

## 5 Considerations For Developing Projects On Native Lands



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*Law360, New York (September 2, 2015, 11:09 AM ET)* -- All parties can benefit from successful projects on Native American lands if all considerations are effectively approached.

There are over 500 federally recognized Native American tribes in the United States and each is a sovereign nation with the right of self-governance and special protections afforded under federal law.[1] Native American tribes have a long history of partnering with private enterprises (including developers and lenders) to develop gaming facilities, energy generation facilities and other projects on Native American lands, ultimately spurring tribal economies and creating investment opportunities. The development of these projects requires that Native American tribes, developers and lenders consider certain matters that are unique to projects on Native American lands. This article describes five such considerations.

### **Consideration 1: Sovereign Immunity**

Native American tribes are sovereign nations and thus enjoy immunity from private lawsuits, unless a Native American tribe voluntarily waives its sovereign immunity (or in certain limited circumstances as Congress authorizes).[2] While recognizing that a Native American tribe's sovereign immunity is important to tribal governments, most nontribal entities that seek to contract with Native American tribes will require a waiver of sovereign immunity in order to provide an avenue for legal recourse in the event of a default or dispute. Native American tribes will often provide only limited waivers of sovereign immunity, which may be restricted to the specific transaction. The parties to any transaction should cooperate to confirm that the waiver of sovereign immunity is legal, valid and enforceable under tribal law and that the execution and delivery of such waiver is properly authorized.

Often, a Native American tribe will own and operate its project through a tribal business entity distinct from the tribal government by creating a subsidiary under state or tribal law. An entity formed under tribal law is more likely to enjoy sovereign immunity. The entity may also have the power to waive sovereign immunity without affecting the sovereign immunity of the tribal governmental entity. All parties should understand whether the Native American tribe or an affiliated entity will enter into any transactional documents and draft waivers of sovereign immunity accordingly. Each party would be wise to review the applicable federal, state and tribal laws, as well as the entity's organizational documents, to ensure that both parties are entering a binding, enforceable and duly authorized waiver of sovereign immunity. When drafting a waiver of sovereign immunity, parties should consider who may bring suit, who may be sued, what types of claims may be brought against the Native American tribe, the type and amount of damages that may be sought, where claims may be brought and under what law the transaction is governed.

### **Consideration 2: Forum Selection**

Parties to a contract may choose a specific forum for the resolution of their disputes by mutual agreement. Choosing an appropriate forum is an important component of an agreement with a Native American tribe, since the failure to specify a forum could result in the unintended consequence of any litigation of disputes being undertaken in the Native American tribe's courts. There are several options for forum selection, namely federal court, state court, tribal court or alternative dispute resolution. While federal courts might be the most appealing to the parties, federal courts do not automatically have jurisdiction over contractual claims against Native American tribes because Native American tribes are not considered "citizens" of any state for diversity jurisdiction purposes, unless the Native American tribe operates its project through a business entity formed under state law.[3] Thus, unless the dispute "arises under" federal law, a federal court may not have jurisdiction to hear the dispute due to a lack of diversity jurisdiction, even if the parties agree to federal jurisdiction in their contract. Generally, Native American tribes prefer disputes to be heard in tribal court and nontribal parties prefer disputes to be heard in federal court or state court (or be arbitrated). Tribes should take care when opting for arbitration, however, as some courts have found that an arbitration agreement is a waiver of sovereign immunity.[4]

Parties should also consider the related issue of the tribal exhaustion doctrine. The doctrine states that, if in a civil proceeding a tribal court has jurisdiction over a nontribal party, that party is required to exhaust tribal court remedies prior to removing the matter to another court or arbitration.[5] There is some ambiguity among courts as to whether a forum selection clause waives the tribal exhaustion requirement.[6] Therefore, for the sake of clarity, the parties should address the doctrine in their agreements by requiring the exhaustion of remedies or including express waivers of the exhaustion requirement.

### **Consideration 3: Choice of Law**

Most contracts specify the law under which such contract is governed. Choosing the governing law can be a controversial issue when financing or developing projects on Native American lands. A Native American tribe may prefer that their tribal laws be selected to govern contracts, while other parties will likely prefer that state law be selected, since tribal laws are generally less developed and settled when compared to most state law regimes. Further, while there are exceptions, nontribal entities typically have more difficulty finding and researching applicable tribal laws when compared to finding and researching state laws, increasing the uncertainty and potential costs of any dispute. However, some tribes have adopted provisions of the Uniform Commercial Code and other bodies of state law to increase the predictability of dispute resolution and to protect parties' respective rights.

