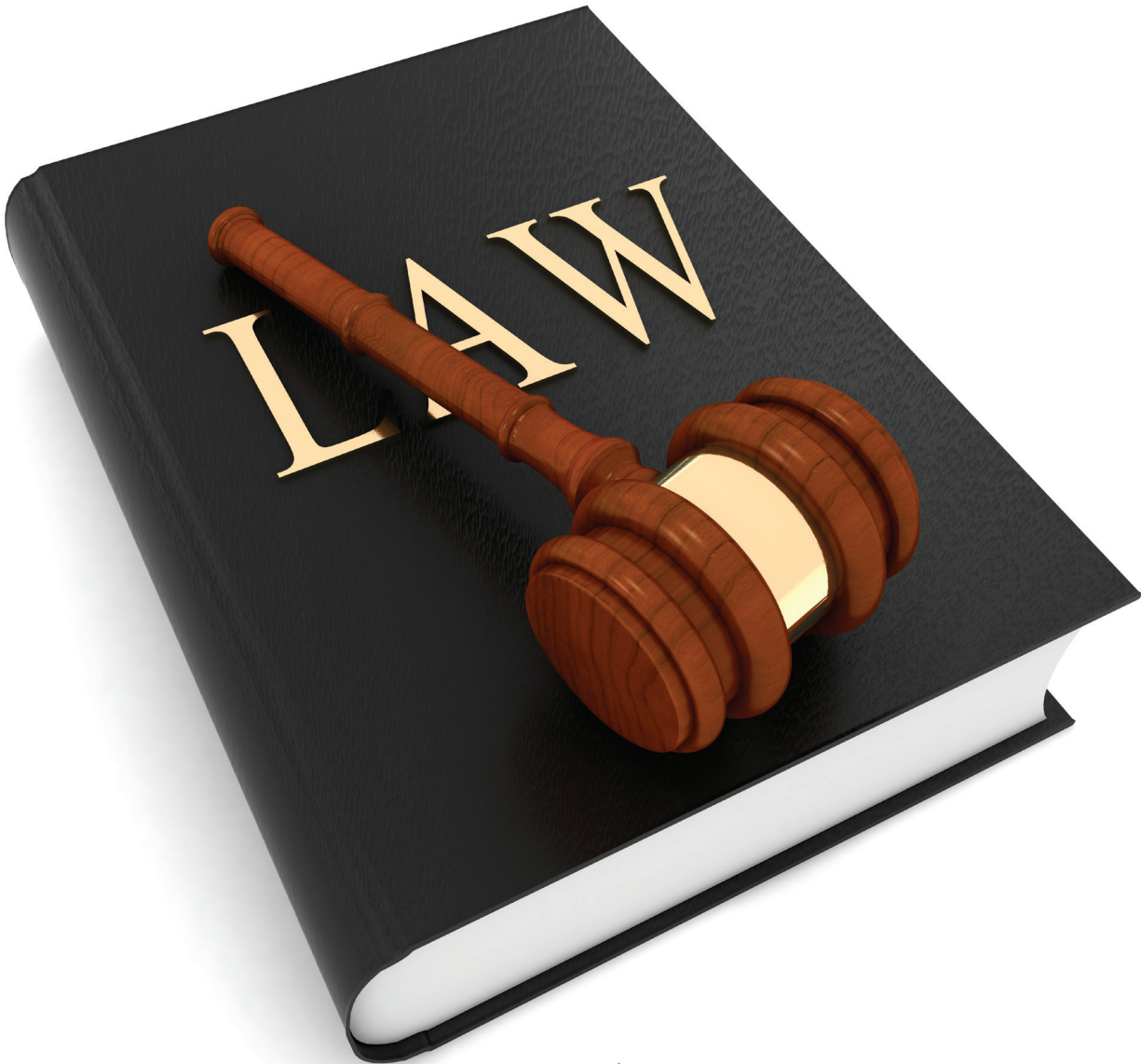


Doing Business on Tribal Lands



- Lending to or investing in Native American projects requires specific knowledge of relevant laws and procedures, both federal and tribal. Two recent court cases illustrate the point.

BY NANCY J. APPLEBY

WHILE DEVELOPMENT OPPORTUNITIES abound in Indian country¹—the tribal reservations and federal trust lands set aside for Native Americans—there are keys to structuring a successful transaction.

Developing or financing a project or business with a tribe or tribal entity, or on tribal land, is not a conventional transaction with conventional terms, financing, and collateral. Transactions in Indian country are governed by federal and tribal laws. As a result, federal processes and approvals may be required, there may be no familiar law governing the granting and perfection of security interests, typical remedies may not be available in the event of a default, litigation may not be an acceptable method of dispute resolution, and tribal law and procedure may not be codified.

