

## WAIVING SOVEREIGN IMMUNITY GROWS TRICKIER

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Providing limited waivers of a tribe's immunity from suit has become a virtual necessity in today's legal and business environment. The creation of tribal corporations allows a tribe to enter into important economic ventures providing limited waivers of its immunity that are specific to that particular enterprise and often to a particular court, and can help to protect the assets of the tribal government. Waivers of immunity have never been taken lightly, and courts make a strong presumption against such waivers.<sup>1</sup> It has long been the rule that, absent a Congressional waiver of a tribe's sovereign immunity, tribal entities cannot be sued without their clear and unequivocal consent.<sup>2</sup> That is now changing, and to balance competing interests of the preservation of tribal sovereignty on one hand and the need for limited waivers in commercial transactions, a tribal corporation should expressly identify how and to what extent it intends to waive immunity. The tribal corporation should always be wary of "sue or be sued" provisions in its charter, as well as of dispute resolution (arbitration) clauses that may be interpreted as implicit waivers of immunity beyond the scope of the tribe's or corporation's intentions.

### "Sue or be Sued" Clauses.

Following the passage of the IRA, the federal government developed model charters for § 17 corporations to use in organizing, without much thought into individual needs of such tribal corporations. Many tribes adopted such charters without significant revision. Included in the standard charters was the general corporate power to "sue or be sued." The inclusion of this phrase

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<sup>1</sup> *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1968 (a waiver of immunity "cannot be implied but must be unequivocally expressed")); *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) ("Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereignty stood fast"). See also *Sanderlin v. Seminole Tribe*, 243 F.3d 1282 (11th Cir. 2001) (the taking of federal funds, even when accompanied by an agreement not to discriminate in violation of federal laws, did not necessarily effect a waiver of tribal immunity). But see *Del Hur, Inc. v. National Union Fire Ins. Co.*, 94 F.3d 548 (9th Cir. 1996) (in a case involving a HUD-required performance and payment bond executed by a contractor, holding that the lower court did have jurisdiction under §1352 because that statute grants federal courts concurrent jurisdiction over causes of action regarding a bond executed under any law of the United States and rejecting the surety's argument that §1352 grants federal court jurisdiction only when a bond is required by federal law).

<sup>2</sup> *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 118 S. Ct. 1700 (1998). See also *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489 (9th Cir. 2002); *Stock West Corp. v. Lujan*, 982 F.2d 1389 (9th Cir. 1993); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (8th Cir. 1998); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001); *Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *American Vantage Companies v. Table Mountain Rancheria*, 2005 WL 2048858, \*\*5-6 (August 26, 2005)(Cal. App. 5 Dist.). But see *Rush Creek Solutions, Inc. v. Ute Mt. Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004).

led to conflict in the courts as to whether tribes by those terms waived immunity, and indeed earlier courts found the clause to be a general waiver of sovereign immunity.<sup>3</sup>

In recent years, however, the trend has reversed, and most cases find the provision by itself provides no waiver.<sup>4</sup> For example, recently in *Sanchez v. Santa Ana Golf Club, Inc.*,<sup>5</sup> the plaintiff contended, in part, that the inclusion of a “sue or be sued” clause in the defendant’s corporate charter waived its immunity. The court concluded that it was not an express waiver because the charter mandated that the waiver be by resolution duly adopted by its board of directors. Absent such resolution, no waiver existed.

