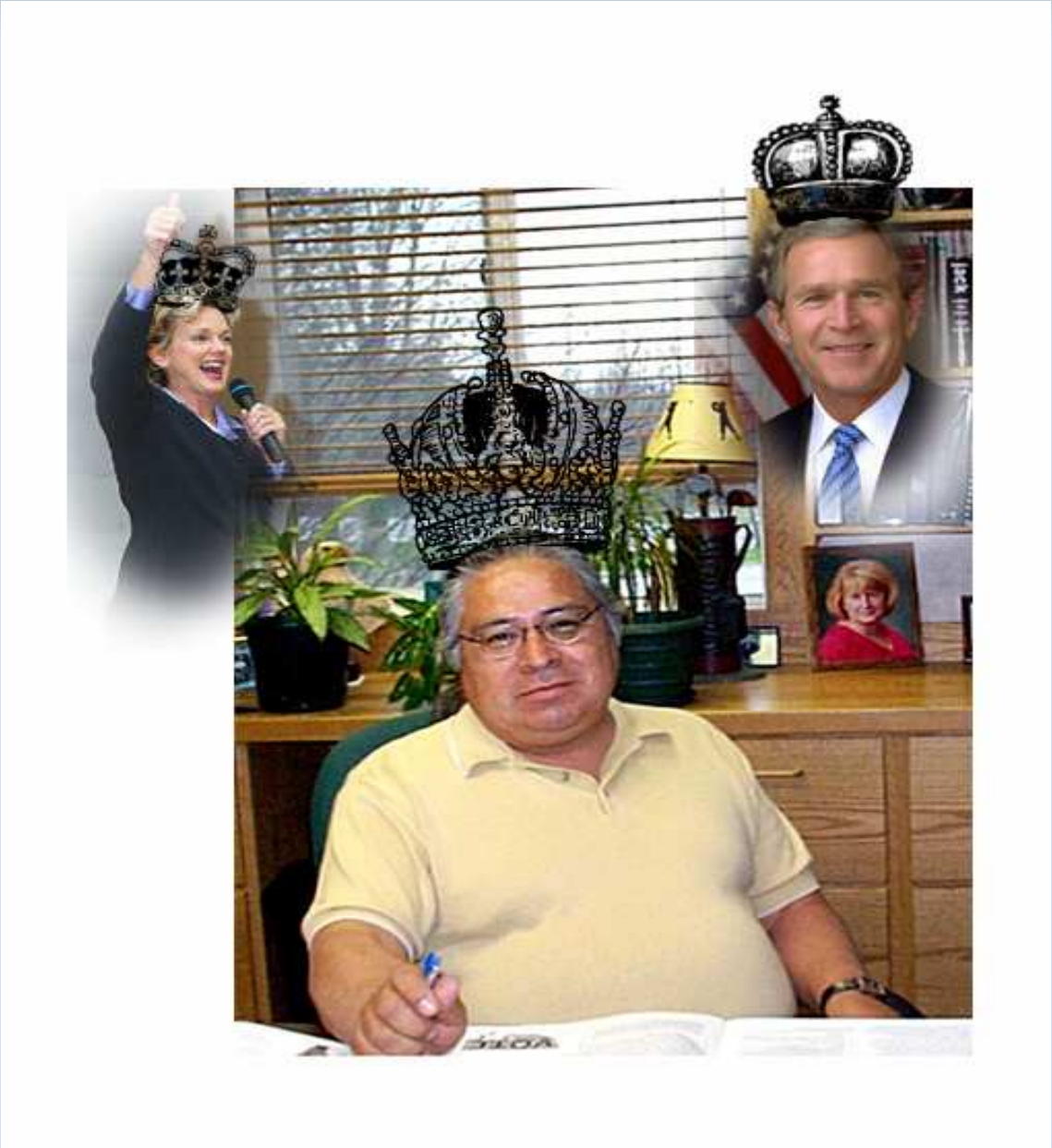


**Asserting and Exercising
Tribal Sovereignty to Craft
Limited and Conditional
Waivers of Sovereign Immunity
and/or Creative Alternatives
that Promote the Conduct of
Tribal Business Without
Undermining Sovereignty**

