TRAVELERS

Contracting & Bonding Issues with Native American Tribes

Contracting with Native American Tribes can be confusing for contractors who are unfamiliar with the concepts of tribal sovereignty, immunity, jurisdiction and law. Understanding these issues, knowing how to properly structure contractual agreements, and appreciating the unique cultural aspects of Native Americans are key elements to successful business partnerships.

NATIVE AMERICAN TRIBES AS SOVEREIGNS

Native American Tribes (also called Indian Nations, Indian Communities, Pueblos, and Bands) are sovereign entities and enjoy the power to make their own laws and govern themselves: their lands, people, and business and other economic enterprises, and also to be free from suit unless they expressly waive their sovereign immunity. Sovereign immunity is presumed to exist unless restricted or eroded by contractual agreements, such as state gaming compacts or other public/private contractual agreements, or by case law. The federal government has plenary power over the tribes, and Congress can make laws affecting tribal sovereignty. States have very little power to do so, generally only what is designated to them by the federal government or agreed to by the tribes themselves.

Under English and European law, the concept of a sovereign being immune from suit is well-entrenched in the law (i.e. "the king can do no wrong" theory). A sovereign nation is one that is independent from all other authority, retaining rights and power to regulate its internal affairs without foreign interference. One of the critical features of a sovereign nation is its inherent immunity from being sued and being subject to a judgment. Sovereign immunity for a Native American Tribe (or any sovereign entity) is that doctrine which precludes the assertion of a claim against that sovereign without the sovereign's consent. As one court aptly stated, "Because of the doctrine of tribal immunity, businesses that deal with Indian tribes do so at great financial risk." *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376, 1385 (Ariz. 1983).

Case law supporting tribal sovereignty dates to 1832, when the United States Supreme Court in *Worcester v. Georgia* declared that Tribes are "distinct independent political communities, retaining their original natural rights" in matters of local self- government. 6 Pet. 515, 8 L.Ed. 483 (1832). This decision was reinforced later in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987), which held that unless expressly limited by treaties or congressional legislation, Native American Tribes have the right and power to make all laws and regulations for the government and protection of its persons and property.

In 2010 there were 564 Federally Recognized Indian Tribes (FRITs), each recognized as having a government – to – government relationship with the United States and possessing certain inherent rights of self government. In 1980, the Federal Tort Claim Act was extended to tribes to cover tort liability, and that protection survives today for tribal enterprises contracted under Public Law 93-638 or the broader scope of self-governance contracts.

Waiver of Sovereign Immunity

Regarding waivers of immunity, it is settled that state courts may not exercise jurisdiction over a FRIT. *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172 (S.Ct.1977). "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (S.Ct.1998). This means that, absent a clear and express waiver, an action cannot be brought against a tribe in federal, state, or tribal court. A tribe's sovereign immunity does not extend to individual tribal members except where tribal officials are acting within the scope of their official duties.

Disclaimer – This paper is for general informational purposes only. None of it constitutes legal advice, nor is it intended to create any attorney-client relationship between you and the author. You should not act or rely on this information concerning the meaning, interpretation, or effect of particular contractual language or the resolution of any particular demand, claim, or suit without seeking the advice of your own attorney.

Case law is split over whether tribal initiation of a suit or action operates as a waiver of its sovereign immunity. While an older Supreme Court case held that tribes do *not* waive immunity by bringing suit, *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), other courts have since held that the bringing of a claim by a Native American Tribe *may* operate as a limited waiver of the Native American Tribe's immunity from suit. *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).*

The United States government can agree to waive its own immunity from suit for contracts - such as it has done with the Contract Disputes Act – however, the sovereign immunity of Native American Tribes remains largely intact. Therefore, unless a contractor obtains a contractual waiver of sovereign immunity, the contractor may be left without recourse against a Native American Tribe.

Most Native American Tribes set forth their sovereign immunity in their tribal Constitutions. For example:

- **ARTICLE XIII - SOVEREIGN IMMUNITY** The Tribe shall be immune from suit except to the extent that the Tribal Council expressly waives the Tribe's sovereign immunity, or as provided by this constitution.

