PROCEED WITH PRUDENCE

ADVISING CLIENTS

DOING BUSINESS IN INDIAN COUNTRY

By R. Lance Boldrey and Jason Hanselman

FAST FACTS:

- Indian tribes are sovereign governments with significant legal and regulatory jurisdiction over those conducting business with the tribe or on Indian land.
- Tribal governments are vested with sovereign immunity from suit that sometimes can be waived contractually if properly approved.
- Many contracts with Indian tribes, particularly those relating to gaming or encumbering land, require approval by the secretary of interior or they may be void *ab initio*.

Introduction

Michigan is home to 12 federally recognized Indian tribes that should generate more than $1.5 billion in revenue in 2010. With this business activity comes many opportunities for Michigan companies. While this article cannot cover every issue a practitioner may encounter, it provides a practical primer for lawyers negotiating business transactions with Indian tribes.

In counseling clients doing business with tribes, it is critical to first understand that Indian tribes are self-governing sovereign entities that possess inherent governmental authority, subject to federal limitations. Tribal governments are also vested to some degree with regulatory jurisdiction over non-tribal persons and activities on their lands.

Tribal Sovereign Immunity

As sovereign governments, Indian tribes enjoy sovereign immunity from suit. That immunity applies to tribal government actions on and off the reservation and applies in tribal, state, and federal courts. Tribal immunity can be abrogated only through two methods: by the tribe expressly waiving immunity or through an act of Congress.[1]

When it comes to enforcing contractual obligations, sovereign immunity can extend to businesses that are functionally an arm of the tribe.[2] Accordingly, businesses contracting with tribes often seek a limited waiver of sovereign immunity from suit to be able to enforce contracts. Not only must such waivers be express, but they must also be given in accordance with the tribe's own constitution and laws. Such laws often delineate the process the tribal

government must follow to waive its immunity and may limit the scope of waivers, choice of forums, and relief available.

In *Memphis Biofuels v Chickasaw Nation,* the Sixth Circuit recently rejected a business's contract claims against a wholly owned subsidiary of a tribe.[3] In that case, while the contract contained language to waive the tribal company's sovereign immunity, tribal law required tribal board approval to validate the waiver. Because such approval had not been obtained, the court ruled that sovereign immunity remained intact. (The court also held that the fact that the tribal entity had been incorporated and that the tribe had vested the entity with the power to sue and be sued did not automatically divest the tribal entity of immunity.)

As the *Memphis Biofuels* case demonstrates, having a waiver in a contract is not sufficient—contracting parties also must ensure that immunity is properly waived under tribal law. For this reason, it is often wise to seek a legal opinion from a tribe's counsel that a waiver was executed pursuant to tribal and other applicable laws.

Forum Selection

In addition to obtaining a waiver of sovereign immunity, it is advisable to explicitly select a forum for dispute resolution, an issue that is frequently politically sensitive for tribes. Resolving this issue is important because federal courts have consistently held that Indian tribes are not "citizens" for purposes of diversity jurisdiction.[4] A dispute with a tribe, therefore, may only reach federal court if it involves a question of federal law.[5] Additionally, while non-tribal contracting parties frequently insist that state courts be used as a forum, tribal officials may be reluctant to submit to state court jurisdiction.

Tribes often insist that their own courts serve as the initial forum to adjudicate contract disputes, and there is legal authority supporting the proposition that remedies provided by a tribal court system must be exhausted before a dispute may be heard by another court.[6] While binding arbitration often is selected as a compromise forum, this does not fully obviate forum selection concerns because the non-tribal party will want a court to have the power to enforce the agreement to arbitrate and any award.[7] The key to forum selection is understanding the ramifications of submitting to tribal court jurisdiction in order to advise clients regarding what such a provision means to the contractual dispute resolution process.

Regulatory Jurisdiction and Taxation

Beyond assuring that a contract with a tribe is enforceable, it is important to understand and account for tribal regulatory authority while also recognizing that state and tribal regulatory powers may overlap.

