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### Cover Page Footnote

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## FUNDAMENTALS OF CONTRACTING BY AND WITH INDIAN TRIBES

Michael P. O'Connell\*

### I. INTRODUCTION

Indian tribes are governments whose status as distinct, self-governing political entities predates the United States Constitution. Indian tribes do not derive their existence or, in most respects, their authority to govern or do business from the United States. Indian tribes, no two identical, have their own forms of government. Most Indian tribes have laws, ordinances and regulations governing business transactions by and with tribal entities. Commerce among Indian tribes predated European contact.

After European contact, commerce by and with Indian tribes expanded in many different modes according to needs and opportunities of the times. On behalf of the Union, Article I, Section 8 of the United States Constitution delegated to Congress the Nation's authority, purposefully preempting state authority, to regulate commerce with Indian tribes. Laws enacted by Congress in the 1790s regulating sales, leases and other conveyances of tribal land and trade with Indian tribes remain substantially in effect.<sup>1</sup> Many treaties between the United States and Indian tribes<sup>2</sup> secured and regulated trade by and with Indian tribes.<sup>3</sup> Federal

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<sup>1</sup> 25 U.S.C. § 177; 25 U.S.C. §§ 261 – 264. See generally Thomas H. Shipps, *The Non-Intercourse Act and Statutory Restrictions on Tribal Resource Development and Contracting*, Paper No. 2, Rocky Mt. Min. L. Fdn. (2005).

<sup>2</sup> Treaties ratified by the United States Senate together with the Constitution and laws enacted by Congress are the "supreme law of the land." U.S. CONST. art VI, § 2, cl. 2.

<sup>3</sup> The several Stevens Treaties with Indian tribes in Washington secured to tribes continuation of their aboriginal right to take fish at usual and accustomed fishing places, a right which included the right to continue to engage in commerce in fishery resources. *E.g.*, Treaty of Point Elliott, art 5, Apr. 11, 1859; *United States v. Washington*, 384 F. Supp. 312, 351-252, 355, 357-358, 407-407 (W.D. Wash. 1974). The Treaty of Point Elliott also included a provision, Article 12, that tribes

laws, regulations, executive orders, and policies too numerous to list promote and regulate commerce by and with Indian tribes. As recently as 2012, and twice in 2010, Congress enacted and the President signed into law amendments to the Indian Long Term Leasing Act, a statute that authorizes and regulates surface leases of tribal and individual Indian land.<sup>4</sup>

While the Constitution vests national power in Congress to regulate commerce with Indian tribes, when Indian tribes engage in business transactions outside Indian country, Indian tribes and tribal entities are subject to state and local laws in such matters, except to the extent that Treaties and other federal laws limit the scope of state and local laws.<sup>5</sup> Non-Indians entering business transactions with Indian tribes and Indians on Indian reservations are exposed to a mix of federal, tribal, state and local laws.<sup>6</sup>

Against this background, this article provides an overview of key considerations in negotiating and drafting a contract by or with an Indian tribe, including: tribal entity issues; federal law; tribal law; sovereign immunity, enforceability and dispute resolution; federal and tribal approvals; land status and

agreed not to trade at Vancouver Island, then under British rule, now British Columbia, Canada. Similar treaties were entered

with Nez Perce Tribe and Confederated Tribes of the Flathead Indian Reservation by Washington Governor Stevens in areas then part of the Territory of Washington, now Idaho and part of Montana respectively.

<sup>4</sup> Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150; An Act to Amend the Act of August 9, 1955, Pub. L. No. 111-334, 124 Stat. 3582; Act of August 9, 1955 to Modify a Provision Relating to Lease Involving Certain Indian Tribes, Pub. L. No. 111-336, 124 Stat. 3587. See Michael O'Connell, *HEARTH Act: Indian Tribes Can Lease Tribal Land Without BIA Approval*, 39 ENVTL. L. 20 (September 2012). Substantial revisions to comprehensive regulations governing the leasing of tribal and individual Indian trust lands under section 415 were adopted by the Bureau of Indian Affairs on behalf of the Secretary of the Interior became effective in 2013. 77 C.F.R. § 72440 (2012).

<sup>5</sup> As an example, tribal sovereign immunity secured by federal law applies to Indian tribes outside as well as within Indian reservations. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2014 (2014) (reaffirming *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)).

<sup>6</sup> The Federal Indian Law preemption doctrine described in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), determines when non-members on a reservation are subject to state or local law. *Montana v. United States*, 450 U.S. 544 (1981), and its progeny determine when non-members are subject to tribal jurisdiction. Both cases were applied in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 319 (2008).

title; taxation; form and duration of the transaction, including rights-of-way; water rights; and employment issues.<sup>7</sup>

## II. TRIBAL ENTITY ISSUES

Virtually every Indian tribe does business as a governmental entity, buying and selling goods and services and developing government-owned property and resources. Indian tribes also engage in a variety of commercial business activities on and outside Indian reservations. As discussed below, Indian tribes have used, and increasingly are using, a wide range of tribal entities to engage in business activity. Transactions may occur between tribes, between a tribe and one or more tribal business entities, between a tribe or tribal business entity and tribal members, and between a tribe or tribal entity and non-members, including Indians not members of the tribe engaging in a business activity.<sup>8</sup> Regardless of the permutation, it is important early in the business transaction planning stage to determine which tribal entity, if any, will engage in the transaction. The choice of tribal entity and the legal basis of its existence and organization under applicable tribal, federal or state law affect a wide range of issues, including: federal and tribal approvals; the validity, enforceability, form and duration of the transaction and transaction documents; sovereign immunity and its preservation or waiver; courts with jurisdiction; alternative dispute resolution; governing law; authority to

<sup>7</sup> Other papers and articles providing perspectives on business transactions with Indian tribes include: Lynn H. Slade, *Indian Tribes – Business Partners and Market Participants: Strategies for Effective Tribal / Industry Partnership*, Paper No. 3B, Rocky Mt. Min (2011); Karen Atkinson, Kathleen Nilles, *Tribal Business Structure Handbook*, OFFICE OF INDIAN ENERGY AND ECONOMIC DEVELOPMENT (2008), available at [http://www.irs.gov/pub/irs-tege/tribal\\_business\\_structure\\_handbook.pdf](http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf) (last visited Nov. 19, 2014); EM Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 3 (2008); Gabriel S. Galanda, Anthony S. Broadman, *Deal or No Deal? Understanding Indian Country Transactions*, 18 BUS. L. TODAY 11 (2008); Michael P. O'Connell, *Indian Tribes and Project Development Outside Indian Reservations*, 21 NAT. RESOURCES AND ENV'T 54, 58 – 59 (Winter 2007); Michael P. O'Connell, *Basics of Successful Natural Resource Development Projects in Indian Country*, Paper No. 1, Rocky Mt. L. Fdn. (2005); Vollmann, *Exploration and Development Agreements on Indian Lands*, 50 Rocky Mt. Min. L. Inst. Ch. 12 (2004); Michael P. O'Connell, *Business Transactions with Indian Tribes*, 34 ARIZ. ATTN. 27 (1998). While Indian gaming has significantly affected Indian reservation economies and business structures, this article focuses on contracting in other tribal business venues.

<sup>8</sup> In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979), the Supreme Court treated Indians not members of the governing tribe where a transaction occurred the same as non-Indians for state-tribal jurisdictional purposes.

exercise, condition or waive the exercise of tribal governmental power;,<sup>9</sup> and environmental reviews.

The range of tribal business entities includes:

- The Tribe itself, a governmental entity,<sup>10</sup> acting through its General Council, Tribal Council or other tribal entities exercising, as applicable, tribal legislative and executive authority:
  - Navajo Nation – Navajo Nation Council and President<sup>11</sup>
  - Hopi Tribe – Tribal Council<sup>12</sup>
  - Yakama Indian Nation – General Council of all adult tribal members delegates certain powers to the Yakama Tribal Council
  - Tulalip Tribes of Washington – Tulalip Board of Directors<sup>13</sup>
  - Confederated Tribes of the Colville Indian Reservation – Colville Business Council<sup>14</sup>

<sup>9</sup> Generally, the powers of Indian tribes derive from their original existence as sovereign entities. Thus, the authority of an Indian tribe to exercise sovereign powers, such as the power to tax, derives from the tribe's original sovereignty, not any grant of authority from the federal government. Absent an express federal law or treaty provision, the Supreme Court firmly rejected claims that the exercise of tribal sovereign powers requires federal review or approval. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985). While some Indian tribes adopted tribal constitutions requiring federal review of certain tribal actions as a matter of tribal law, generally at the instance of federal officials during the early years after enactment of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 460 – 479 (1934), "such tribes are free, with the backing of the Interior Department, to remove the requirement of Secretarial approval." *Kerr-McGee*, 471 U.S. at 199.

<sup>10</sup> As required by 25 U.S.C. § 479a-1 (1994), the Bureau of Indian Affairs (BIA) publishes a list of federally recognized Indian tribes in the Federal Register on a more or less annual basis. See Department of the Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 C.F.R. § 47868 (2012).

<sup>11</sup> NAVAJO NATION CODE § 3; NAVAJO NATION CODE Ch. 3; NAVAJO NATION CODE Ch. 5. "The Navajo Government has been called 'probably the most elaborate' among tribes. The legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos is beyond question" *Kerr-McGee*, 471 U.S. at 201 (citation omitted). References in *Kerr-McGee* to Navajo Tribal Council and Navajo Tribe predate major reforms and reorganization of the Navajo Nation beginning in 1989. The Navajo Nation did not accept the IRA, and does not have a tribal constitution

<sup>12</sup> CONSTITUTION AND BYLAWS OF THE HOPI TRIBE (1936), *available at* <http://thorpe.ou.edu/IRA/hopicons.html> (last visited Nov. 19, 2014). The Hopi Tribe adopted its Constitution and Bylaws under § 16 of the IRA, 25 U.S.C. § 476. Although the original Hopi Constitution required BIA approval of a number of Tribal Council actions, members of the Tribe voted to approved amendments to the Constitution removing such requirements unless required by federal law.

<sup>13</sup> TULALIP CONSTITUTION, (Oct. 4, 2014) *available at* <http://www.codepublishing.com/wa/tulalip/> (last visited Oct. 19, 2014).

- Quinault Indian Nation – Business Committee<sup>15</sup>
- Confederated Tribes of the Umatilla Reservation – Board of Trustees<sup>16</sup>
- Santa Clara Pueblo – traditional leadership<sup>17</sup>
- The Tribe acting through a department, office, agency, or commission of the tribe:
  - Navajo Nation Tax Commission<sup>18</sup>
  - Navajo Nation Environmental Protection Agency, 2 NNC § 1921.
  - Tulalip Tribes Tribal Employment Rights Office<sup>19</sup>
  - Coeur D’Alene Natural Resources Department
  - Osage Minerals Council<sup>20</sup>
- Unincorporated tribal enterprises, authorities and economic subdivisions which are arms and instrumentalities of a tribe:
  - Santa Ysabel Resort and Casino<sup>21</sup>

<sup>14</sup> CONSTITUTION AND BYLAWS OF THE COLVILLE TRIBES OF THE COLVILLE RESERVATION, *available at* <http://www.colvilletribes.com/media/files/P-Constitutionandbylaws.pdf> (last visited Nov. 19, 2014).

<sup>15</sup> CONSTITUTION OF THE QUINAULT INDIAN NATION (March 22, 1975), *available at* <http://www.quinaultindiannation.com/Quinault%20constitution.htm> (last visited Nov. 19, 2014). The BIA determined that Indians of the Quinault Reservation accepted the IRA in an election conducted pursuant to IRA § 18, 25 U.S.C. § 478, but the Quinault Indian Nation, in the exercise of its rights to self-determination and self-government, adopted its Constitution under tribal law, not pursuant to § 16 of the IRA. Thus, the Quinault tribal election on adoption of the Quinault Constitution and any election on proposed amendments are not called by the Secretary of the Interior or the Secretary's delegates and neither the Constitution nor any amendments thereto are subject to federal approval as is the case for tribal constitutions adopted under IRA section 16.

<sup>16</sup> CONSTITUTION OF THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, ART VI. (Dec. 7, 1949) *available at* <http://thorpe.ou.edu/constitution/umatilla.html> (last visited Nov. 20, 2014).

<sup>17</sup> Santa Clara Pueblo v. Martinez, 438 U.S. 49 (1978).

<sup>18</sup> 24 NNC §§ 104(C)-(E).

<sup>19</sup> *Tulalip Tribal Code*, (Oct. 4, 2014) *available at* <http://www.codepublishing.com/wa/tulalip/> (last visited Oct. 19, 2014).

<sup>20</sup> *Osage Nation v. Wind Capital Group, LLC*, 2011 WL 6371384 (N.D. Okla. 2011) (stating that the Osage Minerals Council was established as an independent agency within the Osage Nation by Article XV of the Osage Nation Constitution).

<sup>21</sup> The Bankruptcy Court for the Southern District of California dismissed a petition for Chapter 11 bankruptcy protection filed by the Santa Ysabel Resort and Casino based on motions filed by the United States Trustee and Yavapai Apache Nation, the Casino's largest creditor. Under the Bankruptcy Code, a "person" eligible for protection does not include a "governmental unit" defined as a "foreign or domestic government." The Casino claimed it was an unincorporated company. The United States Trustee and Apache Nation contended that the Casino was an unincorporated "arm" of the Yavapai Nation of the Santa Ysabel and therefore a governmental unit. In dismissing the petition, the Bankruptcy Court agreed with the U.S. Trustee and Yavapai Apache Nation. *In re*

- Ski Apache<sup>22</sup>
- Coeur D'Alene Tribal Farm<sup>23</sup>
- Gila River Farms<sup>24</sup>
- Salt River Farming Enterprise<sup>25</sup>
- Chukchansi Economic Development Authority<sup>26</sup>
- Snow Mountain Recreational Facilities Authority<sup>27</sup>
- Warm Springs Power and Water Enterprises
- Warm Springs Composite Products
- Lummi Indian Seafoods Company<sup>28</sup>
- The Economic Development Authority of the Tohono O'odham Nation<sup>29</sup>
- Kalispel Economic Development Authority
- Southern Ute Indian Tribe Growth Fund<sup>30</sup>
- Fort Apache Timber Company<sup>31</sup>
- Navajo Tribal Utility Authority<sup>32</sup>
- Dine Power Authority<sup>33</sup>
- Navajo Engineering & Construction Authority<sup>34</sup>

Santa Ysabel Resort and Casino, No. 12-9415 (S.D. Cal. Sept. 11, 2012). Many but not all tribal casinos operate through tribal government corporations chartered under tribal law.

<sup>22</sup> *Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993).

<sup>23</sup> *Donovan v. Coeur D'Alene Tribal Farm*, 751 F.2d 113 (9th Cir. 1985).

<sup>24</sup> *Unique v. Gila River Pima-Maricopa*, 674 P.2d 1376 (Ariz. App. 1983).

<sup>25</sup> Discussed in Opinion of the Solicitor, M-36119 (February 12, 1952).

<sup>26</sup> *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010).

<sup>27</sup> *Landmark Golf Limited Partnership v. The Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169 (D. Nev. 1999).

<sup>28</sup> *North Sea Products, Ltd. v. Clipper Seafoods Company*, 595 P.2d 938 (Wash. 1979) (Lummi Indian Seafoods Company is an operating division of Lummi Indian Tribal Enterprise (LITE), an enterprise chartered by the Lummi Indian Business Committee pursuant to Article VI of the Lummi Constitution; LITE has sovereign immunity from a garnishment proceedings).

<sup>29</sup> Tohono O'odham Code, Title 10, Chapter 1.

<sup>30</sup> *Floyd v. Panther Energy Co., LLC*, No 10-95 (N.D. Tex. Jan. 3, 2012) (tribal council resolution and other organizing documents established that Southern Ute Indian Tribe Growth Fund is an arm of and indistinguishable from the Tribe).

<sup>31</sup> *White Mountain Apache Tribe v. Shelly*, 480 P.2d 654 (Ariz. 1971) (Fort Apache Timber Company is a subordinate economic organization of the White Mountain Apache Tribe, not a de facto corporation, and enjoys the Tribe's sovereign immunity).

<sup>32</sup> 21 NNC §§ 1 – 60(1959); *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir. 1979).

<sup>33</sup> 21 NNC § 201 (1959).



- Navajo Housing and Development Enterprise<sup>35</sup>
- Snoqualmie Entertainment Authority
- Mt. Adams Furniture<sup>36</sup>
- Menominee Tribal Enterprise<sup>37</sup>
- Inn of the Mountain Gods<sup>38</sup>
- Political subdivisions of a tribe, such as villages, chapters, and districts:
  - Hopi villages<sup>39</sup>
  - Kayenta Township Commission (Navajo)<sup>40</sup>
  - Navajo self-governing chapters<sup>41</sup>
  - Quil Ceda Village (Tulalip Tribes)
  - Tohono O’odham Nation Districts<sup>42</sup>
- Tribal-owned entities chartered, incorporated or organized under tribal law include:
  - Tribal government corporations<sup>43</sup>

<sup>34</sup> Begay v. Navajo Engineering & Construction Authority, No. SC-CV-44-08 (Nav. Sup. Ct. 2011) (ordering dismissal based on failure to comply with Navajo tribal statutory conditions on waiver of sovereign immunity requiring notice of intent to file suit and naming Navajo Nation as a party in the complaint).

