

DOING BUSINESS IN INDIAN COUNTRY

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This paper sets forth some of the issues to be considered and addressed when entering into a commercial transaction with a federally recognized Indian tribe or tribal entity, a tribally-controlled business enterprise or an Indian-owned, reservation-based business enterprise. This paper deals only with issues of federal law relating specifically to Indian tribes and tribal entities and does not attempt to address considerations relating to general federal laws or regulations regarding interstate commerce or the laws, ordinances or resolutions of particular tribes. These sources should be consulted in each case before entering into any commercial transaction with a tribal enterprise.

The discussion in this paper will be focused on transactions with tribes or with business enterprises being conducted, directly or indirectly, by tribes. Commercial transactions with Indian-owned, reservation based business enterprises give rise to many of the same legal considerations; this paper will note where they differ from the tribal transaction.

1. Organization of an Indian Tribe.

Prior to entering into a transaction with a tribal enterprise, it is essential that one understand the governmental organization of the tribe. Indian tribes are organized in different ways. The method of a tribe's organization affects how powers are distributed, who can act for the tribe, and what, if any, approvals may be necessary in order to carry out a transaction.

If a tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. Section 461, et seq. (the IRA) the tribe will be governed by a Constitution adopted under Section 16 of the IRA, 25 U.S.C. Section 476. The Constitution will normally describe the governing body of the tribe and set forth the powers and authority that the governing body has. It may grant to the governing body all power and authority to adopt legislation and carry on the activities of the tribe or it may reserve some or all of the powers to the adult members of the tribe as a whole (often referred to as the General Council).

Any tribe, whether or not organized under Section 16 of the IRA, may also be incorporated under Section 17 of the IRA, 25 U.S.C. Section 477, whereupon it will also have a charter issued by the Secretary of the Interior. Incorporation is significant in that it creates a separate, somewhat parallel legal entity with respect to which the powers to contract, to pledge assets and to be sued may differ from the governmental entity. The Constitution (for an IRA tribe) or tribal law (for a non-IRA tribe) and the charter will sometimes draw distinctions between the governmental entity (organized under the Constitution or tribal law) and the business entity (organized under the charter) in terms of the responsibility for carrying out certain functions. A

Section 17 corporation may be used by a tribe as its vehicle for carrying out business activities, as discussed in more detail in Section 2, below. Actions of the Section 17 corporation may require approvals by the governing body of the tribe or, again, by the General Council.

Many tribes are not organized under the IRA. In those cases, the tribe's governing instruments may consist of tribal history, ordinances, resolutions or other actions. These must be reviewed carefully in order to determine the identity of the governing body, the powers which that governing body has and the extent to which powers are reserved to the member of the tribe as a whole.

2. Business Organization.

Tribes can carry out business activities through many vehicles, the most common being the governmental entity itself or an instrumentality of the government, a Section 17 corporation or a corporation, partnership or other entity created by tribal or state law. The nature of the entity with whom one is dealing affects the legal rights and remedies available to the non-Indian party.

A. Government or Governmental Instrumentality. Tribal governments and their governmental instrumentalities (e.g., housing authorities, utility commissions, land commissions) contract directly for goods and services. In these cases, the issues of governmental organization and who may act to bind the governmental entity are paramount. In addition, the sovereign immunity, court jurisdiction and remedy issues discussed below are most clearly present.

B. Section 17 Corporations. A tribe that has established a Section 17 corporation may have transferred to that entity some or all of the responsibilities of carrying out tribal business activities. Many Section 17 corporations exist, but most have been inactive since creation. This is the result of the use, in the early years after passage of the IRA, of standard form corporate charters promulgated by the Bureau of Indian Affairs that were quite restrictive in what a Section 17 corporation could do and quite expansive in the oversight and approval powers granted to the Secretary of the Interior. The restrictive nature of the BIA-generated charters is not required by the statute, and some tribes have adopted new charters for their Section 17 corporations that are designed to make those entities useful tools for tribal business activity.