These are not insurmountable obstacles, but they require basic knowledge of two key issues that, when understood, will enable financial professionals to negotiate and underwrite successful transactions.

The First Key: Land Titles and Transferability of Land

Often, land titles are the foundation of a financial transaction, and land titles illustrate the complexity of transactions in Indian country. In many cases, title to the land is held in trust by the United States for the tribe's benefit, or title is "restricted." The general rule is that restricted and trust land is not freely transferable. In other words, it may not be sold, taxed, or encumbered absent specific approvals. Sales require an act of Congress; leases and other rights to occupy and use the land must be approved by the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA).

Whether the fee title to tribal land is freely transferable is not entirely clear; the answer may depend on how title was held historically. Further, lease terms typically are limited to 25 years with a 25-year renewal, unless otherwise provided by statute. The Interior Secretary's approval also is required for leasehold mortgages on the land.

Determining how the land is held, and hence whether it is freely transferrable, requires an examination of treaties, acts of Congress, proclamations by the Secretary of the Interior, BIA title records, and other relevant sources. Lenders should always use a competent title company with appropriate knowledge to conduct a Native American land title search and to insure the lender's leasehold mortgage on, or other interest in, the land.

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Federal surface leasing regulations for Native American land are set out in the Code of Federal Regulations (25 CFR Part 162). In November 2011, the Department of the Interior published a proposed revision of Part 162 of the CFR, including new regulations for residential and business leasing. Final regulations are expected in mid-2012. The revised leasing regulations—the most comprehensive reform of federal regulations governing Native American land surface leasing in more than 50 years—contemplate significant changes for approval of lease amendments, assignments, subleases, and leasehold mortgages. These include the following:

- BIA no longer will be required to approve permits for development of land or (provided certain conditions are met) subleases and assignments.
- BIA will be required to act on requests to approve lease amendments and assignments, subleases, and leasehold mortgages within specified time periods.
- Lease amendments and subleases will be deemed approved if BIA fails to approve them within 30 days.
- BIA will be required to approve amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to.
- BIA will be required to defer to the tribe's negotiated value for a lease of tribal land.
- Automatic rental adjustments will be permitted, limiting periodic BIA rent review.
- Lessees will be required to submit development plans and construction schedules to BIA and to Indian landowners.
- States or localities will be prohibited from taxing improvements on trust or restricted land.

The new regulatory framework will affect how land lessees do business in Indian country, but the leasehold is just

the starting point for financing a real estate project in Indian country. Financial professionals also should understand a second key issue in doing business successfully: waivers of sovereign immunity.

The Second Issue: Tribal Sovereign Immunity and Immunity Waivers

Federal law provides that tribes are dependent sovereign nations with the right to govern and regulate activities of their members, as well as nonmembers who enter into business transactions with a tribe or its members. As sovereigns, tribes have immunity from suit. They regard this immunity as an essential feature of their sovereign status and may resist waiving it. Nonetheless, tribes may, and often do, waive their immunity from suit on a case-by-case basis and may negotiate terms and conditions for the waivers that are acceptable to them and to their counterparties.

Before contracting with a tribe or tribal entity or relying on documents executed by them, a lender, investor, or other

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financial professional should understand the nature of the entity and the protocol and conditions for entering into binding, enforceable agreements and obtaining binding, enforceable waivers of immunity. Failure to appreciate these issues may result in unenforceable agreements and waivers of immunity.

To be enforceable, the tribe's waiver of

immunity from suit must be express, unambiguous, and unequivocal. It also must be authorized and executed in accordance with tribal law. At a minimum, a waiver of tribal immunity from suit should:

- Specify who may (and may not) bring suit and identify the beneficiaries of the waiver.
- Identify who may be sued, including all tribal entities involved in the transaction.
- State the kinds of claims (especially claims to enforce a contract) that may be brought against the tribe.
- Specify the amount and type of damages that may be recovered—for example, limits on the judgment to a maximum dollar amount (such as the amount of the contract) or prohibition on recovering punitive and consequential damages.
- Define, above all, where claims may be brought—tribal, state, or federal court—and the jurisdiction each may exercise.

Whether persons purporting to act on behalf of a tribe or a tribal entity have the power and authority to speak for their entities is a function of tribal law and custom, the nature of the entity, and the entity's organizational documents. Reviewing the underlying organizational documents (such as the constitution, codes of law, ordinances, or resolutions) of the tribe and of the tribal business (such as a charter of incorporation or operating agreement) is essential to determining whether they limit the tribe's or the entity's ability to waive immunity.

