somewhat easier by allowing those negotiating on a business' behalf to say honestly that the Tribe never approves waivers of sovereign immunity, which may encourage vendors to be more flexible and consider other solutions. By consistently refusing to waive sovereign immunity, Tribes will effectively assist other Tribes as well. Vendors occasionally expect Tribes to waive their sovereign immunity because, they claim, other Tribes have done so in the past.<sup>206</sup> Whether there is much truth to those assertions is hard to know,<sup>207</sup> but it is not hard to imagine how one Tribe's casual waiver of sovereign immunity might make negotiations that much more difficult for the next Tribe. On the other hand, if vendors come to expect that Tribes generally will not agree to a waiver, they may be more willing to remove such provisions.

Giving consideration to other types of provisions can also help to place a tribal business in an advantageous position, as well as to protect the tribe's sovereignty without making sovereignty the central issue. For example, ensuring that the business has recourse other than suing the vendor in the event the vendor breaches the agreement will help the business avoid litigation. Even when a tribal business is the plaintiff, litigation can raise complex issues of jurisdiction and tribal sovereignty and should accordingly be avoided whenever possible if the goal is to avoid having to confront these issues directly.<sup>208</sup> Drafting a schedule of payments and tying the payment schedule to various deliverables is one way of doing this.<sup>209</sup> Likewise, warranty provisions can provide protection, particularly if they commence upon acceptance (rather than delivery or installation) and provide for a refund at the Tribe's option (rather

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206. The author has been presented with this argument on a number of occasions.

207. *But see* Kunesh, *supra* note 83, at 406 (stating that "tribes regularly consent to be sued, often through contracts and other commercial transactions").

208. For example, if a tribal business brings suit in tribal court, the defendant could challenge the tribal court's jurisdiction. And the idea of suing in a state forum is often distasteful to tribes. Moreover, courts occasionally find that a Tribe made a partial waiver of sovereign immunity by filing suit. *See supra* note 87.

209. Vendors' proposed contracts often call for large amounts of money up front and/or upon delivery. This does not give the tribal business the chance to determine whether the goods or services are acceptable before having to make payments that it could encounter difficulty recovering if the vendor's performance is unsatisfactory. By limiting the amounts the business is required to pay early in the process and then scheduling subsequent payments in a way that allows the Tribe to determine the acceptability of the goods or services before making payment, the risk is re-allocated. Ideally, the payment schedule can be structured in such a way that, in the event of the vendor's unsatisfactory performance, the Tribe will not have paid much up front, and the Tribe can merely withhold further payment instead of having to sue to recover significant amounts of money.

than merely a repair or a replacement at the vendor's option).<sup>210</sup> Indemnification provisions can preserve tribal business assets, among other things. And confidentiality provisions can protect valuable confidential information and trade secrets.

Finally, by consistently fulfilling their contractual obligations, tribal businesses can do two things. First, they protect their sovereignty by reducing the likelihood that a vendor will sue. Second, they enhance their ability to enter into favorable agreements. Those negotiating the agreements on behalf of a tribal business can use the fact that the business always lives up to its obligations as a bargaining point. If the business develops a reputation for living up to its obligations, vendors will undoubtedly feel more comfortable contracting with it. Moreover, vendors who have had favorable experiences with the business in the past will much more easily agree to enter into future contracts under the tribal business's terms. And by honoring their agreements, tribal businesses can help protect tribal sovereignty in general. If one tribal business defaults on a poorly written agreement and is sued the result has the potential to be harmful to all Tribes, just as the result in *C & L Enterprises* was.<sup>211</sup> Conversely, illogical though it may be, a vendor who has a good experience with one Tribe may be more willing to do business with another Tribe on terms favorable to the other Tribe.

### *B. Employment and Labor Relations*

Consistency and fairness in employment and labor relations is also crucial to the protection of tribal sovereignty. As discussed above, the courts have chipped away at tribal sovereignty in recent years, including in two areas that are particularly relevant to economic development—Tribes' ability to regulate non-Indians and the applicability of federal labor and employment laws to tribal businesses.<sup>212</sup> If Tribes wish to reduce the likelihood of challenges to, and the possible erosion of, tribal sovereignty in these areas, they must consistently enforce good laws and regulations, and tribal businesses must consistently enforce good policies.<sup>213</sup>

Even the best policies will not be effective if employees receive conflicting messages in practice. As an initial matter, the message that a tribal business is a governmental branch of a separate sovereign and that federal and state laws accordingly may not apply should be consistently

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210. Again, this provides tribes with recourse other than having to sue, in the event the vendor's performance is unsatisfactory.

