DEAL OR NO DEAL?

Understanding Indian Country Transactions

By Gabriel S. Galanda and Anthony S. Broadman

If you do deals, sooner or later you will find yourself in Indian Country. The numbers are staggering: tribes generate over $25 billion in revenue from gaming alone and are diversifying their economic activity through entrepreneurial inroads as varied as manufacturing, agriculture, real estate development, telecommunications, and banking. But successful transactions in Indian Country (defined as reservation, dependent Indian community, and allotment lands), require either a profound understanding of the particular complexities of Indian law at play within and beyond Indian reservations, or sheer luck. An unwary attorney doing deals in Indian Country risks putting a client in substantial legal and financial jeopardy if he or she doesn't contemplate—at a minimum—the issues below.

Sovereignty

Tribal sovereignty is the whole point—financially, culturally, politically, legally. It's why tribes can operate gaming businesses, maintain "distinct, independent political communities," and "make their own laws and be ruled by them," as the U.S. Supreme Court pronounced in bedrock federal Indian law cases, *Worcester v. Georgia*, 31 U.S. 515 (1832) and *Williams v. Lee*, 358 U.S. 217 (1959).

Like all governments, those of tribes comprise diverse and elaborate structures, often with familiar elements like executive, legislative, and judicial branches. But just as often, unfamiliar legal structures, political contours, and cultural sensitivities require expertise seldom found outside the Indian law bar.

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Immunity

For purposes of recognizing issues in the bargaining context, perhaps the most important facet of any deal is understanding that a tribal government's immunity from suit can often prevent the enforcement of an otherwise valid contract.

Tribes can only be sued if Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. Tribal immunity generally extends to tribal officials in their official capacity, tribal businesses, and federally and tribally chartered corporations. Tribes and their officials, however, may be subjected to suit under various court-made exceptions (e.g., *ex parte Young* liability when an official acts ultra vires).

Geographically, tribes retain immunity from suit when conducting business both on- and off-reservation. Therefore, even a tribally owned business operating beyond the exterior boundaries of a reservation may stand immune from any litigation relating to a contract.

In deal drafting, a wise attorney will operate under the assumption that a tribe can only be sued under the contract if the parties expressly negotiate a sovereign immunity waiver into the four corners of the contract. That said, the U.S. Supreme Court held in *C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001), that an agreement to arbitrate constituted a clear waiver of immunity. While the Court held that a tribe's waiver must be "clear," it stated for

the first time that a waiver need not include the actual terms "waiver of sovereign immunity" and that an arbitration clause was sufficient to evince a clear waiver.

Limited waivers are commonly used by tribal governments to get deals done. However, many attorneys working on tribal deals fail to provide for contractual doomsday. It likely takes only one such mistake, when an attorney finds his client without a remedy for breach, to teach that attorney to fully explore sovereignty in every applicable agreement. Many tribes will agree to clear and unequivocal limited waivers of immunity in agreements with non-Indian parties to get deals done. Some tribes use state-chartered corporations or subordinate entities to give arm's-length parties assurances that assets are available to remedy any breach. Alternatively, insurance or letters of credit are sometimes used if a waiver cannot be had.

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In negotiating with tribal governments, it must be recognized that sovereign immunity represents more than immunity from suit: to many tribal councils responsible for the welfare of their people, sovereignty and thus immunity are sacred, and not merely a negotiable provision of a contract. Proceed accordingly.

Tribal Corporations

Indian tribes have organized themselves differently. Many 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 adopts a constitution and bylaws that set forth the tribe's governmental framework. The constitution typically outlines governmental processes and authority.

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. 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 below. 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 sovereign immunity protection depending on the test employed by a court. Some courts consider as many as 11 factors when determining whether a tribally owned corporation stands immune from suit.

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

Actual Authority

Like their state and federal counterparts, tribal governments may be bound only through valid exercises of actual authority. If governments could be bound by anything less than an agent acting with actual authority would likely find themselves quickly penniless; particularly tribal governments, which typically 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. When in doubt, get a resolution from the tribe's highest authority, pursuant to tribal law.

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 presents substantial risk for the unwary, because a deal based on anything other than actual authority may unravel when scrutinized by a court.

Tribal Adjudicatory Jurisdiction

Indian tribes have near plenary regulatory jurisdiction over tribal members within Indian Country; even nonmembers are subject to tribal regulatory authority on Indian land. Although almost nothing in Indian law is more complex than sorting through the labyrinth of federal, state, and tribal jurisdictional authority, as an elementary matter, transactional attorneys should recognize and understand the scope of tribal power.

Within the boundaries of reservations and on other Indian Country lands, tribes can tax and regulate like any other government. Just as your client would expect familiarity with the laws of a foreign country in which you represent him or her, a general awareness of how tribal laws will affect your client's business is essential.

If your client is doing business in a Public Law 280 state, familiarize yourself with the reach of that state's assumption of jurisdiction. Although P.L. 280 makes state laws applicable to some on-reservation lawsuits, states' assertions of jurisdiction under it are concurrent with tribal law and do not

divest the tribal courts of power to hear cases appropriately before them. In addition, many states' courts give tribal court decisions full faith and credit.

Montana v. United States

In general, under the modern Supreme Court's most important tribal jurisdictional decision, *Montana v. United States*, 450 U.S. 544 (1981), tribes can only assert jurisdiction over non-Indians in Indian Country if the nonmember 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.