Earlier contrary cases have not been overruled, however, although the *Santa Ana* court distinguished most by those cases’ reference to an express waiver.<sup>6</sup> Therefore, if a “sue or be sued” clause is included in a tribal ordinance or charter, it would be wise to clarify how and to what extent any waiver will occur. It is certainly possible to write a waiver provision that cannot be read as a general waiver of the corporation’s immunity, and many tribes successfully do so, either by requiring the waiver to be in writing supported by a corporate resolution, by limiting the waiver to declaratory judgments or injunctions, or by limiting the waiver to a particular transaction, or to a sum specific (*e.g.*, not to exceed the cost of the contract or not to exceed the amount of insurance).<sup>7</sup> Tribes and

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<sup>3</sup> See, *e.g.*, *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (quoting with approval the sue or be sued clause at issue in *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff’d* 517 F.2d 508 (8th Cir. 1975); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (holding that tribal corporation waived immunity due to express provision within its charter allowing it to be sued in courts of competent jurisdiction); *Roberson v. Confederate Tribes of the Warm Springs Reservation of Oregon*, 1980 U.S. Dist. LEXIS 9991 (D. Or. 1980) (holding that, if a corporation is operated by a tribe in its government capacity, the corporation shares the tribe’s immunity. If, however it is organized as a § 17 corporation it is subject to suit by reason of the sue or be sued clause); *Martinez v. Southern Ute Tribe*, 374 P.2d 691, 693-94 (1962) (same).

<sup>4</sup> *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583-81 (8th Cir. 1998); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047 (E.D. Wis. 1999).

<sup>5</sup> *Sanchez v. Santa Ana Golf Club, Inc.*, 2005 NMCA 3, 104 P.3d 548 (N.M. Ct. App. 2004).

<sup>6</sup> The *Santa Ana* court similarly rejected any reliance on *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 420 (2001) for the proposition that immunity may be waived inadvertently. In *C&L Enterprises*, the court found an agreement to submit disputes to arbitration, to be bound by the arbitration award, and to have the award enforced in a court of law, was unambiguous and a clear waiver.

<sup>7</sup> Many contracts attempt to limit the jurisdiction of the court to hear the dispute, often by specifying that the matter has to be heard, for example, in tribal court or state court. However,

tribal corporations should be aware that the nature and the scope of their sovereignty may be challenged based on the language—or absence of it—and should therefore insist that all of their contracts, their tribal corporate laws, and their tribal charters deal expressly with the “sue or be sued” issue.

### **Arbitration/Dispute Resolution Provisions.**

Even with the “sue or be sued” issue resolved, tribes and tribal corporations must still face the waiver of tribal sovereign immunity. In 2000, the First Circuit, in a less-than-stellar opinion finding that federal question jurisdiction under 28 U.S.C. § 1331 allowed it to make decisions regarding the tribe’s jurisdiction, held that the “sue and be sued” language in the ordinance creating the tribal housing authority did not in and of itself waive the housing authority’s immunity; however, the arbitration provision was found to do so.<sup>8</sup>

Subsequently, in *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*,<sup>9</sup> in a more studied analysis, the United States Supreme Court was presented with the question of whether the tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with a contractor relating to the construction contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards in any court having jurisdiction thereof. The result dramatically changed the law on sovereign immunity.

The tribe in that case had entered into a contract with C&L Enterprises for the installation of a roof on a building owned by the tribe but located off-reservation. The construction contract was a standard form American Institute of Architects agreement, proposed by the tribe. After execution of the contract, but before C&L Enterprises began work on the project, the tribe obtained new bids for different roofing materials and hired a different company to install the roof. C&L Enterprises sought arbitration for breach of contract, and the tribe claimed it was immune from suit and refused to participate in the arbitration. The arbitrator found for C&L Enterprises.

On appeal, the Supreme Court recited the rule in *Kiowa*<sup>10</sup> that a tribe is not subject to suit in state court, even for breach of contract involving off-reservation commercial conduct, *unless it has waived its immunity*. It then held unanimously that the tribe had clearly waived its immunity from suit. Two provisions of the contract were key to this case. First, the contract contained an arbitration clause:

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parties do not have the power to convey or limit a court’s jurisdiction, that being accomplished solely by the legislation creating a court or controlling its powers.

<sup>8</sup> *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000).

<sup>9</sup> *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

<sup>10</sup> *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 118 S. Ct. 1700 (1998).

All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise . . . . The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Second, the contract included a choice-of-law clause that read: "The contract shall be governed by the law of the place where the Project is located."