211. *C & L Enters. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001) (finding that a contract containing an arbitration provision and a governing law provision waived the tribe's sovereign immunity).

212. See *supra* Part II.A. (discussing the scope of tribal and federal authority).

213. See *supra* Part III.C. (discussing policy-making for tribal businesses).

communicated to employees. The posting of references to state or federal employment laws might be inconsistent with that message, for instance. Similarly, an employee who inquires about rights under state or federal law should be reminded that the employer provides employment benefits pursuant to tribal law, not state or federal law. Likewise, any rights and remedies an employee may have pursuant to tribal law should be clearly communicated to employees, along with the message that these may be the only rights and remedies available to employees. Employees might be reminded of these points in periodic policy reviews. Consistency in the communication of policies will ensure that employees do not develop the mistaken impression that they have rights and remedies they may not in fact have. Divesting employees of this misimpression in advance may make them less likely to seek to enforce rights they believe they have under state or federal law in the event a problem subsequently develops.

Even relatively high-level employees, such as departmental directors, sometimes struggle to apply these concepts in practice, though they understand them in theory. They might be able to state that the business is a department of a sovereign government and that state and federal laws accordingly may not apply. However, they might speak in everyday conversation as if such laws did apply, or draft policies containing specific references to such laws, or allow state or federal government officials access to facilities or information as if they had regulatory authority. Any of these things or others like them could have a detrimental effect on tribal sovereignty. Therefore, Tribes should provide key employees with sufficient training on these issues to enable them consistently to speak, write, and act in a manner that reflects the Tribe's sovereignty and the position that certain laws do not apply. They, in turn, should consistently communicate these concepts to non-managerial employees. If resources permit, tribal businesses might train some or all of their employees to have a basic understanding of important subjects such as tribal history, tribal sovereignty, sovereign immunity, and the applicability of federal and state laws. The Cherokee Nation of Oklahoma, for example, developed a forty-hour, college-level course that it requires every employee to attend in order to develop a better understanding of Cherokee history, culture, and national identity.<sup>214</sup>

Consistent enforcement of policies is also important because it reduces the likelihood that problems will arise in the first place. After all, any problem that is avoided represents one less potential challenge to tribal sovereignty. Thus, once a tribal business has established fair and reasonable policies and procedures that set the framework for the pro-

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214. REBUILDING NATIVE NATIONS, *supra* note 79, at 155.

tection of tribal sovereignty, as discussed above,<sup>215</sup> it should apply and enforce them consistently. By avoiding disparate treatment of employees, a tribal business can not only limit conflicts but also protect itself from liability. In the event a court did apply certain federal employment and labor statutes to a tribal business, the business might have to demonstrate that its policies were fairly and consistently enforced.<sup>216</sup>

Finally, simply treating employees well on a daily basis and enforcing policies in a reasonable manner can enhance employee satisfaction and thereby reduce the likelihood of claims. Giving employees a voice in the organization and encouraging open communication about any problems or concerns that may develop allows employees to address issues and may help to prevent claims that the employer violated federal labor or employment laws. Providing reasonable pay and benefits can also help to prevent such claims. Employees who are well treated will also be less likely to feel the need to form a union, which could lead to claims of NLRA violations. Avoiding arbitrary disciplinary actions, such as disciplining one employee but not others for the same or a similar activity is certainly advisable. Similarly, any grievance procedures should be administered consistently and fairly and in such a manner that the employees feel (or at least have reason to feel) that they were afforded some sort of reasonable process. Among other things, those who administer the grievance procedures should be sufficiently trained to do so effectively, and strict confidentiality should be maintained. If employees feel appreciated, have reasonable rights and benefits, do not feel disadvantaged by reason of working for a Tribe, and feel that their grievances are heard, they will be less likely to bring claims against the employer.

