

DOING BUSINESS WITH INDIAN TRIBES

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ABSTRACT

With today's increasing emphasis on the utilization of international ventures to take advantage of an increasingly global economy, an astute business person should explore the possibility of engaging in business activities and ventures with Indian tribes in the United States. Much like international ventures may have advantages such as increasing markets for products and supplies and legal environments more favorable to business, a venture with an Indian tribe may allow a business person to reap similar rewards without the cost layouts associated with international ventures. In considering whether to engage in business with an Indian tribe, many non-Indian business persons are immediately put off by the amazing number of court decisions and statutory provisions governing Indian tribes. This paper is designed to provide an initial examination of several of the advantages of doing business with Indian tribes along with an examination of several statutory provisions and legal concepts relating to Indian tribes.

INTRODUCTION

With today's increasing emphasis on the utilization of international ventures to take advantage of an increasingly global economy, an astute business person should explore the possibility of engaging in business activities and ventures with Indian tribes in the United States. Much like international ventures may have advantages such as increasing markets for products and supplies and legal environments more favorable to business, a venture with an Indian tribe may allow a business person to reap similar rewards without the cost layouts associated with international ventures. Because Indian tribes are sovereign nations capable of establishing their own laws and regulations, one is in essence dealing with a foreign nation within the boundaries of the United States.

In considering whether to engage in business with an Indian tribe, many non-Indian business persons are immediately put off by the amazing number of court decisions and statutory provisions governing Indian tribes. This paper is designed to provide an initial examination of several of the advantages of doing business with Indian tribes along with an examination of several statutory provisions and legal concepts relating to Indian tribes. Since the legal provisions of tribal organization and tribal sovereign immunity may be new concepts for most non-Indian business persons, this paper will examine these concepts along with discussion of reservation lands, power to contract with Indian tribes, state regulation of Indian tribes, and tribal business entities.

ADVANTAGES OF DOING BUSINESS WITH INDIAN TRIBES

The advantages associated with engaging in business activities with Indian tribes are varied, however, they can be divided into the following broad categories: 1) public sector incentive programs; 2) the concept of sovereignty; and 3) the ability of Indian tribes to establish foreign trade zones.

Public Sector Incentive Programs

Many public sector incentive programs have been established by the U.S. government to encourage the economic development of Indian tribes specifically or to aid in the development of all minority-owned businesses. By engaging in activities with Indian tribes, a non-Indian may be able to take advantage of many of these incentive programs.

One example of such a program is the Minority Business Enterprise Program under which the U.S. government has pledged to purchase at least five percent of all Department of Defense purchases from minority vendors (The National Defense Authorization Act of 1988). Another program allows five percent incentive payments to government contractors who subcontract with Indians (25 U.S.C. 1544). Until recently it was extremely difficult for an Indian- owned and non-Indian-owned joint venture to take advantage of these incentive programs and still qualify for assistance by the Small Business Administration; however, the Small Business Act has been clarified to allow such ventures as long as the manager and CEO is an Indian.

The Indian Tribe as a Sovereign State

A second possible advantage in engaging in business with Indian tribes stems from the fact that Indian tribes are treated as sovereign states and are, therefore, exempt from many taxes and eligible for certain loan programs. There are no tribal corporate income taxes, nor is an inventory tax assessed on goods held for resale. There may be a sales tax exemption for machinery and equipment used directly in the manufacturing process and reduced real estate assessment taxes on real estate leasehold interests. Plus, certain property held in trust by the United States is generally exempt from state ad valorem taxes (Anderson, 1993a) . In addition to tax savings, the business-person doing business with Indian tribes may be able to take advantage of certain loan programs such as the industrial-access loan programs through both the Bureau of Indian Affairs and the state department of transportation (Anderson, 1993a).

The concept of sovereignty also enables the Indian tribe to establish their own rules and regulations. The tribe is free to establish their own EPA laws in compliance with federal EPA regulations, to establish their own product liability caps for manufacturers, and to self insure. The ability of the tribe to self insure allows the tribe to offer business persons the advantages of avoiding participation in state unemployment insurance and worker's compensation programs (Anderson, 1993a).

