

Doing Business in Indian Country

Judith Dworkin, esq. & Katya Lancero, esq.



Introduction

- With the commencement of Indian gaming in 1979 and its continued expansion, Indian tribes have had a substantial source of new capital available to Tribal governments.
- In 2020, Indian Tribes brought in \$27.8 billion in gaming revenue, an unprecedented drop of 19.5% from the \$34.5 billion in gaming revenue in 2019. The decline was due to the COVID-19 pandemic. See *IndianAZ.com* (August 17, 2021). As normalcy returns, revenues are anticipated to rebound.
- Tribes have used these revenues to expand business activity throughout their reservations and outside their reservations. In expanding their activities, Tribes are increasingly partnering with non-Indian businesses that bring expertise and new capital to their lands.
- **This presentation introduces the key issues involved in doing business with Indian Tribes on Indian lands.**
- **There are legal complexities unique to dealing with an Indian Tribe that must be addressed when structuring a successful transaction.**

Basic Facts of Indian Tribes

- The Federal Register lists all Federally Recognized Indian Tribes. There are 574 Tribes listed. See Notice by the Bureau of Indian Affairs, 86 FR 7554 (1/29/21).
- Arizona has 22 Federally Recognized Indian Tribes.
- Arizona's Tribes occupy over 19,000,000 acres of land, roughly 26.99% of land in the State, a greater percentage of land than any other State in the continental United States.
- Indian Tribes control 56 million acres of land in the continental United States and substantial natural resources.



The Legal Status of an Indian Tribe

- A Federally Recognized Tribe is a legal designation that establishes certain relationships between the United States and the Tribe.
- Recognition is “a formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a ‘domestic dependent nation,’ and imposes on the [federal] government a fiduciary trust relationship to the tribe and its members.” H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994).
- Recognition “imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members. In other words, unequivocal federal recognition of tribal status is a prerequisite to receiving the services provided by the Department of the Interior’s Bureau of Indian Affairs (BIA), and establishes tribal status for all federal purposes.” H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., at 3 (1994).
- Besides Federally Recognized Tribes, there are also State-Recognized Tribes and unrecognized tribal communities. This presentation focuses only on Federally Recognized Tribes.

Structure of Tribal Governments

- Indian Tribes “are distinct, independent political communities, retaining their original natural rights in matters of local self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).
- An Indian Tribe is free to maintain or establish its own form of government. See 1-4 Cohen’s Handbook of Federal Indian Law § 4.01 (2017).
- Each Tribe may determine its membership, enact criminal and civil laws, levy taxes, control tribal property, exercise powers delegated by Congress, and adjudicate tribal disputes.
- The forms of government that Tribes use to govern themselves vary widely. Some have very familiar structures like a three-branch form of government, that is legislative, executive, and judiciary, while others have only a Tribal Council which has the sole authority.

Status of Land Within a Reservation

- The term Reservation is used to describe the boundaries of the lands governed by a particular Tribe.
- **A key concept is the term “Indian Country.”**
- Indian Country, 18 U.S.C. § 1151, is defined as:
 - 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.

Trust Lands

- Much of the tribal land within a Reservation is held in trust by the federal government for the beneficial ownership of the Tribe or individual Indians.
- Land held in trust by the United States for the benefit of either the Tribe or individual Indians is unalienable and not subject to sale or permanent transfer.
- Trust lands cannot be taxed by the State.
- Congress has provided that no agreement or contract with a tribe that encumbers Indian lands for a period of seven or more years shall be valid unless the agreement or contract bears the approval of the Secretary of the Interior or its designee. 25 U.S.C. § 81.
 - > “Encumber” means “to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances).” 25 C.F.R. § 84.002.

Tribal Business Organizations

- Tribes carry out business activities through different entities. The nature of the entity will affect the legal rights and remedies available to a non-Indian party.
- Types of Entities:
 - > Government itself or a government instrumentality
 - > Section 17 Corporation
 - > Tribal entity
 - > Tribally chartered corporation
 - > State corporation
- **Non-Indian parties entering into contracts to do business in Indian country should determine the exact entity with which they are contracting.**
- **Non-Indian parties should obtain and review all governing and organizational documents of the Indian party with which they are contracting.**

Tribes Have Sovereign Immunity

- A central axiom of Indian law centers on Indian tribes' status "as domestic dependent sovereigns." As such, tribes enjoy federal common-law sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028 (2014) (reaffirming tribal sovereign immunity and holding that it bars suit against an Indian tribe for opening casino outside Indian lands).
- This immunity is very broad. Immunity shields tribal officials, employees acting in their official capacity and within the scope of their employment, and it shields Tribes from suits for damages and requests for injunctive relief (whether in tribal, state, or federal court).
- Immunity applies to activities of the Tribe both on and off the Reservation and for both governmental and commercial activities. Therefore, even a tribally owned business operating beyond the exterior boundaries of a Reservation may be immune from litigation relating to a contract.
- **An entity doing business with an Indian Tribe should be aware that Tribal immunity can prohibit the enforcement of an otherwise valid contract.** The Supreme Court has recognized the power of immunity and stated in the economic context, "immunity can harm those who are unaware that they are dealing with a tribe, [and] who do not know of tribal immunity" *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