<sup>35</sup> Navajo Tribe v. Bank of New Mexico, 700 F.2d 1285 (10th Cir. 1983).

<sup>36</sup> *In re Greene*, 980 F.2d 590 (9th Cir. 1992) (Mt. Adams Furniture is a wholly owned and managed enterprise of the Confederated Tribes and Band of the Yakama Indian Nation), *cert. denied*, 510 U.S. 1039 (1994).

<sup>37</sup> Local IV-32 International Woodworkers Union of America v. Menominee Tribal Enterprise, 595 F. Supp. 859 (D. Minn. 1984) (holding the Menominee Indian Tribe had not waived its sovereign immunity, the court lacked jurisdiction over the enterprise).

<sup>38</sup> Ramey Construction Company, Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982)

<sup>39</sup> CONSTITUTION AND BYLAWS OF THE HOPI TRIBE (1936), *available at* <http://thorpe.ou.edu/IRA/hopicons.html> (last visited Nov. 19, 2014); First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18 (1994).

<sup>40</sup> 1 NNC § 552.O (1959); Kayenta Township Commission v. Ward, No. SC-CV-29-07 (Nav. Sup. Ct. 2011).

<sup>41</sup> Navajo Nation Local Governance Act, 26 NNC § 101 (1959).

<sup>42</sup> CONSTITUTION OF THE TOHONO O’ODHAM NATION (March 6, 1986), *available at*, <http://www.narf.org/nill/Constitutions/tohono/Constitution.pdf> (last visited Nov. 19, 2014).

<sup>43</sup> Many Indian tribes have enacted tribal codes authorizing the creation and regulation of tribal government corporations. See, for example, May 27, 2009, COLVILLE TRIBAL CODE, Tribal Governmental Corporations Chapter, Title 7, Ch. 7-1. Since the earliest days of the United States, and likely much earlier, corporations created by governments for governmental purposes have been recognized as arms and instrumentalities of the government, in accordance with the applicable laws, corporate charters, and articles of incorporation. Thus, in *M’Culloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall, on behalf of a unanimous Supreme Court, held that Congress, within its power through the “necessary and proper” clause “for the carrying into

- Colville Tribal Enterprise Corporation<sup>44</sup>
- Colville Tribal Services Corporation<sup>45</sup>
- Coquille Economic Development Corporation<sup>46</sup>

execution” the enumerated powers granted to Congress in the Constitution, incorporated the Second Bank of the United States as an “instrument, as a means to effect the legitimate objects of government.” *Maryland*, 17 U.S. at 423. The bank so created, served “a useful, and essential instrument in the prosecution of [the] fiscal operations” of the government of the United States. *Id.* at 422.

The law of government corporations is well established, though not as well known as the law applicable to private sector corporations. As to federal government corporations, See the Government Corporations Control Act, 31 U.S.C. § 9101 (2007). Sometimes known as “public corporations,” *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) (the Alaska Railroad Corporation is a “public corporation partially owned by the State of Alaska”), government corporations are to be distinguished from “publicly-held corporations” and “public service corporations.” 1 WILLIAM MEADE FLETCHER ET. AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §§ 57 – 62 (2006). “Federal or government corporations are a type of public corporation that refers to corporations incorporated by or under an act of Congress, such as banks, railroads, and various insurance or relief corporations. These corporations are created to address the needs of the public, usually while remaining financially independent.” 1 WILLIAM MEADE FLETCHER ET. AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS 69.10 at 2-3 (2006). A recent example is the Presido Trust established by section 103 of the Presido Trust Act, 16 U.S.C. § 460bb (1996), to manage the Presido within Golden Gate National Recreation Area, discussed in *Presido Historical Association v Presido Trust*, 2013 U.S. Dist. Lexis 78523 (N.D. Cal. 2013). “There is no comprehensive descriptive definition of or criteria for government corporations. However, President Truman, in his 1948 budget address, outlined some characteristics of governmental corporations . . . . According to this formulation, government corporations: (1) are predominantly of a business nature; (2) produce revenue and are potentially self-sustaining; (3) involve a large number of business-type transactions with the public; and (4) require a greater flexibility than the customary type of appropriations budget ordinarily permits.” *Id.* at 3. See also *United States General Accounting Office, Government Corporations, Profiles of Existing Government Corporations*, United States General Accounting Office (Dec. 1995) available at <http://www.gao.gov/assets/230/222015.pdf> (last visited Nov. 20, 2014). Government corporations, like the Second Bank of the United States and the Alaska Railroad Corporation, have mixed private and government ownership. Government corporations that are wholly-owned by the government “experience greater government control since they are viewed more as agencies within the executive branch, while mixed-ownership are closer to the status of private entities and thus experience less governmental control.” *Id.* Tribal government corporations carrying out tribal government programs or activities are to be distinguished from business corporations and other private business entities owned by tribes and others simply as business investments.

<sup>44</sup> CONSTITUTION AND BYLAWS OF THE COLVILLE TRIBES OF THE COLVILLE RESERVATION, <http://www.colvilletribes.com/media/files/P-Constitutionandbylaws.pdf> (last visited Nov. 19, 2014); *Stock West v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989); *Wright v. Colville Tribal Enterprise Corporation*, 147 P.3d 1275 (Wash. 2006).

<sup>45</sup> The opinion in *Wright, supra*, describes the Colville Tribal Services Corporation as a wholly-owned tribal government corporation subsidiary of Colville Tribal Enterprise Corporation.

<sup>46</sup> *Chance v. Coquille Indian Tribe*, 963 P.2d 638 (Or. 1998) (Coquille Economic Development Corporation).

- Cabazon Bingo, Inc.<sup>47</sup>
- Nooksack Business Corporation<sup>48</sup>
- Kewa Gas Limited (Santo Domingo Pueblo)<sup>49</sup>
- Seneca Gaming Corporation
- Sun Valley Marina Corporation (Gila River Indian Community)<sup>50</sup>
- Marine View Ventures, Inc. (Puyallup Tribe of Indians)
- ‘Sa’ Nyu Wa (Hualapai Indian Tribe)<sup>51</sup>
- Lake of Torches Economic Development Corporation<sup>52</sup>
- Cherokee Nation Business, Inc.<sup>53</sup>
- Oneida Seven Generations Corp.<sup>54</sup>

<sup>47</sup> *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 84 Cal. Rptr. 2d 65, (1999). The California Court of Appeals held that whether tribal immunity extends to a tribal business depends on the degree to which the tribe and the entity are related in terms of factors such as purpose and organizational structure. Noting that courts have applied different factors in deciding whether tribal sovereign immunity applies to tribal business, the *Trudgeon* court cited factors applied in *Galve v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996): whether the business entity is organized for a purpose that is governmental in nature rather than commercial; whether the tribe and the business entity are closely linked in governing structure and other characteristics; and whether federal policies intended to promote Indian tribal autonomy are furthered by extension of the immunity to the tribal business entity. Applying these factors, the *Trudgeon* court noted that Cabazon Bingo, Inc. was created for the specific purpose of improving the financial and general welfare of the tribe, and that Indian gaming encouraged by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (1988), governing Indian gaming on Indian reservations, establishes gaming conducted by and through Cabazon Bingo, Inc. as fundamentally governmental in nature, thereby satisfying the first criteria. The court found the second and third factors also supported its conclusion that Cabazon Bingo, Inc. has the Cabazon Band’s sovereign immunity.

<sup>48</sup> *Outsource Services Management LLC v. Nooksack Business Corporation*, 333 P.3d 380, 2014 WL 4108073 (Wash. 2014).

<sup>49</sup> *Quantum Entertainment Limited v. U.S. Department of the Interior*, 714 F.3d 1338 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>50</sup> *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996).

<sup>51</sup> Discussed in *Grand Canyon Sky Walk Development LLC v. ‘Sa’ Nyu Wa, Inc.*, 715 F.3d 1196 (9th Cir. 2013) (requiring exhaustion of tribal remedies before consideration of a challenge to the Hualapai Indian Tribe’s authority to condemn property), *cert. denied*, 134 S. Ct. 825 (Dec. 16, 2013), and *Grand Canyon Sky Walk Development LLC v. ‘Sa’ Nyu Wa, Inc.*, 923 F. Supp. 2d 1186 (D. Ariz. 2013) (enforcing arbitrators award against tribal government corporation ‘Sa’ Nyu Wa, Inc.; tribal entity subsequently filed for bankruptcy protection). Other Hualapai tribally-owned corporations include Grand Canyon West and Grand Canyon Resort Corporation.

<sup>52</sup> *Wells Fargo Bank v. Lake of the Torches Economic Development Corporation*, 667 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010), *aff’d*, 658 F.3d 684 (7th Cir. 2011); *Saybrook Tax Exempt Investors, LLC v. Lake of Torches Economic Development Corporation*, 2013 U.S. Dist. 32909 (W.D. Wis. 2013).

<sup>53</sup> *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012) (Cherokee Nation Business, Inc., wholly owned and regulated by the Cherokee Nation was incorporated under Cherokee Nation Legislative Act 37-05)

- Dine Development Corporation<sup>55</sup>
- Sioux Manufacturing Corporation<sup>56</sup>
- Lone Butte Development Corporation (Gila River Indian Community)<sup>57</sup>
- For Profit Business corporations:
  - Colville Tribal Law & Order Code, Title 7, Chapter 7-3 Tribal [Business] Corporations, Colville Tribal Corporations Chapter (ordinance is not limited to tribally-owned for-profit business corporations)<sup>58</sup>
  - Navajo Nation Corporation Code, 5 NNC Chapter 19; “Corporation’ or ‘domestic corporation’ means a for profit or non-profit corporation subject to the provisions of this Chapter, except foreign corporations.” 5 NNC § 3102.E.
  - BJK Solutions, Inc.<sup>59</sup>
- Nonprofit corporations, including tribal housing authorities, health agencies, schools and colleges:
  - Oglala Sioux Housing Authority<sup>60</sup>
  - Blackfeet Housing Authority<sup>61</sup>
  - Modoc Indian Health Project<sup>62</sup>
  - Tuba City Regional Healthcare Corporation<sup>63</sup>

<sup>54</sup> Kroner v. Oneida Seven Generations Corp, 819 NW.2d 264 (Wis. 2012).

<sup>55</sup> Navajo Nation Council Resolution, CJY 34-04 (2004).

<sup>56</sup> Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803, 810 (7th Cir. 1993).

<sup>57</sup> Other examples include Stillaguamish Tribal Enterprise Corporation; See Stillaguamish Tribal Enterprise Corporation v. Pilchuck Group II, L.L.C., C-2-11-00387 (W.D. Wash. 2011).

<sup>58</sup> An example of a business corporation chartered under tribal law not owned by an Indian tribe is First American Petroleum, owned by Robert Ramsey, a member of the Confederated Tribes and Bands of the Yakama Nation, formed and licensed under the laws of the Yakama Nation. Salton Sea Venture, Inc. v. Ramsey, 2011 U.S. Dist Lexis 120145 (S.D. Cal. 2011). See also Phillip Morris USA, Inc. v. King Mt. Tobacco Company, 569 F.3d 932, 935 (9th Cir. 2009) (King Mountain Tobacco Company, owned by Yakama Tribal Members Delbert Wheeler and Richard “Kip” Ramsey, was formed and licensed under the laws of the Yakama Nation).

<sup>59</sup> Iowa Tribe of Oklahoma acting through its Business Committee, the political governing body of the Tribe, established this entity under the Tribe’s Constitution and Corporation Act. The entity formerly was a division of the Tribe. United States for the Use of Morgan Buildings & Spa, Inc. v. Iowa Tribe of Oklahoma, 2011 U.S. Dist. LEXIS 7840 (WD. Okla. 2011).

<sup>60</sup> Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1996).

<sup>61</sup> Marceau v. Blackfeet Housing Authority, 455 F.3d 974 (9th Cir. 2006).

<sup>62</sup> Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998).

<sup>63</sup> Vulgamore v. Tuba City Regional Healthcare Corporation, 2011 U.S. Dist. Lexis 89647 (D. Ariz. 2011) (organized under 5 NNC §§ 3301 – 3332 (2005) board of directors composed of

- Lummi Tribal Schools (K-12)<sup>64</sup>
- Dine College<sup>65</sup>
- Navajo Technical University (also known as Crownpoint Institute of Technology)<sup>66</sup>
- Tohono O’odham Community College<sup>67</sup>
- Northwest Indian College (originally chartered as the Lummi Indian Community College by the Lummi Indian Business Council)
- Sisseton-Wahpeton Community College<sup>68</sup>
- Salish Kootenai College<sup>69</sup>
- College of Menominee Nation
- Navajo Nation Non-Profit Corporation Act, 5 NNC Subchapter 3, §§ 3301 – 3332
- Navajo Agricultural Cooperative Act, 5 NNC Subchapter 4, §§ 3401 - 3425
- Colville Tribal Law & Order Code, Title 7, Chapter 7-2 Nonprofit Corporations, Colville Tribal Nonprofit Corporations Chapter
- Limited liability companies:
  - Navajo Transitional Energy Company LLC, established by the Navajo Nation to assume control of the Navajo Mine from BHP to supply coal to the Four Corners Power Plant operated

representatives of 8 Navajo Nation political subdivisions, representatives of Hopi village of Moenkopi, and the San Juan Southern Paiute Tribe).

<sup>64</sup> *Office of Native Education*, OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, [www.k12.wa.us/IndianEd/TribalSchools.aspx](http://www.k12.wa.us/IndianEd/TribalSchools.aspx). (last visited Nov. 19, 2014). (For a list of tribal schools in Washington, See Washington State, Office of Superintendent of Instruction)

<sup>65</sup> *About Dine College*, Dine College (2014), <http://www.dinecollege.edu/about/about.php> (last visited Nov. 20, 2014).

<sup>66</sup> *History*, NAVAJO TECHNICAL UNIVERSITY (2014), [http://www.navajotech.edu/index.php?option=com\\_content&view=article&id=311&Itemid=292](http://www.navajotech.edu/index.php?option=com_content&view=article&id=311&Itemid=292) (last visited Nov. 20, 2014).

<sup>67</sup> *Tohono O’odham Nation Code*, TOHONO O’ODHAM LEGISLATIVE BRANCH, *available at* <http://www.tolc-nsn.org/tocode.htm> (last visited Nov. 19, 2014).

<sup>68</sup> *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000).

<sup>69</sup> *Smith v. Salish and Kootenai College*, 434 F.3d 1127 (9th Cir.), *cert. denied*, 547 U.S. 1207 (2006) (incorporated under tribal law in 1977 and state law a year later); *Tribal Colleges and Universities*, U.S. DEPARTMENT OF EDUCATION, *available at* <http://www.ed.gov/edblogs/whiaiane/tribes-tcus/tribal-colleges-and-universities/> (last visited Nov. 19, 2014).

- by Arizona Public Service Company, following announcement of plans to retire Units 1 - 3 out of 5 units at the power plant
- Navajo Nation Limited Liability Company Act, 21 NNC § 3600, amended by Navajo Nation Council Resolution CAP-21-10 (2010) to provide that any limited liability company organized under that Act and wholly owned by the Navajo Nation “continues to be protected by sovereign immunity”
  - Apsaalooke Tribal Leasing Company, LLC, established by the Crow Tribal Legislature in 2007 to manage tribal leased land
  - Apsaalooke Limited Liability Company Act, Crow Law and Order Code, Title 18 (2007), including in Part 11 provisions for limited liability companies controlled by the Crow Tribe, amended in 2009 to authorize limited liability companies established for charitable and educational purposes
  - Warm Springs Tribal Code, Chapter 701, Limited Liability Companies
  - Ho-Chunk Nation Code, Title 5 – Business and Finance Code, Section 3, Limited Liability Company Act, Article I, Section 8(e) provides that if the Ho-Chunk Nation is the sole member of an LLC established under the Act that the LLC shall have the sovereign immunity of the Ho-Chunk Nation
  - Delaware Nation Economic Development Authority LLC, Delaware Nation Limited Liability Company Act (enacted 2009)
  - Partnerships:
    - Navajo Nation Uniform Partnership Act, 23 NNC § 3800
    - Navajo Nation Limited Liability Partnerships, 25 NNC § 4100
    - Gila River Cellular General Partnership (25% owned by Gila River Telecommunications, Inc.)
  - Tribal utilities:
    - Yakama Power<sup>70</sup>
    - Aha Macav Power Service (Fort Mojave)
    - Navajo Tribal Utility Authority<sup>71</sup>

<sup>70</sup> *About Us*, YAKAMA POWER, available at <http://www.yakamapower.com/about.php> (last visited Nov. 19, 2014).

<sup>71</sup> *About Us*, NAVAJO TRIBAL UTILITY AUTHORITY (2010), available at <http://www.ntua.com/aboutus.html> (last visited Nov. 20).