#### V. WHEN THINGS GO WRONG: EFFECTIVE MECHANISMS FOR HANDLING DISPUTES

Still, at some point, something will inevitably go wrong. Perhaps a former employee will file a discrimination claim or appeal a denial of unemployment compensation. An injured guest might file a tort claim, or a disgruntled vendor might file a breach of contract claim. Or a prosecutor for the state might subpoena a tribal official to testify in the prosecution of a crime committed by a non-Indian on tribal property. Given the inevitability of events of this nature occurring, it is important to have effective procedures and mechanisms in place for the handling

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215. *See supra* Part III.C.

216. For example, a policy adopted after union organizing activities have already begun or a spottily enforced policy could easily be seen as having an anti-union animus. *See, e.g.,* Waterbury Hotel Mgmt, L.L.C. v. N.L.R.B., 314 F.3d 645 (D.C. Cir. 2003) (finding that an employer's across-the-board no-buttons policy was impermissible because it was inconsistently enforced with employees being permitted to wear St. Patrick's Day buttons, but not union buttons).

of such problems. These mechanisms should be in place on two fronts: First, there should be internal dispute resolution mechanisms in place; and second, there should be clear procedures in place for reacting to information requests, subpoenas, and lawsuits from foreign jurisdictions.

### A. Tribal Dispute Resolution

It may seem counterintuitive, but allowing themselves to be sued in tribal dispute resolution fora within prescribed limitations can help Tribes protect their sovereignty. If individuals are provided a tribal forum for the resolution of their issues, they may be less likely to pursue resolution of their claims in other jurisdictions. In the event a disgruntled litigant nevertheless proceeds to federal or state court, the existence of a tribal remedy decreases the likelihood that a foreign court might feel the need to create a remedy.<sup>217</sup> Moreover, tribal judges are more likely than the average state or federal judge to be intimately familiar with federal Indian law and tribal law and, therefore, more capable of correctly applying these complex bodies of law. So, among other things: some Tribes have adopted laws that provide disgruntled employees certain limited remedies in tribal court or some other tribal forum;<sup>218</sup> some Tribes have adopted tort claims ordinances that provide limited remedies to individuals who are injured on the Tribe's property, for instance;<sup>219</sup> and some Tribes and/or tribal courts have allowed litigants to pursue individual rights claims against the Tribe in tribal court.<sup>220</sup> These are all areas in which disgruntled litigants are likely to pursue claims against the Tribe in state or federal court. They may be less likely to do so if a tribal remedy is available to them.

Tribal dispute resolution systems take many different forms. This Article does not presume to say how tribal dispute resolution systems should be structured or how they should operate. Instead, this Article suggests various considerations that Tribes may wish to take into account if they are interested in keeping the resolution of disputes within tribal systems and in reducing the likelihood of federal courts finding

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217. See *supra* note 25.

218. See *supra* note 202 and accompanying text; see also CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE, tit. 9, § 9-4-4 (2007) (permitting workers' compensation appeals to the tribal court); MASHANTUCKET PEQUOT TRIBAL LAWS tit. 13, ch. 2, § 19 (2008) (same); WARM SPRINGS TRIBAL CODE §§ 375.105-.615 (2010) (same); see also MASHANTUCKET PEQUOT TRIBAL LAWS tit. 33, § 11 (2008) (permitting employment rights appeals to the tribal court).

219. See, e.g., CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE tit. 2, § 2-7-1 (2002) (permitting certain tort claims to be brought against the Tribe, within specific limitations); WARM SPRINGS TRIBAL CODE §§ 205.001-.006 (2010) (same).

220. See, e.g., CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS TRIBAL CODE tit. 1, §§ 1-5-1 to 1-5-2 (2008) (enumerating the civil rights of people within the Tribe's jurisdiction and authorizing the enforcement of those rights in tribal court); COLVILLE TRIBES LAW & ORDER CODE tit. 1, ch. 1-5, §§ 1-5-1 to 1-5-8 (1988) (same); NEZ PERCE TRIBAL CODE § 1-6-2 (2006) (enumerating the civil rights of people within the Tribe's jurisdiction).

that tribal systems lack jurisdiction. Essentially, these considerations boil down to creating and maintaining fair, effective, and responsive dispute resolution systems. The existence of such systems is recognized as an important element of economic development.<sup>221</sup>

