

# SUED IN TRIBAL COURT?



## FIRST STEPS TO PREPARING A DEFENSE

Walter E. Stern Modrall Sperling

Imagine you are in-house counsel in the following scenario: Your phone at the office rings. You learn there is a process server waiting for you at the reception desk. Wondering why you are not getting the call or e-mail from CT Corporation, you head out to meet the person. To your surprise, the envelope includes a complaint naming your company as a defendant in a case filed in tribal court. What do you do next? Hint: Do not toss the complaint and related papers away. Tribal courts can exercise jurisdiction over non-Indian defendants in certain circumstances. Take the matter seriously.

Now that you are starting to recover from the initial shock of being sued in an unfamiliar jurisdiction, what then? Of course, every suit presents different challenges, and the strategy to plan and prepare a defense should be tailored to the specific circumstances. This article outlines some of the key steps necessary or appropriate to define certain key strategies and tactics that are presented in the context of suits in tribal courts. To some degree, we also address some of the considerations that may arise in any suit against an Indian tribe or tribal interest irrespective of the court in which the case may be filed.

Litigation in tribal courts or suits against Native American groups in the United States presents unique challenges for the trial lawyer. Many of those challenges arise from the quasi-sovereign status

of Indian tribes and other Native American groups. Since the 1820s and 1830s, when Chief Justice John Marshall defined the relationship between Indian tribes, the federal government, and the several states, Indian tribes have been understood to retain certain attributes of sovereignty. Those attributes or powers, however, are subservient to the plenary power of Congress. As Justice Marshall said, Indian tribes are “domestic dependent sovereigns.”

Over time, the federal courts and Congress have continued to define the scope of tribal powers and jurisdiction. Today, we have more guidance concerning the “rules of the road” relating to tribal authority over non-Indians; however, not all questions have been answered, and this area of the law continues to be an evolving one. As general counsel and outside lawyers, this is a source of frustration because often there are no clear-cut answers. For the same reason, this area of the law lends itself to thoughtful preparation and creativity in developing strategies to defend one’s position.

While generalizations can be dangerous, we recommend serious consideration of the following steps to inform how to proceed in the hypothetical scenario with which we started this article:

1. **Determine the Tribe’s status as a federally recognized tribe (or not):** There are roughly 565 tribes that have been

officially recognized by the federal government. There are many others not so recognized. Be sure that the tribe that has filed suit is federally recognized, or that the tribal court in which suit has been filed is associated with a federally recognized tribe. The current list of federally recognized Tribes can be found at 75 Fed. Reg. 60810 (October 1, 2010). Tribes not federally recognized should not have jurisdiction over you or your company. Nonetheless, as possible stakeholders in your company’s business activities it may be a better practice to contact the “Tribe” and its representatives to discuss the situation.

2. **Obtain and review the Tribe’s organic documents: constitution, tribal code (including any applicable jurisdictional and substantive law), tribal court rules, etc.:** Some of this material may be available on-line. This material can also be available at the tribe’s government offices, or at local law libraries as well. This information is critical in helping determine the scope of a tribe’s authority over non-Indians as a matter of tribal law, and in some cases as a matter of federal law. You may find that some tribal court organic documents provide that those courts have jurisdiction over internal tribal disputes only, such as do-

mestic relations issues between tribal members. Alternatively, you may find a relatively sophisticated court system with well defined rules and clear statements of jurisdictional authority.

There is also a wide variety of tribal websites available for review. The sites have a high degree of variability in what information is available, but it is useful to gather as much information as possible about the tribe, its governmental structure, its court system, and related subjects. Moreover, do not ignore information about its culture and history. If you end up needing to participate in hearings, that information may come in handy. (If you are reading this while considering a possible transaction on Indian lands, we recommend comprehensive research along these lines up front.)