- Dine Power Authority<sup>72</sup>
- San Carlos Apache Telecommunications Utility, Inc.
- Chickasaw Tribal Utility Authority
- Tohono O'odham Utility Authority (formerly Papago Tribal Utility Authority)<sup>73</sup>
- Gila River Indian Community Utility Authority
- Gila River Telecommunications, Inc.
- Tribal-owned, federally chartered section 17 corporations<sup>74</sup> and Oklahoma Indian Welfare Act corporations:<sup>75</sup>
  - Colville Tribal Federal Corporation<sup>76</sup>
  - Navajo Nation Oil and Gas Company<sup>77</sup>

<sup>72</sup> *Tribal Enterprises on the Navajo Nation*, NAVAJO NATION (2004), available at <http://www.navajobusiness.com/tribalDevelopment/TribalEnterprises.htm> (last visited Nov. 20, 2014).

<sup>73</sup> Tohono O'odham Nation Code, Title 24, Chapter 1.

<sup>74</sup> 25 U.S.C. § 477 (1934). Tribal corporations chartered under section 17 of the IRA quite often have names similar to the federally recognized Indian, which owns the corporation. Due diligence is necessary to determine whether action in any such case is by the section 17 corporation or the federally recognized Indian tribe which owns the corporation. See *Parker Drilling Company v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131 (D. Alaska 1978) (distinguishing between Metlakatla Indian Community of the Annette Island Reserve, a tribal government entity with a constitution adopted under section 16 of the IRA, and Metlakatla Indian Community, a corporation owned by the tribal government and chartered by the Secretary of the interior under section 17 of the IRA); *Atkinson v. Haldane*, 569 P.2d 151, 170 - 175 (Alaska 1977) (same entities); *Kenai Oil and Gas, Inc. v. Department of the Interior*, 522 F. Supp. 521 (D. Utah 1981) (noting difficulty in determining whether oil and gas mining leases had been entered by Ute Indian Tribe of the Uintah and Ouray Indian Reservation organized under section 16 of the IRA or The Ute Indian Tribe, a section 17 corporation formed to further the economic development of the Ute Indian Tribe). Although a number of section 17 corporations have been inactive due in part to the initial 10 year limit on leases such corporations could approve, IRA section 17 provides that the charters of such corporations cannot be revoked or surrendered except by an Act of Congress. Thus, such corporations could be revitalized to play an active role in a wide range of business matters. Moreover, while the original version of section 17 limited the term leases that could be issued by such corporations to 10 years, Congress amended section 17 in 1990 to increase the term up to 25 years, and removed the restriction limiting such corporations to those Indian tribes, which accepted the IRA. Charters containing 10 year lease term restrictions and other restrictions not now required by federal law can be amended by appropriate tribal action and approval by the Secretary. A number of IRA section 17 corporation charters and IRA tribal constitutions issued or adopted between the mid-1930s and 1960. As useful as it is, many of the section 17 corporation charters and IRA tribal constitutions posted at this site have been amended in ways not shown in these documents, are in process of being amended or may be amended in the future in significant ways. In addition, the Secretary issued many section 17 corporation charters after 1960 and many Indian tribes adopted tribal constitutions and other fundamental organic documents after 1960.

<sup>75</sup> 25 U.S.C. § 503 (1936).

<sup>76</sup> *Grondal v. United States*, 2012 U.S. Dist. Lexis 19398 at \*18 (E.D. Wash. 2012).

- Amerind Risk Management Corporation<sup>78</sup>
- Seminole Tribe of Florida, Inc.<sup>79</sup>
- Mescalero Apache Tribe, Inc.<sup>80</sup>
- Energy Keepers, Inc. (Confederated Tribes of the Salish and Kootenai Tribes of the Flathead Indian Reservation)
- Tulalip Tribal Federal Corporation
- Metlakatla Indian Community<sup>81</sup>
- Santa Ana Golf Club, Inc. (Santa Ana Pueblo)<sup>82</sup>
- Leaning Rock Water Corporation (Cuypaibe Band of Diegueno Mission Indians)
- Chickasaw Nation Industries<sup>83</sup>
- Blue Lake Rancheria Economic Development Corporation<sup>84</sup>
- Twenty-Nine Palms Enterprise Corporation<sup>85</sup>
- Tribal-owned entities chartered, incorporated or organized under state law:
  - For profit business corporations
    - Tribal Farms, Inc. (Arizona corporation, owned by Fort Mojave Tribe)<sup>86</sup>

<sup>77</sup> Nav. Nat. Oil and Gas Company Board of Directors Resolution, No. 159 (2011) (describing Navajo Nation Oil and Gas Company as a wholly owned corporation of the Navajo Nation organized under section 17 of the IRA, as amended).

<sup>78</sup> Amerind Risk Management Corporation v. Malaterre, 633 F.3d 680 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1094 (2012).

<sup>79</sup> Maryland Casualty Co. v. Citizens Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966).

<sup>80</sup> Ramey Construction Company, Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982).

<sup>81</sup> Parker Drilling Company v. Metlakatla Indian Community, 451 F. Supp. 1127, 1131 (D. Alaska 1978); Atkinson v. Haldane, 569 P.2d 151, 170 - 175 (Alaska 1977).

<sup>82</sup> Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548 (N.M. App. 2004).

<sup>83</sup> Memphis Biofuels v. Chickasaw Nation Industries, 585 F.3d 917 (10th Cir. 2009); Bales v. Chickasaw Nation Industries, 606 F. Supp. 2d 1299 (D.N.M. 2010). Other tribal corporations established pursuant to the Oklahoma Welfare Act include Seneca-Cayuga Tribal Corporation, Breakthrough Management Corporation v. Chukchansi Gold Casino and Resort, 629 F.3d 1173 (10th Cir. 2010).

<sup>84</sup> Admiral Insurance Company v. Blue Lake Rancheria Tribal Court, 2012 U.S. Dist. Lexis 48595 (N.D. Cal. 2012) (Mainstay Business Solutions operated as a division of the section 17 corporation).

<sup>85</sup> Twenty-Nine Palms Enterprise Corporation v. Bardos, 210 Cal. App. 4th 1435, 149 Cal. Rptr. 3d 52, 2012 Cal. App. Lexis 1173 (2012).

<sup>86</sup> Inecon Agricorporation, Inc. v. Tribal Farms Inc., 656 F.2d 498 (9th Cir. 1981) (determined Tribal Farms, Inc. is not the Fort Mojave Tribe for purposes of 25 U.S.C. § 81).



- Eagle Bank, S & K Bankcorp (chartered by Montana, owned by the Confederated Salish and Kootenai Tribes)
- Uniband, Inc. (chartered under Delaware law, owned by Turtle Mountain Band of Chippewa Indians)<sup>87</sup>
- Non-profit corporations:
  - Council for Energy Resource Tribes<sup>88</sup>
  - Modoc Indian Health Project<sup>89</sup>
  - Great Plains Chairmen’s Health Board<sup>90</sup>
  - Salish Kootenai College<sup>91</sup>
  - Ramah Navajo School Board, Inc. <sup>92</sup>
  - Marty Indian School, Inc.<sup>93</sup>
  - Little Wound School Board, Inc.<sup>94</sup>
  - Sicangu Oyote, Inc.<sup>95</sup>
  - St. Regis Mohawk Education and Community Fund, Inc.<sup>96</sup>

<sup>87</sup> Uniband, Inc. v. Commissioner of Internal Revenue, 140 Tax Ct. No. 13, 2013 WL 2247986 (U.S. Tax Court 2013).

<sup>88</sup> Dille v. Council for Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986) (consortium of energy resource tribes treated as Indian tribe exempt from regulation as an employer under Title VII of the 1964 Civil Rights Act).

<sup>89</sup> Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998) (nonprofit corporation established by and serving “as an arm of sovereign tribes” for charitable, educational, and scientific purposes, specifically delivery of services pursuant to the Indian Self-Determination Act to provide health services to tribal members, treated as a tribe).

<sup>90</sup> J.L. Ward Assocs. v. Great Plains Chairmen’s Health Board, 842 F. Supp. 2d 1163 (D.S.D. 2012).

<sup>91</sup> Smith v. Salish and Kootenai College, 434 F.3d 112 (9th Cir.), *cert. denied*, 547 U.S. 1207 (2006) (incorporated under tribal law in 1977 and state law a year later).

<sup>92</sup> Ramah Navajo School Board, Inc. v. Bureau of Revenue, 625 P.2d 1225, 1226 (NM 1980), *rev’d on other grounds*, 458 U.S. 832 (1982).

<sup>93</sup> Marty Indian School, Inc. v. South Dakota, 592 F. Supp. 1236 (D.S.D. 1984) (nonprofit corporation formed by Yankton Sioux Tribe, operated exclusively by tribal members for Indian students exempt from South Dakota fuel tax for fuel purchased by and stored on school premises), *aff’d*, 824 F.2d 684 (8th Cir. 1987).

<sup>94</sup> Giedosh v. Little Wound School Board, Inc., 995 F. Supp. 1052 (D.S.D. 1997) (Indian school board organized as a nonprofit corporation under South Dakota law treated as an Indian tribe employer exempt from regulation under Title VII of the 1964 Civil Rights Act and Americans with Disabilities Act).

<sup>95</sup> Sage v. Sicangu Oyote, Inc., 473 N.W.2d 480 (S.D. 1991).

<sup>96</sup> Ransom v. St. Regis Mohawk Education and Community Fund, Inc., 658 NE 2d 989 (NY 1995) (nonprofit corporation established by St. Regis Mohawk Tribe to carry out tribal education programs under District of Columbia nonprofit corporation act which provides that corporations held to have tribal sovereign immunity despite provision act’s provision that nonprofit corporations so organized have the power to sue and be sued because corporation’ did not expressly waive tribal sovereign

- Limited liability companies:
  - First Nation LLC (Delaware LLC, 51% owned by Tunica-Biloxi Tribe of Louisiana)<sup>97</sup>
  - Ute Energy LLC (Delaware LLC)
  - CTGW LLC (Delaware LLC, 51% owned by Confederated Tribes of the Chehalis Indian Reservation)<sup>98</sup>
  - Panther Energy Co., LLC (Southern Ute Indian Tribe Growth Fund, an arm of the Southern Ute Indian Tribe, was controlling member of the company)<sup>99</sup>
  - U.S. Grant Hotel Ventures, LLC<sup>100</sup>
  - CND, LLC<sup>101</sup>
- Limited liability partnerships:

immunity and corporation's qualifications to do business in New York likewise did not expressly waive the corporation's sovereign immunity).

<sup>97</sup> Warburton/Buttner v. Superior Court, 103 Cal. App.4th 1170, 1174-1175, 127 Cal. Rptr.2d 706 (Cal. App. 2002).

<sup>98</sup> Confederated Tribes of the Chehalis Indian Reservation v. Thurston County Board of Equalization, 2010 U.S. Dist. Lexis 33129 (W.D. Wash. 2010), *reversed*, 724 F.3d 1153 (9th Cir. 2013), and CTGW, LLC v. GSBS, PC, 2010 U.S. Dist. Lexis 69298 (W.D. Wis. 2010) (same limited liability company).

<sup>99</sup> Floyd v. Panther Energy Co., LLC, No. 10-95 (N.D. Tex. Jan. 3, 2012).

<sup>100</sup> U.S. Grant Hotel Ventures, LLC, a California limited liability company, is wholly-owned by its sole member, Sycuan Investors-U.S. Grant, LLC, a California limited liability company, wholly-owned by its sole member American Property Investors-U.S. Grant, LLC, a California limited liability company, wholly-owned by its sole member Sycuan Tribal Development Corporation (STDC), a corporation chartered under tribal law of the Sycuan Band of the Kumeyaay Nation, a federally recognized Indian tribe, whose shareholders are members of enrolled members of the Nation. The articles of incorporation of STDC state that its overall purpose is to "enhancement of the welfare of the [Sycuan] through the acquisition and development of real and personal property, investment of funds and all other lawful activities appropriate to such purposes." In *American Property Management Corporation v. The Superior Court of San Diego County, Respondent, U.S. Grant Hotel Ventures, LLC, Real Party in Interest*, 141 Cal. Repr.3d 802, 2012 (Cal App. 4 Dist 2012), the California Court of Appeal rejected claims that U.S. Grant Hotel Ventures, LLC is an arm of the Sycuan Nation protected by the Nation's sovereign immunity against cross-claims asserted against U.S. Grant Hotel Ventures, LLC in a suit initiated in California Superior Court by U.S. Grant Hotel Ventures, LLC regarding a hotel management agreement for a hotel acquired by the Sycuan Nation in downtown San Diego, California, outside the Sycuan Nation's Reservation or any land held in trust for the Sycuan Nation. In reaching this conclusion, the California Court of Appeals applied a multi-factor analysis, relying extensively on *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).

<sup>101</sup> *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10th Cir. 2012) (CND, LLC, formed under Oklahoma Limited Liability Act, does not have tribal sovereign immunity though wholly owned by and Cherokee Nation Distributors, Inc.).

- Schiavi Homes (Penobscot Tribe and Palmer Management Corporation formed “Schiavi Homes,” a Maine limited partnership)<sup>102</sup>
- Banks:
  - Native American Bank, NA (chartered by the Comptroller of the Currency, U.S. Department of the Treasury, owned by The Native American Bancorporation, Co, subject to regulation by the Federal Reserve Bank)<sup>103</sup>
  - Eagle Bank (chartered by the State of Montana, owned by the Confederated Tribes of the Salish and Kootenai through S & K Bancorp)
  - Peoples Bank of Seneca, Missouri (owned by the Eastern Shawnee of Oklahoma)
  - Bank2 (owned by the Chickasaw Banc Holding Company, wholly owned by the Chickasaw Nation)
- Special purpose entities:
  - Formed for a specific transaction
    - Navajo Transitional Energy Company, LLC<sup>104</sup>
  - Formed by or serving two or more Indian tribes:
    - Council for Energy Resource Tribes<sup>105</sup>
    - Modoc Indian Health Project, Inc.<sup>106</sup>

<sup>102</sup> Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538 (1st Cir. 1997).

<sup>103</sup> The Native American Bank, NA was established in 2001 by 20 Indian tribes and Alaska Native Corporations. As of 2011, the bank was made up of 26 Indian tribes, tribal enterprises and Alaska Native Corporations, according to its web site. The Native American Community Development Corporation is an affiliate of the Native American Bank, NA. See *A Guide to Tribal Ownership of a National Bank, Comptroller’s Licensing Manual, Office of the Comptroller of the Currency* (2002), available at <http://www.occ.gov/topics/community-affairs/resource-directories/native-american/tribalp.pdf> (last visited Nov. 19, 2014).

<sup>104</sup> The Navajo Transitional Energy Company, LLC is a wholly owned limited liability company of the Navajo Nation authorized to purchase and operate the BHP Navajo Mine. See NAVAJO TRANSITIONAL ENERGY COMPANY LLC, available at <http://www.navajo-tec.com> (last visited October 12, 2014).

<sup>105</sup> Dille v. Council for Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986) (council of energy resource tribes treated a tribe; definition of an employer subject to Title VII of the 1964 Civil Rights Act excludes Indian tribes, 42 U.S.C. § 2000e(b)(1)).

<sup>106</sup> Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185 (9th Cir. 1998) (nonprofit corporation established by and serving “as an arm of sovereign tribes” for charitable, educational, and scientific purposes, specifically delivery of services pursuant to the Indian Self-Determination Act to provide health services to tribal members, treated as a tribe; definition of an employer subject to Title VII of the 1964 Civil Rights Act excludes Indian tribes, 42 U.S.C. § 2000e(b)(1)).

- Intertribal Council of Nevada, Inc.<sup>107</sup>
- Columbia River Intertribal Fish Commission
- Northwest Indian Fisheries Commission
- National Tribal Environmental Council (incorporated in the District of Columbia)
- Great Lakes Intertribal Fish and Wildlife Commission<sup>108</sup>
- Alabama Intertribal Council Title IV<sup>109</sup>
- Great Plains Tribal Chairmen's Health Board<sup>110</sup>
- Tuba City Regional Healthcare Corporation<sup>111</sup>

<sup>107</sup> Carsten v. Inter-Tribal Counsel of Nevada, 2013 WL 4736709 (D. Nev. 2013).

<sup>108</sup> Reich v. Great Lakes Indian Fish Commission, 4 F.3d 490 (7th Cir. 1993).

<sup>109</sup> Taylor v. Ala. Intertribal Council Title IV, 261 F.3d 1032 (11th Cir. 2001) (suit against entity barred by sovereign immunity of the intertribal consortium organized to promote business opportunities for and between tribes).