As discussed above, particularly when a Tribe intends to exercise jurisdiction over nonmembers, it should consider making the tribal laws it intends to apply to those nonmembers reasonable, clear, and accessible.<sup>222</sup> The same holds true for rules of procedure for tribal dispute resolution fora<sup>223</sup> and tribal case law.<sup>224</sup> Some non-Indians may have the impression that tribal law is unfamiliar or inaccessible and may be reluctant to enter a tribal dispute resolution forum for that reason. Indeed, commentators have noted that the Supreme Court seems to have taken the perceived unfamiliarity and inaccessibility of tribal law into account in the recent *Plains Commerce Bank v. Long Family Land & Cattle Co.*<sup>225</sup> decision holding that a tribal court lacked jurisdiction.<sup>226</sup> However, Tribes can combat this impression by making tribal law accessible and applying it fairly.<sup>227</sup> When exercising jurisdiction over nonmembers, tribal courts would do well to make their opinions as detailed as possible, particularly on issues of tribal law and procedure, so that, in the event a non-member challenges the tribal court's jurisdiction, a federal court will plainly see what law was applied and that the non-member was provided a full and fair dispute resolution process.<sup>228</sup>

Tribes should also consider how to insulate their judicial systems from political influence. Allegations that tribal judges are subject to the control of the tribal council often plague tribal dispute resolution systems that lack such insulation, particularly when the Tribe is a party to litigation. While there may or may not be merit to such allegations, Tribes may find it advantageous to avoid even the *appearance* of political influence.<sup>229</sup> Moreover, research shows that an independent judi-

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221. COHEN'S, *supra* note 60, at 1321.

222. See *supra* Part III.A.1.f (advocating accessibility of tribal laws); see also Sixkiller, *supra* note 111, at 806 (discussing how the Justices of the *Plains Commerce Bank* Court repeatedly alluded during the oral argument to concerns about the familiarity, accessibility, and fairness of tribal laws to non-Indians in tribal courts).

223. Sixkiller, *supra* note 111, at 806.

224. *Id.* at 807.

225. 128 S. Ct. 2709 (2008).

226. Sixkiller, *supra* note 111, at 806 (suggesting that the bank capitalized on this strategy, and the Tribe missed the opportunity to counter the bank's arguments on this point).

227. *Id.* at 805. For tribes, being able to show that they treat nonmembers fairly can be vital to making a case for jurisdiction. For those challenging tribal court jurisdiction, asserting unfair treatment by the tribal court can be a powerful strategic tool. *Id.*

228. See *id.*

229. MASHANTUCKET PEQUOT TRIBAL LAWS tit. 1, ch. 2, § 1(d) (2008) ("The Tribal Council finds that for the impartial and effective administration of justice, the continued independence of the judiciary is indispensable."); see also REBUILDING NATIVE NATIONS, *supra* note 79, at 122-23 (discussing consequences to economic development of weak tribal court systems that are not sufficiently insulated from political influences).

ary is important for economic development.<sup>230</sup> There are various ways to avoid the appearance of political influence, such as: creating a constitutional court rather than a statutory court ultimately subject to legislators' control;<sup>231</sup> appointing justices for life; allowing justices to be removed only by a supermajority of tribal members;<sup>232</sup> allowing only the judiciary to remove justices;<sup>233</sup> limiting the reasons for which justices may be removed;<sup>234</sup> and more. As with other things, Tribes should choose the structure that suits them best, but in doing so, they should consider whether there could be an appearance of undue political influence, what the potential impact of such an appearance could be, and how they wish to address it.

In addition, tribal courts and other dispute resolution fora should be as responsive and efficient as possible. Although many tribal courts are very well-run and responsive, there are those that are less responsive and efficient than one might desire.<sup>235</sup> The inefficiency and lack of responsiveness of those courts can prompt litigants to seek relief in another forum.<sup>236</sup> Or worse, it can lead a federal court to conclude that tribal jurisdiction was improper.<sup>237</sup> Although such a decision might be very fact-specific and, thus, have relatively little impact on other Tribes, it could conceivably have a broader impact on tribal sovereignty in general. Moreover, with each decision holding that a tribal court did not have jurisdiction, the case against tribal court jurisdiction gets a little stronger.

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230. REBUILDING NATIVE NATIONS, *supra* note 79, at 24, 92, 118.