So, although a Native American Tribe enjoys sovereign immunity, it can waive its sovereign immunity if it's tribal Constitution so provides.

A whole body of case law, developed over the last hundred years, has sprung up around waivers of sovereign immunity. Beginning in 1919, with the Supreme Court case of *Turner v. United States,* 248 U.S. 354, 39 S. Ct. 109 (1919), sovereign immunity has been recognized for Native American Tribes. Since that time, sovereign immunity has been a well settled defense against suit and there has been a strong presumption against waivers of sovereign immunity. The central thrust of the case law on this issue is that a waiver of sovereign immunity cannot be implied, but rather must be clear and unequivocally expressed. *Kiowa, supra; Santa Clara Pueblo v Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). Additionally, it must be in writing and there are no "magic words" required. "We note, however, that while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of "magic words" stating that the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 563 (8th Cir. 1995).

In *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001), the United States Supreme Court held that, in the facts presented, the arbitration clause in a construction contract constituted an express agreement by the Native American Tribe to waive its sovereign immunity. "For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C&L's suit." *Id*. at 423. In that case, two provisions of the construction contract were important to the Court's decision:

- AIA construction contract, with standard AIA arbitration clause
  - Standard clause provides for enforcement of arbitration award in any *federal or state* court having jurisdiction.
- Choice of law provision - "law of the place of the project"
  - meant law of the State of Oklahoma (since an *off-reservation* project)
  - Oklahoma had adopted the Uniform Arbitration Act

"By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Arbitration Act…In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures." *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Oklahoma*, 532 U.S. 411, 420 (2001). Since the 2001 Supreme Court decision in *C & L Enterprises*, other courts have similarly held that arbitration clauses in contracts with Native American Tribes were express waivers of sovereign immunity by the Native American Tribe. *See Bradley v. Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2009); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.2d 224 (8th Cir. 2008); *Campo Band of Mission Indians v. Superior Court*, 137 Cal. App. 4th 175, 39 Cal. Rptr. 3rd 875 (Cal.App.4th Dist. 2006)(tribe's compact with state for tort claims mandated arbitration).

Tribal Resolution

Importantly, a recent case out of the Sixth Circuit Court of Appeals negated a waiver of sovereign immunity contained in a contract with a tribal subsidiary *because the Native American Tribe had not provided a resolution approving such waiver. Memphis Biofuels v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009).The Court held that since the Native American Tribe's internal law required board approval to validate a waiver of sovereign immunity, and one was not

provided with the contract, the contract claims against that tribal subsidiary were barred as the sovereign immunity of the Native American Tribe remained intact. Id. As this case illustrates, it is not sufficient to simply obtain a waiver - the contracting parties must ensure that tribal law is followed in obtaining a waiver of sovereign immunity and, if a tribal resolution is required, it must be obtained in order to ensure the validity of the sovereign immunity waiver.

SUBJECT MATTER JURISDICTION

Federal Court

Federal courts are courts of limited jurisdiction. Unless a federal question is involved under 28 U.S.C. §1331, or a diversity action is present under 28 U.S.C. §1332, or a Miller Act bond is issued pursuant to 40 U.S.C. §270a, a federal district court cannot hear an action. However, a federal question rarely arises out of construction contracts; a sovereign nation is not a "citizen" of another state for diversity purposes; and typically Miller Act bonds are inapplicable to construction contracts with a Native American Tribe. As a result, it would be a rare circumstance for a federal court to hear a case involving a dispute arising out of a construction contract on tribal land. Additionally, parties by contract cannot simply grant subject matter jurisdiction to a federal district court. If the parties were to try to do so, the federal court could invoke the "exhaustion" doctrine and simply kick the action over to tribal court. *See Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985). Some Native American Tribes will offer federal court jurisdiction as a "compromise" when a contracting party objects to tribal court jurisdiction in a contract and requests state court jurisdiction. They have little to lose in offering this because they know disputes will be heard in tribal court anyway since the federal court will not accept the case.