<sup>110</sup> J.L. Ward Assocs. v. Great Plains Chairmen's Health Board, 842 F. Supp. 2d 1163 (D.S.D. 2012). The Great Plains Chairmen's Health Board was incorporated as a non-profit corporation by 16 federally recognized tribes under South Dakota law to provide the Indian people of the Great Plains area with a single entity to communicate and participate with the Indian Health Service and other federal agencies on health matters. After reviewing a number of cases, the court concluded that there was no specific test or list of factors for courts to consider in determining whether an organization is entitled to tribal sovereign immunity. Nevertheless, the court concluded that courts have applied "variations" of a "subordinate economic entity" analysis. Like the Tenth Circuit in Breakthrough Management v. Chuckchansi Gold Casino Resort, 629 F.3d (2010), the South Dakota District Court rejected the Alaska Supreme Court's single factor test which asked whether the financial impact of a judgment against an entity created by more than one tribe would reach the assets of any of the tribes as a real party in interest. See Runyon ex rel. B.R. v. AVCP, 84 P.3d 437 (Alaska 2004). Breakthrough applied a six-factor test. These include: the entity's method of creation; the entity's purpose; the entity's structure, ownership, and management, including level of control the tribes exercise over the entity; whether the tribes intended to extend sovereign immunity to the entity; the financial relationship between the entity and the tribe; and whether the purposes of tribal sovereign immunity are served by granting immunity to the entity. This list, the Tenth Circuit cautioned, is not exhaustive listing and may not be sufficient in every case "for addressing the tribal-immunity question related to subordinate economic entities." 629 F.3d at 1187 n. 10, quoted in *Ward* at page 11 n. 10. Although the first two factors weighed against Great Plains Chairmen's Health Board, incorporation under state law and a judgment against the Board likely would not directly affect any tribe's financial resources, the South Dakota district court concluded the remaining factors established that Great Plains Tribal Chairmen's Health Board is the sort of entity entitled to tribal sovereign immunity. In *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149 n.3 (10th Cir. 2012), the Tenth Circuit noted its disagreement with an out-of-Circuit South Dakota District Court's holding, but did not discuss the tribal government focus of the health board at issue in *J.L. Ward Assocs.*

<sup>111</sup> *Vulgamore v. Tuba City Regional Healthcare Corporation*, 2011 U.S. Dist. Lexis 89647 (D. Ariz. 2011) (organized under NNC §§ 3301 – 3332, corporation had tribal sovereign immunity, board of directors composed of representatives of 8 Navajo Nation political subdivisions, representatives of Hopi village of Moenkopi, and the San Juan Southern Paiute Tribe).

- Kumeyaay Cultural Repatriation Committee (consortium of 12 Kumeyaay tribal governments)<sup>112</sup>

Due care should be taken, appropriate to the transaction scale and risk tolerance of all concerned parties, to determine which tribal entity is proposing to enter a transaction, including whether another tribal entity is available and preferable, given its legal characteristics and the transactional goals of the parties, who has authority to take action on behalf of the tribal entity, and any limitations on transactions the tribal entity may take. Tribal law, including a tribe's constitution, typically provides who may take actions and how those actions may be taken so that they are binding upon and enforceable against a tribe or tribal entity. By way of examples, a tribe's constitution may provide that agreements and leases of tribal land must be authorized by a specific body of a tribe, such as its General Council or Tribal Council, limit the number of years or purposes for which tribal land may be developed or leased, or provide that tribal land cannot be leased until tribal members first are given an opportunity to use it.<sup>113</sup>

Organizational documents of a tribal entity, such as a tribal council resolution, articles of incorporation, plan of operations and tribal law for entities established pursuant to tribal law, state law for tribal entities established pursuant to state law, and a charter issued by the Secretary of the Interior for tribal corporations established pursuant to section 17 of the IRA also typically provide who and how actions may be taken that are binding upon and enforceable against a tribal entity. Like the tribe itself, a tribal entity's organizational documents or law governing the establishment of a tribal entity may restrict the terms and types of transactions the entity is authorized to take. As a matter of federal law, for example, a section 17 corporation may not lease tribal land for more than 25 years, but some section 17 corporate charters limit the number of years such entities are authorized to lease the land to 10 years or less and impose other restrictions on the authority of such corporations.<sup>114</sup>

<sup>112</sup> *White v. The University of California, Order Granting Kumeyaay Cultural Repatriation Committee Motion to Dismiss and the University of California Motion to Dismiss*, C12-1978 (N.D. Cal. Oct. 10, 2012), *appeal pending*.

<sup>113</sup> *E.g.*, CONST. AND BYLAWS OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, Art VI, Sec. 1(c) restricts most surface leases of tribal land to a period not exceeding five years.

<sup>114</sup> *E.g.*, CORP. CHARTER OF THE PYRAMID LAKE PAIUTE TRIBE OF THE PYRAMID LAKE INDIAN RESERVATION, Sec. 5(a)(2) limits leases to 5 years. An amendment to the charter to expand the corporation's leasing authority to the limit authorized by 25 U.S.C. § 477 (1935), currently 25 years,

### III. FEDERAL LAW

Federal law should always be considered in determining what and how actions may be taken and who may take actions that are binding upon and enforceable against a tribe or a tribal entity or the United States in its capacity as fiduciary on behalf of Indian tribes or as owner of the fee to tribal trust land. Sources of federal law affecting Indian tribes and those engaged in transactions with Indian tribes and tribal entities derive from the United States Constitution, including the Indian Commerce Clause, the Treaty Clause, the Property Clause, and the War Power Clause. Under the Supremacy Clause of the United States Constitution, laws enacted by Congress and treaties made pursuant to these authorities are the “supreme law of the land.”<sup>115</sup>

Possibly the most significant law enacted by Congress determining what and how actions may be taken and who may take actions that are binding upon and enforceable against a tribe or a tribal entity or the United States is 25 U.S.C. § 177. Enacted by the First Congress in 1790,<sup>116</sup> section 177 now provides in part: “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 Constitution.” Even transactions approved by a tribe in full compliance with tribal law, but running afoul of this provision are not valid in law or equity as a matter of federal law.

Congress has enacted a number of laws authorizing leases, rights of way, and encumbrances of tribal trust land, and pursuant to these laws many regulations have been adopted. Some but not all of these laws and regulations are listed below:

- Indian Long-Term [Surface] Leasing Act, 25 U.S.C. § 415; 25 C.F.R. Part 162

has been proposed. Action on that proposed amendment was not determined in time for this article.

<sup>115</sup> U.S. CONST. ART. VI, CL. 2.

<sup>116</sup> 1 STAT. 137 (1790).

- Authorizing all tribes to lease land for up to 25 years, with a right of one renewal for up to an additional 25 years, subject to BIA review and approval
- Tribal and individual Indian land in for reservations listed in section 415(a) can lease land for up to 99 years
- Under section 415(b), (e) and (h), Indian tribes can lease tribal and for 25 years with two options, for a maximum up to 25 years, for business and agricultural purposes without federal approval, once tribes adopt and the Secretary of the Interior approves tribal leasing regulations<sup>117</sup>
- General Rights of Way Act, 25 U.S.C. 323-328; 25 C.F.R. Part 169
- 25 U.S.C. § 477 (section 17 corporation leases for a term up to 25 years); no general regulations implement these leases
- Indian Mineral Development Act of 1982, 25 U.S.C. § 2101; 25 C.F.R. § Part 225
- Encumbrances, 25 U.S.C. § 81; 25 C.F.R. Part 84
- Navajo Nation lands, 25 U.S.C. § 635 (disposition of Navajo Nation land, including fee land)
- Leases, business agreements and rights-of-way for energy projects issued by tribes pursuant to Tribal Energy Resource Agreements (TERAs) authorized by the Energy Policy Act of 2005, 25 U.S.C. § 3504; 25 C.F.R. Part 224; as of May 2013, no TERAs have been approved and consequently no tribal energy leases, business agreements or rights-of-way have been granted by Indian tribes

Whether tribal fee land, other than fee land of Pueblo Indians, is subject to section 177 is a matter of some uncertainty. A 2009 Memorandum of the Solicitor of the Department of the Interior opines that fee land outside Indian country is not subject to section 177, but that fee land within Indian country is. M-37023 (January 18, 2009). That opinion cites as authority portions of a brief filed by the Solicitor General as amicus curiae in the United States Supreme Court in *Cass County v. Leech Lake Band of Chippewa Indians*.<sup>118</sup> The Solicitor General's brief asserted "Congress has continued to recognized that [section 177] restricts the alienability of tribally owned lands, including recently acquired lands held in fee." The Interior Solicitor's 2009 opinion omits reference to that part of the Solicitor General's brief

<sup>117</sup> Section 415 does not apply to mineral interests.

<sup>118</sup> *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

which adds: “In recent times, Congress and the Executive Branch have assumed that the INA requires congressional approval of sales of all tribally owned lands, whether or not those lands are within a reservation. See, e.g., Pub. L. No. 101-630, §§ 101(3) and (5), 104 Stat. 4531 (congressional finding that INA required approval of sale of tribally owned fee lands ‘located approximately one hundred twenty-five miles from the [tribal] land base’).”<sup>119</sup> Recent instances of congressional enactments requested by tribes, out of an abundance of caution to resolve this uncertainty, expressly authorizing sales and leases of tribal fee land include Public Law 110-75 (2007) (Coquille Tribe) and Public Law 110-76 (2007) (Saginaw Chippewa Indian Tribe of Michigan).<sup>120</sup> A Ninth Circuit opinion holds that once Congress authorizes disposition of reservation land, reacquisition by a tribe does not re-impose the restriction of section 177.<sup>121</sup> A recent law review article suggests that curative federal legislation would resolve uncertainties created by section 177 for tribal fee land.<sup>122</sup>

Equal to section 177 in historical pedigree are the Indian Traders License Act statutes. 25 U.S.C. §§ 261 *et seq.* Under these laws, the Commissioner of Indian Affairs, whose authority is delegated through the Secretary of the Interior – Indian Affairs to the Bureau of Indian Affairs (BIA), is granted “sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quality of goods and the prices at which goods shall be sold to the Indians.” 25 U.S.C. § 261. Pursuant to that authority, BIA regulations require covered traders to obtain BIA issued licenses. See 25 C.F.R. Parts 140 and 141 (Part 141 applies on the Navajo, Hopi and Zuni Reservations).

The term “trading” is defined in 25 C.F.R. § 140.5 to mean “buying, selling, bartering, renting, leasing, permitting, and any other transaction involving the

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<sup>119</sup> Brief for Petitioner, *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (No. 97-174) 1998 WL 25517.

<sup>120</sup> Several similar statutes are collected in COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.06[4] at 1034-1036 n. 63 (2012); Brief for Petitioner, *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (No. 97-174) 1998 WL 25517. See also Jarboe and Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval*, 2 AM. INDIAN L.J. 211 (2012).

<sup>121</sup> *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993) (arguably contrary to the 2009 Solicitor’s opinion).

<sup>122</sup> Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval*, 2 AM. INDIAN L.J. 10, 25 -28 (2012).



acquisition of property or services.” No equivalent term is in the Part 141 regulations applicable to the Navajo, Hopi and Zuni Reservations. While many BIA agency offices are reluctant to issue Indian Traders Act licenses, viewing them as anachronisms, the statute and regulations mandating such licenses remain on the books. Most BIA offices will issue such licenses if pressed. One very practical effect of the Indian traders license statutes is that they preempt state gross receipts taxes on non-Indian traders doing business with Indian tribes, tribal entities, and tribal members on their respective reservations, regardless of whether the “trader” has an Indian traders license.<sup>123</sup>

#### IV. TRIBAL LAW

As sovereigns on their respective reservations, Indian tribes may and many do regulate transactions by and with the tribe, tribal entities, and tribal members. Many tribes have enacted laws confirming that the tribe itself and tribal entities and in some cases various tribal officials have sovereign immunity and the manner in which that immunity may be waived.<sup>124</sup> Many tribes have enacted tribal taxes,<sup>125</sup> tribal employment laws,<sup>126</sup> tribal environmental laws and regulations,<sup>127</sup> tribal business license and qualifications to do business laws,<sup>128</sup> and other laws affecting on-reservation business transactions. These laws vary from one reservation to the next and from time to time on a reservation. Due diligence

<sup>123</sup> *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). See also *United States ex rel. the [Tulalip] Tribes v. First Choice Business Machines*, 28 Indian Law Reporter 6038-6041 (2000) (Tulalip Tribal Court and Court of Appeals) (held contracts with Tulalip Tribes unlawful and unenforceable absent an Indian traders license).

<sup>124</sup> *Begay v. Navajo Engineering & Construction Authority*, (Nav. Sup. Ct. 2011) (ordering dismissal based on failure to comply with tribal statutory conditions on waiver of sovereign immunity requiring notice of intent to file suit and naming Navajo Nation as a party in the complaint).

<sup>125</sup> *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

<sup>126</sup> *Arizona Public Service Co. v. Aspaas*, 77 F.3d 11128 (9th Cir. 1995); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

<sup>127</sup> *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Middlemist v. Department of the Interior*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 513 U.S. 961 (1994)

<sup>128</sup> The Navajo Nation Corporation Code provides that “no foreign corporation shall have the right to transact business within Navajo Nation Country until it shall have been authorized to do so as provided in [the Corporation Code] . . . .” 5 NNC § 3166. Relying on this statute and 5 NNC § 3174(A), the Navajo Nation Supreme Court noted in *Graven v. Morgan*, SC-CV-32-10 (November 2012) at 6: “A business must follow Navajo Nation laws and be duly authorized to conduct business on the Nation before it can initiate proceedings in our courts.”

appropriate to individual transactions should be conducted to determine which tribal laws and regulations may affect a given transaction.

## V. SOVEREIGN IMMUNITY, ENFORCEABILITY AND DISPUTE RESOLUTION

### A. Sovereign Immunity

#### 1. Tribes and Subordinate Tribal Entities

Like sovereign immunity of the United States, tribal sovereign immunity is derived from federal law<sup>129</sup> and tribal law and may be waived by Congress<sup>130</sup> or the applicable tribe, but not states or state courts as a matter of state law.<sup>131</sup> An Indian tribe does not waive sovereign immunity merely by entering a contract. A waiver of tribal sovereign immunity must be clear, express, and conform to requirements of tribal law. Tribal sovereign immunity goes to subject matter jurisdiction and may be raised by a court on its own,<sup>132</sup> by the sovereign at any time in a proceeding,<sup>133</sup> or to set aside a judgment for lack of subject matter jurisdiction, as where a judgment was entered by default.<sup>134</sup> Like the United States, waivers of sovereign immunity by Indian tribes will not be implied.<sup>135</sup> Like

<sup>129</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>130</sup> Congressional waivers of tribal sovereign immunity are rare but a few exist. *E.g.*, waiver of Navajo and Hopi tribal sovereign immunity in suit to resolve title to the 1934 Act Reservation, 25 U.S.C. § 640d-7, where the United States could not adequately represent one Tribe against the other because of a conflict of interest in its capacity as a fiduciary for both.

<sup>131</sup> The McCarran Amendment waived federal sovereign immunity to suit in federal or state courts for general adjudications of water rights. 43 U.S.C. § 666 (1952). While that statute did not waive the immunity of tribes to suit in state courts for adjudication of tribal water rights, the Supreme Court held that state courts may adjudicate tribal and individual Indian water rights which the United States holds in its capacity as trustee. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

<sup>132</sup> *Amerind Risk Management Corporation v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1094 (2012).

<sup>133</sup> *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 169 F.3d 1173 (10th Cir. 2010) (subject matter jurisdiction); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000) (because sovereign immunity is jurisdictional, and not an affirmative defense, it may be raised at any time in a proceeding, including after entry of default judgment); *Ramey Construction Company, Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982); *Bales v. Chickasaw Nation Industries*, 606 F. Supp.2d 1299 (D.N.M. 2010) (subject matter jurisdiction).

<sup>134</sup> *Merit Management Group v. Ponca Tribe of Oklahoma*, 787 F. Supp. 2d 916 (N.D. Ill. 2011).

<sup>135</sup> Thus, a tribe's agreement to comply with provisions of Title VII of the 1964 Civil Rights Act does not waive the tribe's sovereign immunity. *Nanomatube v. Kickapoo Tribe of Kansas*, 2011 U.S. App. Lexis (10th Cir. 2011).

the United States, conditions on a tribal waiver of sovereign immunity will be strictly construed, such as waivers establishing notice of intent to sue and other conditions on initiating actions against a sovereign<sup>136</sup> and statutes of limitations and courts which may hear suits against a sovereign. The authority of a subordinate tribal enterprise or entity to waive its sovereign immunity is determined by tribal law.<sup>137</sup> A tribal official acting without or in excess of a valid delegation of authority cannot waive tribal sovereign immunity by unauthorized consent, action or inaction.<sup>138</sup> Like suits against officers of the United States in their official capacities, suits against tribal officials in their official capacities are but suits against the sovereign and cannot be maintained absent an appropriately authorized, clear and express sovereign immunity waiver.<sup>139</sup> Suits against Indian tribes seeking determination of title to trust land are barred by the sovereign immunity of the United States as owner of the fee in trust because the Quiet Title Act does not consent to suits against the United States to determine title to trust land.<sup>140</sup>

Because waivers of sovereign immunity must be clear and unequivocally expressed,<sup>141</sup> a waiver of immunity as to one tribal entity will not be construed as waiving immunity of another tribal entity.<sup>142</sup> For the same reason, a sovereign immunity waiver as to one thing does not waive immunity as to another.<sup>143</sup> Thus, a tribe's commencement of suit on one claim waives sovereign immunity as to that claim, allowing full adjudication of that claim,<sup>144</sup> but does not waive immunity as to

<sup>136</sup> *Begay v. Navajo Engineering & Construction Authority*, (Navajo Supreme Court 2011) (ordering dismissal based on failure to comply with tribal statutory conditions on waiver of sovereign immunity requiring notice of intent to file suit and naming Navajo Nation as a party in the complaint).

