Avoid the Pitfalls of Doing Business with Tribal Government and Entities

Against the historical backdrop of treaties dating back to the U.S. Constitution, the federal government has contracted with and passed laws affecting the "self-determination" of indigenous peoples, involving both government services and private enterprise. State governments have likewise entered into inter-governmental agreements or "compacts" with tribes, including regulation of Indian gaming. Opportunities for private entities to do business with Indian nations and on reservation lands has spawned economic development in many areas, including real estate, finance, natural resources, retail and commercial operations, as well as tourism and entertainment. This article is intended to help companies and individual entrepreneurs understand the risks and corresponding benefits of contracting with tribal governments and doing business with tribal entities.

WITH WHOM ARE YOU DOING BUSINESS?

In one form or another, you are dealing with the tribe itself, which is a sovereign nation, meaning that it has sovereign immunity. The tribe's absolute immunity from suit, in government operations as well as commercial transactions, applies even to contracts and business activities off the reservation. This can be intimidating for individuals or companies seeking a business relationship with a tribe; however, those who take the time to understand the law and plan for the pitfalls, may reap many lucrative economic opportunities.

Apart from some traditional government operations, some of which may fall under the aegis of federal law, Indian tribes often conduct business through separate entities, such as tribal corporations and business "enterprises." Tribal corporations can be established under federal law, but more commonly are created under that tribe's own laws, which will be controlling for most business transactions and disputes.

Federal law vests tribal governments with the power to engage in business transactions and to create business corporations under Section 16 of the Indian Reorganization Act (IRA) for government operations, such as housing authorities, and under Section 17 for other commercial activities. The key issue is that most Section 17 corporate charters include a "sue and be sued" clause, which has
been interpreted as being a limited waiver of sovereign immunity, at least regarding those assets specifically pledged or assigned in the transaction. Keep in mind that there are some contracts, including certain leases and professional services agreements, which must comply with requirements set forth by the Bureau of Indian Affairs ("BIA") and are subject to BIA review and approval.

A tribal government may also transact business through a tribal corporation or a business "enterprise" established under tribal law. These entities may also perform traditional governmental functions, such as providing housing, health care and governmental services, or they can be purely economic or business entities created, for example, to operate a resort or casino. Generally, the rights and liabilities will usually be dictated exclusively by the operation of tribal law, including the tribe's Constitution or Charter, and any tribal law or business ordinances for the creation of such entities.

The key question is whether there has been a waiver of sovereign immunity in either the creation of the business entity or in the transaction or contract at issue. Some tribal codes, charters and articles of incorporation waive the immunity of those corporations on a limited basis, or authorize the corporation to do so, sometimes without approval by the tribal government. Otherwise, there must be an explicit and unequivocal waiver by the tribe in order to enforce the contract. Remember, if the tribal corporation or business entity functions as an "arm" of the tribe and for the benefit of the tribe, it likely will have the same attributes of the tribe, including sovereign immunity, again unless the immunity has been expressly waived.

WHERE ARE YOU DOING BUSINESS?

Most tribal governments impose business license requirements as a pre-condition of doing business on tribal lands. This requirement is not usually a difficult or expensive process, but you should research it and be aware of the process and the time involved to complete it well in advance of finalizing the agreement. Businesses which fail to obtain the required tribal licenses risk losing their ability to enforce any obligation arising out of on-reservation business activity. Federal law also requires a business to obtain an Indian traders' license, which is issued by the BIA. Any non-Indian party seeking to do business on a tribal reservation should, therefore, review and understand the licensing requirements for doing so as set forth in both tribal and federal law.

WHAT TAXES WILL YOU NEED TO PAY?

Tribal governments may impose certain taxes on anyone doing business on tribal lands. Whether a state may tax a business transaction on an Indian reservation is more complicated. Tribal governments and members are typically
exempt from state taxes, but if the transaction at issue does not involve trade under the Indian Traders statute and involves a non-Indian, courts generally apply a balancing test. Unfortunately, this balancing test is imprecise and can leave non-Indian business in the difficult position of being obligated to pay tribal, state and federal taxes. Under some circumstances, however, this risk can be minimized by structuring the transaction as a management or service agreement in which the tribal government is deemed to be the project owner or operator and the non-Indian business is retained to provide limited management services.

WHAT HAPPENS IF YOU HAVE A DISPUTE?

Ideally, commercial transactions and contracts should be structured to minimize disputes and to otherwise delineate the methods by which the parties can enforce their rights and remedies. Contracting with tribal governments and enterprises, however, presents unique issues, from the provisions regarding sovereign immunity to jurisdiction and choice of law questions. Fundamentally, all federally recognized Indian tribes are sovereign nations who are immune from suit unless there is a clear and unequivocal waiver by the tribe or an act of Congress. Indian tribes, and in most cases their wholly-owned tribal entities, cannot be sued in any state or federal court, even for business transactions that occur outside the reservation boundaries, without an express waiver by the tribe. Thus, immunity, jurisdiction and choice of law issues must be agreed upon in advance of any business transaction with the tribe or any tribal entity.

It bears noting that a waiver of sovereign immunity does not necessarily mean that a tribe is subjecting itself to jurisdiction in federal or state courts, nor to arbitration, at least without a specific agreement and choice of law provision. More often than not, the tribal courts have exclusive jurisdiction over disputes with a tribe, or tribal court remedies must first be exhausted before seeking other redress. Most tribes have their own substantive laws and rules of procedure, and will also follow "traditional law" and the customs of the tribe.

Having successfully negotiated the sovereign immunity and jurisdictional hurdles, the next thing to consider would be choice of law, and in particular any applicable rules of tribal law or procedure, such as Notice of Claim provisions and the statute of limitations for claims against the tribe and its members. Naturally, you will want to engage an attorney who is not only admitted to practice in the tribal court, but also understands tribal law, procedure and custom as well as how disputes are resolved in tribal court, including the length of time it may take and the applicable rules of appellate procedure.
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