

Rally 2023
Partnering with Tribes to
Protect Conservation Values
Outline

Session Description: Save the Redwoods League purchased redwood forestland with mitigation funding from PG&E, then conveyed title to the InterTribal Sinkyone Wilderness Council, a consortium of ten Tribes. The Council then conveyed a conservation easement to the League. Completing the transaction required reconciling competing legal interests, navigating differing timeframes, decision-making approaches, and elevating the importance of restoring the land to native ownership over alternate paths to preserving the land. The session will focus on: Tribal sovereign immunity and tools to consider a limited waiver in connection with a conservation easement; Tribal processes and considerations in a limited waiver; drafting an enforceable limited waiver including additional instruments to language in the conservation easement; and addressing the interests of third-party funders, whether agencies or other entities, in satisfying a mitigation requirement.

Session Objectives:

- Understanding the process of partnering with tribes and tribal organizations to draft and enforce conservation easements
- Confronting challenges during the project
- Navigating tribal sovereign immunity: how to draft conservation easement to reconcile the competing interests and values

Session Outline:

- Define sovereign immunity, its sources, breadth and depth and extent to which that immunity may apply to Tribal organizations, boards of directors, officers and individuals
- Explain the reasons that sovereign immunity is important to Indian Tribes
- Identify the considerations for Tribes and land trusts that may arise in Tribal waiver decisions
- Describe examples of Tribal processes for considering a waiver of sovereign immunity
- Highlight the sources of the requirement that a land trust must have the right to enforce its conservation easements
- Describe the potential conflicts between a land trust's enforcement rights and a Tribe's sovereign immunity
- Drafting approaches for immunity waivers to be legally effective
 - * Subject matter limited waivers
 - * Drafting to ensure enforceability of a waiver on subsequent Tribal landowner
 - * Additional instruments to strengthen enforceability, e.g. Power of Termination (CA Civil Code Sec. 885.010)

- Interests of third parties involved in the transaction, e.g., agency funders and 3rd party mitigation funders

* How to manage their expectations, demands, and involvement in the transaction

Additional info/comments: At a time when justice for Indian Tribes is increasing difficult to achieve in courts, land trusts have a unique role to play in working with Indian Tribes and Tribal organizations to recover ancestral lands, protect culturally-significant lands and together preserve conservation values on ecologically-significant lands. Although the focus of this presentation is on working with Tribes and tribal organizations, the concept of enforceability is relevant to all conservation easement transactions.

Partnering with Indian Tribes to Protect Conservation Values

Land Trust Alliance Rally 2023

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Because many tribal communities had enduring systems of stewardship and management of their lands, they are often stereotyped as the original conservationists. There is truth in that description. Most tribal cultures are place-based, meaning that particular places have a significance tied to origin stories, tribal histories, the power of spirits and the utility of land for the survival of the community. It is no coincidence that the destruction of Indian communities went hand in hand with the loss of tribal land. The effort to recover land or re-establish connections to ancestral lands owned by others is an essential part of the tribal resurgence and resiliency of the past few decades. Litigation has largely failed as a means to recover tribal lands. *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (Oneida Indian Nation may not sue to recover lands taken more than 150 years ago because of disruption to the “settled expectations” of the non-Indian landowners). As a result, many tribes are turning to land acquisition, conservation easements and related tools to achieve their land recovery goals. Although the relationship of Indian tribes to their land cannot be reduced to technical legal categories, the conventional legal tools land trusts use to protect land are increasingly attractive to Indian tribes.

Indian tribes and land trusts often share common goals for land conservation and protection. There are a wide variety of legal arrangements by which these goals can be met, including, for example, tribes as conservation easement grantors or grantees, tribes as purchasers of land subject to use restrictions to achieve conservation purposes; and tribes as sellers of land

to land trusts or government agencies that have conservation-related use restrictions in the deed or included in an offer to dedicate for conservation purposes.

In each of these contexts, considerations will arise that are unique to tribal communities. These considerations include differing perspectives on the meaning of conservation in the tribal land context; the extent to which tribal cultural values may be incorporated and protected in conservation easements; concerns about identifying and describing culturally-significant places in a conservation easement; potential conflicts between the need to provide public access to lands that are acquired with public funds and tribal interests in privacy for cultural activities; challenges of protecting cultural places and cultural activities without violating tribal confidentiality norms; and concerns about enforceability of conservation easements when sovereign Indian tribes have immunity from unconsented lawsuits.