<sup>137</sup> *Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285, 1288 (10th Cir. 1983).

<sup>138</sup> *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940); *Hydrothermal Energy v. Fort Bidwell Indian Community*, 170 Cal. App.3d 489, 216 Cal. Rptr. 1 (Cal. App. 1985).

<sup>139</sup> *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997).

<sup>140</sup> 28 U.S.C. § 2409a (1972); See *Carlson v. Tulalip Tribes*, 510 F.2d 1337 (9th Cir. 1975).

<sup>141</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

<sup>142</sup> *Ramey Construction Company, Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (citing cases).

<sup>143</sup> *Ramey Construction Company, Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (“the Tribe consented to only to entry of judgment in the amount of the contract; it did not thereby agree to be sued on any other claims”).

<sup>144</sup> *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *United Planners' Financial Services of America, a limited partnership v. Sac and Fox Nation, Sac and Fox Housing Authority*, ALP-12-01 (Sac and Fox Nation Sup. Ct. Sept. 26, 2013) (“the [Sac and Fox] Nation in this case is the party seeking affirmative relief against Broker. The tribe in *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) attempted to use sovereign immunity

counterclaims.<sup>145</sup> Further, a tribe's participation in an administrative proceeding does not waive the tribe's immunity to judicial review of agency action, particularly where a tribe is a necessary and indispensable party in whose absence a case should not proceed.<sup>146</sup>

Except to the extent sovereign immunity is clearly and expressly waived by Congress or in applicable documents or other tribal action, tribal sovereign immunity applies to the tribe as tribe,<sup>147</sup> to tribal departments and agencies,<sup>148</sup> to unincorporated tribal enterprises<sup>149</sup> and authorities operating as arms and instrumentalities of tribes,<sup>150</sup> to tribal government corporations chartered under tribal law,<sup>151</sup> to section 17 tribal corporations chartered by the Secretary of the Interior,<sup>152</sup> and to other tribal entities serving as political subdivisions or arms and instrumentalities of tribes, including in some cases subordinate tribal entities performing governmental functions,<sup>153</sup> and in at least one case, notwithstanding

as a defense to the claims asserted against it, but, here, the [Sac and Fox] Nation is not facing claims against it by the Broker to which it the defense of sovereign immunity might be applicable in certain contexts. The Nation's sovereign immunity is not really an issue insofar as it is the party seeking affirmative relief against Broker.”).

<sup>145</sup> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1998); *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1100-1101 (9th Cir. 1994).

<sup>146</sup> *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

<sup>147</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>148</sup> *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997) (suit against Tribal Council); *North Sea Products v. Clipper Seafoods*, 595 P.2d 938 (Wash. 1979).

<sup>149</sup> *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 169 F.3d 1173 (10th Cir. 2010); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d 726 (10th Cir. 1993).

<sup>150</sup> *Chukchansi Gold Casino and Resort*, 169 F.3d 1173 (10th Cir. 2010); *Ninigret Development Corporation v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000).

<sup>151</sup> *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275 (Wash. 2006); *Chance v. Coquille Indian Tribe*, 963 P.2d 638 (Or. 1998); *North Sea Products v. Clipper Seafoods*, 595 P.2d 938 (Wash. 1979).

<sup>152</sup> *Amerind Risk Mgmt Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1094 (2012); *Ramey Constr. Comp., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (citing cases); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978).

<sup>153</sup> *E.g.*, *J.L. Ward Assocs. v. Great Plains Chairmen's Health Board*, 842 F. Supp. 2d 1163 (D.S.D. 2012)

state laws enabling corporations to sue and be sued where there was no evident intent to waive tribal sovereign immunity.<sup>154</sup>

With respect to certain tribal business corporations and subordinate tribal economic entities, the precise boundary where tribal sovereign immunity leaves off is not always clear. Several courts have developed different tests and have reached results based on specific facts, not all of which can be fully reconciled with the Supreme Court's broad application of tribal sovereign immunity.<sup>155</sup> Nonetheless, there are circumstances where tribes intend for financing, project development, real property ownership and conveyance, and other reasons to create corporate entities under state and tribal laws owned by tribes, including limited liability companies, but which are separate from and independent of tribes and not vested with tribal sovereign immunity.<sup>156</sup>

Where it otherwise is applicable, tribal sovereign immunity applies both to governmental matters and commercial business transactions.<sup>157</sup> Because federal law establishes tribal sovereign immunity, it applies to tribes as a matter of federal law outside as well as within Indian reservations.<sup>158</sup> Sovereign immunity waivers in agreements with tribes requiring but lacking federal approval have been found unenforceable in a number of cases.<sup>159</sup>

Although the rule is firmly established that tribal sovereign immunity will not be implied and must be clear and express, the United States Supreme Court held

<sup>154</sup> *Ransom v. St. Regis Mohawk Education & Community Fund*, 658 N.E.2d 989, 994-995 (N.Y. 1995).

<sup>155</sup> *E.g.*, *Warburton/Buttner v. Superior Court*, 103 Cal App.4th 1170, 127 Cal Rptr. 2d 706 (Cal. App. 2002); *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989).

<sup>156</sup> Rather than waive tribal sovereign immunity in connection with project financing and development, a tribe may prefer to create a special purpose business corporation or limited liability company with sufficient resources to carry out a specific project.

<sup>157</sup> *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2014 (2014) (reaffirming *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)).

<sup>158</sup> *Id.*

<sup>159</sup> *A.K. Mgmt. Agreement Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010), *aff'd*, 658 F.3d 684 (7th Cir. 2011). But See *Match-E-Be-Nash-She-Wish Band v. Kean-Argovitz*, 383 F.3d 512 (6th Cir. 2004), enforcing an arbitration clause in an agreement which the court conceded was not approved as required by law. Compare, however, *Wells Fargo Bank, N.A. v. Sokagon Chippewa Community*, 787 F. Supp.2d 867 (E.D. Wis. 2011), finding tribe effectively waived sovereign immunity in indenture that was not void under federal law.

in *C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe*<sup>160</sup> that a tribe's waiver need not mention sovereign immunity as such. The Court held that a tribe clearly waived tribal immunity to jurisdiction in Oklahoma courts when it proposed and agreed to a contractual arbitration clause providing that arbitral awards would be reduced to judgment in accordance with applicable proceedings in any court having jurisdiction thereof for a transaction outside Indian reservation land in Oklahoma; the contract also specified that the American Arbitration Association's construction industry rules applied and had a choice of law clause selecting Oklahoma law as applicable law.<sup>161</sup>

## **2. Section 17 Corporations and Sue and Be Sued Clauses**

Until relatively recently, section 17 corporate charters issued by the Secretary of the Interior included clauses granting these corporations the power, among others, "to sue and be sued." Where the "sue and be sued" clause is not further conditioned in a corporate charter, some courts have construed that clause to be a waiver of the corporation's sovereign immunity;<sup>162</sup> other courts have viewed the question as an open issue.<sup>163</sup> Where a section 17 corporation has waived its immunity, the corporation's waiver does not extend to the Indian tribe owner of the corporation.<sup>164</sup>

More recent section 17 corporate charter "sue and be sued" clauses condition that consent.<sup>165</sup> In *Sanchez v. Santa Ana Golf Club, Inc.*,<sup>166</sup> the section

<sup>160</sup> *C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

<sup>161</sup> Several cases have followed *C & L Enterprises* in concluding that an arbitration clause in a tribal contract is a waiver of tribal sovereign immunity. *E.g.*, *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rpt.2d 455 (Cal. App. 2002). In *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 923 F. Supp. 2d 1186 (D. Ariz. 2013), the federal district court for Arizona confirmed an arbitration award against 'Sa' Nyu Wa, Inc., a tribally chartered tribal government corporation of the Hualapai Tribe. The Development and Management Agreement between the parties provided that any "controversy, claim or dispute arising out of or related to this Agreement shall be resolved by binding arbitration" pursuant to the rules of the American Arbitration Association.

<sup>162</sup> *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989).

<sup>163</sup> *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 726 n. 6 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009) ("issue of whether a 'sue and be sued' clause in a tribe's enabling ordinance effectuates a waiver of tribal sovereign immunity remains a live issue for determination in this circuit").

<sup>164</sup> *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-493 (9th Cir. 2002); *Maryland Casualty Co. v. Citizens National Bank of Hollywood*, 361 F. Supp. 517 (5th Cir. 1966).

<sup>165</sup> Many recent section 17 corporate charters are based on a Model BIA Section 17 Corporate Charter which provides that a waiver must be in the form of a board of directors' resolution and

17 charter provided the corporation authority to “sue or be sued in its corporate name to the extent provided in Article XVI of this Charter.” Section D of Article XVI mandated that all waivers be set forth in the form of a resolution, duly adopted by the corporation’s board of directors. The charter required the board of directors resolution to identify the parties for whose benefit the waiver was granted, the transaction or transactions and the claims or classes of claims for which the waiver is granted, the property of the corporation which may be subject to execution to satisfy any judgment which may be entered on the claim, and the identity of the court or courts in which suits against the corporation may be brought. The New Mexico Court of Appeals refused to allow the case to proceed against the section 17 corporation as the plaintiff failed to present evidence of a board of directors’ resolution complying with these requirements.

Some section 17 corporation charters do not include “sue and be sued” clauses at all. These charters authorize the corporation to waive sovereign immunity on certain conditions, such as where authorized by a board of directors resolution or where consent to suit is included as a specific term of a contract.

Many tribal housing authorities have “sue and be sued” clauses, presenting substantially the same issues as “sue and be sued” clauses in section 17 corporate charters.<sup>167</sup> These and other tribal entities with “sue and be sued” clauses in their organizational documents may condition the consent to suit on contract-by-contract authorization by a board of directors resolution or as specified in the terms of a specific contract.<sup>168</sup>

Section 17 of the IRA is not available to Indian tribes in Oklahoma. However, tribal corporations chartered under the Oklahoma Indian Welfare Act are

satisfy other requirements. See BIA Model Section 17 Corporate Charter, Article XVI, copy on file with the author.

<sup>166</sup> *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548 (N.M. App. 2005), *cert. denied*, 106 P.3d 578 (N.M. 2005).

<sup>167</sup> *Namakegon Dev. Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975) (finding a “sue and be sued” clause to be a waiver of tribal sovereign immunity); *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916 (9th Cir. 2008) (deferring to tribal court of appeals interpretation of such clause), *cert. denied*, 556 U.S. 1235 (2009).

<sup>168</sup> *Ameriloan v. Superior Court*, 169 Cal. App.4th 81, 86 Cal. Rptr.3d 572 (Cal. App. 2008) (modified January 14, 2009) (tribal resolution establishing Miami Nation Enterprises included a “sue and be sued” clause which provided that the immunity would be waived only to the extent of the specific terms of the applicable contract).

subject to the same treatment for sovereign immunity purposes as section 17 corporations.<sup>169</sup>

### **3. Tribally-Owned Corporations Chartered Under State Law**

Since the mid-1980s, many Indian tribes have chartered corporations by tribal legislative enactments and by enacting tribal business codes creating or authorizing a variety of corporate forms. Before and to some extent after this relatively recent development, Indian tribes seeking to organize for various purposes would establish corporations, limited liability companies, and partnerships under state law. While these state chartered entities are not treated the same as a tribe for federal income tax<sup>170</sup> and certain other purposes, there are some circumstances where such entities have been, and should be, treated the same as tribes when carrying out uniquely tribal governmental functions.<sup>171</sup>

<sup>169</sup> *Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d 917 (10th Cir. 2009); *Bales v. Chickasaw Nation Industries*, 606 F. Supp.2d 1299 (D.N.M. 2010).

<sup>170</sup> Relying in part on Revenue Ruling 94-16, the U.S. Tax Court held, in *Uniband, Inc. v. Commissioner of Internal Revenue*, 140 Tax Court No. 13, 2013 WL 22477986 (U.S. Tax Court 2013), that *Uniband, Inc.*, a Delaware chartered corporation whose sole shareholder was the Turtle Mountain Band of Chippewa Indians (TMBCI), a federally recognized Indian tribe, was subject to the federal income tax. Revenue Ruling 94-16 provides that Indian tribes and IRA section 17 corporations are not taxable entities for federal income tax purposes but that state chartered corporations owned by Indian tribes are taxable entities. The Tax Court rejected *Uniband, Inc.*'s claims that it shared the same tax status as TMBCI, reasoning that the Delaware corporation was distinct from its shareholder-owner as a matter of corporate law and was not an integral part of TMBCI as a factual matter. The Tax Court decision states that TMBCI had obtained a section 17 charter for another corporation also named *Uniband, Inc.* and that the section 17 corporation charter anticipated that the section 17 corporation would acquire all the assets and liabilities of the Delaware corporation and another corporation *Uniband, Inc.* incorporated under tribal law and wholly owned by TMBCI but that, as of the time of the filing of the Tax Court petition, the merger had not taken place.

<sup>171</sup> *Smith v. Salish and Kootenai College*, 434 F.3d 1127 (9th Cir.), *cert. denied*, 547 U.S. 1207 (2006) (incorporated under tribal law in 1977 and state law a year later, articles of incorporation of the College allowed suit in tribal court only; the Ninth Circuit reasoned that the College is a tribal entity because, as it was a nonprofit corporation created as a "tribal corporation," its directors are members of the Confederated Salish and Kootenai Tribes, selected and subject to removal by the Tribal Council, and, though open to nonmembers, is located on tribal lands within the Flathead Reservation, serves the Confederated Salish and Kootenai Tribes, and thus is a tribal entity); *White v. The University of California, Order Granting Kumeyaay Cultural Repatriation Committee Motion to Dismiss and the University of California Motion to Dismiss*, C12-1978 (N.D. Cal. Oct. 10, 2012) (holding that Kumeyaay Cultural Repatriation Committee established by tribal council resolutions of 12 Kumeyaay tribes in southern California, and also incorporated under California law as a nonprofit corporation, had sovereign immunity, applying in part the six factor analysis of the Tenth Circuit in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010)



#### 4. Tribal Officials

Suits against tribal officials in their official capacity are suits against the Indian tribe itself and are subject to dismissal unless the tribe itself has waived sovereign immunity.<sup>172</sup> A tribal official lacks independent authority to waive the tribe's immunity and does not do so by signing a contract that includes an arbitration clause when the tribe's governing body has not authorized such waiver,<sup>173</sup> or by voluntary receipt of service in a law suit.<sup>174</sup> A suit against a tribal official in his or her individual capacity for prospective injunctive relief, where it is alleged that the officer acted without or in excess of legal authority, is not a suit against the tribe and may be tried to determine whether the officer acted within the scope of lawful tribal authority under the fiction of *Ex parte Young*.<sup>175</sup> This rule is qualified by cases holding that a suit nominally against a tribal official in his or her unofficial capacity will be dismissed absent tribal consent where the relief sought would in fact require affirmative action by the sovereign or disposition of unquestionably sovereign property.<sup>176</sup>

#### 5. Authorization of Sovereign Immunity Waiver

A waiver of sovereign immunity must be authorized by the appropriate entity under tribal law or the organization document under which a tribal entity operates.<sup>177</sup> Such waivers should be viewed as legislative in nature and should be authorized by the tribal body exercising legislative authority for the tribe or in the

<sup>172</sup> *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2159 (2009); *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

<sup>173</sup> *Hydrothermal Energy v. Fort Bidwell Indian Community*, 170 Cal. App.3d 489, 216 Cal. Rptr. 1 (Cal. App. 1985).

<sup>174</sup> *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983).

<sup>175</sup> *Ex parte Young*, 209 U.S. 123 (1908), cited in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). See also *Salt River Project Agric. & Improvement District v. Lee*, 672 F.3d 1176 (9th Cir. 2012); *Crowe & Dunlevy, PC v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Burlington Northern & Santa Fe Rwy. Co. v. Vaughn*, 509 F.2d 1085, 1092 (9th Cir. 2007); *Arizona Public Service Co. v. Aspaas*, 77 F.3d 128, 1132-1134 (9th Cir. 1996); *BNSF Ry. Co. v. Flies Away*, 2006 WL 3257544 (D. Ariz. 2006), *aff'd, sub nom*, *BNSF Ry. Co. v. Ray*, 297 Fed Appx. 675 (9th Cir. 2008).

<sup>176</sup> *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1160 (9th Cir. 2002).

