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# Doing Business in Indian Country: Unique Opportunities and Challenges

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*Native American tribes have become major economic players in recent years. Tribal enterprises generated more than $26 billion in 2009 from gaming revenue alone, and tribes are increasingly diversifying their economies to include new industries. Besides gaming, tribes are involved in real estate, banking and project finance, insurance, telecommunications, manufacturing, natural resource extraction and alternative energy development, among many other activities. As tribes expand beyond gaming, there are more chances for tribes and non-Native companies to do business together—and the unique legal status of tribes presents both opportunities and challenges for such partnerships.*

Tribal economic development takes place within the context of federal Indian law. The long history of relations between Indian tribes and the federal government has generated a nuanced legal framework that recognizes the sovereignty of Indian nations (subject to certain limitations), exempts tribes for the application of most state laws, and provides various programs and tax benefits designed to promote tribal economic development. The singular legal status of Native American tribes presents unique opportunities and challenges for non-Native business partners.

This paper briefly describes the status of tribes under federal law and provides a broad overview of issues that arise for tribes and their non-Native partners when doing business in Indian country.

## Tribal Status

### Federal Recognition

Federal recognition is a formal act by the federal government that recognizes a tribe's sovereign status. Recognized tribes operate legally and politically as independent entities. Recognition also establishes an official relationship between the tribe and the federal government and is central to a tribe's eligibility for services and grants offered by Congress. Non-federally recognized tribes have no legal relationship with

the federal government, no federal authorization to operate legally and politically, no protection from state jurisdiction, and little access to federal benefits.[1]

### Governmental Structure

Recognized tribes exercise powers of self-government as an expression of the inherent sovereignty that existed prior to contact with European nations. Although this sovereignty has been limited by federal law, it remains the basis of a tribe's ability to govern its members and territory.[2]

Recognized tribes are free to establish their own form of government.[3] Each tribe may determine its membership,[4] enact criminal and civil laws,[5] levy taxes,[6] control tribal property,[7] exercise powers delegated by Congress,[8] and adjudicate tribal disputes.[9] Other powers have been limited by the federal government, notably criminal and civil jurisdiction over non-Indians within Indian country.[10]

Tribal governments take a variety of forms. Many tribes have adopted written constitutions, often under procedures set forth by the Indian Reorganization Act of 1934 (the "IRA").[11] Written constitutions may share some similarities between tribes. For example, tribal constitutions often create a central governing body (sometimes called the Tribal Council) to perform legislative and executive functions. If the tribe chooses to create a court system, the constitution may define its composition. However, tribes are free to organize themselves as they wish, and great variations exist among tribal governments.

### Business Organization

Tribes may conduct business and enter into contracts directly or through a subdivision of their government. Such business operations may be overseen by the governing body of the tribe or by a business committee or board. These direct business activities generally share the tribe's exemption from taxation and state regulation.[12]

Tribes may also organize separate corporate entities to conduct business. For example, the federal IRA authorizes the creation of tribal corporations that may hold tribal property (including land) and carry out corporate business.[13] The charter and bylaws of an IRA corporation should identify the powers that the tribal government has delegated to it.[14] IRA corporations may share the tribe's sovereign immunity, and tribal assets held by the corporation may be protected from execution to satisfy a monetary judgment.[15]

[1] See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Nell Jessup Newton ed., 2005) [hereinafter COHEN'S].

[2] *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978).

[3] See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978).

[4] See, e.g., *id.*

[5] See COHEN'S, *supra* note 1, at § 4.01[2][c].

[6] See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198, 201 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Morris v. Hitchcock*, 194 U.S. 384, 392-93 (1904).

[7] See, e.g., *Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 n.1 (1894).

[8] *United States v. Mazurie*, 419 U.S. 544, 556-59 (1975).

[9] See COHEN'S, *supra* note 1, at § 7.02.

[10] See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

[11] 25 U.S.C. § 461-494 (LEXIS through 2010 legislation).

[12] See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); Rev. Rul. 67-284, 1967-2 C.B. 55.

[13] 25 U.S.C. § 477 (LEXIS through 2010 legislation).

[14] See *id.*

[15] See *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir. 1966); COHEN'S, *supra* note 1, at § 4.04[3][a][ii].

In addition, tribes may form corporations under tribal law. The corporation may share the tribe's sovereign immunity if owned by the tribe itself.[16] The rights and obligations of such tribal corporations are defined by tribal law and corporate organizational documents.