The Ability to Establish Foreign Trade Zones

Perhaps one of the most interesting advantages is that Indian tribes are eligible to apply for status as a foreign trade zone. Although a full explanation of the advantages achieved through foreign trade zone status is beyond the scope of this paper, one of the chief advantages is the ability to defer the payment of duties on imported merchandise until the imported merchandise leaves the foreign trade zone and

enters the commerce of the United States (Wyatt, 1993). These lower duty rates could entail significant cost savings for manufacturers or assemblers of products in which the component part has a higher duty rate than that of the completed product (i.e., inverted tariffs). It should be noted that all of the major U.S. automobile manufacturers currently use the inverted tariff rules to achieve significant cost savings by assembling many of their automobiles in foreign trade zones (Wyatt, 1993). Foreign trade zones could also be utilized to avoid quota restrictions on goods imported from outside the United States (Wyatt, 1993).

TRIBAL ORGANIZATION

Because the sovereignty of Indian tribes allows each individual Indian tribe to choose the manner in which their tribe is organized and because the method chosen by the tribe can affect how it may interact with non-Indian businesses, any business person considering possible business involvement with an Indian tribe should first determine which type of tribal organization has been chosen by the tribe (Anderson, 1993a). The three most common methods of tribal organization are: 1) organization under Section 16 of the Indian Reorganization Act of 1934 (IRA); 2) organization under Section 16 and incorporation under Section 17 of the IRA; and 3) tribally chartered corporate entities.

Organization under Section 16 of the IRA

Any tribe which has chosen organization under Section 16 of the Indian Reorganization Act of 1934, is governed by a tribal constitution. This constitution will normally describe the governing body of the tribe and set forth its powers and authority. The constitution may grant this governing body all power and authority to adopt legislation and carry on the activities of the tribe, or it may reserve some or all of the powers to the adult members of the tribe as a whole (often referred to as the General Council) (IRA, 476).

Organization under Section 16 and Incorporation under Section 17 of the IRA

A tribe organized under Section 16 of the IRA may also be incorporated under Section 17 of the IRA (IRA, 477). If a tribe is incorporated under Section 17, it will have a charter issued by the Secretary of the Interior in addition to its constitution under Section 16. However, an Indian tribe organized pursuant to Section 16 of the IRA and an Indian tribe incorporated under Section 17 of the IRA are regarded as two different legal entities even though they may constitute the same people (Opinion of the Solicitor of the Department of Interior, 1958; *Atkinson v. Haldane*, 1977). The Section 16 entity is a political body or governmental entity and possesses sovereign immunity. The Section 17 entity is a business corporation and may lack sovereign immunity if it has been waived in the charter establishing the business corporation (*Atkinson v. Haldane*, 1977; *Maryland Casualty Company v. Citizens Bank of West Hollywood*, 1966; *Cohen's Handbook of Federal Indian Law*, 1982). Thus, incorporation creates a separate legal entity with respect to which the powers to contract, to pledge assets, and to be sued may differ from the governmental entity established under the constitution.

Tribally Chartered Corporate Entities

Finally, a tribe may choose not to be organized under any section of the IRA. For these non-IRA tribes, the tribe's governing instruments may consist of tribal ordinances, resolutions, or other actions. These instruments must be reviewed carefully in order to determine the identity of the governing body, the powers possessed by the governing body, and the extent to which these powers are reserved to the tribe as a whole (Anderson, 1993b).

SOVEREIGN IMMUNITY

Key to any contractual agreement reached in the business world are the assumptions that the contracting parties will perform according to the contractual agreement and that any disputes arising from the business agreement can be resolved by appropriate legal processes. The concept of tribal sovereign immunity, however, may serve to erode or destroy these assumptions. Therefore, businesses considering doing business with Indian tribes should have an understanding of sovereign immunity and its possible ramifications.

What is Sovereign Immunity?

Sovereign immunity is a legal doctrine that protects a government from lawsuits that would cause that government to pay out money, real estate or goods from the governmental treasury. The basic rationale behind sovereign immunity is the concept that the government is holding the property in trust for the citizens of that government. Since the property is held in trust for all citizens, any distributions should, therefore, be equally divided among the citizens of that government. If the government allowed itself to be sued, the government would be opening itself up to a situation whereby the public treasury might be inequitably distributed to one successful plaintiff as opposed to all citizens equally (Taylor, 1993).