<sup>177</sup> *Hydrothermal Energy v. Fort Bidwell Indian Community*, 170 Cal. App.3d 489, 216 Cal. Rptr. 1 (Cal. App. 1985).

case of a corporate entity by the board of directors or similar corporate body,<sup>178</sup> or both where the corporate entity's authority to waive immunity must be confirmed by the tribal governing body in accordance with the entity's charter, articles of incorporation or applicable tribal law. A waiver of sovereign immunity perfectly good in form but lacking requisite tribal approval would be found in most instances not to be valid, binding or enforceable upon a tribe or tribal entity.<sup>179</sup>

### **B. Enforceability**

A contract with a tribe or tribal entity which has sovereign immunity but which has not waived its sovereign immunity is legal, binding, and valid in accordance with its terms. It may be enforced by a tribe in an appropriate action in any court with jurisdiction. A tribe or tribal entity filing such an action waives its immunity to the extent of the claim made, allowing the court to enter judgment for as well as against the tribe on the claim made.<sup>180</sup> Thus, in an action by a tribe on a contract where the tribe has not waived its immunity, the counterparty may assert matters arising under the contract by way of defense for recoupment and to offset liability up to the level of the tribe's claim but may not assert counterclaims or obtain an affirmative judgment against the tribe.<sup>181</sup>

Sovereign immunity waivers enable the counterparty to a tribe or a tribal entity vested with sovereign immunity to enforce the agreement in courts with jurisdiction in accordance with the terms and conditions of the sovereign immunity waiver. In many transactions, Indian tribes and tribal entities possessing sovereign immunity will grant a "limited" waiver of sovereign immunity. The limited waiver may specify remedies, courts, administrative agencies or times in which an action or claim may be brought, pre-conditions to filing suit, such as giving notice before commencing suit in order to afford parties an opportunity to resolve the dispute without litigation, and other matters. These conditions generally will be strictly construed in favor of the tribe.

<sup>178</sup> *Amerind Risk Mgmt Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) (charter required board resolution approving a waiver sovereign immunity; absent such a resolution, the court held the corporation's immunity had not been waived), *cert. denied*, 132 S. Ct. 1094 (2012).

<sup>179</sup> *Memphis Biofuels v. Chickasaw Nation Industries*, 585 F.3d at 922; *Colombe v. Rosebud Sioux Tribe*, 2011 U.S. Dist. Lexis 92546 (D.S.D. 2011) (collecting cases).

<sup>180</sup> *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

<sup>181</sup> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1998); *United States v. United States Fidelity & Gauranty Co.*, 309 U.S. 506 (1940).

A contract perfectly good in form but lacking requisite authorization may not be valid, binding or enforceable upon a tribe or tribal entity. Many tribal constitutions and corporate articles of incorporation grant the power to enter contracts on behalf of the entity to a tribal council, board of directors or similar body but require that body must act by resolution or otherwise to authorize specific contracts or contracts of certain types or classes. With respect to actions by a tribal government officer, the concept of apparent authority has little or no application. For all of these reasons, an opinion of tribal legal counsel may be requested in a transaction favorably opining that a contract and actions contemplated therein by a tribal entity are valid, legal, binding and enforceable and have been duly approved.

### ***C. Dispute Resolution***

#### ***1. Mediation***

A number of disputes involving tribes have been resolved by mediation. One key distinction between mediation and arbitration is that in mediation no agreement is binding except one agreed to by the parties. Some courts have mediation programs, requiring or encouraging parties to make an effort to resolve their dispute by mediation before proceeding to litigation.<sup>182</sup>

#### ***2. Arbitration***

Arbitration increasingly is favored as an alternative to judicial litigation for resolution of disputes with tribes and tribal entities. Preliminary to arbitration, an arbitration clause may specify that the parties will make an effort to resolve a dispute by requiring designated representatives to meet informally or with the assistance of a neutral mediator in an effort to resolve a dispute. Where the parties agree that disputes should be resolved by arbitration, better practice is to specify that binding arbitration is the exclusive means of resolving disputes, to avoid claims that arbitration is not the sole means of dispute resolution.

A dispute is subject to arbitration only if the parties agree to arbitration. The terms of the arbitration agreement govern those matters subject to arbitration. The

<sup>182</sup> *E.g.*, 9TH CIR. R. 3-4; 9TH CIR. R. 3-415-2.

American Arbitration Association has various rules, such as construction and commercial arbitration rules, to govern arbitration proceedings.

What if a party refuses to participate in an arbitration proceeding or refuses to abide by the arbitration award or decision? An arbitration agreement may provide that an action may be brought in a court with jurisdiction to compel a party to participate or it may simply allow the arbitration to proceed so long as due notice has been given that the arbitration proceeding has been initiated. Either way, a party who declines to participate in an arbitration proceeding, planning to modify, set aside or vacate any adverse award in a judicial action on jurisdictional grounds that the subject of the arbitration is outside the scope of the arbitration agreement or that the arbitration agreement is not valid or otherwise non-enforceable, forfeits any opportunity to address the merits of the dispute.

The Federal Arbitration Act, state arbitration acts, and tribal arbitration acts or ordinances generally allow an action to be brought in a court with jurisdiction to confirm, enter judgment on and enforce an arbitration award or to modify, correct or set aside an arbitration award. Grounds for relief from an arbitration award are narrow and do not anticipate retrial before the reviewing court of the merits of the dispute resolved in an arbitration award or decision. Relief may be granted, however, if the arbitrators exceed their authority by arbitrating a matter outside the scope of a valid arbitration agreement or by granting relief precluded by the agreement.<sup>183</sup>

### **3. Courts with Jurisdiction**

Whether or not arbitration is provided, a contract with an Indian tribe preferably addresses which court the parties agree has and should exercise jurisdiction if a dispute over the terms of the contract arise. In an on-reservation transaction, state courts may not have subject matter jurisdiction in an action brought against a tribe in state court,<sup>184</sup> at least where a tribe has not agreed to

<sup>183</sup> *E.g.*, Confederated Tribes of the Grand Ronde Community of Oregon v. Strategic Wealth Management, Inc., Case C-04-08-003 (August 5, 2005 Grand Ronde Tribal Court)

<sup>184</sup> *Williams v. Lee*, 358 U.S. 217 (1959). See Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1465-1466 (2011) (“based on interviews with still-living participants in the case and examination of congressional records, Navajo council minutes, and Supreme Court transcripts, records and notes” “the history of *Williams* shows the ways in which the decision and the self-determination movement that followed it were the product of a

state court jurisdiction in advance. Where a tribe brings an action in state court over an on-reservation or off-reservation matter, the state court would have jurisdiction, other requirements of jurisdiction being met.<sup>185</sup> Where a tribe agrees in advance and in writing to state court jurisdiction in respect to an on-reservation matter, there are strong arguments that the tribe's agreement should be binding on it as a matter of freedom of contract, as long as other requirements sufficient for the exercise of state court jurisdiction are met and there is no question as to the validity of the agreement so providing.<sup>186</sup> When tribes engage in transactions outside their reservations, they are subject to jurisdiction of the courts otherwise capable of exercising jurisdiction over such disputes, provided the tribe has waived its sovereign immunity.<sup>187</sup>

Whether a tribe is willing to agree to state court jurisdiction as to on-reservation matter depends on a number of considerations, including past experience with states and state courts.<sup>188</sup> In turn, the non-tribal party may be reluctant to agree to tribal court jurisdiction on the assumption that tribal courts will favor the governing Indian tribe and its tribal entities over all adversaries. One or the other party may be inspired to propose federal court as a solution to this apparent deadlock.

deliberate choice to insist that respect for tribal status was necessary to ensure equal treatment and dignity in the modern era").

<sup>185</sup> *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877 (1986). See also *Navajo Nation v. MacDonald*, 485 P.2d 1104 (Ariz. App. 1994), finding state court had jurisdiction of an action by the Navajo Nation against former chairman in respect to fraudulent transactions occurring partially on the Navajo Reservation but where there were substantial off-reservation contacts.

<sup>186</sup> See *Outsource Services Management LLC v. Nooksack Business Corporation*, 333 P.3d 380 (Wash. 2014).

<sup>187</sup> *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

<sup>188</sup> As an example, in the cases involving treaty fishing rights in Washington, there was active resistance by state officials to implementation of federal court orders. This led one court of appeals judge to note that federal courts were forced to take an active role because "recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) . . . produced the denial of Indian rights requiring intervention of federal courts." *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975) (Burns, District Court Judge, concurring). Fourteen years later, the Supreme Court was forced to address the state's continued resistance to court orders implementing treaty terms, quoting a court of appeals decision as follows: "The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . ., the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979).

Federal courts have limited jurisdiction. The two most common forms of civil jurisdiction exercised by federal courts are “federal question” jurisdiction<sup>189</sup> and “diversity” jurisdiction.<sup>190</sup> Most contract disputes do not raise a substantial federal question over which a federal court may exercise federal question jurisdiction.<sup>191</sup>

Diversity jurisdiction requires, among other matters, “complete diversity of citizenship,” which requires that the parties on opposite sides of a case be citizens of different states or nations. All courts of consequence to consider the citizenship of Indian tribes have concluded that Indian tribes are not citizens of any state or nation. Since an Indian tribe is not a citizen of any state or nation, it cannot have diversity from its opposing party, which destroys federal court diversity jurisdiction in a case to which a tribe is a party or a necessary and indispensable party.<sup>192</sup> However, corporations created under federal, tribal and state law owned by Indian tribes are citizens of the state of their principal place of business and federal court diversity jurisdiction may be exercised over such corporations.<sup>193</sup> Where there is no federal question and no diversity of citizenship, a federal court cannot exercise jurisdiction over an action to which an Indian tribe or other tribal entity is a party. This is so even if a contract provides that the parties agree a federal court has jurisdiction and agree to submit themselves and the subject matter of a dispute to federal court.

This dilemma provides incentive to both sides in many cases to agree to binding arbitration. Since the Federal Arbitration Act<sup>194</sup> does not bestow federal

<sup>189</sup> 28 U.S.C. § 1331 (1980).

<sup>190</sup> 28 U.S.C. § 1332 (2011).

<sup>191</sup> *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005) (an agreement waiving sovereign immunity to confirm an arbitration award by an action in federal court does not grant federal court federal question jurisdiction); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980). Under the well-pleaded complaint rule, a substantial federal question must be determined from what necessarily appears in a plaintiff’s statement of his own claim, unaided by anything alleged in anticipating of avoidance of defenses based on federal law. Thus, a party anticipating that a tribe will raise a defense of tribal sovereign immunity, based on federal law, cannot raise a matter in avoidance of that federal law defense in order to establish federal question jurisdiction. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989).

<sup>192</sup> *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002) (citing decisions reaching the same conclusion from the First, Second, Eighth and Tenth Circuits).

<sup>193</sup> *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2159 (2009).

<sup>194</sup> 9 U.S.C. § 1 (1925).

question jurisdiction over controversies touching arbitrations,<sup>195</sup> federal question jurisdiction does not exist merely because the parties have agreed to resolve disputes by binding arbitration. Uncertainty will exist in some cases as to which court can enforce an arbitration agreement or an arbitration award or to grant relief in an appropriate case to modify, set aside, vacate or correct an arbitration award. Punting on this issue, many agreements provide that parties will seek jurisdiction in any court with jurisdiction, hoping they never have to deal with it. Other agreements may specify that the parties agree to seek jurisdiction first in federal court, then in state court if a federal court is without or declines to exercise jurisdiction. Some but not all agreements go on to provide that the parties will seek jurisdiction in tribal court only after federal and state courts determine they do not have or decline to exercise jurisdiction. Other agreements provide that the parties agree to tribal court jurisdiction in matters relating to enforcement of the promise to arbitrate and matters relating to enforcement of arbitration awards.

Few cases deal with limited liability companies in which an Indian tribe is a member. One case squarely focusing on diversity jurisdiction held that the limited liability company would be treated the same as its Indian tribe owner. Because, as noted above, an Indian tribe does not have citizenship in any state or nation, the court held that it lacked diversity jurisdiction over the limited liability company.<sup>196</sup>

<sup>195</sup> Hall Street Associates, LLC v. Mattel, Inc., 128 S. Ct. 1396 (2008); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 25, n.32 (1983). Exceptions are found in 25 U.S.C. § 415(f) (1968); 25 U.S.C. § 416a(c) which provides, respectively, that any contract, including a lease or a construction contract, affecting land within the Gila River Indian Reservation or any contract, including a lease, affecting land within the Salt River Pima-Maricopa Indian Reservation “may contain a provision for the binding arbitration of disputes arising out of such contract. Such contracts shall be considered within the meaning of ‘commerce’ as defined and subject to the provisions of sec. 1 of tit. 9. Any refusal to submit to arbitration pursuant to a binding agreement for arbitration or the exercise of any right conferred by title 9 to abide by the outcome of arbitration pursuant to the provisions of ch. 1 of tit. 9, sec’s 1 through 14, shall be deemed to be a civil action arising under the Constitution, laws or treaties of the United States within the meaning of section 1331 of title 28.”

<sup>196</sup> *CTGW, LLC v. GSBS, PC*, 2010 U.S. Dist. Lexis 69298 (W.D. Wis. 2010). See also *Floyd v. Panther Energy Co., LLC*, No. 10-95 (N.D. Tex. Jan. 3, 2012), dismissing for lack of diversity an action against Panther Energy Co., LLC of which the Southern Ute Indian Tribe Growth Management Fund was a controlling member because the Fund was an arm of the Tribe and an Indian tribe cannot be a citizen of any state for diversity purposes.

#### **4. Governing Substantive Law and Forum Selection**

As with any other contract, parties to a contract with a tribe or tribal entity may and typically do designate “governing law” that applies to and governs that agreement. In any contract where the law of more than one jurisdiction may apply, a “governing law” clause, also known as a “choice of law” or “applicable law” clause, determines which law governs the contract. Courts ordinarily will honor the parties’ choice of law clause so long as it does not violate public policy of the jurisdiction in which an enforcement proceeding is unconscionable or unreasonable.<sup>197</sup>

One important reason for designating “governing law” in any business transaction is predictability and certainty. The greater the sums involved, the greater the need for predictability and certainty. The law of a jurisdiction so designated may be so well developed that it provides predictable substantive and procedural rules governing business transactions. In turn, business parties may have adapted their business practices, customs, and usages, their goods and services, and even their contractual documents with knowledge of and in reliance upon that developed body of law.

Where there is concern that specifying “governing law” in a contract may be construed as an agreement to litigation in the courts of the jurisdiction so designated<sup>198</sup> and the parties do not intend that result, or the parties otherwise choose to designate the forum in which any litigation may be brought, they may provide in their contract that any litigation or disputes be brought in designated court(s) or that dispute be resolved by binding arbitration with arbitration enforcement in a specified court or courts. Justice Ginsburg’s partial concurrence and partial dissent in *Plains Commerce Bank v. Long Family Land and Cattle*

<sup>197</sup> Regulations adopted by the BIA which became effective in January 2013 for surface leases subject to BIA approval under 25 U.S.C. § 415(a) provide that the parties may subject a lease to state or local law in the absence of federal or tribal law if the lease includes a provision to this effect and the “Indian landowners expressly agree to the application of State or local law.” 25 C.F.R. § 162.014(c) (2012). In *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), the court of appeals refused to give effect to an arbitration forum selection clause which the court found it was unreasonable under the circumstances and procedurally and substantively unconscionable, concluding that the arbitration procedure described in the contracts was a sham and an illusion.

<sup>198</sup> Such was the result in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).



Co.<sup>199</sup> noted the bank seeking to avoid tribal court jurisdiction could have achieved that result by including forum selection, choice of law or arbitration clauses in the contracts in dispute.<sup>200</sup>

*Neptune Leasing, Inc. v. Mountain States Petroleum Corp.*, a 2013 decision by the Navajo Supreme Court,<sup>201</sup> creates some uncertainty regarding application of these well-developed rules, at least in Navajo courts. The complex and unusual facts contributing to the outcome of this case are noteworthy in determining whether the governing law, forum selection and jurisdictional holdings of the case would control a contract by and with the Navajo Nation or a Navajo tribal entity, or would inform decisions involving contracts with Indian tribes and tribal entities elsewhere.<sup>202</sup> *Neptune Leasing* involved a 2006 contract between non-Indian entities. Neptune claimed to have sold a helium plant on Navajo land under a multi-year installment contract to Mountain States, which resold the plant in 2007 to a third party, Nacogdoches Oil and Gas, Inc. Neptune claimed that the resale to Nacogdoches was without its consent and breached the Neptune-Mountain States contract. Neptune commenced a repossession action against Mountain States in Navajo Shiprock District Court seeking repossession and damages against Mountain States. The Shiprock District Court recognized that it had exclusive subject matter jurisdiction over the repossession claim but “yielded” jurisdiction to a Texas court, pending domestication and recognition in Navajo courts of an order of repossession from the Texas court. The helium plant itself is an improvement under a 1974 business site leasehold between the Navajo Nation and an unidentified entity not a party to the case. Neptune’s sale to Mountain States was without the knowledge or involvement of the Navajo Nation.

Neptune conceded to the Navajo Supreme Court it was unable to produce any lease or written document as the basis for its possession of the site or ownership of site improvements. Nacogdoches in turn conceded to the Navajo Supreme Court that it had never entered a written lease or operating agreement

<sup>199</sup> *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008)

<sup>200</sup> *Long Family Land and Cattle Co.*, 554 U.S. at 344.

<sup>201</sup> *Neptune Leasing, Inc. v. Mountain States Petroleum Corp.*, SC-CV-24-10 (Nav. Sup. Ct. 2013).

