

# Due Diligence in Business Transactions with Tribal Governments and Enterprises

by Maurice R. Johnson and Benjamin W. Thompson



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There are over 500 federally recognized Indian tribes in the United States. During the past several decades, many tribes have become active participants in the private marketplace. Most tribes have taken over the administration of various federal programs under the Indian Self-Determination and Education Assistance Act,<sup>1</sup> positioning the tribes as major purchasers of goods and services. At the same time, many tribes' economic development efforts have succeeded to such an extent that they have acquired diverse interests in real estate, construction, hospitality, manufacturing, and retail outlets.

While there are plenty of opportunities to do business with Indian tribes, there are also plenty of reasons to be cautious when contemplating a particular transaction. Doing business with tribal governments and tribal enterprises is more like doing business with the state or federal governments than with private companies. Because tribes are sovereign entities and Indian lands are sovereign territory, special rules apply to these business transactions. Not knowing these rules can change a golden opportunity into an expensive lesson in tribal sovereignty.

As an illustration, let's assume that a heating and cooling contractor enters into a contract with a tribe for the purpose of installing a new climate control system in one of the tribe's buildings. The proposed system will cost in excess of \$50,000. On jobs of this size, the contractor usually accepts a down payment with monthly payments thereafter. Using the contractor's standard purchase agreement, a tribal employee and the contractor reach a deal and the system is installed.

However, 15 months later, the system malfunctions. Because the warranty has expired, the contractor insists on a labor charge to service the system, but the tribal employee refuses. Despite assurances from the employee that the tribe

would continue to pay the balance of the system's purchase cost, there are no further payments and the contractor is unable to collect. When the contractor threatens to uninstall and remove the system, the contractor receives a notice that his company is barred from entering the tribe's reservation.

To an attorney, this scenario does not leave many avenues for enforcing the purchase agreement. If the contractor attempts to enforce the contract in state court, the tribe may successfully move for dismissal for lack of jurisdiction based on the tribe's sovereign immunity from suit. Unless the contractor owns land within the tribe's reservation, the contractor may legitimately have lost the privilege of entering the reservation and removing the climate control system, regardless of whether the purchase agreement provided for its removal in the event of nonpayment.

Indian country business transactions do not have to end this way though. This article is intended to provide an overview of some of the issues that must be considered before doing business with a tribal government or tribal enterprise. With the right due diligence, businesses can satisfy their expectations in any business transaction with a tribal government or enterprise. Like any other contemplated commercial transaction, conducting due diligence simply means knowing whom you will be doing business with.

## Tribal Sovereignty

In the case of a tribal government or enterprise, you will be doing business with a sovereign entity, which has serious implications for the transaction. It is important to understand the nature of tribal sovereignty. Although tribes possess inherent sovereignty, it is not absolute sovereignty. In past treaties, tribes have often submitted to the protection and overriding sovereignty of the federal government.<sup>2</sup> The Supreme Court has also found restraints on tribal self-government implicit in the relationship between the tribes and the federal government, which it characterized as a guardian-ward or trust relationship.<sup>3</sup> Otherwise, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."<sup>4</sup>

In general, the scope of tribal sovereignty is evident in the various powers exercised by tribal governments. Among the fundamental powers of tribes are the powers to establish a chosen form of government, administer justice, determine tribal membership, exclude people from tribal lands, and charter business organizations.<sup>5</sup> Tribal governments also enjoy the flexibility of police power and sovereign immunity from suit.<sup>6</sup> Each of these sovereign powers of self-government will impact business transactions with tribes.

## Tribal Organization

Tribes may enter into business transactions as a tribal government or a tribal enterprise. Tribes with self-determination contracts with the federal government will often contract with outside vendors for the provision of goods and services to the tribal government. However, tribes are also engaging in commerce with increasing frequency as tribal enterprises, providing goods and services to others. Therefore, it is a good idea to understand how both tribal governments and tribal enterprises may be organized.