Historically, courts have held that tribes may exercise regulatory authority over all persons within reservation boundaries and may exercise criminal jurisdiction over all Indian persons within a reservation.[8] Although broad tribal jurisdiction has been diminished by the courts, the United States Supreme Court recently restated the judicially created rule that tribal jurisdiction over non-Indians on the reservation exists when a non-Indian "enter[s into] consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements."[9]

Tribes also may exercise regulatory jurisdiction over a non-Indian's activity when the activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[10] Application of these rules varies with the facts of each case.

Taxation is an issue that can cause real consternation among those doing business in Indian country. In addition to the significant likelihood that tribes have regulatory and taxing authority over business activities within the tribe's jurisdiction, state taxes also may apply to transactions in Indian country. The general rule is that for transactions involving a tribe or tribal member in Indian country, state taxes are pre-empted if the legal incidence of the tax falls on the tribe or a tribal member.[11] If the incidence falls on a non-member, pre-emption depends on a balancing of the state and tribal interests—and dual taxation is not prohibited, meaning that a business may be subject to both state and tribal taxes.[12]

Determining whether an entity is subject to dual taxation requires a fact-intensive analysis, and often is a hotly contested issue. Fortunately in Michigan, nine tribes have entered into state-tribal tax agreements that delineate boundaries and define the tax treatment for various taxes and types of transactions.[13] Those doing business with a tribe without a tribal tax agreement must determine the tax implications of any business dealings at the outset of the relationship.[14]

Complicating the jurisdictional analysis, the extent of "Indian country," where tribal jurisdiction exists, is not always clear. Land within reservation boundaries is Indian country and, in some cases, land held in trust by the federal government for the benefit of a tribe also generally is Indian country, even if that land is outside the reservation boundaries.[15] Unfortunately for a number of Michigan tribes, reservation boundaries—or even whether particular reservations continue to exist—is often a matter of dispute and remains unclear.[16] Accordingly, it is wise to attempt to contractually define at least the nature and extent of tribal jurisdiction when doing so may have a significant effect on the business at issue.

Federal Approval of Contracts

Once concluded, certain contracts require federal approval. With some tribe-specific exceptions, federal law generally requires that the secretary of the interior approve a contract with an Indian tribe that "encumbers Indian lands for a period of 7 or more years…."[17]

Additionally, the secretary must approve any lease of land owned by an Indian or Indian tribe and held in trust or restricted status by the United States.[18] In considering the applicability of

that provision, the Bureau of Indian Affairs has opined that, "[u]nder [25 USC 415], any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void *ab initio,* has no force or effect, and grants no rights to either the attempted lessor or lessee."[19]

Finally, contracts relating to gaming activities also require federal approval in certain instances (or they also may be void *ab initio*),[20] and may be subject to requirements imposed by tribal gaming ordinances.[21] A key consideration at the outset of any contract negotiation with an Indian tribe is to determine whether secretarial approval is likely to be required for the contract.

Michigan's Federally Recognized Indian Tribes

- Bay Mills Indian Community
- Grand Traverse Band of Ottawa and Chippewa Indians
- Hannahville Indian Community
- Keweenaw Bay Indian Community
- Lac Vieux Desert Tribe of Lake Superior Chippewa
- Little River Band of Ottawa Indians
- Little Traverse Bay Bands of Odawa Indians
- Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
- Nottawaseppi Huron Band of Potawatomi Indians
- Pokagon Band of Potawatomi Indians
- Saginaw Chippewa Indian Tribe
- Sault Ste. Marie Tribe of Chippewa Indians

Conclusion

A number of unique legal issues are inherent in working with Indian tribes and on tribal lands. In addition to the issues briefly discussed in this article, clients should also be aware that there may be other special considerations relating to tax laws, criminal jurisdiction, and tribal treaty rights. Although there are hurdles to doing business in Indian country, understanding the basic concepts in this area of the law should allow practitioners to navigate those issues appropriately, allowing clients to enter into endeavors that are mutually beneficial for the tribe and its business partners while also protecting both parties' legal interests. ■

R. Lance Boldrey is a member in the Lansing office of Dykema. Mr. Boldrey's practice focuses on Indian law, and he regularly counsels companies doing business with Indian tribes in a wide range of industries, as well as tribes themselves. Mr. Boldrey previously served as the state-tribal liaison for Gov. John Engler.

