

Tribal Sovereign Immunity



TRIBAL GOVERNANCE PROGRAM

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What does “Sovereign” mean:



Possessing supreme and ultimate power:
“The King Reigns Above”

Sovereign Immunity

- A doctrine originally based on the English Common Law idea that: *'the King can do no wrong'*.
 - *This reflects the European worldview at that time, that the King was chosen by God. To question the King was to question God.*
 - *The Sovereign Monarch was the government, including the court.*

You can't use the King's Court to sue the King

Sovereign Immunity: *the modern meaning*

- Sovereign immunity means that a sovereign (a government) can not be sued without its consent.
- Tribal governments, State governments and the federal government all have sovereign immunity.

Tribal Sovereign Immunity

- Tribal council members, judges, and other tribal officials and staff all have sovereign immunity, while acting in their official capacity.

“We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law.” – Arizona v Tohono O’odham Nation (9th Cir. 2016)

Waivers of Sovereign Immunity

- Waiving sovereign immunity means giving up the right not to be sued, allowing your government to be sued.
- Federal, state, and tribal governments all waive their immunity for various reasons (ex. Federal Torts Claim Act 1946)
 - A waiver of immunity is giving consent to be sued

Waivers of Sovereign Immunity

- The government is waiving immunity,
it is not waiving sovereignty

Sovereign Immunity is a legal tool. It is an attribute of sovereignty.

The Tribe should be mindful of when to, and when not to waiver sovereign Immunity.

So what does it mean to have Tribal Sovereign Immunity?

- Alaska Cases:
- In *AVCP v Runyon* (2004) the Alaska Supreme Court recognized that Alaska tribes possess sovereign immunity on the same level as all federally recognized tribal governments:

“each of AVCP's member tribes is therefore protected by tribal sovereign immunity.”

Tribal Sovereign Immunity

- Alaska Cases:
- More recently in *Oertwich v Togiak* (2019) federal district court held:

“the court concludes that all of Plaintiff’s claims against the Tribe and the individual defendants acting in their official capacity as officers and employees of the Tribe are barred by the doctrine of sovereign immunity.”

Background of the Togiak case (from federal district court findings of fact in Oertwich v. Togiak):

- Oertwich (a non-Native owner of the Airport Inn) imported alcohol into the dry community of Togiak, which was seized by Togiak Tribal Police.
- Togiak Tribal Court issued an ‘Order to Banish’, and Oertwich was escorted to the airport and removed from the community.
- Oertwich returned the next day, was arrested and placed in a cell at the City of Togiak jail.
- Refusing to comply with the removal order, he was held in the City of Togiak jail for 6 days. He was eventually handcuffed, legs bound with duct tape and placed on a plane to Dillingham.

Given the extreme circumstances in that case,
what does the court say:

“the court concludes that all of Plaintiff’s claims against the Tribe and the individual defendants acting in their official capacities as officers and employees of the Tribe are barred by the doctrine of sovereign immunity.”

...

“this court cannot adjudicate this claim. The ICRA creates no private right of action, and the Supreme Court has explained that [it] creates no implied right of action against a tribe or its officers.

...

[These claims] cannot be pursued in this court. Plaintiff may pursue this claim in tribal court.”

What about the banishment/removal?

“To the extent that this claim is asserting that the Tribe could not banish him, it cannot be an individual capacity claim, because it rests entirely on the premise that the banishment was wrongly taken by tribal officials on behalf of the Tribe.

...

Count I will be dismissed with respect to Plaintiff’s banishment.”

- The Court held that Tribal Sovereign Immunity barred this claim.

Banishment: Removal

Removal under Inherent Tribal Authority: Tribal governments can order the removal of an individual from the village, it is up to the tribe to enforce this removal.

Removal under Delegated Federal Authority, VAWA: All public safety officers must enforce a properly executed tribal protective order, including removal provisions.

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Thank You!



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