Who is Covered Under Sovereign Immunity?

Indian tribes and their officers are protected by sovereign immunity as long as they are acting within the scope of the law and within the scope of their official duties. Sovereign immunity also protects the tribal treasury and assets from liability for the acts of tribal agencies and businesses which conduct a public function such as the tribal accounting department or the tribal trading post. However, sovereign immunity does not protect individual members of the tribe and their personal businesses. Thus, a tribal member operating his or her own private business, whether on or off the reservation, could not successfully raise the defense of sovereign immunity (Taylor, 1993).

Waivers of Sovereign Immunity

For a waiver of sovereign immunity to be effective, it must be expressly waived by a tribal entity with the lawful power to do so. If there is no clear or express waiver of immunity, no suit can be brought. The courts have determined that "[i]t is settled law that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed" (Santa Clara Pueblo v. Martinez, 1978).

There are two kinds of clear or express waivers that have been found to be effective. The first type of express waiver occurs if the United States Congress or a tribal legislative body enact the waiver into

law (United States v. Oregon, 1981; Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 1974; Merrion v. Jicarilla Apache Tribe, 1980; Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 1986; American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 1985). The second type of express waiver may be created through an action by an authorized tribal body, the natural consequences of which are binding on the tribe. In regards to Section 17 business corporations,, any express waivers of sovereign immunity would be found in the corporation's charter. For other tribally-owned businesses, one must carefully examine all documents related to the creation and governance of the business entity in order to determine whether immunity has been expressly waived (Anderson, 1993b; Taylor, 1993).

RESERVATION LAND

Title to Reservation Land is generally held by the United States Government in trust for the tribe. The Non-Intercourse Act of 1926 (NIA) explicitly states that "[no] purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the [United States] Constitution." The NIA convention applies to any conveyance of an interest in the land, including a deed of trust or foreclosure upon mortgage. It covers "tribal land" which is defined as all land "held in trust by the United States for an Indian tribe, lands owned by a Tribe with federal restrictions against alienation, and any other land owned by an Indian tribe (25 C.F.R. 152.22(b)).

Designed to protect Indians and prevent unfair or improvident disposition of Indian land, the NIA can be invoked only by an Indian tribe or by the United States government on behalf of the tribe (United States v. Candelaria, 1926; Federal Power Commission v. Tuscarora Indian Nation 1960; Narraganset Tribe of Indians v. Southern Rhode Island Development Corp., 1976). In addition, the NIA may not be waived by Indians. Historically, no defenses have been available against application of the NIA once the required elements have been proved to exist (Schaqhticoke Tribe of v. Kent School Corporation , 1976.)

Nevertheless, it is possible that conveyance by a tribal business corporation, as opposed to the tribe itself, is outside the scope of the statute. In addition, a court may uphold conveyance by a tribe in a particular case based on the sophistication of the tribe, or the fact that the transfer was voluntary and informed and was not induced or influenced by any third party (Mashpee Tribe v. New Seabury Corp., 1977; Otoie and Missouri Tribe of Indians v. United States, 1955). However, the best course of action in all cases is to obtain Congressional approval of the security instrument thereby validating the conveyance.

POWER TO CONTRACT

According to federal law, "no contract with any Indian tribe relative to its lands or to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands or thing under laws or treaty with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, is valid unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs" (25 U.S.C. 81). Failure to comply with this approval

requirement renders the contract in question null and void. Where approval is granted, any money paid by a tribe in excess of the amount approved by the Secretary and the Commissioner may be recovered by the tribe or by the United States.

However, contracts covering the purchase or financing of equipment, vehicles or other moveable personal property should not require approval by the Secretary and the Commissioner unless the money is coming from the United States. Nevertheless, since the penalty for violating this requirement is so severe, considerable caution should be exercised in deciding to do without approval. For example, in one case, the non-Indian manager of a tribels gaming operation sought approval of its management contract with the Bureau of Indian Affairs (BIA). The BIA refused to give the approval on the grounds that the approval was not required under the law. Later, when the tribe sued to cancel the management contract, the court determined that the management of a gaming operation on the tribe's reservation was relative to the tribe's lands and was, therefore, covered by the law. The fact that the manager had tried to get the required approval from the BIA was determined to be irrelevant to the court's determination of the case (*United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company*, 1985).