Much as a state-chartered corporation's articles of incorporation and bylaws spells out the corporation's authorized purposes and its method of acting, a Section 17 charter will spell out the authorized purposes of the Section 17 corporation, its ability to borrow money, to encumber its assets, to sue and be sued and to waive its sovereign immunity, and how autonomous it is from tribal governmental control. When dealing with a Section 17 corporation, it is essential to review the charter provisions, and any bylaws of the corporation, to determine any limits on the corporation's powers to act, who can act for the corporation, the extent to which corporate action must be approved either by tribal government or the Secretary of the Interior, the extent to which assets of the corporation can be used as collateral to secure corporate obligations, whether the corporation enjoys sovereign immunity and the ability of the corporation to waive sovereign immunity.

Some of the laws affecting dealings with tribes directly do not apply to transactions with a Section 17 corporation. Those differences will be noted below.

C. Tribally or State Chartered Business Entities. In several cases, tribes have formed corporations or other legal entities organized under tribal or state law, rather than Section 17 of the IRA, to conduct business operations. In these instances, it is necessary to examine the charter, bylaws or other organizational documents of the entity in question as well as the state or tribal laws, ordinances or resolutions under which it is organized.

If the entity is created under tribal law, the tribe will probably have enacted a corporation code or some similar tribal statute or ordinance governing the ability of tribal corporations to be formed, the procedures to be followed, and the powers and immunities of tribal corporations. Tribal law may distinguish between tribal corporations owned by the tribe itself (which then serve as vehicles for tribal business activity) and tribal corporations wholly or partially owned by tribal members. In the case of tribally-owned tribal corporations, the corporation may share in the sovereign immunity and other privileges of the tribe itself, the powers of the corporation to sue and be sued may be restricted, and the tribal government may exercise some oversight and control. In the case of individually-owned tribal corporations, sovereign immunity may not be present but tribal law may specify the forum in which it may be sued. Thus, when entering into a business transaction with a tribally created entity, one must perform the necessary investigation and review of organizational documents, including authorizing resolutions of all governmental and business entities involved, to ensure that the entity with whom you are contracting is properly organized and is acting within its power and that all necessary steps have been taken to approve and authorize the execution, delivery and performance of the contract by the tribal entity.

If the entity is created under state law, the general laws of the state will apply. A corporation created under state law is a creature of the state, notwithstanding the fact that the owners of the corporation may be a tribe or tribal members. Thus, the corporation may be sued in state courts as may any other state-created entity and judgment may be obtained against corporate assets. See, *Airvator, Inc. v. Turtle Mountain Manufacturing Company*, 329 N.W. 2d 596 (N.D., 1983); see generally, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 edition, pages 355-356. However, actions against the corporate owners (in an attempt to pierce the corporate veil) would be subjected to the same defenses those owners would have if sued in other situations. For these reasons (as well as for tax considerations), tribes and tribal members generally find the use of state-chartered entities not as desirable as entities created under tribal law.

3. Reservation or Trust Land.

Title to reservation lands is generally held by the United States of America in trust for the tribe. Under applicable federal law, such tribal trust lands generally may not be sold, taxed or encumbered. It is possible, with the approval of the BIA, for a tribe to lease tribal trust lands (for example, to a tribal entity or tribal member for business or residential purposes or to a non-tribal

party for business purposes) and for the lessee to grant a leasehold mortgage on his leasehold interest; this approach can give a lender the right, upon a default, to exercise dominion and control over the land in question for the remaining term of the underlying lease. Such leases, by federal regulation, are generally limited to a term of 25 years with the right to grant one renewal option for an additional 25 years. With respect to certain reservations, such leases may have a term of up to 99 years.

Land held in trust for individual Indians, or land held in restricted fee status by individual Indians, cannot be sold, mortgaged or encumbered without the approval of the Secretary of the Interior.

Determination of the trust status of particular lands involves reviewing treaties, Acts of Congress, Secretarial proclamations, title records maintained by the Land Titles and Records Offices of the Bureau of Indian Affairs and other documents.

4. Power to Contract; Federal Approval.

Under 25 U.S.C. Section 81, no contract with any Indian tribe that encumbers, for a period of 7 or more years, lands held by the United States in trust for the tribe, or lands held by the tribe subject to a federal restriction against alienation, is valid unless the contract bears the approval of the Secretary of the Interior or his designee. Such approval is usually obtained from the Area Director of the BIA Area Office having jurisdiction over the reservation or trust land involved. Violation of the Section 81 approval requirement renders the contract in question null and void. The Secretary was required to issue regulations in late 2000 identifying types of contracts that are not covered under Section 81 but, as of the date of this writing, has not done so.