While a number of tribal governments are organized strictly under tribal law, many are reorganized under federal law pursuant to the Indian Reorganization Act ("IRA"),<sup>7</sup> which Congress passed in 1934 following the issuance of a report emphasizing the failures and shortcomings of the federal government's policy of allotment and assimilation.<sup>8</sup> The IRA prohibits any further allotment of reservation land<sup>9</sup> and provides for the voluntary adoption of government and corporate charters by tribes.<sup>10</sup> Due to the influence of the Bureau of Indian Affairs ("BIA") in drafting the charters, IRA tribes often have similar government and corporate structures, while non-IRA tribes may have quite different structures. Either way, virtually all tribes have written constitutions and bylaws that empower the tribal governments.

When a tribal government operates a business, the enterprise may be organized in several different ways. The tribal enterprise can be organized under a federal IRA charter; a state charter; a tribal charter; or simply as the tribe doing business as the enterprise. It is extremely important to identify how the tribal enterprise is organized to fully understand each party's rights and remedies.

Tribes with IRA corporate charters ("Section 17 Corporations") have federal charters that define the scope of the tribal corporation. While many Section 17 charters exist, very few IRA tribes operate pursuant to that charter due to the inflexibility of the charters and generic "sue and be sued" clauses that provide a waiver of the tribe's immunity from suit. Some tribes early on organized their tribal enterprises pursuant to a state charter, just as privately owned enterprises would. However, this practice has been drastically curtailed due to IRS rulings that treat such corporations the same as private corporations for purposes of tax liabilities.<sup>11</sup>

It is becoming more common for tribal enterprises to be operated pursuant to a tribal charter. This can take the form of an actual charter obtained pursuant to a tribal corporations code, or it can be a public charter issued directly by the tribal government pursuant to its constitutional authority. For most purposes, these tribally incorporated enterprises will be treated the same as the tribal government and will therefore enjoy the same sovereign privileges and immunities.<sup>12</sup>



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Finally, the tribal government itself operates some tribal enterprises, many of which are Indian casinos. These DBA tribal enterprises (“doing business as” the tribal enterprise) do not have a separate corporate structure or management. Like tribal corporations, these enterprises share in the tribe’s sovereign privileges and immunities, but DBA enterprises also involve different political considerations due to their ultimate control by elected tribal officials.

### Applicable Laws

By doing business with a tribal government or enterprise, you are opening the door to the potential application of a third sovereign’s laws. It will also impact the application of federal and state laws to what might otherwise be a straightforward commercial transaction. The applicability of tribal, federal and state laws will depend on the identity of the parties, the type of transaction, and whether the transaction takes place on or affects Indian lands. The nature of the law in question, whether regulatory or adjudicatory, will also impact the analysis.

For starters, anyone contemplating a business transaction with a tribal government or tribal enterprise should be familiar with what constitutes “Indian country” or “Indian lands.” While specific definitions of “Indian lands” exist throughout federal, state, and tribal laws, “Indian country” is the general benchmark for defining the respective territorial scope of federal, tribal and state jurisdiction. Although the true definition of Indian country comes from the United States criminal code,<sup>13</sup> the Supreme Court held that it also applies to issues of civil and tribal jurisdiction.<sup>14</sup> Federal law<sup>15</sup> defines Indian country as including reservations, allotments, and “dependent Indian communities,” which has been interpreted by the Supreme Court as land (1) set aside for the use of Indians and (2) under federal supervision.<sup>16</sup>

The only clear guideline that can be given about jurisdiction in Indian country is that it is never clear. Indian lands have been recognized at different times and under different circumstances, and the unique history behind each will influence the applicability of laws to transactions occurring on those lands. On one extreme, there are Indian reservations that have been set aside for a particular tribe with no further interference by the federal government; on the other side are Indian lands that have been allotted or sold as a result of a tribe’s termination, but later reacquired as part of the tribe’s restoration to federal recognition. This unique history must be understood before drawing any conclusions about a law’s applicability.