Jason Hanselman is a member in Dykema's Regulated Industries Department. Mr. Hanselman's practice focuses on helping clients in highly regulated industries conduct business with government entities, including local, state, federal, and tribal governments. Mr. Hanselman regularly advises clients regarding a variety of gaming issues—assisting with casino and supplier licensing issues for Michigan's casinos and working on tribal casino projects around the country.

The authors would like to thank Shaun Johnson and Jamie Park for assisting with this article.

FOOTNOTES

1. See *Kiowa Tribe v Mfg Technologies, Inc,* 523 US 751, 754; 188 S Ct 1700; 140 L Ed 2d (1998).
2. See, e.g., *Allen v Gold Country Casino,* 464 F3d 1044, 1047 (CA 9, 2006); *Kiowa, supra* at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."). See, however, *Puyallup Tribe v Dept of Game,* 433 US 165, 97 S Ct 2616; 53 L Ed 2d 2616 (1977) (tribal immunity extends to individual tribal officials acting in their official capacity within the scope of their authority, but not to individual members of a tribe acting in their individual capacity).
3. *Memphis Biofuels, LLC v Chickasaw Nation Industries, Inc,* ___ F3d ___ (CA 6, 2009).
4. See, e.g., *Oglala Sioux Tribe v C & W Enterprises, Inc,* 487 F3d 1129, n 2 (CA 8, 2007).
5. See *National Farmers Union Ins Co v Crow Tribe,* 471 US 845 (1985) (whether tribal court has jurisdiction over a case is a federal question).
6. *Iowa Mutual Insurance Co v LaPlante,* 480 US 9, 16–17; 107 S Ct 971; 94 L Ed 2d 10 (1987).
7. See *Gaming World Int'l, Ltd v White Earth Band of Chippewa Indians,* 317 F3d 840, 849–852 (CA 8, 2003).
8. *Oliphant v Suquamish Indian Tribe,* 435 US 191; 98 S Ct 1011; 55 L Ed 2d 209 (1978).
9. *Plains Commerce Bank v Long Family Land and Cattle Co,* ___ US ___; 128 S Ct 2709, 2720; 171 L Ed 2d 457 (2008) (quoting *United States v Montana,* 450 US 544 (1981)).
10. *Id.*
11. See, e.g., *Oklahoma Tax Comm v Chickasaw Nation,* 515 US 450; 115 S Ct 2214; 132 L Ed 2d 400 (1995).
12. *Cotton Petroleum Corp v New Mexico,* 490 US 163, 189–193; 109 S Ct 1698; 104 L Ed 2d 209 (1989).
13. See Michigan Department of Treasury, Taxes—Native American <http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html> (accessed January 6, 2010).
14. Tribes operating without tribal tax agreements also often struggle to determine the applicability of certain state taxes to the tribe and its members. See, e.g., *Keweenaw Bay Indian Community v Rising,* 569 F3d 589 (CA 6, 2009).
15. See, however, *United States v Stands,* 105 F3d 1565, 1572, 1572 n 3 (CA 8, 1997) (holding that "tribal trust land beyond the boundaries of a reservation ordinarily is not Indian Country.").
16. *United States on Behalf of the Saginaw Chippewa Indian Tribe v Michigan,* 106 F3d 130 (CA 6, 1997), vacated 524 US 923 (1998).
17. 25 USC 81.
18. 25 USC 415(a).
19. *Bulletproofing, Inc v Acting Phoenix Area Director, BIA,* Interior Board of Appeals, 20 IBIA 179, 179 (1991) (emphasis added).
20. 25 USC 2710(d)(9); 25 USC 2711(a)(1); see also *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Kean-Argovitz Resorts,* 249 F Supp 2d 901 (WD Mich, 2003) (development agreement that included promissory note was void because it was not approved by National Indian Gaming Commission, therefore negating contractual sovereign immunity clause).
21. 25 USC 2710(b).