Tribal Court

Often, Tribal courts will have jurisdiction to hear a matter involving a contract between itself and a non-tribal member. The United States Supreme Court recently reinforced this rule that tribal jurisdiction exists over non-Indians on a reservation when a non-Indian enters into a contract with a Native American Tribe or its members. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008). While the jurisdictional limits of a tribal court will be found in its charter, constitution, or code, typically a tribal court will have exclusive jurisdiction over disputes arising on the reservation. The strong presumption is that subject matter jurisdiction will lie with the tribal court with respect to a contract dispute when the Native American Tribe is a party to that contract, unless an alternative forum is mutually chosen by the parties.

State Court

Somewhere in the middle of federal court and tribal court jurisdiction, is the issue of whether a state court has subject matter jurisdiction of a contract dispute involving a Native American Tribe and a non-tribal member. State courts are courts of general jurisdiction, meaning they hear all matters. But the issue of whether a state court can adjudge a case involving a non-tribal contractor's contractual dispute with a Native American Tribe varies. At one end of the spectrum is a situation where a contract between a Native American and a non-tribal member occurs entirely off-reservation; at the other end is the situation where the dispute occurs entirely on-reservation. Further, six states do have jurisdiction granted to them by federal statute to hear disputes involving Native American Tribes. Specifically, 28 U.S.C. §1360 grants six states:

> [j]urisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Those states are:

- Alaska
- California
- Minnesota (except the Red Lake reservation)
- Nebraska
- Oregon (except the Warm Springs reservation), and
- Wisconsin

These six states aside, however, Edward Rubacha, noted jurist and legal commentator on Indian issues, explains what needs to be considered to determine whether a state court (in a state other than those six listed) would have subject matter jurisdiction:

> There are three caveats to a blanket assertion of jurisdiction by state courts over every dispute involving a Native American tribe or tribal entity. First, there is an 'ever-present, overriding principle: State jurisdiction must not interfere with Indian self-government, absent some compelling state interest.'…Second, 28 U.S. C. §1360 specifically excludes jurisdiction by a state court over a dispute involving 'ownership or right to possession of [Native American] property or any interest therein…Third, if a tribal court has already asserted jurisdiction over a dispute or has concurrent jurisdiction, a state court may decline jurisdiction if the dispute involves tribal sovereignty or issues of tribal law.[i]

States and Native American Tribes have concurrent jurisdiction over the same territory. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Given the fact of concurrent jurisdiction and the relative uncertainty with respect to state court jurisdiction, it is important that a contractor include in its contract state court as the venue for disputes arising under the contract, rather than remaining silent on the issue.

A "significant contacts" test is often employed by state courts to determine whether a state court can assume jurisdiction in a transaction involving a Native American Tribe. These factors are:

- Place of contracting;
- Place of negotiation of the contract;
- Place of performance;
- Location of the subject matter of the contract; and
- Place of residence of the parties.[ii]

Therefore, depending on the relative importance of these factors, it is not unusual for a state court to decline jurisdiction even if the parties have negotiated a state court jurisdiction clause. While federal courts have declined to hear tribal issues on the basis of the exhaustion doctrine, state courts typically will decline under the abstention or comity doctrines. **Obtaining a valid waiver of sovereign immunity with state law and venue is important and should help facilitate a hearing in state court**.

Arbitration

A number of courts, including the United States Supreme Court in *C & L Enterprises*, have held that Native American Tribes are bound by arbitration provisions set forth in their contracts. An arbitration provision inserted into a construction contract and bond form alleviates many of the subject matter jurisdiction issues discussed above. It also can be viewed as a way to strike a balance between a tribal court and a state court, both of which often are viewed by the other party with suspicion. Therefore mediation and binding arbitration clauses should be considered for dispute resolution purposes. However, while binding arbitration can, as a compromise forum, avoid many of the pitfalls of sovereign immunity and forum, a non-tribal party will still want to have enforcement of the arbitration clause as well as any arbitration award in court. Therefore, the arbitration clause should allow for enforcement of an arbitration award in tribal court, as well as state court.