The Court rejected the tribe's argument that the arbitration clause was a waiver of the parties' right to a court trial, not a waiver of immunity. Instead, the Court held that the arbitration clause demonstrated the parties' commitment to comply with the dispute resolution procedures, noting that the arbitration clause would be meaningless if it did not constitute a waiver of whatever immunity the tribe possessed.<sup>11</sup> Also rejected was the tribe's contention that a form contract designed for entities that were not sovereign and thus had no immunity to waive, could not be seen as a clear waiver. The court noted the common-law rule of contract interpretation, construing any ambiguous language against the drafter, but stated that rule was inapplicable in this case because the contract was not ambiguous.<sup>12</sup> The Supreme Court provided no predictable guidelines for interpreting whether a particular waiver has occurred if the contract language is not as clear as that in *C&L Enterprises*.

*C&L Enterprises* is the highest court's decision on this matter<sup>13</sup> and is helpful in that it provides an example of an arbitration provision that clearly is a waiver, but waivers of immunity and dispute resolution provisions in contracts vary in dozens of ways and must be reviewed very

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<sup>11</sup> *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411.

<sup>12</sup> *Id.* at 423.

<sup>13</sup> Conflicting holdings exist in several earlier lower federal court and state court cases. For example, the Seventh Circuit Court of Appeals, the Alaska Supreme Court, and the Arizona Court of Appeals all had precariously held that arbitration clauses expressly waived tribal immunity. See *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656 (7th Cir. 1996); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983); *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 703 P.2d 502 (Ariz. Ct. App. 1985) (same). The Ninth Circuit had disagreed. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (clause requiring arbitration of contractual disputes did not expressly waive tribe's immunity) The Eighth Circuit had held that an arbitration clause in a contract waives immunity for contractual claims under the contract, but not for any tort claims arising out of the same agreement. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. 1995). No cases on this subject have been decided yet by the Tenth Circuit.

carefully to ensure that the tribe's intentions concerning the nature and scope of its waiver are met. As a general rule, stated in *Kiowa*, state courts do not have jurisdiction to hear cases against tribes, and motions in state court to dismiss for lack of jurisdiction are generally successful. However, it is worth noting that many if not most states have laws that give their courts jurisdiction to review and/or enforce any arbitration decisions made in that state. Oklahoma did, and therefore Oklahoma state courts suddenly had jurisdiction that previously eluded them. This is potentially disastrous for two reasons for tribes which, in the past, had come to expect any cases against them to be heard in federal or, more commonly, tribal court. First, often tribes agree to arbitration provisions exactly because they believe such provisions are a way to keep them **out** of any court; instead, such provisions are now very likely to support jurisdiction for the first time in state courts, generally considered inimical to tribal interests. Second, more sophisticated tribes previously relaxed, knowing that they could not confer jurisdiction on state courts.<sup>14</sup> However, now when they agree to arbitration and enforcement in "any court of competent jurisdiction," they may be agreeing to enforcement in state court, a heretofore virtually unknown experience in non-P.L. 280 states.

Tribal sovereignty is now on the bargaining table. While tribes may or may not have the ability to reject arbitration provisions, they have lost some leverage. Given the common use of arbitration provisions in contracts past and present, *C & L Enterprises* has had and will continue to have a tremendous impact on the protection afforded by sovereign immunity. Yet even to this date—five years after *C & L Enterprises* was decided—tribes and tribal organizations continue to agree to and even aggressively insert arbitration provisions in their contracts, waiving immunity from suit and creating state court jurisdiction to decide their fate.

#### **Applicability of Sovereign Immunity to Officials.**

The issue of whether tribal officials are covered by tribal sovereign immunity is another unresolved area. Supreme Court in *dicta* in *Santa Clara Pueblo v. Martinez* suggested that a tribe's immunity does not extend to its tribal officers,<sup>15</sup> yet it found that § 1302 does not impliedly authorize actions for declaratory or injunctive relief over either the tribe or its officers.<sup>16</sup> Subsequently, in *Oklahoma Tax Comm'n*,<sup>17</sup> the Supreme Court stated that it has never held that officers of a tribe are immune from suit, though it has never held that they are not.