By John Petoskey, General Counsel Grand Traverse Band of Ottawa & Chippewa Indians.
Great Lakes Tribal Economic Development Symposium

SOVEREIGN IMMUNITY

- ✦ **HISTORICALLY THIS WAS AN ABSOLUTE DOCTRINAL POSITION THAT HELD FEDERAL, STATE AND LOCAL GOVERNMENTS IMMUNE FROM LIABILITY ARISING FROM ACTIVITIES OF THE GOVERNMENT**
- ✦ **SOVEREIGN IMMUNITY IS TREATED IN TWO PLACES IN THE U.S. CONSTITUTION -ARTICLE III, SECTION 2 IS APPLICABLE TO QUESTIONS INVOLVING THE IMMUNITY OF FEDERAL OFFICIALS FROM LAWSUITS, SUITS AGAINST THE FEDERAL GOVERNMENT BY A STATE AND VICE VERSA, AND SUITS AGAINST THE FEDERAL GOVERNMENT IN GENERAL**
- ✦ **THE SECOND PLACE IS THE ELEVENTH AMENDMENT DEALT THE DIVISION OF POWER BETWEEN THE VARIOUS SOVEREIGNS—STATE AND FEDERAL— STATE AND STATE- AND DIVERSITY CASES OF CITIZENS IN DIFFERENT STATES: CONFUSING AND CONTRADICTIONARY CASE LAW**
- ✦ **TRIBAL SOVEREIGN IMMUNITY IS FEDERAL COMMON LAW DOCTRINE**
- ✦ **SOVEREIGN IMMUNITY IS BASED ON THE CONCEPT OF THE “KING CAN DO NO WRONG”. IN PESHAWBESTOWN WE HAVE THE “THREE KINGS FEAST” WHICH, HOWEVER, IS NOT RELATED TO THIS PRESENTATION BUT DOES PARALLEL THE CONCEPTS OF THIS PRESENTATION...I PRESENT THE THREE KINGS OF TRIBAL, STATE AND FEDERAL GOVERNMENTS**



TRIBAL SOVEREIGNTY

- SOVEREIGNTY IS A WORD OF MANY MEANINGS IN FEDERAL INDIAN LAW AND THE POLITICAL WORLD, AND IS USED CONSTANTLY AND LOOSELY ALL THE TIME.
- A BASIC MEANING IS THE INHERENT RIGHT TO GOVERN
- THE MARSHALL TRILOGY— *JOHNSON v. McINTOSH*, (1823) *CHEROKEE NATION v. GEORGIA*, (1831) AND *WORCESTER v. GEORGIA* (1832)
- THESE CASES ESTABLISHED TRIBES AS “DOMESTIC DEPENDENT NATIONS” WHOSE INDEPENDENCE WAS LIMITED IN ONLY TWO WAYS: 1. THE POWER TO CONVEY LAND, AND 2. THE ABILITY TO DEAL WITH FOREIGN POWERS

TRIBAL SOVEREIGN POWER ANALYSIS

- A TRIBE IS ITS OWN SOURCE OF POWER
- A TRIBE IS SOVEREIGN AND NEEDS NO AUTHORITY FROM THE FEDERAL GOVERNMENT FOR THE TRIBE'S EXISTENCE AND POWER *MERRION v. JICARILLA* (1982).
- THE RELEVANT INQUIRY TO DETERMINE THE SCOPE OF TRIBAL POWER IS WHETHER ANY AUTHORITY EXISTS TO **PREVENT** THE TRIBE FROM ACTING--- NOT WHETHER ANY AUTHORITY EXISTS TO **PERMIT** THE TRIBE TO ACT. *NATIONAL FARMERS v. CROW TRIBE* (1985).
- THE SELF-GOVERNING CHARACTER OF TRIBES ENABLES CONGRESS TO DELEGATE POWER TO TRIBES THAT COULD NOT BE DELEGATED TO NON-GOVERNMENTAL PRIVATE ORGANIZATIONS. *U.S. v. MAZURIE*, (1975).
- I PRESENT TRIBAL SOVEREIGNTY AS UNDERSTOOD BY THE EXECUTIVE DEPARTMENT