If the information is available, due diligence also should include a review of tribal common law, including custom and tradition, and the opinions of its courts. The lender or investor also should require the tribe to adopt resolutions specifically authorizing the transaction, granting authority to execute and deliver documents, and granting or authorizing the grant of the waiver and consent to jurisdiction. The investor also should request that legal counsel for the tribe deliver opinions regarding 1) the organization of the tribe, the organization of the tribal business, and the power and authority of each; and 2) the enforceability of the waiver of immunity. Each of these steps is important, because any waiver made in violation of the tribe's laws or organizational documents is likely to be unenforceable.

It is not uncommon for waivers of sovereign immunity to be silent respecting jurisdiction, leaving the parties to argue over jurisdiction later. Businesses often assume that disputes with tribes or tribal businesses will be heard in a federal court, but 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. Tribal courts generally have jurisdiction over persons acting on tribal land. Therefore, a better practice is to couple the tribe's waiver of immunity with its consent to jurisdiction in courts of competent jurisdiction, which, the contract will provide, specifically includes state courts.

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. The same is true for many state courts. As a result, disputes and claims may be resolved in a tribal court. It is essential that persons doing business investigate the tribe's judicial system and gain an understanding of tribal law as it relates to business and financial transactions.

Two recent court cases illustrate avoidable snares faced by ill-prepared business interests.

Immunity Case Study: When Is a Lease Breached?

In *Hollywood Mobile Estates Limited v. Seminole Tribe of Flor-*

ida, the tribe (STOF) appealed the BIA Eastern regional director's refusal to cancel the tribe's commercial lease to Hollywood Mobile Home Estates, Ltd. (HME).

HME operated a mobile home park on STOF land under a 55-year lease that HME assumed in 1986. The lease was scheduled to expire in 2041. In 2008, STOF claimed various defaults had occurred under the lease and notified HME that the tribe was terminating it, ejecting HME, and retaking the property. HME denied it had breached the lease and demanded arbitration. The tribe responded that the arbitration clause in the lease did not apply to defaults.

On July 15, 2008, the tribe declared the lease terminated. When HME filed an emergency motion to prevent STOF from retaking the leased premises, relief was denied because the federal court agreed with STOF's assertion that the arbitration clause did not apply to the default provision in the lease and that the tribe had not waived its sovereign immunity from suit. Therefore, the court concluded, HME could not satisfy one of the requirements for obtaining a preliminary injunction—namely, that it was likely to prevail on its claims against the tribe.

HME next appealed to the Interior Board of Indian Appeals (IBIA). In a ruling more favorable to HME, the IBIA found that HME had not breached the lease and that, even if some of HME's management practices rose to the level of defaults, the lease would not be canceled because the tribe violated BIA's leasing regulations when it failed to give HME notice and an opportunity to cure any claimed default before dispossessing HME.

Unfortunately for HME, its victory before the IBIA was, at best, half a loaf. IBIA did not rule in HME's favor on the arbitration or sovereign immunity issues (in fact, the IBIA did not address them at all) and did not order STOF to permit HME to continue occupying the leased premises. As a result, HME could regain possession only through further litigation. Absent an enforceable waiver of immunity, that path is difficult to pursue. It could have been avoided (and, perhaps, a preliminary injunction issued) had the lease included a clear waiver of immunity and an arbitration clause clearly applicable to disputes over defaults under the lease.

Immunity Case Study: When Is a Debt Void?

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. Therefore, the tribe's waiver of immunity in the bond indenture was invalid, and the creditor could not sue to collect the debt secured by the indenture.

The documents at issue related to financing for a tribal casino. Believing that federal approval was not required, the parties executed the documents and funds were dis-

bursed. When the tribe defaulted and the bond trustee sued for collection and appointment of a receiver, the tribe objected, alleging that approval of the relevant federal authority (in this case, the chairperson of the National Indian Gaming Commission) was required to make the bond indenture binding on the tribe. The court agreed, holding that the bond indenture and all related documents were void, thereby making the tribe's waiver of immunity from suit also void. As a result, the bondholders were left with no legal recourse against the tribe. The Seventh Circuit Court of Appeals confirmed the District Court's conclusion.

The *Seminole* and *Lake of the Torches* cases are very fact-specific. Nonetheless, their messages are clear:

- Know the rules of sovereign immunity or suffer the consequences if something goes wrong. Also, appreciate that federal courts are not likely to have jurisdiction over contract disputes and that, absent an appropriate agreement regarding jurisdiction, the tribe's counterparty may find itself unable to assert state court jurisdiction.
- Failing to obtain requisite federal approvals has dire consequences.

Developing and implementing a strategy for addressing each of these key issues requires a solid knowledge and understanding of federal Indian law, necessary due diligence, appropriate points for negotiation, and good drafting of documentation. Prudent lenders and investors developing a business or credit proposal are well advised to consult with legal counsel familiar with these matters to ensure that issues that could sidetrack a transaction are addressed appropriately. ❖



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Note

1. According to 18 U.S.C. § 1151, "the term 'Indian country' ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

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