231. *Id.* at 91-92, 129-32.

232. WHITE EARTH BAND OF CHIPPEWA JUDICIAL CODE, tit. 1, ch. 3, § 8 (1997), available at <http://www.whiteearthtribalcourt.com/JudicialCode.pdf> (providing that judges may only be removed after a petition has been signed by at least 20% of voters and two-thirds of on-reservation tribal members vote for removal).

233. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, JUDICIAL CONDUCT COURT RULES § 5.305, available at <http://www.ltbbodawa-nsn.gov/Tribal%20Court/Chapter%205%20Judicial%20Conduct%20Court%20Rules.pdf> (providing that judges may be removed only by the judiciary).

234. MASHANTUCKET PEQUOT TRIBAL LAWS tit.1, ch. 2, § 1(d) (recognizing that the making of unpopular or erroneous decisions is not grounds for discipline and stating that judges may be removed only for certain reasons).

235. *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007). The *Burrell* court declined to recognize a tribal court judgment, in part because of the tribal court's lack of responsiveness, stating:

Although the first tribal judge conducted two days of evidentiary hearings, he failed to make any rulings on the parties' pending motions after four years . . . . Further, when the Burrells returned to the tribal court, they encountered a new tribal judge who had not presided over the two days of hearings. Whether the new judge had reviewed or had any knowledge of the testimony from those hearings is unclear, but the record reflects that the first tribal judge never responded to the parties' request for a transcript of the proceedings. Without any further hearings or ruling on any other pending motions, the second tribal judge issued a one-page order . . . and dismissed the Burrells' claims. This one-page order contained no reference to any testimony from the evidentiary hearing, or for that matter any explanation of the tribal court's reasoning.

*Id.* at 1173. This may not be typical of tribal courts, but it nevertheless damages the perception of tribal courts.

236. *Id.* at 1165.

237. *Id.* at 1171.

*B. Handling of Lawsuits, Information Requests, and Subpoenas from Other Jurisdictions*

Tribes, tribal businesses, and their employees will inevitably be served with lawsuits, information requests, and subpoenas from other jurisdictions, and it is important to have mechanisms in place to handle them appropriately. As with purchases and contracts, routing all such matters through one person or department can ensure the most consistency and, therefore, the best protection of the tribe's sovereignty. That way, all employees can simply be instructed to direct lawsuits, information requests, and subpoenas to the appropriate person(s). Those individuals would be trained to handle such matters and to consult with legal counsel when necessary. Having designated individuals handle such matters will help to ensure that employees do not unintentionally act outside the scope of their authority and inadvertently compromise the Tribe's sovereignty or other interests, as can happen when, for example, an employee believes he has the authority to handle what might seem to be a relatively harmless information request.

Lawsuits present a direct challenge to tribal sovereignty and should be promptly referred to legal counsel, who can determine the best way to handle them. In many cases, a Tribe, tribal business, or tribal employee can move to dismiss the lawsuit for lack of jurisdiction.<sup>238</sup> Whether a motion to dismiss or some other response is appropriate, a response is normally due in a relatively short time.<sup>239</sup> While lack of jurisdiction can also be raised at a later time, there are likely to be additional issues and expenses involved by then.<sup>240</sup> Therefore, it is important quickly to route lawsuits to legal counsel and ensure that legal counsel responds in a timely fashion.

As long as an information request is truly a request (that is not a subpoena, or a demand made pursuant to a statute that the requester asserts is applicable, or some other assertion of jurisdiction), then information requests normally do not pose a threat to tribal sovereignty. The individual(s) designated to handle such requests can handle them in accordance with the policies of the tribe or the tribal business. In some

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238. See, e.g., *Ferguson v. SMSC Gaming Enter.*, 475 F. Supp. 2d 929 (D. Minn. 2007) (dismissing claims against a tribal business and one of its officials).

239. Under Rule 12 of the Federal Rules of Civil Procedure, for example, an answer is due within 21 days of service of the complaint. It is advisable to file a motion to dismiss within that time period as well, to ensure the plaintiff does not seek a default judgment.

