

## Key Takeaways

*What is Tribal sovereign immunity?*

A legal rule that Indian Tribes cannot be sued by anyone other than the United States unless either they agree to be sued or Congress passes a law allowing others to sue them.

*Why does sovereign immunity matter in the context of land conservation?*

Conservation easements are contracts: agreements between parties about how land will be used and managed in the future. One way we make sure everyone complies with these agreements is through litigation (or the possibility of litigation). If a party to a conservation easement has sovereign immunity, that party cannot be sued against its will, even if it is violating the terms of the easement (e.g., engaging in prohibited uses). Thus, sovereign immunity can make it challenging to draft a conservation easement that is clearly enforceable.

*We are working more and more with Tribes on land conservation/"land back"/reatriation efforts. How can we continue that work while making sure that the terms of conservation easements are enforceable and the land at issue is permanently preserved?*

If a Tribe is going to hold the conservation easement, obtaining a waiver of sovereign immunity is a good start. Waivers are only valid if all necessary tribal procedures are followed. Some Tribes grant waivers routinely, others do not. Therefore, we recommend approaching this subject with candor and sensitivity.

*Why is sovereign immunity so important to Tribes?*

Sovereign immunity confirms that Tribes retain inherent sovereignty from before the formation of the United States. It is an expression of Tribes' separate legal status, culture, and independence, and honors tribal ancestors who fought many battles against to preserve the authority of tribal governments. Crucially, sovereign immunity also protects Tribes' resources from damages awards and litigation expenses.

*What does a waiver of sovereign immunity look like?*

A general waiver could say, "Grantor hereby expressly waives its sovereign immunity and consents to suit to the limited extent necessary to interpret or enforce this Conservation Easement." More limited waivers are possible (and common) as well.

*Are there instances in which a waiver of sovereign immunity would not be enough to permit enforcement of a conservation easement's terms?*

Waiver by one Tribe does not constitute waiver by another Tribe if an easement is transferred from one Tribe to another. Consider adding provisions to your conservation easements requiring notice and approval of transfers and allowing the original easement grantor to regain ownership if such provisions are violated. In California, this is called "Power of Termination" (formerly a "right of reverter") and is governed by California Civil Code Section 885.010.

*What if a conservation easement negotiation involves more parties than just the grantor and grantee, such as a funding entity? How should those third parties be notified of the sovereign immunity issue and involved in the discussion of waivers, etc.?*

A third-party funder of the conservation easement will have the same interest as the easement holder to ensure that the conservation easement is enforceable to protect the conservation values. Typically, negotiations regarding conservation easement terms, including those about sovereign immunity and waiver, occur between the tribe and the conservation organization with easement enforcement duties. The conservation organization should be prepared to keep the funder informed about the discussions regarding the issue and the additional wording to the conservation easement addressing the issue. In some circumstances, it may become appropriate to have a three-party discussion, i.e. among the tribe, the funder and the conservation organization, to resolve the issue and agree on wording.