3. **Determine whether any federal laws apply to the matter:** If Congress has acted, federal statutes may be controlling on a range of issues, including where disputes are to be presented, whether the tribe or tribal court has jurisdiction, and related subjects. In addition, there is a great deal of federal common law defining the scope of tribal jurisdiction over non-Indians or non-members. See Item No. 6 below.
4. **Investigate and determine the key jurisdictional and related facts giving rise to the case (a) personal injury/tort vs. (b) contract case.** This project could be slotted higher on the list, perhaps. If the suit arises from a contract, one should understand who the parties to the contract are, and what relationship the parties and the agreement have to the tribe and to the lands over which the tribe may have jurisdictional authority. Is the contract between your company and the tribe? Does it have a forum selection clause? Is there a choice of laws clause? If the suit is a personal injury case, where did the accident occur? Was it on a Reservation? What is the land status where the injury occurred – privately owned, tribally owned, held in trust by the United States for the tribe or an individual Indian? The answers to all of these questions (and others) will help inform the inquiry whether the tribe and its tribal court would have jurisdiction over your company.
5. **Retain experts as necessary concerning jurisdictional issues (historians, demographers, etc.):** Often jurisdictional disputes require collection and analysis of a range of historical, demographic and related information in order to assess whether a tribe and its courts have jurisdiction. The analysis of a tribe's power usually does not end with the language of a statute or treaty. Contemporaneous interpretations and subsequent history may be considered relevant as well. Historians with experience in working with the National Archives and Federal Records Centers can bring good value where there may be ambiguities concerning the geographical extent of a tribe's powers. Similarly, because settlement patterns of tribal members and non-Indians can be relevant to determining jurisdictional questions, demographers, sociologists, and similar experts may provide useful data as well.
6. **Evaluate the facts in light of applicable federal and tribal law to determine whether the tribe or its court has jurisdiction under applicable Supreme Court and other applicable authority:** While Supreme Court doctrine often requires exhaustion of tribal judicial or administrative remedies in the first instance, exhaustion is not always required. In some circumstances, the best defense may be taking the offensive and filing a declaratory judgment action in federal court seeking a declaration that the tribal court lacks jurisdiction. *Montana v. United States*, 450 U.S. 544 (1981), has been described by Justice Ginsberg as the "pathmarking" case in seeking to define whether an Indian tribe has jurisdiction over non-Indians. While there are nuances to the rule, under *Montana*, tribes generally lack jurisdiction over non-Indians operating on private lands even within reservations unless (a) the non-Indian has a consensual relationship with the tribe or its members, or (b) the non-Indian's activities threaten the economic existence, political integrity, or health and welfare of the tribe or its members. These exceptions are ordinarily narrowly defined.
7. **Assess whether the tribal forum is the appropriate one, relative to (a) arbitration or forum selection clauses in contracts; (b) state or federal court options:** If your case is a contract case, or arises in some measure from a contractual relationship, the relevant contract may have forum selection and choice of law provisions that apply. Scrutinize the agreement to determine whether it includes such direction.
8. **Formulate strategy and implement:** Your research and investigation may lead to a strategy to file suit in federal court to avoid the necessity of proceeding in tribal court. Alternatively, you may determine that the best course is to proceed initially in tribal court, with the possibility that, after exhausting tribal remedies, federal court review may be necessary. If you find that starting in tribal court is the right approach, remember to treat the tribunal with respect, make your record from the beginning with your pleadings, in the jury selection process (*e.g.*, is the jury limited to tribal members?), and through trial and any tribal court appeals. While there are no "appeals" from tribal court to federal court, a federal court likely will review the record developed in tribal court should you seek federal court intervention to set aside a tribal court judgment for lack of jurisdiction. Of course, you may also find that tribal judges are as effective and thoughtful as judges in other jurisdictions.

Now you know just enough to be dangerous, but we hope that this provides a flavor for the challenges of defending oneself in tribal court. In some measure, it can be like a home court advantage for your adversary, but there are unique challenges as well. Good luck!



Walter Stern is a shareholder at Modrall Sperling, ([www.modrallsperling.com](http://www.modrallsperling.com)) a New Mexico based law firm serving local, national and multinational clients with responsive, efficient and creative counsel.

Walter has over thirty years of experience in providing representation, advice and counsel to businesses and individuals in their dealings with Indian Tribes, and public land management agencies. Walter's practice is focused on natural resources, energy and environmental law.

Walter thanks Lynn Slade, his co-chair of Modrall Sperling's Indian Law Practice Group, for editorial support.