This paper focuses on the sovereign immunity question. The immunity of Indian tribes from unconsented lawsuits is a fundamental element of tribal sovereignty. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S.____, ____ (2023) (slip opinion at 4) (“We have held that tribes possess ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’”) (internal citation omitted). The sovereignty of Indian tribes, which is inherent rather than delegated by Congress, is the right of Indian tribes to govern themselves. *United States v. Wheeler*, 435 U.S. 313, 323-324 (1978). It predates the formation of the United States. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“[A]s the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the fifth amendment . . .”). Tribal sovereign immunity applies to the tribe, its tribal council or other governing body, its employees and agents acting on behalf of the tribe. *See, e.g., Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F. 3d 1125, 1131 (8th Cir. 2019) (tribal immunity extends to

tribal officials acting within the scope of their lawful authority). Suits against tribal officers may be allowed to enjoin prospective actions that would violate federal law, although this exception is rarely successfully applied. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). Tribal non-profit organizations may also be entitled to sovereign immunity if deemed to be an “arm of the tribe.” Courts examine a number of factors in making this determination, including whether the tribe owns the organization, whether the tribe controls the organization by retaining the power to appoint or remove the board of directors, and whether the organization provides governmental services to the tribe or its members. *Hagen v. Sisseton-Wahpeton Community College*, 205 F. 3d 1040, 1043 (9th Cir. 2006), *see also*, *Mestek v. Lac Courte Oreilles Community Health Center*, ___F. 4th ___, No. 22-2077, 2023 WL 4240807 (7th Cir., June 29, 2023 (adopting arm-of-the-tribe test). Tribal organizations may be entitled to immunity even if chartered under state law, although organizations chartered under tribal law often more easily meet the “arm of the tribe” test. Immunity applies to any form of relief in a lawsuit, and to any court in which relief is sought. Tribes are not immune from suits filed by the United States. *United States v. Yakima Tribal Court*, 806 F. 2d 853, 861 (9th Cir. 1986). Tribal sovereign immunity does not have a geographic component; it applies within Indian reservations and outside such territories. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

Those tribal communities that are not recognized by the U.S. Department of the Interior as Indian tribes under federal law are not entitled to invoke sovereign immunity. The Department currently recognizes 574 Indian tribes and Alaska Native communities that are entitled to the benefits and protections of federal law that are made available to Indians because of their legal status as Indians. A group of Indian may obtain federal recognition in three ways: 1) petitioning the Department to recognize the group under the Federal Acknowledgment

regulations at 25 C.F.R. part 83; 2) by act of Congress; or 3) by court decision. The judicial avenue is rarely successful, so most tribal groups pursue federal recognition by either the administrative or congressional process. Because non-recognized tribes may in the future obtain recognized status and thereby invoke sovereign immunity, the immunity waiver question should be addressed even in cases where the goal is to enforce conservation obligations or restrictions against non-recognized tribal groups.

Tribal sovereign immunity should be considered a topic for discussions with Indian tribes in promoting the shared goal of enforceable conservation protections. Sovereign immunity does not create insurmountable obstacles to enforcing conservation easements or deed restrictions designed to protect conservation values. There are several ways to address this issue in negotiations with Indian tribes. First is to consider whether Congress has abrogated tribal immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (congressional abrogation of tribal immunity “cannot be implied but must be unequivocally expressed.”). This so-called clear statement rule is not a “magic words” requirement, but rather asks “simply whether, upon applying ‘traditional’ tools of statutory interpretation, Congress abrogation of tribal sovereign immunity is ‘clearly discernable’ from the statute itself.” *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, *supra* at 4.

Congressional abrogation of tribal immunity has not occurred in the land conservation context. Most congressional abrogations have occurred in federal environmental and commercial statutes. *See, e.g., Lac du Flambeau Band of Lake Superior of Chippewa Indians v. Coughlin*, *supra* (holding that Bankruptcy Code’s provision abrogating immunity of “governmental unit[s]” defined to include “other foreign or domestic government” abrogates the sovereign immunity of Indian tribes); Resource Conservation and Recovery Act of 1976, 42

US.C. § 6903(13) (authorizing “persons” to sue to enforce the Act, defined to include “municipality,” which in turn is defined to include “an Indian tribe or authorized tribal organization.”)