GOVERNING LAW

A choice of law clause is of critical importance in a construction contract with a Native American Tribe. That is, the parties to the contract should negotiate and agree upon which law will be used in interpreting the contract. Typically in construction contracts it is a choice of which State's law will apply; here though the decision will be whether to apply the Native American Tribe's law or the law of the State in which the reservation is located. As previously discussed, each Native American Tribe will have its own law, which can vary widely from codified tribal law to oral traditions and customs. Hence, it is important to examine the governing law clause of the construction contract to see what law will apply.

Aside from the lack of a body of law upon which to rely for precedent (or even if there is one for a particular Native American Tribe, getting access to it), is the issue of a state court or arbitrator having to apply tribal law.

Some forms of construction contracts, such as AIA contracts, have governing law provisions that apply "the law of the place of the project." If the project is on tribal lands, however, this will mean that the Native American Tribe's law applies. Other forms of construction contracts provide that "the law of the State of the project" will apply. A governing law clause such as this can be one way to provide that state law, and not tribal law, applies.

Once again, obtaining a valid waiver of sovereign immunity with state law and venue is important and should help facilitate a hearing in state court

TRIBAL ENTITIES

The Indian Reorganization act of 1934 (IRA) protected the land base of Native American Tribes – it basically prohibited sale or purchase of their lands. It also granted the Native American Tribes the right to write and adopt their own constitutions, referred to as Section 16 Constitutions. [iii] Many, but not all, Native American Tribes are organized under constitutions pursuant to Section 16 of the IRA. Basically then, there are two types of Native American Tribes – those organized under Section 16 of the Indian Reorganization Act and those *not* organized under Section 16. A Native American Tribe organized under Section 16 will be governed by a constitution. The constitution will typically describe the governing body of the Native American Tribe and set forth the powers and authority of that governing body. For Native American Tribes which are *not* organized under Section 16 of IRA, the governing instruments will consist of tribal history, tribal ordinances, resolutions and other actions. Examination of each document to determine the tribal entity, as well as its powers and the extent to which powers are reserved to the members of the Native American Tribe (i.e. a general council) or to a small body (i.e. tribal council),is critical.

Regardless of how a Native American Tribe is organized, it may also be incorporated as a federal corporation pursuant to Section 17 of IRA. In such case, the Native American Tribe will have a federal charter issued by the Secretary of the Interior. Federal incorporation creates a corporate legal entity distinct from the governmental entity with respect to which the powers to contract, pledge assets, and be sued may differ. The constitution (for a Section 16 IRA Native American Tribe) or tribal law (for a non-Section 16 Native American Tribe) and the Native American Tribe's charter will usually draw a distinction between the governmental entity (which is organized under the constitution or tribal law) and the business entity (which is organized under the charter) in terms of responsibility for carrying out certain functions. A Section 17 corporation may be used by a Native American Tribe as a vehicle for carrying out business activities. It may give them the power to sue or be sued and to waive sovereign immunity separate from the governmental entity of the Native American Tribe. Actions of the Section 17 corporation may require approval by the governing body of the Native American Tribe or, again, by the general council. The Section 17 charter provides that the corporate entity has the power "to sue and be sued." However, the "sue and be sued" clause of the Section 17 charter does not affect the sovereign immunity of the Section 16 Native American Tribe, nor does it act as a waiver of sovereign immunity for the Section 17 corporation. The "sue and be sued" clause merely gives the Section 17 corporation the power to waive its immunity. Without clear and express language waiving sovereign immunity in the construction contract, there will be no waiver.

The existence of two parallel entities can cause confusion. The activities of the governmental entity enjoy sovereign immunity, whereas the activities of the corporation may or may not, depending on a subsequent finding of whether the entity was acting in a tribal government function or merely economic. A waiver of sovereign immunity for both entities and verification that the contractor is contracting with the appropriate entity may be the most prudent course.