Finally, tribes may form a corporation under state law. Corporations organized under state law will be subject to the same laws as any other state corporation, even if owned by a tribe. However, such corporations may still share the tribe's sovereign immunity, depending on the laws of the state in which the corporation is incorporated. Generally, this option is the least appealing to tribes as it tends to yield the fewest tax benefits.[17]

Given the many ways that tribal governments or business entities may be organized, it is important for tribal and non-Native business partners to be familiar with the nature of the entities involved in any agreement. On any major transaction or partnership, interested parties should review applicable tribal law, the governing documents of the tribe and the organizational documents of any business entity.

## Trust Status of Land

Tribal land is generally held by the federal government in trust for the tribe. This land-owning relationship is one expression of the "trust doctrine." Courts have held that the federal government owes a trust responsibility to tribes, similar to that of a guardian to a ward.[18] This doctrine arose in the context of early Supreme Court decisions defining the ownership of land. As the Court approved non-Indian seizures of tribal land, it held that tribes retained limited claims to the land and declared them "domestic dependent nations," requiring the protection of the federal government.[19]

Restrictions on trust land reflect this paternalistic history. Trust land may not be sold, leased or taxed without federal approval. It is impossible to use trust property as collateral, although tribes may be able to use long term leases as a substitute.[20] Trust property is also exempt from any execution of judgment.[21]

Tribes and their business partners should be knowledgeable about the status of land involved in business transactions because the status of the land—most importantly, whether it is held in federal trust—affects property rights and the application of tribal, state and federal law.

## Federal, Tribal and State Law in Indian Country

The application of a government's laws is known as "regulatory jurisdiction." State, federal or tribal regulatory jurisdiction over business activities in Indian country depends on the identity of the parties involved and the location of the activity.

"Indian country" is land within which Indian laws and customs and federal laws relating to Indians are generally applicable.[22] Federal law defines Indian country as including reservation land, allotment land, and dependent Indian communities.[23] Trust land is always Indian country.[24]

[16] See COHEN'S, *supra* note 1, at § 21.02[2].

[17] See COHEN'S, *supra* note 1, at § 21.02[1][b].

[18] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[19] *Id.*

[20] See COHEN'S, *supra* note 1, at § 21.02[3].

[21] *Id.* at § 7.07[1][b].

### Federal Law

Courts view federal power over Indian tribes as nearly limitless. Federal law generally applies throughout Indian country.[25] However, federal courts have held that any federal law that does not explicitly state that it applies to Indian tribes will not apply in Indian country if the law affects "intramural" tribal matters.[26] Courts reach varying opinions as to which matters are intramural, but for the most part refuse to apply federal law that would interfere with a tribe's internal governance.[27]

### Tribal Law

Tribal power is at its strongest on Indian land in Indian country. Indian land is trust land and land that is owned by Indians. Tribal law applies exclusively to Indians on Indian land in Indian country, absent a specific federal law to the contrary.[28]

As well, tribal law applies to non-Indians on Indian land in Indian country.

Tribal law does not apply to non-Indians on non-Indian land in Indian country unless the non-Indians are involved in consensual relations with the tribe or substantial tribal interests are threatened.[29] However, uncertainty remains as to whether a court will consider a given activity on non-Indian land a "consensual relationship." Parties may be able to resolve this uncertainty by contractual choice of law provisions.

### State Law

State law generally applies to non-Indian activities on land within Indian country, but not to Indian tribes or tribal activities. Even as to non-Indians doing business in Indian country, state law applies only if it would not interfere with tribal self-government or conflict with federal laws and policies.[30] For example, states may tax non-Indians in Indian Country only where the state has a strong interest in the activity being taxed and the tax minimally impacts tribal sovereignty.[31]

Congress has sometimes invoked its authority to extend state law over Indians in Indian country. For example, Public Law 280[32] applies to six states—including California—and extends state criminal law to reservations in those states.[33] In addition, the Indian Gaming Regulatory Act of 1988 ("IGRA")[34] author-

[22] See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

[23] 18 U.S.C. § 1151 (LEXIS through 2010 legislation).

[24] See *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985).

[25] See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

[26] See *Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

[27] See, e.g., *id.*

[28] See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

[29] See *Montana v. United States*, 450 U.S. 544, 565-566 (1981).

[30] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

[31] See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980).

[32] Codified at 18 U.S.C. § 1162 (LEXIS through 2010 legislation), 25 U.S.C. §§ 1321–1326 (LEXIS through 2010 legislation), and 28 U.S.C. § 1360 (LEXIS through 2010 legislation).

