ABA SPRING MEETING

FINANCING INDIAN GAMING ENTERPRISES

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INDIAN COUNTRY

The finance of Indian gaming enterprises involves several complex regulatory and legal theories uncommon to state or private finance transactions. Perhaps the first issue to consider is where the enterprise is located. Most Indian County transactions occur on reservations or within Indian County.

A. **Definition**. "Indian Country" includes "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 independent 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." 18 U.S.C. § 1151.

B. **Checkerboard**. Most reservations are a "checkerboard," including tribal trust land, individual allotments in trust and fee land. Title to the land on most reservations today is held by many different entities. Title can be held by tribes, individual Indians, non-Indian individuals and groups, the state, the county and the federal government. This checkerboard pattern of ownership causes problems including jurisdictional issues.

C. **Jurisdiction**. Generally, jurisdiction within Indian Country is shared by federal, state and tribal governments depending on the interests, matter, parties and land involved. Indian interest holders are sometimes unable to use their land because of probate backlogs, difficulty contacting multiple co-owners, problems executing real estate transactions and the mismanagement of funds derived from the land.

I. PRACTICAL ISSUES RELATING TO CONTRACTING WITH AN INDIAN TRIBE

A. What law governs?

1. Tribal government.

2. Tribal corporation organized under Section 17 of the IRA, 25 U.S.C. §477.

3. A corporation chartered under state law.

4. A corporation chartered under Tribal Law.

II. DISPUTE RESOLUTION

A. **Where will disputes be decided?** Under any financing agreement, the parties must consider where the dispute will be resolved. Often state court's will lack

jurisdiction over Indian tribes and tribal entities. Indian tribes will prefer to have any dispute resolved in a tribal court or through a tribal forum.

B. Federal Civil Adjudicatory Jurisdiction

1. Frequently financing documents will have broad provisions that call for dispute resolution in federal or state courts. Any person assisting with financing tribal enterprises should be aware of the following:

(a) Federal courts are courts of limited jurisdiction U.S. Const. Art. III.

(b) That an Indian tribe is a party does not confer civil "federal question" jurisdiction on federal courts pursuant to 28 U.S.C. § 1331; Niagra Mohawk Power v. Tonawanda Band, 94 F.3d 747 (2nd Cir. 1996); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221 (9th Cir. 1989); Kenai Oil Gas, Inc. v Dept. of Interior, 522 F. Supp. 521 (D. Utah 1981), aff'd and remanded on other grounds, 671 F.2d 383; R.J. Williams Co. v. Fort Belknap, 509 F. Supp. 933 (D. Mont. 1981).

(c) Courts have held that a tribe is not a citizen of any state for purposes of diversity jurisdiction. Gaines v. Ski Apache, 8 F.3d 726 (8th Cir. 1993); Romanella v. Hayward, 933 F. Supp. 163 (D. Conn. 1996), aff'd 114 F.3d 15; Whiteco Metrocom v. Yankton Sioux, 902 F. Supp. 199 (D.S.D. 1995).

C. State Jurisdiction

1. Generally states lack jurisdiction over Indians on reservation lands

2. Over Non-Indians. Absent a Congressional prohibition, state courts may exercise criminal and civil jurisdiction over non-Indians on reservation lands, where the exercise of such jurisdiction would not interfere with tribal rights of self-government or impair a right granted or reserved by federal law. County of Yakima v. Yakima Nation, 502 U.S. 251, 257-58, 116 L. Ed. 2d 687, 112 S. Ct. 683 (1992). New Mexico v. Mescalero Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state could not tax on reservation activities of non-Indian loggers logging tribal timber).

3. Over Indian Claims Against Non-Indians. State courts have jurisdiction over claims brought by Indians against non-Indians, even where such claims arise in Indian country. Three Affiliated Tribes v. Wold, 467 U.S. 138, 148, 81 L.Ed.2d 113, 104 S. Ct. 2267 (1984).

4. Over Indian Matters. State jurisdiction that infringes tribal rights of self-government or federal interests is prohibited. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987) (state civil regulation of tribal gaming prohibited); Bryan v. Itasca County, 426 U.S. 373, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973).

5. Adjudication by state courts of adoption proceeding involving only Indians would infringe tribe's right of self-government. Fisher v. District Court, 424 U.S. 382 (1976).

6. Claim by non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store would infringe tribal rights of self-government. Williams v. Lee, 358 U.S. 217 (1959).

7. State imposition of property tax on non-Indian owned livestock grazing reservation land did not implicate significant tribal interest. Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1950).

D. Tribal Jurisdiction

1. Tribes have jurisdiction over internal tribal affairs and over members within reservation whether residing on trust land or fee land. Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).

2. Tribes have civil jurisdiction over nonmembers where (1) a claim arises from a nonmember's consensual relationship with the tribe or trial member, through commercial dealings, contracts, leases or other arrangements or (2) the conduct threatens, or has a direct effect on, the political integrity, economic security or health or welfare of the tribe." Strate v. A-1 Contractors, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997); see also, Montana v. U.S., 450 U.S. 544 (1981).

3. The jurisdiction of tribal courts over on-reservation activity of nonmembers bearing directly on the political integrity, economic security or the health or welfare of the tribe must be applied with reference to the principal that "Indian tribes retain their inherent power [to punish] tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . but [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." Strate, 137 L. Ed. 2d at 679, quoting, Montana v. United States, 450 U.S. 544, 564, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981). (Bracketed material is provided in

original Strate decision.)