Leases of trust lands, and mortgages of the resulting leasehold estate, require approval of the Secretary under 25 U.S.C. Section 415 and the related regulations separate and apart from Section 81.

As discussed at point 5, below, Indian tribes are immune from suit unless either they or the Congress expressly waive that immunity. Contracts that are within the scope of Section 81 must, to be approved, either (a) provide for remedies in the case of a breach of the agreement or contract, (b) reference a tribal code, ordinance, or court ruling that discloses the right of the tribe to assert sovereign immunity as a defense in an action brought against the tribe, or (c) include an express waiver of the right of the tribe to assert sovereign immunity as a defense in an action brought against the tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

The Section 81 approval requirement does not apply to contracts with a Section 17 tribal corporation. See, Opinion of the Solicitor of the Department of the Interior M-36119, February 14, 1952. For the same reason, Section 81 approval should not be required with respect to a tribally-chartered corporation, whether it is owned by the tribe itself or by tribal members.

5. Sovereign Immunity.

Indian tribes enjoy sovereign immunity from suit similar to that of the United States. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). See generally, COHEN at 324 to 328. Unlike the concept of sovereign immunity of states and local governments, which has been greatly eroded by the courts and by legislative action, the sovereign immunity of tribes is robust and almost uniformly upheld by the courts.

The United States Supreme Court has held that the sovereign immunity of tribes may be waived by Congress. The Supreme Court has ruled that an Indian tribe has the power to waive its sovereign immunity from suit, provided that such waiver is clear, explicit and unambiguous. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). To maximize the likelihood that a waiver of sovereign immunity will be enforced by the courts, the waiver should be limited to specific assets of the tribe or tribal entity, and those assets should be expressly pledged or made available to satisfy claims growing out of the transaction.

A number of tribes, however, regard the assertion of their sovereign immunity as an essential feature of their sovereign status, and are no more willing to waive that immunity than they are to sell tribal land. Thus, it often is necessary to find a middle ground -- one that respects the tribe's sovereign status yet assures the non-Indian party that he will be able to enforce the terms of the contract if that becomes necessary.

A tribe that has incorporated under Section 17 of the IRA or has formed a corporation under state or tribal law has created a separate legal entity which, under applicable authorities, may have broader power to sue and be sued. If the entity involved is wholly-owned by the tribe, the tribe's sovereign immunity may well extend to that entity; an examination of the tribe's Section 17 charter or other organizational documents and governing statutes, ordinances or resolutions, as discussed above, would be necessary in order to determine the extent of immunity and the power to sue and be sued. If the entity is individually-owned, it is unlikely that it would have sovereign immunity; sovereign immunity is an attribute of a tribe itself, not of individual members of a tribe.

In all cases, a party dealing with a tribal entity must identify the assets to which it wants recourse in the event of a default, determine which legal entities have or may have control over those assets and obtain effective waivers of sovereign immunity from all such entities, tied specifically to the assets so identified. As a part of this process, one should conduct appropriate inquiries to determine the extent to which such assets may have been pledged or set aside to secure other obligations of the tribe.

6. Court Jurisdiction.

A. *Federal Courts.* Federal courts are courts of limited jurisdiction. The parties to a contract cannot, by agreement, give a federal court jurisdiction over a matter (“subject matter jurisdiction”). With the exception of certain specific jurisdictional grants regarding land (e.g., 25 U.S.C. Sections 345, 346; 28 U.S.C. Section 1353) civil rights (e.g., 28 U.S.C. Section 1343), and other matters, federal court jurisdiction must be established by showing that the case presents a federal question (28 U.S.C. Section 1331) or is based on the diversity of state citizenship (28 U.S.C. Section 1332). See, *Weeks Construction*, supra.

It is unlikely that most disputes or remedial actions arising under business transactions with tribes or tribal entities will present a federal question. Therefore, that method for obtaining federal court jurisdiction would not usually be available.

