GAMING TRANSACTIONS IN INDIAN COUNTRY: A ROUGH GUIDE FOR ROUGH TIMES

By Gabriel S. Galanda and Anthony S. Broadman

Late last year, when it appeared to Wells Fargo that the Lac du Flambeau Band of Lake Superior Chippewa Indians wasn't going to timely pay interest and principal on $46.6 million in bonds it had issued, the bank went to court. Instead of coming away with a receiver and its money, Wells Fargo learned from a federal judge in Wisconsin that the contract on which it was suing was entirely "void" since it was a "management contract" that had not been submitted to the National Indian Gaming Commission (NIGC) for approval.

In essence, the court held that the failure of lawyers to get a contract approved by the federal government meant that Wells Fargo was owed $0 instead of $46.6 million. This was an impressively bad result for the entire Indian gaming industry, as it could further chill tribal commercial financing opportunities or other private investment in tribal governmental gaming enterprises, illustrating the absolute necessity for attention to the federal and tribal laws affecting gaming-related transactions in Indian country. Even in a healthy economy, the doctrines discussed below are required knowledge for tribal governmental gaming decision makers and the non-tribal industry with which they deal.

Sovereignty

Indian law begins and ends with tribal sovereignty. Financially, it protects tribal assets. Culturally, it is the most tangible expression of what it means to be a tribe. Politically, it is the strongest shield available to tribal governments. When you first see an Indian law question, ask yourself if sovereignty bears the answer. Put one way, tribes can "make their own laws and be ruled by them."[1] Put another, tribes can only be sued if Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity.[2]

Tribal immunity generally extends to tribal officials in their official capacity and tribal businesses within and beyond the boundaries of the tribe's reservation. Although the U.S. Supreme

Court has lowered the bar for a clear waiver of immunity,[3] recognize that unless a tribe has clearly waived its immunity in a particular contract, it probably hasn't consented to suit.

Lawyers cannot underestimate the cultural and political significance of immunity waivers. That said, some tribes have made limited waivers in exchange for appropriately invaluable contract terms. When determining whether a tribal client has waived its immunity in a given scenario, review every piece of paper related to the transaction—tribal council actions, corollary contracts, the organic documents of the tribal entity itself, etc. You can be sure that a party attempting to prove the existence of a waiver will have been at least as thorough.

Tribal Corporations

Understand exactly which tribal entity is behind the casino in question. Indian tribes have been organized and have organized themselves differently. Many gaming tribes are organized pursuant to a treaty with the United States. Others are organized pursuant to an executive order. Still others are organized pursuant to the Indian Reorganization Act of 1934 (IRA), which contemplates two main tribal structures. A tribe organized under Section 16 of the IRA adopted a constitution and bylaws that set forth the tribe's governmental framework. Under Section 17 of IRA, the Secretary of Interior issues the tribe a federal charter under which the tribe creates a separate legal entity, essentially dividing its governmental and business activities. The Section 17 corporation has familiar corporate elements: articles of incorporation and bylaws that identify its purpose, much like a state-chartered corporation.

In addition, a tribal corporation may have been organized under tribal or state law to run the casino. If the entity was formed under tribal law, the tribe will have done so pursuant to its corporate code. Under federal Indian jurisprudence, the corporation likely enjoys immunity from suit, as discussed above. If the entity was created under state law, however, the tribal corporation exists as a state entity and state law governs the corporation and its activity. However, it does not necessarily follow that a state-chartered tribal corporation may be sued in state court, as a state-incorporated tribal corporation may still enjoy the protections of sovereign immunity.

When the status of a tribal party is unclear, turn to its own governing documents and the associated tribe's law. Get your hands on and read the treaty, executive order, constitution and bylaws, federal charter, operating agreement, etc. There you can identify exactly what type of entity you are representing or engaging.

Actual Authority

Like their state and federal counterparts, tribal governments may be bound only through valid exercises of actual authority. This element is particularly important when you are forced to look back at the early days of a casino. If authority was unclear at the initiation of a tribe's gaming operation, contracts signed by improper parties may fail if examined closely.

This doctrine is of the utmost importance: If governments—tribal or otherwise—could be contractually bound by anything less than an agent acting with actual authority, they would likely find themselves quickly penniless. This is particularly true of tribal governments, which often lack a tax base.

Practically, this requires attorneys to understand what, under tribal law, constitutes actual authority. For many tribes, the tribe's governing council must either authorize an individual officer to take specific actions or take the action itself.

Authority is most crucial in the immunity-waiver context. Tribal law, whether in resolution, statute or ordinance form, dictates how a proper waiver may be made. As with failures to secure valid waivers of immunity, contracting with an agent of a tribal government contract party, rather than the government itself, presents substantial risk for the unwary.

Tribal Jurisdiction

Indian tribes have regulatory authority over tribal members and non-members on Indian land.[4] Within the boundaries of reservations and on trust lands, tribes can tax and regulate like any other government.[5] Some states are subject to Public Law 280. Although "P.L. 280" makes state laws applicable to some on-reservation lawsuits, a state's assertion of jurisdiction under it is arguably concurrent with tribal law and does not divest tribal courts of power to hear cases appropriately before them.[6] In addition, some courts give tribal court decisions full faith and credit.[7]

In general, under *Montana v. U.S.*, tribes can only assert jurisdiction over non-Indians in Indian country if the non-member has entered into a consensual relationship with the tribe or its members or partaken in conduct that threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe.[8]

In *Nevada v. Hicks*,[9] the Supreme Court noted that it has "never held that a tribal court had jurisdiction over a non-member defendant" and admitted avoiding the question of whether tribes may generally adjudicate claims against non-Indians arising from on-reservation transactions.[10] In June, the court held that a tribal court did not have jurisdiction to adjudicate a discrimination claim brought by tribal members against a non-Indian bank concerning the bank's sale of fee land the tribal members had mortgaged to the bank. The court's decision suggests that the *Montana* consensual relationship exception does not extend, without more, to disputes over the sales of tribally-owned fee land within a reservation.[11]

In many cases, tribal regulatory authority extends to gaming conducted on tribal lands. Even under compacts with the state, some tribes are the primary regulators of gaming in tribal casinos. Even where the state was given some authority under compact to additionally ensure the integrity of play, its reach is limited because of the absolute prohibition of taxes on tribal gaming operations—through tribes or the vendors who serve them.