However, if tribal land is held by the United States in trust for the tribe, the Secretary of the Interior may not approve any agreement that encumbers such land for more than seven years without an express waiver of sovereign immunity. 25 U.S.C. § 81(d). We are not aware of any conservation easements having been placed on tribal trust land, and there are serious doubts about whether the Secretary would approve such agreements even with an express waiver of immunity. It is unlikely that this federal statutory provision will come into play when private land trusts seek to negotiate and enforce conservation easements with Indian tribes.

The second, and more feasible option to enforce conservation easements when an Indian tribe is a party concerns the willingness of the tribe to waive its immunity or agree to other means of enforcing the easements, such as a fee conveyance subject to a condition subsequent with a right of termination or right of entry if the condition is violated. Federal law authorizes Indian tribes to voluntarily waive their immunity from suit to allow judicial enforcement of their contracts and agreements, if such waivers are clear and unequivocal. *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). This legal principle raises both relationship and drafting issues. From the tribes’ perspective, sovereign immunity is more than an abstract legal principle. It is a tangible and enduring expression of their status as sovereign governments whose existence long predates the invasion of Europeans into their lands. That is why it is so important to acknowledge that immunity is inherent in the tribe’s separate and distinct legal status. Neither sovereignty nor immunity has been granted to Indian tribes by any foreign government. Acknowledging this fundamental fact of tribal political and legal

existence is not simply a discussion about the law and enforceability of conservation easements. Affirming this status recognizes tribal identity and the tribes' unique characteristics. One of the earliest descriptions of tribal legal status by the U.S. Supreme Court was made in 1832; Indian tribes are "distinct, independent political communities" qualified to exercise powers of self-government. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). That description has stood the test of time. It is woven into the political and cultural fabric of Indian tribes today.

Honoring tribal sovereign immunity also ties tribes today to their ancestors who fought many political and legal battles to preserve this inherent status. Coupled with land thefts, curtailing the sovereign powers of Indian tribes has been a frequent tool of the federal government, including federal courts, to force tribes to assimilate and give up their cultures and identities. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-205 (197) (Indian tribes may not exercise any powers inconsistent with their status as dependent sovereigns). One of the darkest days in federal-tribal history was the termination era of the 1950s when Congress terminated federal legal protections and status for many Indian tribes and sold off reservation land, and the Bureau of Indian Affairs sought to relocate tribal people from their reservation communities to cities. *See Charles F. Wilkinson & Eric R. Briggs, The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139 (1977). Efforts to restore that sovereign status and land defined an entire generation of tribal leadership.

Because tribal sovereign immunity implicates identity, culture and history, assumptions about the willingness of a particular tribe to waive its immunity to allow enforcement of conservation easements should be avoided. There are tribes who eschew conservation easements when a condition of becoming a party to such instruments is a waiver of immunity. Other tribes acknowledge that as a practical matter, the likelihood of obtaining the benefits of permanent

protection of land is very low without at least a limited waiver of immunity that allows enforcement. The scope of the waiver, the respectful nature of the discussions and prior experience with waivers may also factor into a tribal decision. The key to developing a relationship in which these issues can be discussed openly and candidly is respect for the principle that the decision to waive immunity is a sovereign choice of the tribe. Waiver discussions may be appropriate even when there is doubt about whether a particular tribal organization could invoke sovereign immunity under federal law.

The tribes' willingness to consider a sovereign immunity waiver may also depend in part on understanding the land trust's need for enforcement. Standard contracts are valid even without an enforcement provision. However, conservation easement agreements must include enforcement provisions for donees to qualify for conservation contribution treatment by the IRS. 26 C.F.R § 1.170A-14(c). Land Trust Alliance accreditation standards also require the land trust to adopt written procedures for documenting and responding to violations of the terms of the conservation easement.