Diversity jurisdiction is not available to an in-state plaintiff, and may not be available to an out-of-state plaintiff in an action involving an Indian tribe. An Indian tribe “is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction.” *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Circuit, 1974); *Gaines v. Ski Apache*, 8 F.3d 726 (10th Circuit, 1993). The same would hold true for a tribal enterprise that does not have a separate legal existence; a tribally or state-chartered corporation would be subject to the normal rules. *Gaines*. Individual Indians born in the United States are United States citizens (8 U.S.C. Section 1401b) and citizens of the state in which they reside (United States Constitution, Amendment XIV, Section 1).

B. *State Court.* Under *Williams v. Lee*, 358 U.S. 217 (1959), state courts lack subject matter jurisdiction over suits brought by non-Indians against Indians with respect to matters arising in Indian country when such jurisdiction would infringe “on the right of reservation Indians to make their own laws and be governed by them.” Thus, as a matter of federal law, state courts are without jurisdiction to hear lawsuits brought by non-Indians against tribes, tribally-created entities and reservation Indians with respect to transactions arising on a reservation. (This rule should not bar suits in state court against state-chartered entities, even if owned by tribes or tribal members.) An exception to this lack of jurisdiction, applicable to suits with respect to most reservations in the States of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, as well as certain Indian lands in certain other states, is Public Law 280; 28 U.S.C. § 1360.

Public Law 280 reads, in relevant part: “Each of the States listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed ... to the same extent that such State has jurisdiction over other civil causes of action ...”. 28 U.S.C. Section 1360(a). Thus, a state court in a Public Law 280 state may exercise civil adjudicatory jurisdiction over a matter that arises within Indian country to the same extent it would otherwise have jurisdiction over the same civil action not involving Indians or Indian matters. Public Law 280 expressly provides, however, that nothing in the statute confers jurisdiction upon state courts “to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [trust] property or any interest therein. 28 U.S.C. Section 1360(b).

In order to avoid the effect of *Williams v. Lee*, non-Indian parties have tried to take steps that would bolster the contention that the transaction in question did not “arise on” the reservation. Those steps (e.g., having the contract documents signed off of the reservation, delivering the goods in question off of the reservation) are of questionable effectiveness.

C. *Tribal Court*. Many tribes have established tribal courts, which may be courts of general or of limited jurisdiction. If a tribal court has jurisdiction over a case or controversy, federal and state courts with jurisdiction will often abstain until the tribal court proceedings have concluded. See, *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9 (1987); *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998); *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379 (Minn.App. 1995)). Thus, it is quite likely that, if the tribe has an established, functioning tribal court, that is the court which will have subject matter jurisdiction, in the first instance, over any suit to enforce a reservation-related contract, regardless of whether a federal court would also have jurisdiction or a state court would have jurisdiction under Public Law 280.

D. *Subject Matter Jurisdiction, Personal Jurisdiction and Immunity*. The foregoing discussion only addresses the question of which court or courts would have subject matter jurisdiction over a cause of action brought against a tribe or a tribal entity to enforce a contract. The fact that a court may have subject matter jurisdiction does not mean that court has personal jurisdiction over the tribe or tribal entity. Personal jurisdiction requires an effective waiver of sovereign immunity, as discussed in point 5, above. Thus, unless the organizational documents of the tribal entity waive the immunity of the entity at the outset, it is essential that a contractual waiver be obtained, even if limited in scope.

E. *Contractual Forum Selection Provisions*. Some non-Indian parties insist that their contracts with tribal entities contain waivers of tribal court jurisdiction or agreements to submit disputes to federal or state courts. These provisions are unenforceable in at least some instances and will almost certainly be viewed as offensive by tribes with functioning court systems. A balanced approach requires review of the make-up, operation, organization, powers, procedures and historical performance of each tribal court to evaluate its suitability as a forum for dispute resolution. If the non-Indian party is unwilling to submit the resolution of disputes to tribal court, an ordinance or resolution of the tribal government may be necessary to remove the contract at issue from the tribal court’s jurisdiction. This approach must be taken with caution, however, not only because of the resentment that it is likely to generate but also because it might result in no forum having jurisdiction to decide disputes under the contract. Indeed, some tribes insist that their contracts contain an agreement that any dispute or enforcement action be brought in tribal court. In most instances, tribes are unwilling to submit their disputes to the jurisdiction of state courts, and, as discussed above, federal courts are often without jurisdiction in contract enforcement actions. In practice, an agreement to submit to binding arbitration is often a mutually agreeable alternative to court proceedings, although it would still be necessary to resort to a court in order to enforce the agreement to arbitrate and any resulting arbitration award.

