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## BUSINESS LAW



## The Law of Business in Indian Country

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The cocktail-party answer to the commonly asked question, "Does each tribe have its own laws?" ("Yes.") is actually more profound than it first seems. Tribes comprise 562 distinct nations, each with its own political system and legal structure. As a matter of bedrock Indian law, tribes make their own laws and are ruled by them. Operating under these laws, tribes infuse *tens of billions* of dollars into the economy and provide jobs to thousands of native and nonnative

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citizens. (And, "Do tribes pay taxes? Yes." More on that later.)

Negotiating and litigating in and around Indian country demands careful attention to tribal, state, and federal jurisdictional nuances—which run through every matter involving Indian people or lands.

> reference to the Tribal Court Litigation Chapter to the Annual Review of Developments in Business and Corporate Litigation (2007 ed.), coauthored by Heidi McNeil Staudemaier and Mr. Galanda.

Some states, recognizing the burgeoning and diversifying tribal economy and legal world, have put Indian law on their bar exams. Young lawyers from those jurisdictions will now know at least how to spot a federal Indian legal issue—and perhaps seek the help of a tribal specialist. More seasoned lawyers must be similarly prepared to recognize the Indian law issues outlined below, given the rapid expansion of tribal economic development in many states and the legal work it has spawned.

## Sovereignty

Tribal sovereignty is the single most important element of practicing in Indian country both because it protects tribal coffers from suit and because of its sacred importance to tribal clients and lawyers. Sovereignty is often the answer to the most preliminary Indian legal questions like, "Can this entity be sued?" or "Why can tribes operate casinos?" Put simply, "distinct, independent political communities" *(Worcester v. Georgia*, 31 U.S. 515 (1832)) can "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Sovereignty means that practically tribes can only be sued if Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998). 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 (*C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001)), recognize that unless a tribe wanted to waive its immunity in a particular contract, it probably hasn't.

Lawyers cannot underestimate the cultural and political significance of immunity waivers. That said, some tribes are willing to offer limited waivers for appropriately invaluable contract terms. Many businesses who are familiar with the legal implications of sovereign immunity, and who are in the position to do so, seek such limited waivers when dealing with sovereign governments or businesses.

## Tribal Corporations

Indian tribes have been organized, and 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 adopted 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.

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. If governments could be bound by anything less than an agent acting with actual authority, they 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.

## Taxes

The rumors of tax-free Native America have been greatly exaggerated. Individual tribal members generally pay taxes like any other American. With regard to state taxes, however, tribes and tribal members cannot be taxed by states or counties *in Indian country* as a function of the sovereignty described above. *Oklahoma v. Chickasaw Nation*, 515 U.S. 450 (1995). This geographical exclusion from tax typically includes all state taxes—B&O, public utility tax, retail sales tax, use tax, etc. If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or is related to the exercise of treaty rights.

Retail sales tax is not imposed on sales to tribal members if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. Many cases address the issue of sales taxes on tribally made goods, such as tobacco products, sold to nonmembers. As tribal enterprise has moved beyond such taxable events, however, tribal tax law outside the sales tax context has become exceedingly complex such that taxing authorities and tribes are constantly confronted with matters of first impression.

Some taxes on non-Indians are also preempted by virtue of tribal sovereignty. The "*Bracker* balancing test"—like many balancing tests—provides tribes, nonmembers doing business with them, and nontribal taxing authorities with ample room for debate. *Bracker White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Essentially, certain taxes on nonmembers in Indian country will be preempted based on the federal, tribal and state interests at issue. Courts take a fact-intensive look at each case such that it is extremely difficult to structure tax-free deals or predict the outcome of litigation in any given situation.

## Tribal Jurisdiction

Indian tribes have regulatory authority over tribal members and nonmembers

on Indian land. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (power to tax transactions on trust lands). Within the boundaries of reservations and on trust lands tribes can tax and regulate like any other government. *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001).

Although "P.L. 280" makes state some laws applicable to some on-reservation lawsuits, some states' assertions of jurisdiction under it are arguably concurrent with tribal law, and do not divest tribal courts of power to hear cases appropriately before them. *See* Vanessa J. Jimenez & Soo C. Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 AM. U. L. REV. 1627 (1998). In addition, some states, like Washington, give tribal court decisions full faith and credit. *See* Washington Civil Rule 82.5.

In general, under *Montana v. U.S.*, 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. *Montana v. U.S.*, 450 U.S. 544 (1981). Only the first "consensual relationship" prong of *Montana* has real teeth. *Atkinson Trading Post, supra.*

In *Nevada v. Hicks*, *Nevada*, 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. *Id*. at 358. 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. *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. ___ (2008).

## 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. *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."). Tribal courts should make the first determination regarding the scope of their jurisdiction. *Nat'l Farmers Union*, 471 U.S. at 857.

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 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" *National Farmers*, supra, 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." *Strate*, *supra*.

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.

As tribes continue to develop as economic and political bases of power, lawyers will necessarily need to be familiar with the state, tribal, and federal legal labyrinths surrounding Indian country. Studying Indian law on the bar is, unsurprisingly, not enough. If you recognize any of the issues above, you will be much better off than your colleagues—many of whom fail to appreciate the benefits and risks of litigating and transacting with any of the 562 sovereign Indian nations.

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