Today

2004 VOTE
C-SPAN



THE BUSH CONCEPT OF TRIBAL SOVEREIGNTY

- ◆ Sovereign is sovereign (circular definition) or the Forest Gump view “Sovereign is as Sovereign does.”
- ◆ “Your [tribal governments] been given sovereignty” Who or what is the unstated subject of the sentence that gives sovereignty to the tribes—the tribes themselves?---the Congress?---the Supreme Court?
- ◆ And what is this new relationship between the federal government and tribes that President Bush calls **“sovereignty”**
- ◆ Is this the lost “state of” noun that we all have been looking for to describe our shifting concept of sovereignty---our tribal dignity, our governance capacity, our Indian humanity and our immunity---our **“sovereignty”** immunity

TRIBAL SOVEREIGNTY TODAY **AS A JUDICIAL MATTER FINDING INHERENT** **LIMITATIONS**

- ✦ **OLIPHANT(1978) COURT FINDS THE INHERENT LIMITATION THAT INDIAN TRIBES HAVE NO CRIMINAL JURISDICTION OVER NONINDIANS**
- ✦ **WHEELER (1978) NO DOUBLE JEOPARDY-TRIBE SEPARATE SOVEREIGN**
- ✦ **MONTANA (1981) EXCEPTION TO LIMIT INHERENT POWER TURNED INTO A RULE TO LIMIT INHERENT SOVEREIGNTY OF INDIAN TRIBES**
- ✦ **HICKS (2001) TRIBAL COURT HAS NO JURISDICTION OVER TORT CLAIM AGAINST STATE OFFICERS**
- ✦ **LARA (2004) THE FEDERAL CONGRESS HAS THE POWER TO RESTRICT OR EXPAND [BUSH'S "GIVEN SOVEREIGNTY"] THE EXERCISE OF SOVEREIGNTY [REALLY THIS IS SAYING THE FEDERAL PLENARY POWER CAN EXPAND INHERENT POWER OF THE TRIBES]**
- ✦ **SO MAYBE BUSH WAS NOT PREPOSTEROUS BUT SIMPLY PRESCIENT— INDIANS ARE SUBJECT TO THE PLENARY POWER OF CONGRESS AND THE QUASI-PLENARY POWER OF THE SUPREME COURT TO TAKE OUR INHERENT SOVEREIGN STATUS AND TO EXPAND ["you been given"] OUR INHERENT SOVEREIGN STATUS; APPARENTLY TRIBES ARE "GIVEN" SOVEREIGNTY BY CONGRESS AND THE COURT IS ALWAYS FINDING NEW INHERENT LIMITATIONS.**

SOVEREIGN IMMUNITY OF THE TRIBES

- ✦ ***KIOWA TRIBE* (1998) TRIBAL SOVEREIGN IMMUNITY IS STILL STRONG!**
- ✦ **RULES FROM THE CASE:**
- ✦ **THE IMMUNITY APPLIES TO TRIBES FOR ACTIVITIES ON AND OFF THE RESERVATION**
- ✦ **WHETHER GOVERNMENTAL OR COMMERCIAL**
- ✦ **EXTENDS TO AGENCIES OF THE TRIBE**
- ✦ **APPLIES IN STATE AND FEDERAL COURT**
- ✦ **APPLIES IN TRIBAL COURT**
- ✦ **EXTENDS TO CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF, MONEY DAMAGES**
- ✦ **NOT DEFEATED BY CLAIM THAT TRIBE ACTED BEYOND ITS POWER**
- ✦ **ONLY CONGRESS HAS THE POWER TO MODIFY THE DOCTRINE**

KIOWA THREATS TO SOVEREIGN IMMUNITY WITHIN THE OPINION

- Weak doctrinal foundation: “[D]octrine...developed almost by accident...passing reference to immunity [*Turner*] ...did become...explicit ..that tribes had immunity [*USF&G*]...later cases, albeit with little analysis, reiterated the doctrine. *Puyallup, Santa Clara, Blatchford*... There are reasons to doubt the wisdom of perpetuating the doctrine...extends beyond the need to safeguard tribal self-governance...[tribes] take part in the Nation’s commerce...ski resorts, gambling...these considerations...suggest a need to abrogate tribal immunity [but] we defer to Congress...[which] can alter its limits through explicit legislation”
- Dissent: “Indians [off the reservation] subject to state law” Doctrine is judge made law—we create we destroy— “immunity is anomalous and unjust”