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<sup>14</sup> See n.6, *supra*.

<sup>15</sup> In *dicta*, the Supreme Court stated that the Pueblo's immunity did not extend to its Governor: "As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49.

<sup>16</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>17</sup> *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

The Tenth Circuit Court of Appeals declined to extend tribal immunity to officers when the law under which they acted is being questioned.<sup>18</sup> Courts within the Fifth Circuit Court<sup>19</sup> have held that "[w]hile the Tribe may enjoy sovereign immunity, as officers of the Tribe, the individual defendants do not share that immunity from suit in declaratory or injunctive actions."<sup>20</sup> Previously, in *Dauids*,<sup>21</sup> the court similarly found that tribal sovereign immunity did not bar injunctive and declaratory relief sought against members of a Tribal Council for violations of the Indian Gaming Regulatory Act ("IGRA"). However, the court noted that it must then determine if the tribal council members acted outside the scope of their authority, and, if so, whether the cause of action for declaratory and injunctive relief asserted was expressly or implicitly authorized by IGRA. The court held that, even assuming the tribal council members acted outside the scope of their authority, Congress had not chosen to authorize civil actions by private parties against tribal officers under IGRA.

Some federal circuits have extended tribal sovereign immunity to tribal officials under some circumstances. In *Linneen v. Gila River Indian Cmty.*,<sup>22</sup> the Ninth Circuit held that a tribe's sovereign immunity barred a suit for money damages brought against a tribe's governor and ranger by two non-Indian plaintiffs based on alleged unlawful detention. Citing *Santa Clara Pueblo* for the principle that tribes have long been recognized as possessing common law immunity from suit, the court noted that "[t]his immunity extends to tribal officials when acting in their official capacity and

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<sup>18</sup> See, e.g., *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572 (10th Cir. 1984). In *Tenneco Oil Company*, the tribe argued that a sovereign can act only through its agents and, thus, a suit against the agent is essentially a suit against the sovereign. The court noted that the tribe's reasoning had been followed, but only in cases where a tribe's power to perform the action at issue was unquestioned. 725 F.2d 572 (citing, e.g., *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 521 (D. Utah), *aff'd* and *remanded*, 671 F.2d 383 (10th Cir. Utah 1982)).

<sup>19</sup> The Fifth Circuit draws a distinction between actions for damages and suits for declaratory and injunctive relief, *Kiowa Tribe v. Manufacturing Techns., Inc.*, 523 U.S. 751 (1998).

<sup>20</sup> *Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes*, 78 F. Supp. 2d 589, 593 (E.D. Tex. 1999), *aff'd in part and rev'd in part*, 261 F.3d 567, 570 (5th Cir. 2001) (agreeing with the district court's ruling on the lack of immunity of tribal officers with respect to suits for declaratory or injunctive relief), *cert. denied*, *Ala. & Coushatta Indian Tribes v. Comstock Oil & Gas*, 535 U.S. 971 (2002): See also *T T E A v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999).

<sup>21</sup> *Dauids v. Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994).

<sup>22</sup> *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489 (9th Cir. 2002), *cert. denied*, 536 U.S. 939 (2002).

within the scope of their authority.”<sup>23</sup> Although this seems at potential odds with *Santa Clara Pueblo*, the Supreme Court denied the *writ of certiorari* in *Lineen*. The short opinion in the *Lineen* case simply explains that the suit arises from a tribal official’s alleged misconduct during his official duties as a tribal ranger on the tribe’s land and concludes that “Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer.”<sup>24</sup>