7. Judgment and Remedies.

The extent to which a creditor (secured or unsecured) of an Indian tribe can execute against tribal property is limited by the extent of the tribe's waiver of sovereign immunity with respect to the matter. Section 16 of the IRA authorizes an IRA tribe to include provisions in its Constitution "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the Tribe." Accordingly, in order to enforce a judgment, lien or right of repossession against assets belonging to or in the possession of an IRA tribe, the tribe must first have waived its sovereign immunity with respect to such action and have pledged such assets to the satisfaction of such claim, thus permitting the creditor's remedies to be exercised against them. This same issue is present in transactions with a Section 17 corporation; the extent to which a creditor may exercise remedies against corporate assets is often limited by the terms of the Section 17 charter (particularly in the earlier charters). With respect to actions against tribally-created entities, one must consult both tribal law and the entity's organizational instruments.

The extent to which particular remedies may be available to a creditor -- including, particularly, the right of repossession of property -- is often a matter of tribal law. See, *Babbitt Ford Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Circuit, 1983). Tribal law must be consulted and, in some cases, new ordinances or resolutions must be drafted and enacted by the tribal government, in order to ensure that the desired remedies are, in fact, available. In many instances, legal remedies drafted into a contract can be given the force of law by the adoption of an ordinance or resolution specifically affirming the enforceability of the contract in accordance with its terms as a matter of tribal law. This approach may not always be adequate to address matters affecting the rights of third parties, such as perfection and priority of security interests, and it may be necessary to have the tribe adopt an ordinance, probably closely patterned after certain provisions of the Uniform Commercial Code, addressing these concerns in a way that will establish the perfection, and protect the priority, of a secured party's security interest vis-a-vis other claimants of interests in or liens against the same property.

In the end, it is important, upon entering into the transaction, for the parties to consider how, and against what assets, recourse will be available in the event of a default and to ensure that the necessary tribal and contractual vehicles for achieving the desired ends are in place.

8. Governing Substantive Law.

State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply. See, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1983). See generally, COHEN at 273. Public Law 280, discussed in paragraph 6.B above, is an example of such Congressional action. Public Law 280 applies only in certain jurisdictions and there is considerable uncertainty regarding its scope even in those jurisdictions, particularly as it relates to tribal entities.

There is no body of general, substantive federal law similar to the Uniform Commercial Code governing private equipment sales, leasing and financing agreements with Indian tribes. Although contracts might be drafted to provide that state law governs the rights and obligations of the parties, such provisions may be unenforceable, particularly with respect to remedies against collateral located on a reservation, and offer no protection against third-party claims to the collateral. It is probable that tribal law will ultimately be found controlling, notwithstanding contrary contractual language. The prudent course, therefore, is to ensure, prior to entering into a business transaction, that tribal legislation is in force adequate to protect each party's interests as a matter of tribal law. This legislation could take the form of the adoption of state substantive law -- including the Uniform Commercial Code -- as positive tribal law. Such law can then be specifically identified in the contract as the governing law, thus eliminating much uncertainty.

9. Financing Concerns

With the recent dramatic increase in income and economic activity on many Indian reservations brought about, in part, by the expansion of Indian gaming, many institutional lenders are becoming more interested in, and knowledgeable about, financing Indian enterprises. While the legal complexities are significant, they are by no means insurmountable, as evidenced by the number of casino construction and expansion projects recently completed or now underway on reservations throughout the country.

A large potential lending market exists which could accommodate the financing of business activities by tribe and tribal entities. The key to success in obtaining financing lies, in part, in convincing lenders of the ability of the parties, both Indian and non-Indian, to identify and deal effectively with the legal issues and circumstances which make business transactions with an Indian tribe or tribal entity different from off-reservation transactions.

CONCLUSION

The foregoing is only a brief summary of some of the major issues involved in entering into business transactions with tribes and tribal entities. The author would be most interested in discussing particular issues, or issues that people have encountered that are not discussed herein, relating to business transactions with tribes and tribal entities.