SO CONGRESS ACTS: An Indian Tribal Economic Development and Contract Encouragement Act of 2000

PL 106-79 (AKA THE WHITEMAN PROTECTION ACT IN THE TRADITION OF INDIAN DEPRADATION ACTS)

- ✦ Requires disclosure of Indian tribal sovereign immunity in contractual situations covered under 25 U.S.C. § 81 (encumbrance of tribal land by leasehold mortgages, easements and other agreements that by their terms give a third party exclusive or nearly exclusive proprietary control over the tribal land).
- ✦ Requires a provision that provides remedies in the case of a breach of the agreement or contract.
- ✦ Requires an express waiver of the right of Indian tribes to assert sovereign immunity as a defense in an action brought against the Indian tribe program including a waiver that limits the nature of relief that may be provided or the jurisdiction of a Court with respect to such action.
- ✦ Does not apply to leases of tribal land that are exempt from approval under 25 U.S.C. § 477. (IRA § 17 Corporations)(25 CFR § 84.004)

AND CONGRESS ACTS A LITTLE MORE: **Indian Tribal Tort Claims and Risk Management** **Act of 1998**

- ◆ Narrow in its encroachment upon tribal sovereignty
- ◆ No substantive impact on tribal immunity or self-governance
- ◆ Secretary of Interior is to conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes. Good luck on finding that study.
- ◆ Should follow the road map established in 1990 for business deals by the statutory requirements in 25 USC § 450f(c) for self-determination contracts which require the Secretary to “obtain or provide liability insurance or equivalent coverage for S-D contracts.”

MICHIGAN COURT VIEW OF TRIBAL SOVEREIGN IMMUNITY

- ***Huron v. Potawatomi, Inc. v. Stinger***, 574 N.W.2d 706 (1998) Pre Kiowa, nevertheless the court finds 1. Tribe possessed immunity as a federal Indian tribe 2. Tribe's filing of suit did not waive immunity for counterclaim 3. Incorporation under state law does not waive immunity 4. Civil rights statute did not apply to actions of Indian tribe.
- ***Sungold v. Match-E-Be-Nash-She-Wish aka Gun Lake***, 2002 WL 522886 (Mich App.) Unpublished Opinion "...federal recognition does not bestow sovereignty on a tribe, but rather recognizes sovereignty that already exist[s], *U.S. v. Wheeler*. Therefore Gun Lake is immune even though not yet federally recognized.
- Tax Agreements with Michigan Tribes require a waiver of Sovereign Immunity.

Tribal Responses to Judicial and Legislative action Questioning the Legitimacy of the Doctrine of Tribal Sovereign Immunity

- ◆ Some tribal constitutions incorporate Indian Civil Rights Act like protections for tribal members and provide for a limited waiver for suits by tribal members against the Tribal government. Generally money damages are precluded. GTB Constitution Art. 10 & Art. 12
- ◆ Separation of Powers with an Independent Tribal Judiciary. GTB Constitution Art. 5

TRIBAL LEGISLATIVE REMEDIES

- ◆ WAIVER OF IMMUNITY FOR TORT CLAIMS
- ◆ WAIVER OF IMMUNITY FOR CONTRACT CLAIMS
- ◆ ARBITRATION CODES
- ◆ NOTICE REQUIREMENTS WHEN NON-TRIBAL PARTIES ASSERT ISSUES OF TRIBAL SOVEREIGNTY OR JURISDICTION ISSUES

TYPICAL RESPONSE OF GTB TO QUESTIONS OF SOVEREIGN IMMUNITY

GTB has developed institutional and legislative responses to the federal common law doctrine of Tribal Sovereign Immunity. GTB has both general statutory tribal provisions for the limited waiver of Tribal Sovereign Immunity, (6 GTBC Chapters One, Sovereign Immunity Waiver for Torts, Chapter Two, Wavier of Sovereign Immunity and Jurisdiction in Commercial Transactions 3 GTBC Chapter Four- limited waiver for jurisdiction and choice of law provisions, 15 GTBC Sections 215,216,217, and 218 providing a specific procedure for the waiver of sovereign immunity of the EDC), and a number of specific resolutions on the waiver of sovereign immunity for agreements with the State of Michigan, (Tax Agreement, 4 GTBC Chapter Four- waiver for the administration of sales and use tax provisions), and loan and financing wavier tied to specific financing and purchase acquisition documents. The GTB Code is available on line at www.narf.org/nill/codes/index.htm GTB typically structures its waivers to be specific and limited as to duration, grantee, transaction, property or funds put at risk, insurance coverage, jurisdiction of the court and the applicable law.