<sup>202</sup> For example, in *United Planners’ Financial Services of America, a limited partnership v. Sac and Fox Nation, Sac and Fox Housing Authority*, APL-12-01 (Sac and Fox Nation Sup. Ct. Sept. 26, 2013), the Sac and Fox Supreme Court noted that a forum selection clause “may be agreed upon by an party to an agreement, including an Indian tribe or tribal entity,” provided the tribe or tribal entity approves that clause in accordance with applicable tribal law. The Sac and Fox Nation Supreme Court decision did not discuss *Neptune Leasing*.

specific to the helium plant with the Navajo Nation. However, Nacogdoches asserted that its purchase from Mountain States was with the knowledge and consent of the Navajo Nation, that it operates the plant with the verbal approval of the Navajo Nation, and pays Navajo royalties and rents pursuant to regional oil and gas operating agreements with the Nation under which Nacogdoches has the right to develop and produce helium, hydrocarbon and other gas resources within specified areas of the Navajo Nation. Further, Nacogdoches claimed to have entered operating agreements specific to the plant with Neptune and Mountain States, but those agreements were not in the record.

Mountain States claimed that the matter should be tried in Texas courts due to forum selection and choice of law clauses in the Neptune-Mountain States contract and that Navajo courts lacked subject matter jurisdiction over it. On an appeal by Neptune, the Navajo Supreme Court framed two issues: First, Whether the district court properly dismissed the case for lack of personal jurisdiction over Mountain States. Second, whether the district court properly “yielded” subject matter jurisdiction to an unnamed Texas court conducting unspecified proceedings involving some or all of the parties. On the issue of personal jurisdiction over Mountain States, the Navajo Supreme Court found under the Navajo Nation’s Long Arm statute,<sup>203</sup> grounding jurisdiction on business conduct within the Navajo Nation, as well as federal common law of tribal jurisdiction over non-members, *i.e.*, *Montana v. United States*,<sup>204</sup> based on Mountain States’ 2006 purchase and 2007 re-sale of the helium plant located on a Navajo leasehold, the subject of Neptune’s repossession claim, each of which were sufficient the Navajo Supreme Court held for finding subject matter jurisdiction. Questions of Navajo tribal court jurisdiction over non-members ultimately may be determined in a federal court under federal law.<sup>205</sup>

The truly interesting and challenging part of this case deals with the Navajo Supreme Court’s treatment of the Neptune-Mountain States security agreement in which the parties agreed to address disputes arising from their agreement in a Texas court under Texas law. The Navajo Supreme Court rejected Mountain States’ claim that this clause took jurisdiction away from Navajo courts, stating:

<sup>203</sup> 7 NNC § 253a (2001).

<sup>204</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>205</sup> *Salt River Project v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

[N]o private agreement can ever avoid Navajo Nation jurisdiction over transactions on Navajo trust land. Under Navajo law, an agreement between individuals or entities to avoid Navajo jurisdiction may certainly never be enforced when the transaction concerns “physical and intangible assets” that may include improvements to a Navajo Nation business site leasehold on trust land. . . . In this case, no one in the present action has been able to produce any lease involving the parties, under whose terms the [Navajo] Nation’s reversionary interests may properly be examined, and pursuant to which any transfers of improvements may be monitored and regulated.

In order to transfer improvements, a business entity must have the consent of the Nation and must have proper color of title, i.e., must be a leaseholder, in order to do so. . . . Under the Navajo Nation Business Leasing Regulations of 2005, a lease must be periodically reviewed every five (5) years in the best interests of the people, and any improvements revert to the Navajo Nation unless otherwise provided in a lease. . . . Nacogdoches has asked us to apply on them the terms of a 1974 lease involving a non-party entity. Essentially, they would have us find an equitable lease with fixed terms inferred from a forty-six year old document not signed by any party, and without being able to track how any of the parties came to “own” the site, and subsequently to properly transfer improvements on that site in conformance with Navajo law.<sup>206</sup>

Having found jurisdiction over the subject matter and the parties, the Court then found that the Shiprock District Court erred when it “yielded” to the Texas court. Under the Navajo Nation’s Long Arm statute, a court may “stay or dismiss an action due to inconvenient forum ‘in whole or in part on any condition that may be just.’”<sup>207</sup> For several reasons, the Navajo Supreme Court found the transaction involving Navajo land “over which our courts have exclusive jurisdiction” “must be tried before a Navajo Nation court for reasons of sovereignty and application of Navajo law.”<sup>208</sup> The Court also was concerned that “the legality of transfers of Navajo land from one private party to another . . . without consultation with the Nation and without proper leases since 1974 can only be addressed by a Navajo

<sup>206</sup> *Neptune Leasing, Inc.*, SC-CV-24-10 (Nav. Sup. Ct 2013).

<sup>207</sup> *Id.* at 14.

<sup>208</sup> *Id.*

Nation court under Navajo Law.”<sup>209</sup> “Thirdly, the extent of the Nation’s reversionary interest in improvements on business site leaseholds cannot be addressed in any other forum because that interest is based on Navajo law, and ‘any attempt by a state court to adjudicate property interests of the Nation on trust land within its territory would most certainly infringe on the right of the Nation to make its own laws and be ruled by them.’”<sup>210</sup>

The extraordinary facts in *Neptune Leasing* solely involving private parties and a stale lease of Navajo land that no one could produce involving a lessee not before the Court drove the Navajo Supreme Court to these findings and conclusions. It is an open question whether the Court’s conclusions regarding forum selection, choice of law and jurisdiction would apply in an agreement with and approved by the Navajo Nation or Navajo tribal entities in accordance with Navajo law, thus presenting very different considerations from those considered in *Neptune Leasing*. The Navajo Nation and other Indian tribes and tribal entities have been and undoubtedly will want to be parties to future transactions involving substantial investments and commercial transactions. On facts quite different from *Neptune Leasing*, the Sac and Fox Supreme Court noted that a forum selection clause “may be agreed upon by an party to an agreement, including an Indian tribe or tribal entity,” provided the tribe or tribal entity approves that clause in accordance with applicable tribal law.<sup>211</sup> In *Outsource Services Management, LLC v. Nooksack Business Corporation*,<sup>212</sup> the Washington Supreme Court enforced terms of an agreement entered by the Nooksack Business Corporation, a business corporation wholly owned by the Nooksack Tribe, which included a loan agreement forum selection clause designating state courts as the forum for disputes arising under the loan agreement. The Washington Supreme Court noted that a waiver of sovereign immunity included in the agreement would not have been sufficient standing alone to enable the state court to exercise jurisdiction.

In some cases, parties may desire definitive determinations on questions of tribal law in advance of and as a condition of closing a transaction. Although an opinion of tribal legal counsel may provide some comfort as to application of tribal

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *United Planners’ Financial Services of America, a limited partnership v. Sac and Fox Nation, Sac and Fox Housing Authority*, slip opinion at 10, APL-12-01 (Sac and Fox Nation Sup. Ct. Sept. 26, 2013).

<sup>212</sup> *Outsource Services Mngt, LLC v. Nooksack Business Corp.*, 333 P.3d 380 (Wash. 2014).

law in a transaction, an opinion of counsel remains just that, an opinion. It is not binding on tribal courts. To obtain certainty on the validity, binding effect and enforceability of a contract under tribal law, a tribe could enact a tribal law authorizing submission of those and other issues regarding a specific transaction for a binding determination by the highest court of the tribe. Known as a validation action, the determination of questions so presented and determined would be binding on the tribe and its courts, thereby provide certainty before a transaction becomes final and binding. If one or more of the parties is not satisfied with the tribal court's determination, they could seek alternatives that would comply with applicable tribal law or terminate the transaction before it becomes final and binding.

### **5. Exhaustion of Tribal Remedies**

Even when federal courts have jurisdiction over an on-reservation matter, the court may be required as a matter of comity to abstain from the exercise of jurisdiction or dismiss the case until the parties have exhausted available tribal remedies, administrative and judicial, on whether all or part of the matter in dispute is a matter within the jurisdiction of the tribe.<sup>213</sup> There are limited but important exceptions to the exhaustion requirement.<sup>214</sup> When parties have exhausted their tribal remedies, they may return to federal court. There, a tribal court's determination of tribal law is binding on the federal court. Questions of tribal court jurisdiction, a question of federal law, are reviewed by federal courts on a de novo basis.<sup>215</sup> There are other issues raised by the exhaustion of remedies rule of comity. Suffice it to say, parties should seek legal advice specific to their transaction to understand how it affects the transaction and dispute resolution.

<sup>213</sup> *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 485 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 825 (2013).

<sup>214</sup> *El Paso Natural Gas Company v. Neztosie*, 526 U.S. 473 (1999); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) (holding that agreement to a tribal court forum in a payday loan contract did not create tribal court subject matter jurisdiction over a non-member or require exhaustion of tribal remedies where federal law requirements for the exercise of tribal jurisdiction over a non-member were not met).

<sup>215</sup> *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995).

## **6. Foreign Corporations**

Corporations and other entities organized under the laws of a jurisdiction other than that of the state where they seek to do business generally are considered “foreign corporations” and typically need to take affirmative steps to qualify to do business in states other than their place of incorporation or organization. Similarly, corporations and other entities incorporated or organized under the law of a jurisdiction other than of an Indian tribe governing a reservation where they seek to do business may need to qualify to do business within the reservation in accordance with applicable tribal law<sup>216</sup> as a condition of having access to the courts of that tribe.<sup>217</sup>

## **VI. FEDERAL AND TRIBAL APPROVALS**

### **A. Federal Approvals**

As noted in section III above, 25 U.S.C. § 177 provides in part: “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 Constitution.” Set forth below are statutes authorizing leases and other conveyances of interests in tribal lands.

### **1. Surface Leases**

Before 1955, Congress enacted a number of laws authorizing relatively short leases of the surface of tribal land, often for limited purposes or named reservations.<sup>218</sup> Until 1990, only tribes which voted to accept the Indian Reorganization Act of 1934 (IRA)<sup>219</sup> were authorized to obtain charters for section 17 corporations granting authority to lease tribal land for a maximum of 10 years. The 1990 amendments to section 17 expanded authority to obtain leases to all

<sup>216</sup> 5 NNC § 3166; 5 NNC § 3170.

<sup>217</sup> 5 NNC § 3174(A). See *Graven v. Morgan*, Navajo Supreme Court, No. SC-CV-32-10 (November 2012) at 10.

<sup>218</sup> *E.g.*, 25 U.S.C. § 402a (1927) (farming for 10 years); 25 U.S.C. § 403a (1927) (Port Madison, Swinomish and Tulalip Reservations not to exceed 25 years).

<sup>219</sup> 25 U.S.C. §§ 460 (1948).

federally recognized tribes, and expanded the term of such leases and mortgages by such corporations to 25 years.

In 1955, Congress enacted the Indian Long-Term Leasing Act, 25 U.S.C. § 415, authorizing surface leases of “[a]ny restricted Indian lands, whether tribal or individually owned,” by the trust owners with BIA approval “for public, religious, educational, recreational, residential or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of substantial investment in improvement of the land for the production of specialized crops.” Surface leases under section 415 may not authorize exploration, development or extraction of any mineral resources. Section 415, as amended in 2012, authorizes, among other things, the following regarding tribal land:

- Leases of the surface of tribal land for business and other purposes for a term up to 25 years (except for grazing purposes restricted to 10 year terms), which leases may authorize renewal for one additional term, not to exceed 25 years, all such leases requiring approval of the tribal landowner and BIA;
- Leases of the surface of named reservations and certain other lands for up to 99 years, all such leases requiring approval of the tribal landowner and BIA, provided that such leases may authorize renewal of one additional term not to exceed 25 year term if the base lease is for a term of not more than 74 years;
- Subject to and in accordance with tribal leasing regulations approved by the Secretary of the Interior, all Indian tribes may lease tribal lands for agricultural and business purposes without BIA approval for up to 25 years, with two options, each for up to 25 years.<sup>220</sup>

Before approving a lease or any extension of an existing lease, where BIA approval is required, section 415 requires the BIA to satisfy itself that adequate consideration has been given to the use of the leased land and the use of neighboring land; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and

<sup>220</sup> 25 U.S.C. § 415(b), (e)-(h) (1959); Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, Pub. Law No. 112-151, 126 Stat. 1150.

other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased land will be subject. Under this authority, the BIA may condition its approval of a lease.

As authorized by section 415(a) for leases requiring BIA approval, the BIA has adopted regulations regarding surface leases.<sup>221</sup> These regulations were substantially revised in 2012. As revised, Part 162, Subpart A includes general provisions,<sup>222</sup> Subpart B applies to agricultural leases, Subpart C applies to residential leases, Subpart D governs business leases, Subpart E applies wind energy evaluation and wind and solar resource leases, and Subpart F governs leases on certain named reservations.<sup>223</sup> Where BIA approval is required of leases, the Part 162 regulations govern, among other matters, amendments, subleases, assignments, encumbrances of leases, and foreclosure of encumbrances.

## ***2. Mineral Leases and Mineral Agreements***

After enactment in 1938 of the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a – 396g, and subsequently the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101 – 2108, these laws and their respective implementing regulations became the primary authorities for developing minerals on most tribal land.<sup>224</sup> Regulations implementing these statutes are found at 25 C.F.R. Parts 211 and 216 (Indian Mineral Leasing Act) and 225 (Indian Mineral Development Act of 1982). Both laws require tribal and BIA approval of tribal mineral leases and mineral development agreements, as applicable.<sup>225</sup>

<sup>221</sup> 25 C.F.R. Ch. 1 Pt. 162 (2012).

<sup>222</sup> Among the general provisions are new sections addressing laws applicable to leases approved under Part 162 and federal, tribal, and state taxes applicable to leases approved under Pt 162. 25 C.F.R. §§ 162.014 and 162.017 (2012), respectively. A recent federal court decision relying in part on 25 C.F.R. § 162.017 (2012) holds that Florida's rental tax on non-member tenants leasing property from the Seminole Tribe of Florida is preempted by federal law. *Seminole Tribe of Florida v. Florida*, Department of Revenue, 2014 WL 4388143 (S.D. Fla. 2014).

<sup>223</sup> 77 C.F.R. § 72440 (December 5, 2012).

<sup>224</sup> Exceptions apply to Navajo Nation oil and gas in Utah, *See Utah v. Babbitt*, 57 F.3d 1145 (10th Cir. 1995), and tribal minerals in Oklahoma. *See also* 30 U.S.C. § 1300(c) regarding coal leases.

<sup>225</sup> 25 U.S.C. § 396a; 25 U.S.C. § 2102(a). For more on tribal mineral development, *See* COHEN'S HANDBOOK § 17.03[2] (2012); Lynn Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights, and Culture*, 56TH ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE (2010). *See also* Michael Webster, *Negotiating and*



### 3. Tribal Energy Resource Agreements

The Energy Policy Act of 2005 authorized tribal parties to Tribal Energy Resource Agreements (TERAs) to issue leases, business agreements and rights of way for mineral energy development without BIA.<sup>226</sup> This authority has not gained substantial traction to date, due significantly to the complex regulatory requirements for BIA approval of TERAs.

### 4. Rights of Way

Before 1948, Congress had enacted a number of statutes authorizing rights of way across tribal land for various uses.<sup>227</sup> Though these earlier authorities were not amended or repealed by enactment of the General Right of Way Act in 1948, 25 U.S.C. §§ 323-328, rights of ways over tribal land are now granted under the implementing regulations adopted by the BIA.<sup>228</sup> For all rights of way governed by the 1948 Act, the BIA is the grantor; the BIA in turn must comply with applicable federal environmental laws before granting such rights of way. However, the BIA will grant a right of way over tribal land only with the prior written consent of the tribe.<sup>229</sup> For hydroelectric projects licensed under the Federal Power Act,<sup>230</sup> the Federal Energy Regulatory Commission may authorize use of tribal lands, including rights of way over tribal land.<sup>231</sup>

In response to the Supreme Court's decision in *Strate v. A-1 Contractors*,<sup>232</sup> narrowly construing tribal authority over certain rights of way and non-members on such rights of way, some tribes impose stringent conditions on their consents to

*Drafting Indian Mineral Development Agreements, Natural Resources Development and Environmental Regulation in Indian Country*, ROCKY MOUNTAIN MINERAL LAW INSTITUTE (1999); Tim Vollmann, *Federal Approval of Mineral Development on Indian Lands Natural Resources Development and Environmental Regulation in Indian Country*, ROCKY MOUNTAIN MINERAL LAW FOUNDATION (1999).

<sup>226</sup> 25 U.S.C. § 3504 (2014); 25 C.F.R. Pt. 224.

<sup>227</sup> *E.g.*, 25 U.S.C. §§ 311-322 (2012).

<sup>228</sup> 25 C.F.R. Pt. 169 (2012).

<sup>229</sup> 25 C.F.R. § 169.3(a) (2012).

<sup>230</sup> 25 U.S.C. § 326 (2012).

<sup>231</sup> 16 U.S.C. § 797(e) (2012). See *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1983).