240. *Hagen v. Sisseton-Wahpeton Cmty Coll.*, 205 F.3d 1040 (8th Cir. 2000) (concluding that the district court should have reversed a default judgment entered against a tribal college because sovereign immunity is a jurisdictional prerequisite that may be asserted at any stage of a proceeding). Despite its holding, the court noted that the college's failure to raise the motion earlier had resulted in delay, expense, and the waste of judicial resources. *Id.* at 1044. Although the United States Court of Appeals for the Eighth Circuit nevertheless made the correct decision, it is not difficult to imagine that a similar scenario could cause a court to hold, albeit incorrectly, that a belated motion to dismiss is "too late," as the district court in *Hagen* had held. *Id.* at 1042.

instances, the Tribe or business might provide the requested information. For instance, information about an employee might be provided with the employee's authorization. Or a Tribe might have an interest in cooperating with a prosecutor who sends a letter respectfully requesting that a tribal employee testify in the state court prosecution of a non-Indian for a crime occurring on the tribe's land. In other instances, such as when a request seeks information the Tribe views as confidential, the Tribe might decline to provide the requested information. Any response to such a request might briefly discuss the Tribe's or business' sovereign immunity and, if any information is provided, highlight the fact that it is being provided voluntarily.

Occasionally, a Tribe or tribal business might receive a request made pursuant to a statute or regulation that the requester asserts is applicable to the Tribe or tribal business. Although this purports to be a request, it is also an assertion of jurisdiction over the Tribe or tribal business. Compliance with such a request could be construed as a concession to the assertion of jurisdiction. Therefore, requests of this nature should be forwarded to legal counsel, so that legal counsel can determine whether the statute applies and how the request should be handled.

Subpoenas also present a direct threat to tribal sovereignty because the intended effect of a subpoena is to compel the sovereign to act. Such a result is characteristic of a direct action against the sovereign and is accordingly barred by sovereign immunity.<sup>241</sup> As the Supreme Court has stated, there are "the strongest reasons of public policy" for the rule that a court may not compel a sovereign possessing sovereign immunity to act.<sup>242</sup> Sovereign immunity is not merely a defense to liability, but an immunity from suit,<sup>243</sup> which includes the right to be free from court processes and the attendant burdens of litigation,<sup>244</sup> such as subpoenas.<sup>245</sup> Thus, when a Tribe has sovereign immunity, a subpoena gener-

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241. See *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if . . . the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (citations omitted).

242. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

243. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002).

244. *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558 (9th Cir. 2002), *rev'd on other grounds sub nom.* *Inyo Co. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701 (2003) (holding that the execution of a California warrant to search a tribal corporation's employee records violated tribal sovereign immunity); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)) ("The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation."); COHEN'S, *supra* note 60, at 635 ("Indian tribes are immune from lawsuits or court process in both state and federal court unless 'Congress has authorized the suit or the tribe has waived its immunity.'").

245. See *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993) (upholding on the basis of sovereign immunity a district court order quashing a subpoena issued to the Quinault Indian Nation Department of Social and Health Services); *Quair v. Bega*, 388 F. Supp. 2d 1145, 1148 (E.D. Cal. 2005) (granting a tribe's motion to quash subpoenas on the ground of sovereign immunity); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 204 F. Supp. 2d 647 (S.D.N.Y.

ally should not be enforced against the Tribe or those to whom the Tribe's sovereign immunity extends.<sup>246</sup>

There are several options for handling subpoenas in light of sovereign immunity. If the Tribe or tribal business objects to the assertion of jurisdiction that the subpoena represents, but has no particular objection to providing the information requested, it can contact the individual requesting the information, explain the situation, and state that if the subpoena is withdrawn, the Tribe will provide the information voluntarily. This approach may not be successful, particularly when the requester does not have an appreciation for tribal sovereignty. In that event, the Tribe has two choices—it can ignore or challenge the subpoena and deal with whatever consequences might follow, or it can cooperate but make an express reservation of its sovereign immunity and its position that the subpoena is without force before doing so. Although the first option might be theoretically preferable, the safest option is sometimes the second one. If the Tribe ignores the subpoena, the requester may attempt to enforce the subpoena, thus, presenting a direct challenge to sovereign immunity. The decision to either ignore or challenge a subpoena can lead to months or even years of litigation and the expenses associated therewith.<sup>247</sup> In addition, there is often an employee caught in the middle who risks being held in contempt of court for ignoring the subpoena.<sup>248</sup>