Practically, the first "consensual relationship" prong of *Montana* is far more important than the second, as "direct effect" jurisdiction has been held to offer tribes "nothing beyond what is necessary to protect tribal self-government or to control internal relations." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court noted that it has "never held that a tribal court had jurisdiction over a nonmember defendant," and admitted avoiding the question of whether tribes may generally adjudicate claims against non-Indians arising from on-reservation transactions.

In June, the High 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. In *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. ___ (2008), the Court suggested that the *Montana* consensual relationship exception does not extend, without more, to disputes over the sales of tribally owned fee land within a reservation.

For tribes and businesses operating in Indian Country, especially lenders and developers, the case is a general warning that where suits involve sales of reservation fee land, tribal courts may be deemed to lack jurisdiction over nonmembers. Still, if your client is transacting in Indian Country and is party to a contractual, commercial relationship with an Indian tribe, recognize that to the extent its activity is located on tribal land, your client may be subject to the civil adjudicatory authority of the tribe. That is, unless the contract dictates otherwise.

Again, agreements clearly recognizing where and how disputes will be resolved are indispensable.

Tribal Regulatory Jurisdiction

Justice John Roberts, writing in *Plains Commerce*, acknowledged that tribal governments retain the power to regulate nonmember conduct "that implicates tribal governance and internal relations." *Plains Commerce* specifically affirms the tribes' taxing and permitting authority over nonmembers who satisfy either the "consensual relationship" or "direct effect" prong of *Montana*.

Accordingly, at the outset of any deal be aware that nonmembers operating in Indian Country may be subject to different taxes, land use rules, and other tribal regulation.

Tribal Court Exhaustion

Returning to the topic of tribal adjudicatory power, 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. Tribal courts should make the first determination regarding the scope of their jurisdiction.

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." *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Once a tribal court determines it has jurisdiction, it will likely determine the case. A party challenging tribal court jurisdiction would then likely file

ADDITIONAL RESOURCES

For more reading on a similar topic, you can retrieve the following articles on the *Business Law Today* Web site at **www.abanet.org/buslaw/blt**.

Doing Business with Alaska Native Corporations—
A New Model for Native American Business Entities
By E. Budd Simpson
Business Law Today
July/August 2007
Volume 16, Number 6–page 37

Lending in Indian Country—
The Story Behind the Model Tribal Secured Transaction Law
By Susan Woodrow and Fred Miller
Business Law Today
November/December 2005
Volume 15, Number 2–page 39

Getting Commercial in Indian Country—
That Can Be Big Business, and Lawyers Should Be Ready
By Gabriel S. Galanda
Business Law Today
July/August 2003
Volume 12, Number 6–page 49

When the Location Is Tribal—
A New Law Affects Real Estate Deals in Indian Country
By Mark D. Ohre
Business Law Today
March/April 2001
Volume 10, Number 4–page 55

DID YOU KNOW?

The ABA Business Law Section already supports two committees that focus on Indian law and gaming issues, providing Section members top-notch education and programming on these burgeoning practice areas.

The Business and Corporate Litigation Committee has a Tribal Court Litigation Subcommittee, which is currently co-chaired by Heidi M. Staudenmaier of Snell & Wilmer in Phoenix and Gabriel S. Galanda of Williams Kastner in Seattle. The subcommittee annually publishes a chapter by the same name in the *Annual Review of Developments in Business and Corporate Litigation*. That chapter is perhaps the most authoritative text on litigating in Indian Country.

In addition, the Section's Gaming Law Committee, chaired by Mr. Galanda, focuses heavily on the $25 billion Indian gaming industry. That committee hosts an Indian Gaming Subcommittee, which is co-chaired by Ms. Staudenmaier and John Roberts, a lawyer and executive director of the San Pascual Gaming Commission. The Gaming Law Committee's subcommittees on Federal, State & Tribal Regulation, Finance & Restructuring, and Criminal Enforcement also conduct Indian gaming education and programming.

The "Tribal Court Litigation" chapter co-authored by Heidi McNeil Staudenmaier and Gabriel S. Galanda appears in the *Annual Review of Developments in Business and Corporate Litigation* (2008 ed.). This two-volume set is available through the ABA Service Center at 800-285-2221, or order online at **www.ababooks.org**.

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. According to the Supreme Court, in *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Strate*, 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," 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."

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

Any contract encumbering Indian lands for a period of seven or more years requires approval from the secretary of the interior or his or her determination that approval is not required, pursuant to 25 U.S.C. § 81. 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 according to 25 U.S.C. § 415.

Any contract encumbering tribal land should be run through the section 81 and 415 calculus. If a contract needs to be approved by the secretary of interior and is not, that failure could render the agreement null and void.

Approval of Management Contracts

Contracts with Indian tribes to manage gaming operations are fine—if approved by the National Indian Gaming Commission (NIGC) chairman pursuant to 25 U.S.C. § 2710(d)(9). Without approval, management contracts are null and void.

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 under 25 U.S.C. § 2711. But the chairman cannot approve a contract unless it provides an agreed ceiling for the repayment of development and construction costs, among other requirements.

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 just over 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.

Conclusion

If you can spot the issues above, at least you'll know what you don't know. Most contracts made with tribal entities contain provisions that would likely be different had their drafters been equipped with that knowledge. As tribes solidify their substantial role in the U.S. economy, comfort with the intricacies of deal making under tribal and federal Indian law will become an increasingly valuable tool of the transactional attorney. BLT

Please see page 1 for information on the upcoming BLT Live teleconference on this topic.