Without a choice-of-law provision, the parties leave it up to the courts or arbitrators to decide which law to apply.

In general, state courts have typically applied state law and tribal courts have typically applied tribal law.[7] Each venue should apply a choice-of-law analysis, but state courts have often been hesitant to apply tribal law and vice versa. Thus, the parties should expressly agree upon the law governing their agreements.

#### **Consideration 4: Real Property Security and Collateral**

The nature of the security that a Native American tribe can grant to a nontribal entity is a key difference between developing and financing projects on Native American lands versus on non-Native American lands. Unlike traditional project finance transactions, lending institutions are generally restricted from taking a security interest in the Native American tribe's fee interest in its lands.[8] In certain instances, the Native American land is not actually owned by the Native American tribe itself, but is held in trust for the Native American tribe by the United States government for the benefit of the Native American tribe. In either instance, federal law largely restricts tribal entities from mortgaging Native American land. Notably, Native American tribes and financial institutions can enter into leases of Native American lands and grant leasehold mortgages over such Native American lands to provide lenders with certain protections. Those mortgages, however, are subject to approvals by the Bureau of Indian Affairs (the "BIA") and typically provide remedies that are inferior to the remedies available to lenders with loans secured by mortgages over fee interests of nontribal lands.[9]

#### **Consideration 5: Diligence**

Due diligence is also significantly different on tribal projects when compared to nontribal projects. For instance, title searches of Native American land differ from title searches of non-Native American land. Unlike non-Native American title records, which are kept in the local county records, all Native American title records for real property are maintained by the BIA. Persons seeking title records from the BIA must request a title status report. A title status report does not create liability on the part of the BIA or U.S. Government nor is it guaranteed for accuracy. Rather, the parties must obtain insurance from a title insurance company willing to insure an interest in Native American land.

Further, as discussed above, Native American tribes will typically create a subsidiary under state or tribal law in order to enter into contracts and engage in business related to a project. The entity type and entity organizational documents are significant components in assessing whether the Native American tribe has waived sovereign immunity, the applicability of state law and the tax status of the project company.

Finally, project developers and lenders should undertake due diligence in order to understand the laws of the Native American tribe that may impact the applicable project. As sovereign entities, Native American tribes have the right to pass legislation that governs Native American lands, which may include tax regimes, environmental laws and use restrictions, among others. All parties should understand the legislative landscape that will affect a project prior to entering into any agreement.

#### **Conclusion**

Developing and financing projects on Native American land can benefit all parties involved and the general public. While the developing and financing of such projects gives rise to unique considerations, with the requisite diligence, negotiations and drafting, parties can develop successful projects that protect their respective interests while reducing risk and maximizing returns. Parties would be wise to consider sovereign immunity, forum selection, choice of law, real property security and diligence matters during the course of their negotiations.

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[1] Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012).

[2] *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”)

[3] See *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); see also *American Vantage Cos. Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095-97, n.1 (9th Cir. 2002) (as amended).

[4] *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418-19 (2001).

[5] *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-54 (1985); *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 920 (9th Cir. 2008) (“Exhaustion of tribal remedies is mandatory.”) (internal quotations omitted).

[6] *Meyer & Associates v. Coughatta Tribe of La.*, 992 So. 2d 446, 450 (La. 2008) (“There is no doubt that the language contained in the forum selection clauses would suffice to waive the Tribe's sovereign immunity”); but see *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000) (“Whether, and to what extent, an arbitration or forum-selection clause [...] constitutes a waiver of a tribe's sovereign immunity turns on the terms of that clause. The courts are not consentient on the degree of specificity that must be employed.”)

[7] Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 Am. U. L. Rev. 1627, 1628-35 (2006).

[8] See 25 U.S.C. §§ 483, 483a (2012); *Approval of Mortgages and Deeds of Trust*, 25 C.F.R. §152.34 (2015).

[9] *Leases and Permits*, 25 C.F.R. §§ 162.010, et seq. (2015).