If the Tribe decides that providing the requested information is preferable to the risks associated with ignoring or challenging the subpoena, then it might provide the information requested but state for the record before doing so that it does not concede that the subpoena is enforceable, that it has decided to provide the information voluntarily, and that it expressly retains its sovereign immunity. Admittedly, this is not the strongest exercise of sovereignty. But it does allow the Tribe to avoid the risks associated with the alternative approach while reserving the argument that subpoenas are without effect. And the Tribe may actually have an interest in providing the information in some instances. For example, a Tribe has an interest in the prosecution of non-Indians who commit crimes on its land and allowing its employees to testify for

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2002) (quashing a subpoena issued to a tribe's Executive Director).

246. *But see, e.g.*, N.L.R.B. v. Fortune Bay Resort Casino, No. 08-0065, 2010 WL 681663 (D. Minn. Feb. 25, 2010) (ordering the casino to comply with an NLRB subpoena).

247. *See, e.g., id.* at \*1 (Nearly a year and a half passed between the time the subpoena was served and the district court's decision to enforce the subpoena.); *Shakopee Mdewakanton Sioux (Dakota) Gaming Enter. v. Prescott*, No. 70-CV-05-25680, 2007 WL 2769666 (Minn. Ct. App. Sept. 25, 2007) (quashing on appeal subpoenas issued to members of a Tribe's gaming commission well over a year after the subpoenas had been served); *see also Inyo Co.*, 538 U.S. 701 (pertaining to a Tribe's challenge to a county's search warrant that wound its way through the courts for more than three years, even reaching the U.S. Supreme Court).

248. Although a *subpoena duces tecum* might not present this problem, an employee subpoenaed to appear in state court to testify in a criminal prosecution arising out of events occurring on the tribe's land might be placed in an extremely difficult situation.

the prosecution furthers that interest.

There will be times, however, when the Tribe is simply unwilling to provide the information requested. In some of these instances, a Tribe might determine that its unwillingness to provide the information outweighs the risks of ignoring or challenging the subpoena. Particularly when no employee is caught directly in the middle and when the Tribe has the resources to litigate the issue, a Tribe might decide to challenge or ignore a subpoena.<sup>249</sup> Similarly, if the risks are minimal, a Tribe might ignore or challenge a subpoena. This might be the case if, for example, the Tribe is issued a subpoena in connection with a state unemployment insurance proceeding. Matters of this nature do not often lead to prolonged or complex litigation, and the worst possible outcome would normally be a determination that the ex-employee is entitled to unemployment compensation. In such a case, the Tribe might ultimately decide that its sovereignty and ability to protect its information are worth more than what it would potentially pay in unemployment compensation, should the court find against it because it failed to provide the information sought. Indeed, challenging a subpoena is the strongest exercise of tribal sovereignty, but like other strong exercises of tribal sovereignty, it carries the risk of ultimately eroding tribal sovereignty in the event of an unfavorable outcome. Tribes certainly should not avoid strong exercises of sovereignty because of that risk, but they should remain mindful of it and be strategic about conducting their business and affairs in light of it.

## VI. CONCLUSION

When Tribes operate in the business arena, the risk of direct challenges to their sovereignty and the potential erosion thereof increases. With the recent wave of economic development in Indian Country, Congress and the Supreme Court have begun to whittle away at tribal sovereignty in a variety of ways. Yet tribal sovereignty and self-determination are the very things that have enabled this economic growth; and continued economic development is desperately needed by many Tribes, as well as being crucial to Tribes' ability truly to exercise their sovereignty. Tribes need practical solutions to this dilemma. Particularly in times of legal and political uncertainty, the best way for Tribes to assert and protect their sovereignty may be to take a careful, proactive approach. A bolder approach would undoubtedly be more satisfying and, when the pendulum is closer to the respectful end of the spectrum, could have a far greater positive impact for tribal sovereignty. But such an approach is also riskier, particularly when the pendulum is

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249. See, e.g., *supra* note 247.

closer to the disrespectful end of the spectrum. This Article provides a starting point for Tribes and tribal businesses, their attorneys, and advocates, who wish to develop and implement a plan of action for proactively protecting tribal sovereignty in the course of day-to-day business operations.