STATE REGULATION OF INDIAN TRIBES

In general, state laws are not applicable to Indians tribes or an Indian reservation except where Congress has expressly provided that state law shall apply (*Cohen's Handbook of Federal Indian Law*, 1982; *McClanahan v. Arizona State Tax Commission*, 1972; *Bryan v. Itasca Countv*, 1976; *Three Affiliated Tribes v. Wold Engineering*, 1983). For example, a state's Uniform Commercial Code would not extend to reservation transactions. However, it may be possible that some or all of the provisions could be made applicable by contract or by tribal ordinance.

Nevertheless, in certain limited circumstances, the Supreme Court of the United States has allowed states to assert their authority over tribal reservations. To be able to assert their authority, states must overcome two independent but related barriers: 1) a particular exercise of state authority may be foreclosed because it would undermine the right of reservation Indians to make their own laws and be ruled by them; and 2) state authority may be preempted by incompatible federal law (*Three Affiliated Tribes v. Wold Engineering*, 1983; *White Mountain Apache Tribe v. Bracker*, 1980).

The result of applying this test to a particular state attempt to regulate in Indian country will depend on whether Indians or non- Indians are being regulated. According to the Supreme Court, states have no power to regulate tribal members in Indian country. As the Court has stated, "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self- government is at its strongest" (*White Mountain Apache Tribe v. Bracker*, 1980). Thus, courts have found a variety of state and local laws and regulatory actions to be inapplicable to tribal members (*United States v. Harvey*, 1983; *Wauneka v. Cambell*, 1974; *Zachary v. Wilk*, 1985; *City of Sault Ste. Marie, Mich. v. Andrus*, 1980).

With respect to state regulation of non-Indians in Indian, country, the courts must follow the second prong of the test to determine if a state law will be effective. In such cases, the Supreme Court has

stated that the "relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" must be examined. It is only this "particular inquiry into the nature of the state, federal and tribal interests at stake..... [that can determine if] the exercise of state authority would violate federal law" (White Mount Apache Tribe v. Bracker, 1980). Applying this analysis, the Supreme Court has invalidated a variety of state actions (White Mountain Apache Tribe v. Bracker, 1980; New Mexico v. Mescalero Apache Tribe, 1982; Warren Trading Post v. Arizona Tax Comm., 1965).

TRIBAL BUSINESS ENTITIES

A small business seeking to do business with an Indian tribe should investigate the manner in which a tribe is authorized to engage in commercial activities. Some tribal entities are more conducive to conducting commercial activities than are others. In one situation, the tribe's governmental entity also serves as its business entity. The inadequate separation of governmental activity from the business entity may lead to problems such as: 1) the inability of creditors of such an enterprise to sue the tribe because of the doctrine of sovereign immunity; and 2) business proposals having to be presented to the elected officials of the tribe which may create difficulty if the elected individuals do not have a business background or if they have their own hidden agendas.

As stated previously, a tribe may charter a separate corporate business entity, under Section 17 of the IRA. The tribe could conduct its commercial activities through this federally-chartered corporate entity. The federal charter granted to Indian tribes using this method frequently provides that the corporate entity may "be sued in courts of competent jurisdiction" (Anderson, 1993a). If the corporate charter authorizes the corporate entity to be sued, creditors may bring suit to obtain a judgement and otherwise enforce their lien or contractual rights. However, in such suits, only the corporate entity's assets are subject to judgement (Anderson, 1993a).

An Indian tribe may also charter a corporate entity to operate a business enterprise. The tribe may authorize their tribally-chartered corporation to be sued. Under these circumstances, the creditors of the corporate entity could sue this entity to obtain a judgement or otherwise enforce their liens for contract rights. However, any judgement obtained against such an entity may only be enforced against the property owned by that entity (Anderson, 1993a).

CONCLUSION

It is clear from the discussion above that entering into business ventures in Indian Country or with Indian tribes exposes the small business to certain risks that business might not otherwise have to face. Like international ventures, each Indian tribe has its own culture, customs, values, and rules for doing business. However, it is also clear from the discussion above that a business person willing to study, analyze, and learn these differences may be able to reap rewards beyond those obtainable without such an interaction, especially when one realizes that these "foreign" markets are usually only a few miles away.

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