Regardless of how Indian lands were established, one of the most prevalent misconceptions among non-Indians concerns the applicability of state laws to transactions involving non-Indians. Although early Supreme Court case law suggested that state laws have absolutely no applicability in Indian

country,<sup>17</sup> this view has been affected by later demographic and statutory changes. At the present, it is generally accepted that tribal, state and federal laws can all apply within Indian country, depending on the circumstances. Therefore, there are three sovereign governments with possible jurisdiction.

It is now recognized that state laws do apply to non-Indians in Indian country unless preempted by Congress, so merely residing or transacting business on Indian lands does not exempt a non-Indian from state laws. However, when an incident involves an Indian and a non-Indian, federal laws may preempt state laws, especially in the adjudicatory context. In the 1950’s, Congress passed a law<sup>18</sup> transferring federal adjudicatory jurisdiction in Indian country to certain states, referred to as “PL 280 states,” so that states may adjudicate all matters in Indian country. Some PL 280 states have subsequently retroceded some or all of that authority back to the federal government, which further complicates any jurisdictional analysis. In general though, state laws, both regulatory and adjudicatory, will always apply to transactions exclusively involving non-Indians.

When a non-Indian transacts business with an individual Indian or an entire tribe, both tribal and federal laws may also apply. Although the federal government has restricted tribal jurisdiction over non-Indians in both the criminal and civil contexts, certain exceptions have been recognized in the civil context. These exceptions, known as Montana exceptions (for the case giving rise to them),<sup>19</sup> extend to consensual relationships between the non-Indian and the tribe, such as commercial dealings, contracts and leases; as well as non-Indian conduct that threatens or has a direct effect on the political integrity, economic security, health or welfare of the tribe. In these cases, a tribe may regulate the conduct of the non-Indian through taxation, licensing, or other methods. Later Supreme Court case law extended this framework to the civil adjudicatory context as well.<sup>20</sup>

Federal laws of general applicability apply to anyone within Indian country.<sup>21</sup> More specific federal laws also apply to certain matters involving Indians, including laws restricting the ability of tribes or their members to contract;<sup>22</sup> requiring trader licenses when doing business with Indians on reservations;<sup>23</sup> and authorizing the leasing of Indian lands for grazing, mineral extraction, timber harvesting, or other purposes.<sup>24</sup> In commercial transactions with a tribal government or tribal enterprise, these federal laws and regulations may impose specific requirements on the non-Indian that would not otherwise exist in a general commercial transaction.

In a commercial transaction, state commercial codes generally do not apply in Indian country unless tribes adopt them. Tribes may therefore adopt a state’s code, adopt a code of their own, or they may negotiate agreements each time they

enter into a business transaction. Because relatively few tribes have adopted state codes or created their own, the latter scenario usually governs.

## Dispute Resolution

When a dispute arises out of a business transaction between a non-Indian and a tribal government or tribal enterprise, the default method of resolving that dispute will, to the surprise of the non-Indian, often fall within the tribe's jurisdiction under the Montana exception identified above. Tribes have the inherent authority to create their own systems of dispute resolution. While some tribes continue to send disputes to a tribal council or traditional forum for resolution, many have developed their own tribal courts or intertribal courts with other nearby tribes.

Tribal courts are the result of various attempts by the federal government to provide a judicial law enforcement mechanism on the reservations. Subsequent to the passage of the IRA, which restored substantial autonomy to tribes, tribes moved towards representative tribal governments, including the establishment of tribal courts. The tribal courts, in turn, have played an increasingly important role in the development of tribal governments and the economies of the reservations.