But Immunity Can Be Waived

- Tribes may waive their sovereign immunity by tribal law or contract, so long as the waiver is clear and unequivocal. See *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).
- While a waiver must be “clear,” there are no magic words needed. The United States Supreme Court in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001), held that an agreement to arbitrate constituted a clear waiver of immunity.
- **A waiver of immunity must be undertaken by a tribal entity with the authority both to enter the agreement and waive sovereign immunity.** See *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (finding that tribal corporation did not waive immunity in contract because corporation did not get Board of Directors approval of waiver).
- Congress has the power to abrogate tribal sovereign immunity. To do so, Congress must “unequivocally express that purpose.” Federal statutes which have waived immunity are the Indian Gaming Regulatory Act, the Clean Water Act, and the Safe Drinking Water Act.

Scope, Terms, & Conditions of Waiver Need to Negotiated

A non-Indian party seeking a waiver of immunity from the tribal party should focus on:

- Who benefits from the waiver;
- What recourse is available if a default occurs;
- What assets could satisfy a potential claim;
- Who controls those assets;
- What steps must be taken to ensure those assets can be reached; and
- The extent to which those assets can be set aside to secure other tribal obligations.

The Dispute Resolution Provision

Key contractual provision:

- What court may resolve disputes between the parties?
- Will the parties agree to binding arbitration rather than litigation?
- In *Grand Canyon Skywalk*, the federal district court in Arizona upheld an arbitration award against Sa Nyu Wa Inc., a tribally chartered corporation of the Hualapai Tribe, where the agreement between the parties stated that “any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration.” See *Grand Canyon Skywalk Dev., LLC v. Sa' Nyu Wa, Inc.*, 923 F. Supp. 2d 1186, 1192 (D. Ariz. 2013).

Be aware: Some Tribes insist that their contracts contain an agreement that any dispute or enforcement action be brought in tribal court. Tribes prefer to avoid the jurisdiction of state courts, and federal courts are often without jurisdiction to address contract enforcement actions.

Binding arbitration is often a mutually agreeable alternative to court proceedings, although it would still be necessary to resort to a court in order to enforce the agreement to arbitrate and to enforce an arbitration award.

Judgment & Remedies

- The extent of any creditor (secured or unsecured) executing against tribal property will be determined by the Tribe's waiver of immunity.
- Further, there can be no recovery against assets of the Tribe held in trust by the United States.
- To enforce any judgment, lien, or right of repossession against assets of the Tribe, the Tribe will have had to waive its immunity and pledged any assets for any potential claim.
- **Be aware:** The parties need to specify in the contractual agreement how, and against what assets, recourse will be available in the event of any default or breach.

Governing Law on the Reservation:

Federal & Tribal Law will apply

- Within Indian Country, generally speaking, “primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.” *Alaska v. Native Village of Venetie Tribal Gov’t.*, 522 U.S. 520 ,527 n. 1 (1991).
- “Absent clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country.” Cohen’s Handbook, § 7.03. In *Williams v. Lee*, the Supreme Court held that an Arizona state court did not have jurisdiction over a non-Indian’s lawsuit to collect a debt incurred by a reservation Indian at a trading post on the reservation. The Court held that allowing the suit to proceed would undermine the authority of the tribal courts and therefore infringe on the tribe’s ability to govern affairs on the reservation. See *Williams v. Lee*, 358 U.S. 217 (1959).
- P.L. 280 State Exception: State laws can apply in these states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska.

Regulatory & Adjudicatory Jurisdiction Lies With the Tribe

- For non-Indian contractors working on an Indian Reservation on trust land, assume that Tribal law will apply:
 - > A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships through commercial dealings, contracts, leases, or other arrangements, with the tribe or its members. In *Montana v. United States*, 450 U.S. 544, 565 (1981)(Exception 1).
 - > A tribe may exercise civil authority over the conduct of non-Indians on non-Indian fee lands within its reservation when that conduct threatens or directly affects the tribe's political integrity, economic security, health, or welfare. 450 U.S. at 565-566. This exception has been narrowly applied.
- **Be aware: Tribal parties will generally provide for this type of regulatory and adjudicatory jurisdiction in the contract.**

Tribal Regulatory Power:

Tribal permits & licenses, Tribal U.C.C. laws

- Many Tribes require a license or permit to conduct business activity on the Reservation.
- See Gila River Indian Community Business License (“Anyone engaged in business on the Gila River Indian Reservation must apply for, and be issued a business license.”).
- See Salt River Pima-Maricopa Indian Community, Code of Ordinances, § 15-24 (“No person shall commence, practice, transact or carry on any business as defined in this article without first having procured a license as provided for in this article.”).
- A Tribe’s general business laws will apply to any transaction on the Reservation. See Navajo Nation Uniform Commercial Code Title 5A (governs the sale of goods, enforcement of contracts, remedies for breaches of contract, obligations, and liabilities of those using negotiable instruments in transactions, and procedures for a creditor to enforce security interests).

