

Doing business in Indian country

Five questions to consider before entering into a contract with a tribe



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Broadly speaking, Indian country is all land under the supervision of the United States government that has been set aside permanently for use by Indians. It includes all Indian reservations and other areas under federal jurisdiction and designated for Indian use. Additionally, it includes lands held by the United States in trust for tribes, and lands owned by tribes subject to federal restrictions on alienation.

There are more than 560 federally recognized Native American tribes in the United States, and unprecedented interest in commercial development — especially commercial real estate and natural resource development — in Indian country. Indian country offers unique opportunities for broad economic development in concert with tribes that are committed to creating jobs on reservations and to creating a sound economic base for their people. Even so, bringing such projects to fruition involves a number of unique issues and challenges. Developers, investors and financial institutions should make certain that they

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can answer the following five questions to ensure that an otherwise promising transaction is not delayed or even canceled because the right preparations were not made beforehand.

1. HOW IS THE TRIBE ORGANIZED?

Indian nations are sovereign entities that have their own forms of governance and their own laws. How a tribe is organized will affect how power is distributed, who can act for the tribe in contracts and what, if any, approvals may be necessary to enter into a binding and enforceable transaction. According to §16 of the Indian Reorganization Act of 1934, which addresses many aspects of tribal governance, tribes may be governed by a constitution that describes the governing body and its authority. Section 17 of the IRA allows tribes to incorporate under a charter issued by the Secretary of the Interior. That charter can also describe governance and authority.

However, not all tribes are organized under the IRA, and even tribes that are not can incorporate under §17. When dealing with non-IRA tribes, it is critical to review tribal custom and common law. A record of tribal history, traditions, ordinances, resolutions and other actions of the governing body will demonstrate how much authority the tribal council has. In any transaction, it also is essential to confirm the actual authority of any persons negotiating and executing documents on behalf of the tribe. Do not assume authority or rely on apparent authority.

2. HAS SOVEREIGN IMMUNITY BEEN WAIVED?

Indian tribes are sovereign nations that, like other sovereigns, are immune from lawsuit. The form and substance of

a tribe's or tribal enterprise's waiver of its immunity from suit has been, and continues to be, of critical concern for persons doing business with them. To give just one recent statement of this principle, in *High Desert Recreation v. Pyramid Lake Paiute Tribe of Indians*, an unpublished opinion, the Ninth Circuit U.S. Court of Appeals gave a clear statement of what sovereign immunity means: "An Indian tribe is subject to suit only where Congress unequivocally authorizes suit, or where the tribe has clearly and expressly waived its immunity."

Tribes regard their sovereign immunity as an essential feature of their sovereign status, and they may resist waiving it. However, as sovereigns, tribes may — and often do — elect to waive their immunity from suit on a case-by-case basis and to negotiate terms and conditions of a waiver that are acceptable to the tribe and to the contracting party. At its core, to be enforceable, the waiver of a tribe's immunity from suit must be unambiguous and "unequivocally expressed" (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Again, however, it is critical that any party contracting with a tribe or a tribal entity review the tribal constitution and laws to understand the nature of the entity with which it is contracting and the protocol and conditions precedent for entering into binding, enforceable agreements and thus, binding, enforceable waivers of immunity.

3. HAVE THE APPROPRIATE FEDERAL AGENCIES APPROVED?

Indian nations not only are sovereign entities that have their own governing bodies; they also continually interact with the federal government and its primary tribal administrative agency, the Bureau of Indian Affairs. Pursuing com-

mercial marketplace opportunities often requires negotiating with the BIA to obtain its approval of contracts with tribes, as well as structuring business contractual agreements and, sometimes, inter-governmental compacts with the state(s) in which tribal land is located.

Investors, developers and contractors for projects in Indian country should be familiar with federal law related to Indian tribes and with tribal law and custom. Additionally, any gaming-related project involves the Indian Gaming Regulatory Act and IGRA regulations. Failing to be familiar with the entirety of this body of law invites disaster. In reality, few people are familiar with federal Indian law or tribal law, governments and dispute resolution systems (which reflect each tribe's sovereign status and unique culture), language, laws, mores and traditions. Getting the advice of legal counsel who understands the interplay of these legal regimes before agreements are signed is crucial to avoiding problems later.

4. WHERE WILL DISPUTES BE ADJUDICATED?

While the better practice is for a tribe to expressly, unequivocally and clearly waive its immunity from suit and to consent to jurisdiction and venue, it is not uncommon for waivers of sovereign immunity to be silent with respect to jurisdiction, leaving the parties to argue over jurisdiction later. While federal courts clearly have jurisdiction over questions rooted in federal law, tribal courts gener-

ally have jurisdiction over persons acting on Indian land. Businesses too often assume that their disputes with tribes or tribal businesses will be heard by a federal court. But it is a basic principle that federal courts have jurisdiction only where there is a question of federal law to be decided, or where the parties reside in different states and meet the requirements for diversity jurisdiction.

Even when federal courts have jurisdiction over a claim involving a tribe, they are not inclined to exercise their jurisdiction if it means inserting themselves in a case over which a tribal court also has jurisdiction. Stated a bit differently, there is no guarantee that a business dispute involving a federal claim will be heard by a federal judge.

Deferring discussions over which court will have jurisdiction to adjudicate disputes between parties to a contract may leave the nontribal party without a forum in which to adjudicate at all. Be sure to include a provision for consent to jurisdiction and venue in the tribal waiver of immunity. However, also be prepared to adjudicate claims in tribal court; and consider the benefits and risks of doing so before signing a contract with a tribe.

5. HOW WILL JUDGMENTS BE ENFORCED?

In structuring a commercial transaction with a tribe, the investors almost certainly will be concerned about how to enforce a judgment if one is obtained. Whether a creditor can execute against

tribal property is limited by federal law, tribal law, the scope of the tribe's waiver of sovereign immunity and the power and authority of the tribe as debtor. A waiver of the tribe's sovereign immunity does not automatically allow execution of a judgment against tribal assets. It is thus critical that the waiver include language allowing such enforcement, identifying the property upon which execution can be made, and if the property is located outside of Indian land, stating that the judgment may be enforced by a state and/or federal court against it.

CONCLUSION

None of the issues cited here should discourage business interests who wish to pursue projects in Indian country. But the fundamental message is clear: Know the rules, or suffer the consequences if something goes wrong. Jurisdictional and other issues arise in every transaction with a tribe or tribal entity. The best practice is to consult with Indian law counsel before transacting any business with a tribe to understand any limitations on authority and resolution of disputes, to obtain all necessary approvals for the transaction and to weigh risks against the benefits of the proposed project, so that your expectations are achieved.

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