Tribes have realized that in order to foster an environment that encourages investors to invest and businesses to do business within the reservation, they must have capable institutions of self-governance, from commercial codes to effective and independent judicial systems. Accordingly, many tribes have enacted business and corporate codes that set forth the rights and remedies of parties entering into a business transaction with the tribes. In other words, tribes have an economic interest in ensuring businesses that they can enforce their remedies in tribal court and have a fair and impartial hearing and decision maker. Without these assurances, businesses often attempt to "get around" having disputes heard in tribal court, by going straight to state or federal courts without first exhausting the remedies available in tribal court. Usually, this is a mistake.

Principles of comity require that tribal court remedies must be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land.<sup>25</sup> On the other hand, deference to tribal court proceedings is not absolute, as illustrated in a case where the court stated that exhaustion would not be required where it would be "futile because of the lack of an adequate opportunity to challenge the (tribal) court's jurisdiction."<sup>26</sup>

However, the contracting parties are free to agree to an alternative method of dispute resolution. This may be in state or federal court, or it may be true alternative dispute resolution through mediation or arbitration. The trend in large

commercial transactions with tribes is to agree to arbitration with enforcement of arbitral awards in federal courts. As a compromise, non-Indians will often agree that any tribal laws affecting commercial transactions will apply despite resolving the dispute in federal court.

## Sovereign Immunity

Even where statutes and other applicable laws grant a right, the possessor of the right may still be unable to enforce that right if they are unable to sue the tribe. For example, although states have the authority to tax sales of cigarettes to nonmembers at a tribe's convenience store, a tribe's sovereign immunity prevents states from suing the tribe itself to collect these taxes.<sup>27</sup>

Tribal sovereign immunity depends on a number of variables. In federal court, tribal sovereign immunity is a matter of federal law. The Supreme Court has held that tribes are immune from suit in federal court, but tribal officials are not immune from suits seeking injunctive relief.<sup>28</sup> The immunity extends to both reservation and trust lands,<sup>29</sup> as well as commercial activity off the reservation.<sup>30</sup> A tribe may assert the defense of sovereign immunity at any time during litigation and may assert the defense even if there is no alternative forum to adjudicate the claim.<sup>31</sup>

Like the sovereign immunity of the federal and state governments, tribal sovereign immunity has few limitations. Courts have rejected a number of challenges to tribal sovereign immunity, including arguments that only federally recognized tribes are entitled to sovereign immunity; that states may abrogate a tribe's immunity; that tribes waiving immunity from some claims waive immunity from other claims; that sovereign immunity does not apply to nonmembers; or that a tribe's acceptance of federal funds constitutes a waiver of its immunity from any suit challenging the expenditure of those funds.<sup>32</sup>

Some tribal entities, such as tribal housing authorities, normally share the tribe's sovereign immunity from suit. Even commercial activities of the tribe may be covered by the tribe's immunity protection. For instance, a tribal casino may be protected by sovereign immunity when it is run by a commission composed "entirely of tribal members . . . [where] the Tribe has exclusive control over the appointment and the removal of its decision makers [and] the sole responsibility of the commission is to operate the Casino for the Tribe."<sup>33</sup> The outcome may be different if the casino is operated and managed by an independent contractor.

Despite the relatively few limitations on tribal sovereign immunity, tribes may still be vulnerable to suit in their corporate capacity. Tribal corporations operating under a state



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charter generally do not have tribal sovereign immunity. Tribal corporations operating under a federal charter—“Section 17 Corporations”—are subject to suit if they have waived their sovereign immunity in the charter. Most federal charters for Section 17 Corporations included a clause authorizing the tribe to “sue or be sued” in its corporate capacity. However, the Eighth Circuit Court of Appeals has ruled that a tribe must explicitly act pursuant to its Section 17 charter for the provisions of the charter to govern; the mere existence of a Section 17 charter does not mean that any business activity undertaken by the tribe will be pursuant to that charter.<sup>34</sup> To bring suit then, the aggrieved party must show that the Section 17 Corporation is the entity legally responsible for the action and is the entity that is being sued.<sup>35</sup>

When tribal sovereign immunity does exist, it can be abrogated by Congress or waived by the tribe. Congress has only abrogated tribal sovereign immunity in a few areas. For purposes of this article, some relevant areas include suits regarding mandatory liability insurance and gaming activities to some extent.<sup>36</sup> The tribe provides most waivers of tribal sovereign immunity directly, either through tribal law or in a contract.