4. Tribes have no criminal jurisdiction over nonmembers. Oliphant v. Suquamish, 435 U.S. 191 (1978).

5. Tribe could impose tribal liquor license requirement on non-Indian bar owner on the land within reservation (based in part on congressional delegation of power). U.S. v. Mazurie, 419 U.S. 544, 95 S. Ct. 710 (1975).

6. A tribe cannot regulate hunting and fishing by non-members on land within a reservation owned in fee by non-Indians. Montana v. United States, 450 U.S. 544 (1981).

7. Tribe may not exercise jurisdiction over non-Indian defendant arising from traffic accident occurring on reservation highway. Strate, supra.

E. Exhaustion of Tribal Court Remedies

1. Supreme Court has stated that as a matter of federal policy and comity, matter within the tribe's jurisdiction "presumptively" lie in tribal court. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987).

2. Non-Indian defendant must exhaust tribal court remedies before challenging tribal court jurisdiction in federal court. Strate, Id., National Farmer's Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987).

3. Exhaustion requirements provide tribal courts with an opportunity to "explain to the parties the precise basis for accepting [or rejecting] jurisdiction. 471 U.S. at 857, 85 L. Ed. 2d 818, 105 S. Ct. 2447; Strate, 137 L. Ed. 2d at 674.

4. The exhaustion rule is prudential, not jurisdictional, in nature. Strate, 137 L. Ed. 2d at 674. When the lack of tribal court jurisdiction is "plain," exhaustion is not required. Strate, 137 L. Ed. 2d at 679, n. 14.

5. Tribal exhaustion rule probably applies even where action filed in state or federal court precedes the filing of a tribal court action. Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1993); Barker v. Menominee Nation Casino, 897 F. Supp. 389, 397 n. 6. But see, Drum v. Brown, 716 A.2d 50 (Conn. 1998) (federal exhaustion doctrine applies to state courts but is not required in the absence of a pending tribal court action.

6. Tribal court judgments are generally entitled to full faith and credit under Wisconsin law. Wis. Stats. § 806.245.

F. Sovereign Immunity

1. Tribal sovereign immunity extends to (1) activities of a commercial, rather than governmental, nature, and (2) activities conducted off reservation, were both resolved in tribes' favor in ***Kiowa Tribe v. Manufacturing Techs., Inc.***, 523 U.S. 751, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981 (1998). Furthermore, as the *Kiowa* decision made clear, the issue of sovereign immunity is separate from the issue of state regulatory authority. In connection with activities outside Indian country, a tribe, whether in its governmental capacity or through a corporate entity, is generally subject to state taxation and other regulation, ***New Mexico v. Mescalero Tribe***, 462 U.S. 324 (1983) but is nonetheless still immune from suit.

2. Assuming the tribe wishes to limit its activities to Indian country, it would normally not be subject to the state's taxing or other regulatory authority. The question remains whether a corporation related to a tribe, operating within Indian country, shares the tribe's status for purposes of sovereign immunity. The Supreme Court acknowledged in ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145, 157 n. 13 (1973) that "the question of tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct its business" but there is debate among the various state and federal jurisdictions as to the characteristics that allow a corporation to share a tribe's immunity from suit. Courts have generally extended tribal immunity to a corporation that is wholly owned by the tribe and managed by a Board of Directors appointed by and removable by, the tribe's governing body. See, e.g., ***Trudgeon v. Fantasy Springs Casino***, 71 Cal.App.4th 632, 84 Cal.Rptr.2d 65 (Cal. App. 1999), ***Gavle v. Little Six, Inc.,*** 555 N.W. 2d 284 (Minn. 1996).

G. IGRA

1. Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA") in 1988 in response to the *Cabazon* decision. The Act was intended to give state government a voice in the conduct of gaming activities on Indian reservations. The IGRA divides gaming into three categories. Class I gaming, social games for prizes of minimal value or traditional forms of Indian gaming, is regulated solely by tribal governments. Class II gaming, including bingo (whether or not electronic, computer or other technologic aids are used) and card games not explicitly prohibited under state law, is regulated solely by the tribe and the National Indian Gaming Commission ("NIGC"), a three-member commission based in Washington, D.C. Class II gaming is not subject to state regulation.

Class III gaming, which includes all games that are neither Class I or Class II, is permitted only pursuant to a Compact between a tribe and a state government.

H. Where can gaming enterprises be conducted under IGRA?

Tribes may engage in Class II or Class III gaming under an ordinance approved by the Chairman of the National Indian Gaming Commission only on "Indian lands." 25 U.S.C. § 2710(b) and (d). Indian lands include:

> (A) all the lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."
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> IGRA, § 4, 25 U.S.C. § 2703.

I. What approval do I need for gaming activities?

Secretarial Approval

(a) To qualify as "Indian lands," therefore, it would be necessary for the Secretary of the Interior to first take the land into trust for the Tribe. Section 20 of the IGRA, 25 U.S.C. § 2719, addresses gaming on lands taken into trust after October 17, 1988, the date the IGRA was enacted:

> (a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
>
> (2) the Indian tribe has no reservation on October 17, 1988, and—
>
> (A) such lands are located in Oklahoma and—
>
> (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or;
>
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions. (1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.