Tribal Taxation

The United States Supreme Court holds that Indian tribes have the authority to impose taxes on activities that take place on the Reservation and to impose taxes on non-Indians. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (“The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.”).

- The Navajo Nation Business Activity Tax is imposed on the gross receipts from the sale of goods or services within the Navajo Nation, with the legal incidence of the tax on the party receiving the gross receipts. See Navajo Tax Code Section 402, 404.
- The Salt River Pima-Maricopa Community Transaction Privilege Tax is imposed on the gross proceeds of sale or gross income from the business operating within the Reservation. See Code of Ordinances, § 15.1-50.

State Taxation in Indian Country

- States can tax non-Indian transactions on Indian reservations, unless the state tax is preempted by federal law or interferes with the Tribe's ability to govern itself.

See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188-189 (1989);
White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-143 (1980).
- A balancing test is imposed to determine whether a State tax will apply.
 - > Non-Indian company contracts with Indian Tribe, Tribal entity, or Affiliated Indian, state tax does not apply. *See Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).
 - > Non-Indian company contracts with a State entity or the Bureau of Indian Affairs, the state tax does apply. *See Dep't of Revenue v. M. Greenberg Constr.*, 182 Ariz. 397, 897 P.2d 699 (Ct. App. 1995); *Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999).
- There can be double taxation by a Tribe and the State.

Adjudicatory Power:

Tribal courts will be the forum unless the parties agree to adjudicate disputes elsewhere

- All of Arizona Tribes have Tribal Courts.
- **Disputes will be decided by these Tribal Courts absent a contractual agreement to hear disputes elsewhere.**
- Arizona State Courts recognize the decisions by Arizona Tribal Courts. *See Tracy v. Superior Court of Maricopa Cty.*, 168 Ariz. 23, 34 (1991) (“Arizona courts have consistently afforded full recognition to tribal court proceedings.”).
- Arizona Courts recognize certain Tribal Court judgments as a matter of Arizona procedural law. *See Arizona Rule 5, Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments.*

Choice of Law Clauses

- A non-Indian party to a contract with a Tribe or Tribal entity should negotiate and designate the “governing law” provision.
- In any contract where the law of more than one jurisdiction may apply, a “choice of law” clause will determine which law governs the contract. See 5A Navajo Code §1-105 (“the parties may agree that the law either of the Navajo Nation or of such state or nation shall govern their rights and duties.”).
- Justice Ginsburg in her concurrence in *Plains Commerce* noted that if the non-Indian party wanted to avoid responding in tribal court or the application of tribal law, the Bank could “have included forum selection, choice-of-law, or arbitration clauses” in its agreement. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg J., concurrence).

Tribal Employment Preferences

- Many Tribes specifically provide for Indian preference in employment and contracting. Section 703(i) of the U.S. Civil Rights Act permits Indian preference on or near Reservations and exempts tribes from the coverage of Title VII.
- Tribes enact tribal preferences through tribal employment rights ordinances (TEROs), which govern employers doing business on Reservation land. TEROs generally authorize tribes to:
 - 1) impose numerical hiring goals and timetables specifying the minimum number of Indians an employer must hire;
 - 2) prohibit the use of certain job qualifications or personnel procedures that tend to disqualify Indians;
 - 3) require employers to provide or participate in training programs designed to increase the pool of qualified Indian applicants;
 - 4) establish counseling and support for Indian workers to assist them in regaining employment;
 - 5) impose fees to fund tribal employment programs; and
 - 6) provide for other requirements designed to achieve increased Indian employment.

Federal Laws That May Apply:

- 25 U.S.C. § 81: Any contract that “encumbers” Indian trust lands for a period of seven years or more must be approved by the Secretary of Interior or his/her designee. Section 81 approval does not apply to contracts with Tribal members, contracts entered into under the Indian Self-Determination and Tribal Self Governance Act, and contracts entered into with Section 17 IRA Corporations and Tribally Chartered Corporations.
- 25 U.S.C. § 415: Any “leasing” of Tribal lands requires Secretary Approval. But the 2012 HEARTH Act permits Tribes with federally approved procedures to lease Trust lands without Secretarial approval for up to 25 years. See § 415(h).
- 25 U.S.C. § 261 *et seq.*: The Indian Traders License Act statutes. These statutes grant the Secretary of the Interior the authority to appoint traders to Indian Tribes and to make rules governing the selling of goods. Pursuant to this authority, the BIA requires covered traders to obtain BIA-issued licenses. See 25 C.F.R. § 140 and 141. The Indian Traders Act preempts state taxation of the transaction. See *Central Machinery Co. v. Arizona State Tax’n*, 448 U.S. 160, 165 (1980).
- **40 U.S.C. § 3131 *et seq.*: The Miller Act’s bond requirements typically do not apply to construction contracts with an Indian tribe on the Reservation.**
- 1-21 Cohen's Handbook of Federal Indian Law § 21.02 (2017)

Any Questions?

Thank You



Judith Dworkin

480.425.2615

dworkin@sackstierney.com



Katya Lancero

480.425.2621

lancero@sackstierney.com