[33] COHEN'S, *supra* note 1, at § 6.04[3][a]. The six states covered by Public Law 280 are California, Nebraska, Alaska, Oregon (except Warm Springs Reservation), Minnesota (except Red Lake Reservation) and Wisconsin (except Menominee Reservation). Ten other states have opted to assume limited degrees of jurisdiction under Public Law 280. *Id.*

[34] 25 U.S.C. §§ 2701-2721 (LEXIS through 2010 legislation).

izes and requires states to negotiate gaming compacts with tribes which may provide for some state regulation of tribal gaming.[35]

## Available Court Forums

The power of a state, federal or tribal court to hear a given case is known as "adjudicatory jurisdiction." Adjudicatory jurisdiction generally follows the same pattern for regulatory jurisdiction described above. However, some additional points are worth noting.

### Federal

Federal courts are courts of limited jurisdiction. Despite the ubiquitous influence of the federal courts on Indian law generally, disputes involving tribes must pass the same jurisdictional hurdles that any other case must clear to get into federal court.[36] Accordingly, a case must qualify for "diversity" or "federal question" jurisdiction for it to proceed in federal court. Tribes are not considered "citizens" of any state for diversity purposes, so diversity jurisdiction is unlikely.[37] And because there is no "federal question" in most commercial litigation, federal jurisdiction will often be lacking.

Moreover, even federal courts that have jurisdiction will wait to decide cases that arise in Indian country until the plaintiff exhausts available tribal court remedies. While some exceptions exist, exhaustion is generally required.[38]

### Tribal

The scope of tribal adjudicatory jurisdiction is similar to that of tribal regulatory jurisdiction. Tribes possess extensive adjudicatory power over Indians in Indian country, but tribal adjudicatory power over non-Indians exists only where the tribe has regulatory authority as described above.[39] Nevertheless, the consensual nature of a business relationship between tribes and non-Indians may give tribal courts jurisdiction to adjudicate disputes that arise out of the relationship, even on non-Indian land within Indian country.[40]

### State

State adjudicatory jurisdiction in Indian country is subject to the same limitations as state regulatory jurisdiction there.[41] Generally, state courts lack jurisdiction to hear actions against Indian defendants that arise in Indian country.[42] However, Public Law 280 gives state courts authority to hear "civil causes of action" involving Indian defendants in the six states which have assumed full authority under Public Law 280.[43]

[35] 25 U.S.C. § 2710(d)(3) (LEXIS through 2010 legislation).

[36] See, e.g., *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949-52 (9th Cir. 2004).

[37] See, e.g., *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993).

[38] See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).

[39] *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

[40] See *id.*

[41] See *Williams v. Lee*, 358 U.S. 217, 220-22 (1959).

[42] *Id.*

[43] 28 U.S.C. § 1360(a) (LEXIS through 2010 legislation). As described in *supra*, note 33, and accompanying text, those states are California, Nebraska, Alaska, Oregon (except Warm Springs Reservation), Minnesota (except Red Lake Reservation) and Wisconsin (except Menominee Reservation).

The Supreme Court interprets this to mean that Public Law 280 gives state courts adjudicatory jurisdiction to hear private civil actions against Indian defendants that arise in Indian country, but not the power to apply state regulatory law.[44] Thus, a Public Law 280 state court's adjudicatory jurisdiction over an Indian defendant in Indian country may depend on the type of dispute at issue.

## Sovereign Immunity

Tribes are immune from lawsuits or court process in state and federal court unless Congress has authorized the suit or the tribe has waived its immunity. Tribal sovereign immunity is based on the federal government's recognition that tribes are separate governments and immunity is a necessary aspect of sovereignty.[45]

Sovereign immunity extends both to a tribe's commercial and governmental activities. It also extends to activities outside of Indian country. Immunity covers tribal officials acting within the scope of their authority and tribal employees,[46] but does not cover tribal members as individuals.[47]

While Congress may abrogate tribal sovereign immunity, it must do so unequivocally and expressly.[48] Congress may partially abrogate sovereign immunity. For example, courts have found such a partial abrogation in IGRA's approval of suits brought by states to enjoin gaming activity conducted in violation of a tribal-state gaming compact.[49]

Tribal waivers of sovereign immunity must be "clear."[50] Such waivers must also be undertaken by a tribal entity that has the authority both to enter into the agreement and to waive sovereign immunity.[51] However, no magic language is required. For example, the Supreme Court found that a binding arbitration clause was a sufficiently clear waiver of immunity.[52] Similarly, corporate charters organized under Section 17 of the IRA contain a clause allowing the corporation to sue and be sued, which some courts view as a waiver of sovereign immunity.[53]

Sovereign immunity is an integral part of tribal identity. While business partners have a legitimate interest in ensuring that contracts with tribes will be enforceable—which requires some waiver of sovereign immunity—the scope, terms and conditions of any waiver are a proper subject for negotiation.

