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NEGOTIATING DISPUTE RESOLUTION WITH INDIAN TRIBES: DON'T DO IT ALONE

by Patrick Sullivan

Indian tribes enjoy sovereign immunity from civil suits arising from contractual relationships, even if the contracts are made, paid, or performed entirely off the reservation. Tribally owned corporations generally enjoy sovereign immunity from suit as well.

Savvy attorneys know that a well-executed waiver of sovereign immunity is a green light to conduct profitable business with an Indian tribe. Tribes regularly execute these waivers, but most transactional attorneys may only see one or two of these in their careers. While those attorneys can be forgiven for not having deep Indian law experience, they should not be forgiven for failing to bring in an expert. Here are some aspects of doing business with tribes that an experienced Indian law attorney will know how to handle.

Waiver Language Is Negotiable

Most Indian tribes doing business want to be fair and maintain mutually beneficial and lasting relationships, but they have a legitimate interest in protecting against the risk that the Tribe's coffers will be emptied by a large judgment award. To that end, Tribes are accustomed to executing limited waivers. In our experience, an overzealous tribal attorney may open negotiations with a waiver so limited that it offers no real recourse and present it as "boilerplate" language that can't be revisited. Of course, this is nonsense. To prevent the dispute resolution negotiations from souring the relationship, make it clear early on that you expect a process that will lead to a fair resolution for the parties and that you are prepared to walk away from a deal without a process that protects the interests of both parties.

Cover Your Regulatory Bases

One especially dangerous pitfall is that even a validly executed waiver of sovereign immunity in a contract can fall away if that contract is deemed void for lack of agency approvals required in certain transactions with tribes. For example, contracts encumbering Indian land for seven years or more are void absent sign-off from the Department of the Interior, and more than one non-Indian business has been left with no recourse when an unapproved lease was deemed void because the waiver of immunity was not severable from the voided lease.

Similarly, some gaming contracts require review and approval of the National Indian Gaming Commission and are void absent that approval. Investors have found out the hard way that their sovereign immunity waivers fell with their voided contracts, and courts held that they were without recourse to recover millions of dollars in investment.

An attorney experienced in Indian law will know immediately which regulatory approvals are required to ensure not only that your agreement is enforceable but also that your right to pursue a recovery will be preserved should it fail.

Dispute Resolution Is More Than Sovereign Immunity

Your agreement may provide for alternative dispute resolution that may include informal preliminary conferences with the tribal council, mediation, binding or nonbinding arbitration, or outright litigation in court. It should specify which law will govern, which courts will have jurisdiction, and whether tribal remedies must be exhausted before proceeding to state or federal court.

A tribe may desire and even require that its own tribal court has jurisdiction. Despite a common misperception that tribal courts always rule for the tribe, it is possible for nonmembers to recover in tribal court. But not all tribal courts are created equal, and an Indian law expert can help you determine if a particular forum offers your clients a reasonable chance at a recovery. And, many tribes have agreed to adjudication in non-tribal courts.

Another common misperception is that providing for a tribal-court forum waives tribal sovereign immunity. This is not true. Absent a waiver, an Indian tribe is immune from suit even in its own courts.

Also, many assume that federal courts automatically have jurisdiction to hear any dispute with Indian tribes. Again, this is not true. In fact, the mere presence of a tribal party creates neither diversity nor "arising under" federal court jurisdiction.

Conclusion – Don't Do It Alone

Simply put, these are dangerous waters. At the mouth of the Columbia River, even the most experienced captains of colossal ocean freighters gladly yield command of their vessel to a local pilot to navigate the narrow channel. Likewise, smart attorneys bring in an Indian law expert to establish profitable relationships with Indian tribes and ensure that the deal will not run aground.

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THE RESUSCITATION OF THE DUWAMISH RECOGNITION EFFORT

by Dennis J. Whittlesey

A federal judge has just given new life to the efforts of the descendants of Chief Seattle to gain federal recognition for his tribe, the Duwamish Tribe of Washington. Specifically, Judge John Coughenour has vacated a negative determination of tribal status by the Department of the Interior and remanded the file to the Department with direction to reconsider the tribal Acknowledgement Petition under all applicable regulations, rather than only half of them.

This order reversed one of the most controversial actions in the history of the Department of the Interior's frequently criticized administrative tribal recognition process managed by the Office of Federal Acknowledgment ("OFA"), and it validated actions of former Acting Assistant Secretary for Indian Affairs Michael Anderson, who had written a positive determination for Duwamish over OFA's objections and proposed negative order in the final hours of the Clinton Administration on January 19, 2001. The Bush Administration withdrew the Anderson Final Determination prior to its publication in the *Federal Register* and subsequently replaced it with a final negative determination some nine months later.

The principal dispute concerned Interior's reliance on one set of acknowledgement regulations published in 1978 and Anderson's reliance on subsequent regulations published in 1994. The Duwamish claimed that the Department violated the Administrative Procedure Act and their equal protection rights by failing to evaluate the Duwamish petition under both the 1994 and 1978 regulations, despite having evaluated a similarly situated Washington tribe's petition under both sets of regulations at the same time.

Anderson hand-edited the OFA's proposed negative determination, reversed its ultimate conclusion, and signed the hand-edited copy just before departing the Department late on Friday, January 19, with instructions for OFA to retype the document to reflect his edits. However, he had not executed all of the necessary documents because they apparently were not given to him by OFA personnel. OFA summoned him back to the Department on the following Monday to execute the additional documents, an action curiously conducted outside the Department since Anderson's federal credentials had expired and OFA did not authorize clearance for him to enter the building. At some subsequent point, the file became the subject of a formal investigation that resulted in Anderson being cleared of any suggested impropriety.

As Anderson was being vindicated, the Duwamish were losing. The Interior Solicitor rendered a new final determination that fall restoring the OFA denial, and the file seemed closed for a tribe that essentially had exhausted all available funding with which to continue the effort. Nonetheless, the tenacious Duwamish team kept their hopes for status clarification alive. A legal challenge was filed and prosecuted by a Seattle law firm to its successful conclusion long after most tribal supporters had given up hope.

Interior now has to go back and retrace Anderson's steps, which is to assess the Duwamish Petition under both sets of regulations rather than relying solely on the one that admittedly was unfriendly to the Duwamish situation. Anti-Duwamish bias at OFA is being watched by a lot of people this time, including one very involved federal judge.

DISCLOSURE: The author was the Duwamish attorney for the acknowledgment effort, a multi-year effort that concluded in the Anderson tribal recognition of January 19, 2001.