For a tribe to waive its sovereign immunity, the waiver must be clearly expressed.<sup>37</sup> However, this does not require that the waiver expressly use the words “sovereign immunity.”<sup>38</sup> Most waivers are extremely limited, so that a waiver of sovereign immunity from some claims does not constitute waiver of immunity from other claims.<sup>39</sup>

Recently, the Supreme Court held that an agreement by a tribe to arbitrate disputes constitutes a waiver of immunity, allowing a tribe to be sued in court to enforce the arbitration award where the contract containing the arbitration agreement contained a choice of law clause that subjected the tribe to “the law of the place where the Project is located,” which was off reservation.<sup>40</sup> Although the tribe did not use a phrase waiving sovereign immunity in the contract, the combination of the agreement to arbitrate along with this choice of law clause was found to be an express waiver of sovereign immunity by the tribe.<sup>41</sup>

Accordingly, although tribes typically enjoy sovereign immunity from suit, their sovereign immunity is not without limitation. It can be limited by Congress or by the tribe’s own waiver. Additionally, even where the tribe is not subject to suit, tribal corporations may, under certain circumstances, still be subject to suit in their corporate capacities.

## Conclusion


In the illustration set forth above, simple due diligence on the contractor’s behalf would have resulted in an enforceable contract. To begin with, the contractor should not have relied

on the authority or assurances of a tribal employee that he could contract on behalf of the tribe or that the tribe would continue to pay the balance of the system’s purchase cost; rather, the contractor should have asked for a resolution by the tribal council authorizing the transaction in the first place. The resolution may also authorize and designate a tribal official to negotiate and enter into the contract on behalf of the tribe.

The contractor’s legal counsel should have determined the organization of the tribal entity by reviewing the tribe’s organizational documents, such as the constitution of the tribe; the tribe’s corporate charter, as discussed above; and other pertinent documents reviewed in the course of due diligence. This would assist in determining contractual capacity and whether a waiver of sovereign immunity would be necessary to enforce the agreement.

At a minimum, the contractor’s legal counsel should have been familiar with the tribe’s civil procedure and commercial laws. Relevant laws may include those relating to the collateral securing the financing; Uniform Commercial Code or other secured transactions ordinance; pledges or security interests; real estate and secured financing matters; usury; contract claims; arbitration or other dispute resolution; sovereign immunity (or its waiver); and, the establishment, jurisdiction and operation of the tribal court.

Further, legal counsel’s due diligence should have included an examination of all agreements or contracts of the tribe or its affiliates that may materially affect the collateral, such as equipment leasing and participation agreements; franchise, management or consulting agreements; real property leases and/or mortgages that relate to the collateral or underlying property; and guarantees or other contingent liabilities of the tribe or any affiliate relating to the collateral. The tribe’s legal counsel should be able to provide the relevant codes and other materials necessary to conduct a due diligence assessment.

Doing business with a tribe may appear to be complex, but it can be made relatively simple by performing a little extra due diligence in addition to what is usually performed in the ordinary course of a business transaction with any entity. Many tribes are experiencing economic growth and diversifying their economy. Accordingly, tribes want to encourage business by being easy to do business with and are doing so by enacting business and corporate codes, amending outdated constitutions, and entering into agreements that provide for limited waivers of sovereign immunity and alternative dispute resolution. This enables both parties to negotiate a fair and enforceable agreement. 

*If you would like the Endnotes to the article, please contact Anne Nau at the NSBA Office at (402) 475-7091, ext. 138 or email [anau@nebar.com](mailto:anau@nebar.com).*