Tribal Court Exhaustion

Where a tribal court has jurisdiction over a non-Indian party to a civil proceeding, the party is required to exhaust all remedies in the tribal court prior to challenging tribal jurisdiction in federal district court.[12] Tribal courts should make the first determination regarding the scope of their jurisdiction.[13]

As a result, even where federal court jurisdiction exists over a case involving tribal court jurisdiction, "a federal court should stay its hand until after the tribal court has had a full opportunity to determine its own jurisdiction."[14] Once a tribal court determines it has jurisdiction, it will likely determine the case. A party challenging tribal court jurisdiction would then likely file suit in federal court, where that court will review *de novo* the federal question of tribal jurisdiction. Despite the *de novo* standard, the tribal court's decision "guides" the federal court's determination regarding whether the tribal court had jurisdiction.

Notwithstanding apparently clear rules, several exceptions to the exhaustion requirement exist. Where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith … or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction"[15] or "when … it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," exhaustion serves "no purpose other than delay."[16]

A party to litigation attempting to force its case into federal court, or keep a matter in tribal hands, would do well to explore the fact-based inquiries courts have used to determine when exhaustion is and is not necessary.

Section 81/415 Approval

If litigation involves an encumbrance of Indian lands for a period of seven or more years, ensure that such encumbrance was approved by the Secretary of the Interior.[17] Since 2000, revisions to "Section 81" have prevented the secretary from approving any such contract or agreement if the document does not set forth the parties' remedies in the event of a breach, disclose that the tribe can assert sovereign immunity as a defense in any action brought against it, or include an express waiver of tribal immunity. Leases of restricted lands also require Secretarial approval.[18]

Any contract touching tribal land—especially those dealing with physical plants of gaming operations—should be run through the Section 81 and 415 calculus. Contracts that have not been approved by the Secretary of the Interior, but should have been, may be null and void.

NIGC Approval of Management Contracts

As illustrated by Wells Fargo's fomenting federal court dispute with the Lac Du Flambeau Tribe, contracts with Indian tribes to manage gaming operations, or which operate or could be construed to confer management rights to the contractor (or financier), must be approved by the NIGC chairman.[19] Without approval, management contracts can be rendered null and void *ab initio,* meaning that any tribal sovereign immunity waiver in the agreement(s) in question could also be invalidated and as such, the agreement(s) rendered totally unenforceable.

Among other things, the Indian Gaming Regulatory Act of 1988 permits tribes to enter into management contracts for the operation and management of gaming facilities, subject to the approval by the chairman of the NIGC.[20] But the chairman cannot approve a contract unless it provides an "agreed ceiling for the repayment of development and construction costs"[21] and a "representation that the contract as submitted … is the entirety of the agreement among the parties."[22]

Several other requirements must be met, including NEPA compliance and certain fee justifications. As an indication of how complex the review process can be, since 1993 the NIGC has approved more than 50 management contracts. Presumably, lawyers representing clients pursuing management contracts will familiarize themselves with the often lengthy administrative approval process. Those who don't may find the approval process disappointingly brief.

Final Thoughts

Until (and after) gaming and the economy return to their winning ways, be prepared to confront the issues above when dealing with contract law in Indian country. If you understand the application of these doctrines, you know at least when to seek help. The law of Indian gaming marries two of the most dynamic areas of practice. Those who immerse themselves in it know that there are no straightforward applications of any of the general rules. Rather, often arbitrary nuances dictate outcomes. However, through meticulous study of the law surrounding sovereignty, jurisdiction and the other issues outlined above, gaming decision makers can greatly improve their odds of success in Indian country.

Note: The authors made reference to the Tribal Court Litigation Chapter to the Annual Review of Development in Business and Corporate Litigation (2008 ed.), co-authored by Heidi McNeil Staudenmaier and Gabriel S. Galanda.

1 *Williams v. Lee*, 358 U.S. 217, 220 (1959).

2 *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998).

3 *C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001)

4 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (power to tax transactions on trust lands).

5 *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001).

6 See Vanessa J. Jimenez & Soo C. Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 AM. U. L. REV. 1627 (1998).

7 CR 82.5; In re Adoption of Buehl, 87 Wn.2d 649 (1976).

8 *Montana v. U.S.*, 450 U.S. 544 (1981).

9 Nevada, 533 U.S. 353 (2001).

10 Id. at 358.

11 *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. ___ (2008).

12 See *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("Until petitioners have exhausted the remedies available to them in the tribal court system ... it would be premature for a federal court to consider any relief.")

13 Nat'l Farmers Union, 471 U.S. at 857.

14 *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

15 National Farmers, supra.

16 Strate, supra.

17 25 U.S.C. § 81.

18 25 U.S.C. § 415.

19 25 U.S.C. § 2710(d)(9).

20 25 U.S.C. § 2711

21 § 2711(b)(4); 25 C.F.R. § 531.1(g).

22 25 C.F.R. § 533.3(a)(2).

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