Several considerations might be kept in mind when negotiating sovereign immunity waivers with Indian tribes. Effective waivers must comply with the tribe's own law regarding which governmental body or officer has authority to execute a waiver on the tribe's behalf and how that waiver should be adopted. Does the waiver need to be authorized by the tribal council in a separate resolution, or would it be effective if the council approves a conservation easement that contains a waiver provision? Is the tribal council required to make special findings in support of a waiver? Does the tribal chair have authority without a council resolution to execute a waiver? Do immunity waivers need to be approved by the tribe's general membership in a referendum? Does the tribe's constitution preclude issuance of waivers under circumstances

that apply to conservation easements? Must the waiver be presented to the tribal council for consideration in a separate legal document, or can it be considered as part of the conservation easement? These are questions for the tribe to answer by reference to its governing law, but the land trust should seek assurances that waivers comply with tribal law in order to make them effective.

Tribal codes that answer these questions are publicly available and most are easily accessible on-line. Consider the Navajo Nation's standards for waiving immunity. The Navajo Sovereign Immunity Act limits lawsuits against the Nation to the courts of the Navajo Nation, and then only when "explicitly authorized by Resolution of the Navajo Nation Council." § 554. The Act also waives the immunity of Nation officers, employees, and agents in Navajo courts to compel performance of a legal duty under the laws of the United States and the Navajo Nation. § 554(G). The Act also establishes procedures for filing suits when immunity has been waived. Other tribes authorize the chair to execute waivers for tribal business entities if the waiver is in writing and signed by the chair (Cherokee Nation of Oklahoma), or authorize the tribal council to grant a waiver but only upon the vote of a minimum number of council members (Yurok Tribe).

Under federal law, only tribal immunity waivers that are unequivocal will be considered effective. This means enforcement provisions that depend on inferences being drawn from ambiguous language will be ineffective. For example, simply providing in a dispute resolution provision that either party may ask a court to resolve a dispute arising from the conservation easement is not likely to be an effective waiver. A conservation easement that is silent as to the method for resolving disputes, or that simply says each party retains its legal remedies, will not be enforceable in court. In other words, waivers must clearly state that the tribal party is waiving its immunity from unconsented suit for purposes of enforcing the conservation easement. If

there are limits on the scope of the waiver, that must be plainly stated as well. For this reason, often immunity waivers in tribal conservation easements are the longest and most complex provisions in the easement.

If a tribe agrees to an immunity waiver, the next question is the scope of the waiver. Careless drafting may create risk for the tribe that the waiver applies to disputes arising outside the conservation easement agreement. Immunity waivers may address the court(s) in which suit may be brought; the remedies that may be sought, for example, whether consequential damages may be sought; whether there are conditions precedent to filing suit, such as exhausting the remedies available in a tribal court before seeking relief in foreign courts; and the tribal entities or persons against whom enforcement may be sought. It may also be necessary to specify the types of tribal property or assets that may be used to satisfy a money judgment in a particular lawsuit. Tribal property that is held in trust by the United States on behalf of an Indian tribe is generally unavailable to satisfy a court judgment. In general, waivers should specify the types of relief that may be sought, including restoration costs, injunctive relief, and damages. The goal is to reach a meeting of the minds on where a lawsuit may be filed, against whom may relief be sought, what kinds of relief may be sought, and what steps must be taken before filing suit. Consult tribal codes for legislative limitations on the scope of waivers that the tribe is authorized to grant.

Bear in mind that parties by contract cannot give a court jurisdiction over a case that it otherwise does not have, so that specifying the court in which suit may be filed is no guarantee that that court will have jurisdiction. Indian tribes often favor federal court over state courts due to the historical antipathy of state courts to tribal interests, but federal courts will not have jurisdiction over an easement dispute unless it raises a federal question or the parties are citizens

of different states and damages are involved. Each of these issues is an appropriate subject of negotiations with the tribe.

In sum, tribal sovereign immunity presents a bit of a paradox for land trusts. On the one hand, discussions about the issue are premised on the recognition of the status of Indian tribes as separate sovereign and cultural entities; on the other hand, effective enforcement of shared conservation protections will depend on finding a way to remedy or prevent violations while overcoming the barrier of sovereign immunity. Honoring tribal sovereignty under these circumstances is the challenge for land trusts and Indian tribes.

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.