Other circuits also have extended tribal sovereign immunity to tribal officials with respect to damage suits filed against them in their official capacities if such officials did not act beyond the scope of their authority.<sup>25</sup> In *Bassett*, the court held that “a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe.”<sup>26</sup> The court further noted that a tribal official who also is sued in his “individual capacity” is only “‘stripped’ of tribal immunity when he acts ‘manifestly or palpably beyond his authority.’”<sup>27</sup> While the damages claims were barred, the court permitted suit to proceed against the tribal officials in their official capacities with respect to the requested injunctive relief for alleged ongoing violations of federal copyright law<sup>28</sup> (“[a] tribal officer is entitled to sovereign immunity if his actions are within the

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<sup>23</sup> *Linneen v. Gila River Indian Cmty., Supra.*. See also *Garcia v. Akwesasne Hous. Auth.*, 105 F. Supp. 2d 12 (N.D.N.Y. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (“tribal immunity protects tribal officials against claims in their official capacity”); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (holding that, when tribal officials act in their official capacity and within the scope of their authority they are immune from suit); *United States v. Oregon*, 657 F.2d 1009, 1012, n. 8 (9th Cir. 1981) (tribal immunity extends to tribal officials when acting within the scope of their authority); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (in a suit against the tribe and its officials for injunctive and declaratory relief as well as damages, ruling that “tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority”).

<sup>24</sup> *Linneen v. Gila River Indian Cmty., Supra.*.

<sup>25</sup> See, e.g., *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002).

<sup>26</sup> *Id.* at 280.

<sup>27</sup> *Id.* at 280 (citations deleted).

<sup>28</sup> *Id.* at 279. See also *Sulcer v. Davis*, 1993 U.S. App. LEXIS 3457 (10th Cir. Feb. 18, 1993). *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 (10th Cir. 1984) (McKay, J., concurring) (*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949)). Note that the decision expressly states that it “has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, *res judicata*, or collateral estoppel.”

scope of his authority”).<sup>29</sup>

In sum, there does not appear to be a clear consensus among courts about the application of *Santa Clara Pueblo*. Tribal officials, whether they be elected or appointed officers of the governing bodies, agencies, commissions, housing authorities, tribal councils, or just individual members of these governing bodies or executive agencies, may be at risk for suit, at least for injunctive and declaratory relief and possibly for damage suits, in their individual and official capacities. And, if sued, a court may or may not find that they are protected by the sovereign immunity of the tribe. Fortunately, it would seem that some circuits will apply immunity to officers sued in their official capacity who are acting within the scope of their authority, especially when a suit is for damages.

### **A Few Final Observations and Conclusions.**

Whether in the context of contractual relations, or in the context of Directors and Officers, tribes and tribal corporations need to be acutely aware that they may be unintentionally waiving their immunity, or that of their officials. Conversely, they may be relying upon immunity that may be non-existent. For this reason, they should know whether their Constitutions or Charters contain the “sue or be sued” provisions and what is needed to trigger such provisions and under what limited circumstances: an express writing, a resolution, an agreement to resolve the matter in a tribal forum, a limited type of cause of action (*e.g.*, declaratory judgment, injunction). More critically, if an arbitration provision is demanded, the tribal or corporate attorney should be asked for an opinion as to whether the provision 1) waives immunity, and 2) results in state court jurisdiction. If that is not the tribe’s/corporation’s intention, the decision should be made in advance in order to avoid the unexpected turn of events.

Similarly, with regard to corporations and boards in particular, the corporation and the board members should have a discussion about their needs and expectations. These intentions can then be included in the Charter, the Bylaws, or even a resolution, spelling out the duties and responsibilities on both sides, with a particular reference to the duties of care and loyalty. It should be clear when the corporation will discharge an officer or Director, when they will agree to release and indemnify them, and whether and under what circumstances insurance will be available to defend officers or Directors acting within the scope of their duty.

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<sup>29</sup> *Sulcer v. Citizens Band Potawatomi Indian Tribe*, 510 U.S. 870 (1993). *See also Tamiami Partners, Ltd. by & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212 (11th Cir. 1999). *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999).