TORT CLAIMS

- ◆ SEVERAL MECHANISMS CREATED BY TRIBAL GOVERNMENTS TO WAIVE IMMUNITY, UNDER THE TRIBAL CONSTITUTION, RESOLUTIONS, PEACE MAKER COURTS
- ◆ CENTRAL COMPREHENSIVE METHOD IS BY ENACTMENT OF A TRIBAL STATUTE THAT WAIVERS IMMUNITY FOR INJURIES CAUSED BY THE NEGLIGENT ACTS OR OMISSION OF THE ENTERPRISE.
- ◆ LIMITATION ON DAMAGES AWARDS
- ◆ TRIBAL STATUTE OF LIMITATION
- ◆ SEE NARF WEB SITE TO FIND SEVERAL EXAMPLES

CONTRACT CLAIMS

- WAIVER OF IMMUNITY FOR PROPRIETARY CONTRACTS
- FORUM SELECTION
- LIMITATION ON DAMAGES—LIMITED TO CONTRACT AMOUNT
- IDENTIFICATION OF TRIBAL ENTITY
- STATUTE OF LIMITATIONS
- CONSENT TO COURT OF COMPETENT JURISDICTION

ARBITRATION CLAIMS

- ◆ DOES NOT WAIVE SOVEREIGN IMMUNITY
- ◆ HOWEVER ARBITRATION CODE ESTABLISHES A METHOD FOR THE PARTIES TO RESOLVE DISPUTES CONSISTENT WITH RECOGNIZED ARBITRATION PROCEDURES SUCH AS: CONSTRUCTION ARBITRATION, COMMERCIAL ARBITRATION AND OTHER UNIQUE ARBITRATION METHODOLOGIES
- ◆ WAIVER IS DONE VIA SPECIFIC RESOLUTION OR REFERENCE TO WAIVER ORDINANCE SUCH AS A COMMERCIAL TRANSACTION OR TORT WAIVER ORDINANCE
- ◆ WORKS WELL: GTB HAS USED SEVERAL TIMES FOR CONSTRUCTION DISPUTES

SPECIFIC TRIBAL RESOLUTIONS

1. Acquisition Resolutions
2. Refunding Resolutions
3. Financing Plan Resolutions
4. Types of Specific Tribal Council Resolutions-
 - A) 401k Trustee
 - B) Workers Disability Compensation Self-funding
 - C) Cellular Telecommunications Resolutions
 - D) Health Care 3rd Party Billing
 - E) Ground Leases
 - F) Personnel Policy, Alternative Dispute Resolutions

BENEFITS OF MEASURING THE RISK TO INSURE FOR THE KNOWN RISK

- ◆ THE MAJOR BENEFIT OF A LIMITED WAIVER IS THE ESTABLISHMENT OF KNOWN RISK FACTORS WHICH CAN THEREBY BE MEASURED FOR THE COST OF INSURANCE.

CONCLUSION

- ◆ NON-INDIANS ARE CRITICAL OF IMMUNITY
- ◆ MOST KNOWLEDGEABLE NON-INDIANS WANT A WAIVER OR ASSURANCE THAT REMEDIES ARE AVAILABLE FOR CONTRACT, LEASE OR TORT CLAIMS
- ◆ TRIBAL ENACTMENTS OF LEGISLATION OR SPECIFIC RESOLUTIONS CAN ADDRESS ALL THE CONCERNS OF NON-INDIANS, AND AT THE SAME TIME PROTECT THE RIGHTS AND INTERESTS OF THE TRIBE.
- ◆ INSURANCE COSTS TO THE TRIBE ARE ACTUALLY LOWER BECAUSE OF THE KNOWN RISK