## Federal Approval of Certain Contracts

The paternalistic history of federal Indian law also affects tribal contracts. Under federal law, certain contracts with tribes must be approved by the federal government.

[44] See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[45] See *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986).

[46] See, e.g., *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985).

[47] See, e.g., *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 171-73 (1977).

[48] See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

[49] See *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997).

[50] See *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

[51] See *C & L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 423 n.6 (2001) (noting that tribe has raised argument that waiver of immunity was not authorized, but court declined to reach the issue for procedural reasons).

[52] *Id.* at 423.

[53] See, e.g., *Rosebud Sioux Tribe v. A & P Steel Inc.*, 874 F.2d 550, 552 (8th Cir. 1989); *Martinez v. Southern Ute Tribe*, 374 P.2d 691, 694 (Colo. 1962).

For example, any contract that "encumbers" Indian trust lands for a period of seven or more years must be approved by the Secretary of the Interior.[54] Where secretarial approval is necessary, a contract must provide remedies for breach of the contract and either assert or waive tribal sovereignty.[55] If a contract is not approved as required, it is likely void or voidable.

## Taxing Powers

Businesses in Indian country may be subject to federal, tribal and state taxes.

### Federal

The federal government does not tax tribal income.[56] This exemption also applies to tribal corporations chartered under the IRA and under tribal law. Non-Indians conducting business in Indian country are subject to standard federal taxes, but may qualify for the special tax breaks discussed below.

### Tribal

Indian tribes retain the power to tax as an inherent aspect of sovereignty.[57] Tribes are free to tax activities in Indian country. However, federal courts have limited tribes' ability to tax non-Indians on non-Indian land in Indian country, allowing such taxing only when the non-Indians are involved in consensual relations with the tribe or when substantial tribal interests are threatened.[58]

### State

States may not tax tribes or tribal members in Indian country unless "clearly" authorized by Congress.[59] Generally, states may tax non-Indians unless the legal incidence of the tax falls on Indians or tribes, the tax would interfere with the tribe's ability to exercise its sovereign functions, or federal law preempts the state tax.[60] Courts balance the federal, state and tribal interests at stake in a given case in deciding whether it is appropriate to allow the state to tax.

## Tax Incentives

The federal government offers special tax benefits for private enterprises that operate in Indian country. For example, federal law provides tax incentives through credits for employing tribal members and accelerated depreciation of business property on reservations.[61]

[54] 25 U.S.C. § 81 (LEXIS through 2010 legislation).

[55] *Id.*

[56] See Rev. Rul. 67-284, 1967-2 C.B. 55.

[57] See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982).

[58] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 652-53 (2001).

[59] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

[60] See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

[61] See 26 U.S.C. § 45A (LEXIS through 2010 legislation) (employment tax credit); 26 U.S.C. § 168(j) (LEXIS through 2010 legislation) (depreciation).

While tribes retain the power to tax, only some tribes rely on taxes as a source of revenue. In many instances, those tribes that do tax also offer significant tax breaks to attract business to the reservation.[62]

## Financing

Historically, the capital most readily available to tribes was money received through grants and other assistance from the federal government. Federal agencies ranging from the Bureau of Indian Affairs to the Department of Agriculture continue to operate such programs, some of which provide direct loans or loan guarantees for tribal economic development.

As tribal economies have expanded, tribes have become increasingly able to incur private debt to finance economic development activities. For example, tribes may incur bank or bond debt to raise funds. Commercial banks often loan directly to tribes and, for larger amounts, a group or syndicate of banks may collectively loan money.[63] Bonds may provide tribes access to more capital for longer periods of time, but require more complex transactions.[64] Tribes may also be able to issue tax-exempt bonds for certain purposes, offering debt holders interest that is not subject to taxation.[65]

## Conclusion

Native American tribes have become major players in the U.S. economy, and the success of Indian gaming has been heavily publicized. Less well known is the increasing extent to which many tribes are involving themselves in other sectors of the economy. As tribes expand beyond gaming, the possibilities multiply for doing business in Indian country.

The unique legal status of Native American tribes presents both opportunities and challenges for companies doing business with tribes. There is great potential for companies and tribes to forge business ventures and engage in commercial transactions, provided the legal issues unique to Indian country are appreciated and addressed.

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If you have any questions about the content of this white paper, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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[62] See COHEN'S, supra note 1, at § 21.02[4].
[63] *Id.* at § 21.03[2][b].
[64] *Id.* at § 21.03[2][c].
[65] *See* 26 U.S.C. § 103(b) (LEXIS through 2010 legislation).