TRIBAL LAND

Trust Land

In 1948, Congress clarified the statutory definition of Indian country:

> …the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1151. This definition was cited by the U.S. Supreme Court in 1997, in *Strate v. A-1 Contractors*, and continues to be widely accepted and used in almost all other contexts. Given that the majority of land on an Indian reservation is owned by the federal government and held in trust for the Native American Tribe, **no mechanic's liens can be recorded against such property.**

BIA Approval of Contracts

Title 25 U.S.C and other Federal Indian statutes provide that the statutes passed for the benefit of dependent Indians "are to be liberally construed, doubtful expression being resolved in favor of the Indians." With respect to contracts with Native American Tribes, Congress amended 25 U.S.C. § 81 effective March 14, 2000, and the amendment effectively removed the draconian impact of the statute by expressly dictating what contracts are within the section's scope. Under Section 81,

as amended, the only agreements that must have the approval of the Secretary of the Interior are those that encumber Indian land, as defined in the amendment, for a period of seven years or more. In addition, the law requires the BIA to promulgate regulations to further clarify the scope of its review. In the recent form of those proposed regulations, the Secretary will not issue accommodation letters given that the reach of Section 81 has been curtailed. In summary, if the contract term is less than seven years, Section 81 approval by the Secretary will not be needed.

ISSUES FOR CONTRACTORS

Based on law and history, each Native American Tribe should be regarded as a separate distinct nation with it own history, culture, legal and political structure. It can be difficult for non-tribal members to fully understand and grasp the complexities of a Native American Tribe and their social and political structures. The concept of Tribal Sovereign Immunity dates back many years and Tribal leaders will typically advocate their sovereign immunity when contracting with non-tribal parties.

Unless sovereign immunity has been waived, a contractor working for a Native American Tribe needs to understand **they are** in a very poor negotiating position to resolve disputes with the Native American Tribe. Based on the principle of sovereign immunity, the contractor is likely going to be faced with a one sided agreement that favors the Native American Tribe:

- A contractor cannot lien a project on Native American land. Indian lands are held in trust by the U.S. Government for the Native American Tribes and 25 U.S.C. §177 prohibits such liens.
- A contractor cannot sue the Native American Tribe in any court (tribal, state, or federal). Also, no ability to counterclaim against the Native American Tribe, even if the contractor is sued in Tribal court.
- A contractor can be sued in Tribal Court. If the contractor loses in tribal court, the resulting judgment can be enforced in state court. If the contractor appeals the case to the state court, the State may hear the case, but will only review the procedural aspect of the Tribal court case and will not review the underlying facts.

If sovereign immunity is waived, the contractor can sue the Native American Tribe in Tribal Court; however, there are concerns:

- Since the Native American Tribe is the judge, jury and defendant, there is a legitimate conflict of interest concern as to whether the Contractor will get a fair and balanced hearing in Tribal Court. Unlike the situation that applies outside of Tribal legal systems, the appellate options to counteract potential local bias are much more limited, and where they exist are not likely to be any less local in nature. The federal court system, which exists in part to counter the bias that state courts may show against citizens of other states, is generally not available for construction disputes between Native American Tribes and non-Native American entities.

Tribal law and codes may be based more on Tribal custom and history, uncodified and subject to change. To the extent there is written law and decisions, they are likely to have little bearing on construction issues. Because of this, it is difficult to reliably predict how the court would rule on an issue.

While a simple waiver of sovereign immunity will allow an action against the Native American Tribe in Tribal Court, this does not go far enough. Predictability based on established State law and rules and avoidance of litigation in Tribal Court is important too. In order to achieve this, a waiver of sovereign immunity or binding arbitration clause clearly identifying the venue where litigation or binding arbitration will take place (State Court of xxx state) and what law will apply (State law of xx State) is equally important.[iv]

TERO Agreements

In order to maximize the economic impact of construction spending, many Tribal contracts contain mandated tribal member employment levels, or goals. Such levels/goals are generally presented in TERO (Tribal Employment Rights Office) Agreements. The TERO Agreement also can include requirements for tribal employee training programs and may incorporate an “Employment Rights Fee” which can be between 2.5-4% of the contract price. In exchange, the TERO will assist the contractor in satisfying the employment goals. Contractors must determine prior to execution of the contract whether employment goals are reasonable or achievable. Additionally, union contractors must determine if the hiring of non-union workers is a violation of union agreements.

