DOING BUSINESS IN INDIAN COUNTRY

Know the Rules or Suffer the Consequences

BY NANCY J. APPLEBY

There are more than 560 federally recognized Native American tribes in the United States. They are located on what is collectively called "Indian country" – a legal term referring to tribal reservations and federal trust lands which are situated within the territorial boundaries of one or more states. The legal governance of Indian country is highly complex, encompassing treaties with the U.S. government and the standard legal characterization of tribes as being domestic dependent nations with their own sovereignty.

Investors and entrepreneurs are showing unprecedented interest toward commercial development projects in Indian country. Until recently, this economic activity did not reach into the capital markets or commercial real estate. However, Indian country has experienced an economic development awakening, which has created a need for capital to match the commitment by tribes to create 21st century, sustainable economies. Coupled with federal government incentives for doing business with tribes, this has created potential real estate finance and business opportunities. While opportunities in Indian country abound, prudent investors understand that that there are legal complexities in Indian country that must be addressed when structuring a successful transaction.

GOVERNANCE ISSUES

Indian nations not only are sovereign entities that have their own governing bodies, they continually interact with the federal government and its primary administrative agency, the Bureau of Indian Affairs (BIA). Pursuing commercial marketplace requires negotiating with these authorities, as well as structuring business contractual agreements and, sometimes, intergovernmental compacts with the state(s) in which tribal land is located.

Real estate finance professionals, 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 (IGRA) and the 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.

Developing a real estate or construction project with a tribe or tribal entity, or on tribal land, is not a conventional transaction with conventional terms, conventional financing and conventional collateral. In Indian country there may be no familiar law governing the granting and perfection of security interests. Typical remedies in the event of a default

may not be available under applicable federal law and tribal law. Litigation may not be the preferred, or even an acceptable, method of dispute resolution. Tribal law may not be codified. There may be no established formal judicial system for hearing disputes. There may be no written rules of court procedure. Court opinions may not be available for review by non-tribal members. These issues are not insurmountable. However, non-Indians working with this system are likely to need assistance navigating the system and will find their way more easily if they are respectful, flexible and tolerant of differences in law, procedure, style and personality.

SOVEREIGNTY AND JURISDICTION

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 tribes and their businesses. In a recent case, High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe of Indians, the U.S. Ninth Circuit Court of Appeals stated that "[a]n Indian tribe is subject to suit only where Congress unequivocally authorizes suit, or where the tribe has clearly and expressly waived its immunity." This black letter law seldom is questioned. Therefore, it is critical that any contractual arrangement with a tribe or a tribal business include an express, written waiver of its sovereign immunity from suit and that the waiver is authorized by all action required by tribal law.

Investors often assume that their disputes with tribes or tribal businesses will be heard by a federal court. Often that is not the case.

The basic principle in federal and Indian law is 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.

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 respecting jurisdiction, leaving the parties to argue later over jurisdiction. In those cases, the parties are able to resolve their substantive dispute only after they litigate over which court has jurisdiction – not the scenario that the non-Indian party typically will prefer.

ENSURING DUE AND PROPER AUTHORITY

Questions of dispute resolution are inseparable from the fundamental issue of who has authority to act on the tribe's behalf. How the tribe is organized will affect how power is distributed, who can act for the tribe as borrower and what, if any approvals may be necessary to enter into a binding and enforceable transaction. Sections 16 and 17 of the Indian Reorganization Act of 1934 (IRA) address many aspects of tribal governance, including the constitution that will describe the governing body of the tribe and its authority. However, not all tribes are organized under the IRA. In those cases, reviewing the tribe's custom and common law is critical. In each case, the investor should confirm the actual authority of any persons negotiating and executing documents on behalf of the tribe. Do not assume there is authority or rely on apparent authority.

It is prudent to review the underlying organizational documents (e.g., constitution, laws, ordinances, resolutions) of the tribe and of the tribal business (e.g., charter of incorporation, operating agreement) to determine whether they limit the tribe's and/or the entity's ability to waive immunity. Any waiver made in violation of the tribe's laws and/or organizational documents may be void. The investor's due diligence also should include a review of tribal law, including custom, tradition and opinions of its courts. The investor should require the tribe to adopt resolutions specifically authorizing the transaction and granting authority to execute and deliver documents. The investor also should request that legal counsel for the tribe deliver opinions regarding the organization of the tribe, the organization of the tribal business and the respective power and authority of each and respecting the enforceability of the waiver of immunity.

LAND TITLES

Similar complexities involve the issue of land titles. In many cases, title to Indian land is held in trust by the United States for the tribe's benefit. The general rules are that tribal trust land may not be sold, taxed or encumbered and that BIA approval is required for leases of trust land. Lease terms typically are limited to 25 years with a 25-year renewal, unless otherwise provided by statute. BIA approval is also required for a mortgage on a leasehold interest in tribal land. A leasehold mortgage may permit the lender to exercise dominion and control over leased land in the event of a default, but determining the status of land requires reviewing treaties, acts of Congress, proclamations by the Secretary of the Interior (who has ultimate responsibility for the BIA), BIA title records and other sources. Lenders should thus always use a competent title company with appropriate knowledge to conduct an Indian land title search and to insure the lender's leasehold mortgage.

CASE IN POINT

The issues of immunity, jurisdiction, organization and land title reviewed here merely touch on the complexities involved in financing an Indian country real estate project. Thorough preparation is essential for lenders, and a recent court case illustrates the type of problems that the unwary can face. In Wells Fargo Bank, National Association, as Trustee, v. Lake of the Torches Economic Development Corporation, the U.S. District for the Western District of Wisconsin declared that a bond indenture evidencing a $50 million tribal debt was void, with the ostensible result that the tribe had no obligation to repay the debt.

The documents at issue in Lake of the Torches evidenced financing for a tribal casino and were subject to the Indian Gaming Regulatory Act, which requires federal approval for a management contract. In Lake of the Torches, the bond indenture provided for the appointment of a "management consultant" by the bondholders, restricted the right to remove key personnel without the bondholders' consent, and required that the bondholders could appoint new management in event of default. Provisions like these are quite common in secured lending transactions; however, because this secured transaction was with a tribal corporation, the court concluded that the indenture was a management contract for which federal approval was required. Sadly for the bondholders, since such approval was not obtained (or, for that matter, even sought), the court concluded that the indenture was void. The Seventh Circuit Court of Appeals confirmed the District Court's conclusion.

This was a very fact-specific case, but its message is clear. It is essential to consult with Indian law counsel to develop any business or credit proposal to ensure that obtaining necessary approvals and other issues that may sidetrack your transaction are addressed appropriately. Your project will have a much better chance of a favorable outcome if you take care of the basics and understand the rules of Indian country at the beginning of your deal.

Nancy J. Appleby, principal of Appleby Law PLLC, has 30-plus years of experience in Indian law and in the real estate, energy, commercial finance and project development business sectors that seek to pursue business opportunities on Native American lands. She has been selected for inclusion in such authoritative lawyer rankings as The Best Lawyers in America and Chambers USA, and may be reached at 703-837-0001 or by email at info@applebylawpllc.com.