Funding Sources

As with any project, the source of funding for the construction project should be investigated in advance. Just like any other industry segment, public or private, some tribes are well-capitalized and some are not. The Bureau of Indian Affairs

(BIA) is involved as the financier for many projects that benefit the individual members of the Native American Tribe (Schools, Housing, and Municipal Facilities), and both availability and receipt of federal funding for tribal projects should be ascertained. Also, while the BIA acts as the funding agent, the tribe remains responsible for paying the contractor on a project. In the event of non-payment, contractors cannot seek recourse or relief from the BIA. Large projects, such as tribal casinos and hotels, require additional due diligence to confirm the tribe is fully financed and the structure of the agreements is acceptable to protect the interests and rights of the contractor (as noted above). In most cases, a tribe must waive its sovereign immunity to the financial institutions involved in the financing package.

OTHER ASPECTS OF WORKING FOR NATIVE AMERICAN TRIBES

- Davis Bacon: Even if federal government funding is involved, the Native American Tribe does not have to comply with Federal Acquisition Regulations and the Davis Bacon Act. Given this, some construction contracts for Native American Tribes require Davis Bacon wages and others do not.
- Building Codes: As a separate nation, Native American Tribes can enact their own codes and the contractor needs to be familiar with them.
- OSHA: There are mixed opinions as to whether OSHA requirements have to be followed on a Native American project. General opinion is that if Federal funding is involved then OSHA will have jurisdiction on the project.

VI.SUMMARY

Each and every contractor considering this type of work needs to thoroughly research the Native American Tribe they are considering working for and consult with an attorney who is familiar with Tribal Law. It is essential that a contractor receive advice and guidance from an attorney familiar with Tribal law.

From both the contractor's and surety's perspective, a level and fair dispute resolution process where an impartial party evaluates the dispute and renders a decision based on established law and due process, is the optimum result.

A valid waiver of Sovereign Immunity and a properly executed Tribal Council Resolution are critical. This could constitute a full waiver, a limited waiver or a binding arbitration provision that meets the requirement presented in *C & L Enterprises*, *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.2d 224 (8th Cir. 2008); *Campo Band of Mission Indians v. Superior Court*, 137 Cal. App. 4th 175, 39 Cal. Rptr. 3rd 875 (Cal.App.4th Dist. 2006)(Native American Tribe's compact with state for tort claims mandated arbitration).

With regard to bond forms, again those which allow for a fair and impartial dispute resolution process will be critical. The Bond form modification language **should include (1) wording that allows for litigation in state court and be subject to state law, or (2) binding arbitration subject to state law with enforcement in state court.**

VII. ADDITIONAL RESOURCES

Website which provide background on a number of Native American Tribes and Tribal Courts:

- http://www.tribal-institute.org/lists/justice.htm

Website for federally registered Native American Tribes:

- http://www.ncsl.org/?tabid=13278

Website for federally recognized as well as state recognized Native American Tribes, and Alaska Native Americans, and Canadian First Nations:

- http://www.500nations.com/500_Tribes.asp

Websites for Native American Tribe specific constitutions, codes, charters, and more:

- http://thorpe.ou.edu/
- http://www.umt.edu/law/library/Research%20Tools/Tribal%20Law.htm#Montana

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[i] *Tribal Sovereign Immunity and Tribal Lands,* by Edward Rubacha, *citing to* Duluth Lumber & Plywood v. Delta Dev., Inc., 281 N.W.2d 377, 381 (Minn. 1979).
[ii] 2 Bruner and O'Connor Construction Law §7:131(2009).
[iii] Tribal Sovereign Immunity : An obstacle for non Indians doing business in Indian Country – Sue Woodrow).
[iv] *See* Sample Waiver of Sovereign Immunity at Exhibit A hereto.