<sup>232</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

new rights of way, which consent the BIA must receive before granting a right of way over tribal land.<sup>233</sup> Still other tribes refuse to consent to rights of way under 25 U.S.C. §§ 323-324. Instead, some tribes may issue rights of way in the form of linear leases pursuant to a leasing authority, such as 25 U.S.C. § 415, subject to BIA approval where applicable, because tribes have greater regulatory authority over leased land and persons thereon.<sup>234</sup>

On June 17, 2014, the BIA published proposed regulations that would substantially revise the Part 169 right-of-way regulations.<sup>235</sup> The proposed regulations include provisions regarding applicable law and federal, tribal and state taxes applicable to ROWs approved under Part 169 substantially similar to those adopted by the BIA for leases approved under 25 C.F.R. Part 162. Compare proposed ROW regulations 25 C.F.R. §§ 169.008 (applicable law) and 169.009 (taxes) with 25 C.F.R. §§ 162.014 (applicable law) and 162.017 (taxes).<sup>236</sup> Other important provisions, that are either new or substantially revised in the proposed regulations, address ROW term limits, compensation, assignments and mortgages, compliance, enforcement and remedies.

### **5. Encumbrances**

Before enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000,<sup>237</sup> 25 U.S.C. § 81 governed a broad but uncertain category of agreements with Indian tribes for “services . . . relative to their lands.” The vagueness of section 81 and the draconian effect of non-compliance with section 81 played out in litigation whether agreements approved by tribes but not the BIA should be set aside,<sup>238</sup> including contracts where the BIA had opined that

<sup>233</sup> 25 C.F.R. § 169.3(a) (2012).

<sup>234</sup> Under a TERA are approved under 25 U.S.C. § 3504 and 25 C.F.R. Pt 224 (2014), a tribe may grant certain energy related rights of way without BIA approval. To date, however, no TERA have been approved by the BIA.

<sup>235</sup> Rights-of-Way on Indian Lands, Proposed Rule, 79 C.F.R. 34455 (June 17, 2014).

<sup>236</sup> The federal district court for the southern district of Florida recently relied in part on the BIA’s leasing regulation 25 C.F.R. § 162.017 (2012) to hold that Florida’s rental tax on non-member tenants leasing property from the Seminole Tribe of Florida is preempted by federal law. *Seminole Tribe of Florida v. Florida, Department of Revenue*, 2014 WL 4388143 (S.D. Fla. 2014).

<sup>237</sup> To Encourage Indian Economic Development, Pub. Law No. 106-179 (2000), 114 Stat. 46.

<sup>238</sup> *Quantum Entertainment Limited v. U.S. Department of the Interior*, 714 F.3d 1338, (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538 (1st Cir. 1997); *Alzheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 810 (7th

its approval was not required based on its assessment that the agreement was not subject to section 81.<sup>239</sup>

As revised in 2000, section 81 is a substantial improvement. Section 81(b) provides that “No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 years or more shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.” The term “encumber” is not defined in section 81. Regulations adopted by the BIA to implement revised section 81 provides that “*Encumber*’ means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control of tribal land.” 25 C.F.R. § 84.002. Helpfully, the regulations also list types of contracts and agreements that do not require BIA approval under section 81.<sup>240</sup>

As a threshold matter, section 81 excludes from its scope, but not the scope of any other applicable law, the need for BIA approval of any contract or agreement that encumbers tribal land for a term of less than 7 years. Unlike its prior incarnation where courts afforded no meaningful deference to BIA determinations regarding inapplicability of section 81 to certain contracts,<sup>241</sup> section 81(c) now provides that section 81(b) “shall not apply to any agreement or contract that the [BIA] determines is not covered under that subsection.”<sup>242</sup>

## 6. Indian Gaming

The Indian Gaming Regulatory Act makes management contracts for operation of class II and class III Indian gaming activities subject to approval by

Cir. 1993); *Gasplus, L.L.C. v. United States Dep’t of Interior*, 510 F. Supp. 2d 18 (D.D.C. 2007); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987).

<sup>239</sup> *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. denied*, 487 U.S. 1274 (1989); *Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985).

<sup>240</sup> 25 C.F.R. § 84.004 (2014).

<sup>241</sup> *E.g.*, *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986).

<sup>242</sup> 25 U.S.C. § 81(c) (2014).

the chairman of the National Indian Gaming Commission.<sup>243</sup> Management agreements lacking such approval are not enforceable.<sup>244</sup>

## **7. Consequences of Federal Approvals**

### **A. Tribal Actions Involving Federal Approvals**

Actions by federal agencies on proposals to approve tribal contracts, leases, mineral agreements, and encumbrances, and granting rights of way are federal actions. Generally, such actions must be consistent with applicable federal law, including the Administrative Procedure Act. Where a specific federal action is subject to administrative appeal, administrative remedies must be exhausted in most cases before review may be had in federal court, if the action is of a type subject to judicial review. The BIA has rules governing administrative appeals of BIA actions.<sup>245</sup> The Department of the Interior has rules governing appeal of BIA actions to the Interior Board of Indian Appeals.<sup>246</sup>

With limited exceptions, the BIA must comply with procedural requirements of applicable federal environmental laws and regulations before taking action on proposal, such as requests to approve tribal leases or mineral agreements, grant rights of way over tribal and individual Indian land, provide funds for projects, and authorize direct BIA actions. Key federal environmental laws and regulations and an executive order triggered by proposals for BIA and other federal actions are:

- National Environmental Policy Act (NEPA), 42 U.S.C. § 4321; 40 C.F.R. Parts 1500-1508
- Endangered Species Act (ESA), section 7, 16 U.S.C. § 1536; 50 C.F.R. Part 402
- National Historic Preservation Act (NHPA), sections 106 and 110, 16 U.S.C. §§ 470f and 470h-2; 36 C.F.R. Part 800
- Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c); 15 C.F.R. Part 930

<sup>243</sup> 25 U.S.C. §§ 2710(d)(9) (2014); 25 C.F.R. § Pt, 553 (2014).

<sup>244</sup> *Wells Fargo Bank v. Lake of the Torches Economic Development Corporation*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010), *aff'd*, 658 F.3d 684 (7th Cir. 2011).

<sup>245</sup> 25 C.F.R. Pt. 2 (2014).

<sup>246</sup> 43 C.F.R. Pt. 4 (2014).

- Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855 (consultation regarding actions that may adversely affect “essential fish habitat”)
- Executive Order 11988 (floodplain management)

The Department of the Interior has adopted agency-wide NEPA regulations.<sup>247</sup> These regulations are supplemental by NEPA provisions of the Departmental Manual (DM), 516 DM 1-15, which provides agency and bureau-specific guidance on NEPA implementation. Of special importance for BIA actions is 516 DM 10, Managing the NEPA Process - Bureau of Indian Affairs. In addition to agency-wide categorical exclusions included in 43 C.F.R. Part 46, this chapter lists categorical exclusions specific to BIA actions. Where a categorical exclusion is applicable and extraordinary circumstances do not require otherwise, the BIA need not prepare either an environmental impact statement or an environmental assessment for its proposed actions.<sup>248</sup>

The President has issued a number of executive orders and memoranda giving policy direction to federal executive agencies. Among these is Executive Order 13175, issued by President Clinton, directing federal agencies to consult with Indian tribes on certain matters. On November 5, 2009, President Obama issued a Memorandum directing all federal executive agencies to develop policies on implementation of Executive Order 13175. On December 1, 2011, after consultation with Indian tribes, Secretary of the Interior, Salazar, issued Secretarial Order 3317 updating, expanding and clarifying the Department of the Interior Policy on Consultation with Indian Tribes.

Section 10 of Executive Order 13175 provides: “*Judicial Review*. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.” Although compliance with executive orders containing such a clause may not be subject to judicial review, Executive Orders are intended to and do have real world consequences. It is clear that the Department of the Interior and other federal agencies are taking Executive Order 13175 seriously during the Obama Administration.

<sup>247</sup> 43 C.F.R. Pt. 46 (2014).

<sup>248</sup> National Environmental Policy Act of 1969, 516 DM 10.

Regardless of whether federal approval is required, activities under a contract with an Indian tribe on or outside an Indian reservation must comply with applicable federal environmental laws, including applicable permit requirements. This includes, as applicable, the Clean Water Act, Rivers and Harbors Act, Clean Air Act, Resource Conservation and Recovery Act, Endangered Species Act, Native American Graves Protection and Repatriation Act, and Archaeological Resources Protection Act.

### ***B. Tribal Actions Not Requiring Federal Approvals***

Federal approvals or grants are not required for the following tribal actions:

- Leases and mortgages of tribal land for 25 years or less by tribal corporations chartered under 25 U.S.C. § 477, subject to the restrictions on tribal corporation powers set forth in corporate charters (some older section 17 charters require BIA approval of leases)
- Leases up to 75 years granted by tribes designated in 25 U.S.C. § 415(b), (e) and (h), once the BIA approves tribal leasing regulations<sup>249</sup>
- TERA authorized leases, business agreements and rights of way involving energy development up to 30 years, with a renewal term up to another 30 years (and leases up to 10 years for production of oil resources, gas resources, or both, and for so long thereafter as oil or gas is produced in paying quantities)
- Agreements and contracts encumbering tribal land for less than 7 years, 25 U.S.C. § 81(b), 25 C.F.R Part 84
- Other actions Indian tribes may take independent of the need for any federal action or approval, such as developing tribal facilities, including tribal business facilities, on tribal land.

Where tribal action may be taken without BIA action or approval, federal environmental laws triggered by federal agency action do not apply. However, tribal actions may require action by other federal agencies. For example, a tribal project may require a permit issued by the United States Army Corps of Engineers (Corps) for the discharge of dredged or fill material into waters of the United States

<sup>249</sup> HEARTH Act of 2012, Pub. Law No. 112-151, 126 Stat. 1150. *E.g.*, Navajo Nation Council Resolution CO-53-13 (2013).

pursuant to section 404 of the federal Clean Water Act<sup>250</sup> or a permit from the Environmental Protection Agency (EPA) for the discharge of a pollutant from a point source to waters of the United States, including discharges of stormwater associated with construction activities, under section 402 of the Clean Water Act.<sup>251</sup> Where a federal agency is proposing to take action in issuing a permit, it must comply with all applicable laws and regulations for its proposed action.

When federal agency action is not required for a project, or the scope of agency discretion and control over a project is substantially limited, this can reduce the costs and the time it takes to develop a project as well as the risks of administrative appeals and federal judicial review triggered by federal agency action. However, many tribes have their own land use and environmental laws, regulations and procedures. The absence of a federal approval or permit does not mean that tribal land use and environmental reviews, permits and approvals are not required.

### ***C. Tribal and Tribal Entity Approvals***

As with any entity, validly authorized, executed and delivered approvals are essential to contracts with Indian tribes and tribal entities. Tribal officers and agents of Indian tribes, tribal political subdivisions, unincorporated tribal entities and enterprises, tribal government corporations, section 17 corporations and tribal entities acting as arms and instrumentalities of Indian tribes do not have inherent or implied authority to bind their respective governmental principals.<sup>252</sup>

The authority of tribal officers and agents depends in the first instance on the tribal constitution, if a tribe has one (not all tribes have a written constitution), other tribal laws (including applicable tribal court decisions), ordinances and resolutions of the tribal government, plan of operation or other documents for an unincorporated tribal entity, and the charter or articles of incorporation of an incorporated tribal entity. Since tribal constitutions, laws, ordinances, plans of operation, and charters or articles of incorporation frequently do not grant direct authority to act to such officers or agents, a resolution or other authorizing action of the governing body of tribe or other tribal entity generally must be adopted or

<sup>250</sup> 33 U.S.C. § 1344 (1948).

<sup>251</sup> 33 U.S.C. § 1342 (1948).

<sup>252</sup> *Hydrothermal Energy v. Fort Bidwell Indian Community*, 170 Cal. App.3d 489, 216 Cal. Rptr. 1 (Cal. App. 1985).

issued granting a tribal officer, agent or other designated person authority to execute and deliver contract documents. In any significant transaction, most Indian tribes and tribal business entities will provide such resolutions.

In a significant decision elaborating these concepts, the Sac and Fox Supreme Court held in *United Planners' Financial Services of America, a limited partnership v. Sac and Fox Nation, Sac and Fox Housing Authority* that the general and valid authorization by the Sac and Fox Business Committee granting designated tribal officers authority to enter a variety of contracts was valid, but did not clearly and expressly authorize those officers to waive tribal sovereign immunity.<sup>253</sup> In consequence, the Court found that the general provisions of agreements executed by tribal officials in accordance with tribal authorizations were binding on the Sac and Fox Nation, including the Nation's promise to resolve disputes by arbitration, but that the waivers of sovereign immunity included in those same agreements were not authorized or valid. Thus, affirmative relief against the Nation to compel it to submit to arbitration was barred by the Nation's sovereign immunity. At the same time, the Nation was bound by its promise to resolve disputes by arbitration rather than by filing an action in any court, including the Nation's courts, to resolve a dispute.

## VII. LAND STATUS AND TITLE ISSUES

### A. Tribal Trust Land

For tribal and individual Indian trust land, including fee land taken into trust by the United States under 25 U.S.C. § 465 or otherwise, the United States is the owner of the fee in trust for the respective tribe or individual Indian owner. Trust land is not subject to state and local taxes or land use laws or environmental regulations unless Congress has expressly provided otherwise, or the BIA's discretionary process for taking fee land into trust imposes the equivalent of such requirements as a condition of taking land into trust.<sup>254</sup> While there are some

<sup>253</sup> *United Planners' Financial Services of America, a limited partnership v. Sac and Fox Nation, Sac and Fox Housing Authority*, APL-12-01 (Sac and Fox Nation Sup. Ct. Sept. 26, 2013).

<sup>254</sup> 25 C.F.R. § 1.4 (1965). Compare *Santa Rosa Band of Indian v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) and *Snohomish County v. Seattle Disposal Company*, 425 P.2d 22 (Wash.), *cert. denied*, 389 U.S. 1016 (1967), both concluding tribal trust land is not subject to local land use laws, with *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (Maine has permitting authority under section 402 of the Clean Water Act on the Penobscot and Passamaquoddy Reservations based on the Maine Indian Claims Settlement Act).



exemptions, non-members doing business on a reservation are not automatically exempt from generally applicable state and local taxes for activities occurring on or property used on reservation land. Tax issues are discussed in Section X below.

### ***B. Fee Land***

As a result of allotment and other actions, lands within a reservation may be owned in fee by tribes, Indians, non-Indians and non-Indian entities. It is relatively common for allotted land to be owned in undivided interests among a tribe, tribal members, Indians from other reservations, non-members, and even state and local governments. In approving a lease of trust land, the BIA will not lease any fee interest in Indian land.<sup>255</sup>

Fee land is subject to applicable state and local taxes, notwithstanding ownership by a tribe or Indian on the reservation of the tribe or where the Indian is a tribal member.<sup>256</sup> Pursuant to 25 U.S.C. § 465, the BIA may acquire fee land in trust for Indian tribes and Indians or any interest in land, water rights or surface rights. Once land is held in trust, BIA regulations provide that none of the laws, ordinances codes, resolutions, rules, or other regulations of any state or political subdivision of any state limiting, zoning or otherwise governing, regulating, or controlling the use or development of real property shall be applicable to any such property leased or used under any agreement with any Indian tribe that is held in trust by the United States for such tribe.<sup>257</sup>

Regulations governing the “fee-to-trust” process are found at 25 C.F.R. Part 151. The time to complete such transactions can be quite long. Unless Congress mandates acquisition of land into trust, such that the BIA exercises no discretion whether to take such land into trust, the BIA must comply with procedural requirements of applicable federal environmental laws before making a discretionary decision and action on a “fee-to-trust” request.

<sup>255</sup> 25 C.F.R. § 162.004(a)(1)(2011).

<sup>256</sup> *County of Yakama v. Confederated Tribes and Bands of Yakama Indian Nation*, 502 U.S. 251 (1992).

<sup>257</sup> 25 C.F.R. § 1.4 (1965).

### **C. Title Records**

The BIA's land records and title document regulations are found at 25 C.F.R. Part 150. "The purpose of recording is to provide evidence of a transaction, events or happening that affects land titles; to preserve a record of the title documents; and to give constructive notice of the ownership and change of ownership and the existence of encumbrances of the land."<sup>258</sup> The phrase "title document" is defined as "any document that affects the title or encumbers Indian land and is required to be recorded by regulation or Bureau policy."<sup>259</sup>

The BIA maintains regional "Land Titles and Records Offices" and other offices with title services responsibilities.<sup>260</sup> Responsibility for recording title documents is on the BIA official who approves title documents or accepts title.<sup>261</sup>

The BIA's Land Titles and Records Offices will prepare upon request a title status report (TSR).<sup>262</sup> Certified TSRs take more time to prepare and obtain than informal TSRs. Certified copies of BIA title documents are admissible in evidence the same as originals.<sup>263</sup>

"The usefulness of a Lands Titles and Records Office depends in large measure on the ability of the public to consult the records contained therein."<sup>264</sup> The BIA regulation so stating adds that it is BIA policy "to allow access to land records and title documents unless such access would violate the Privacy Act, 5 U.S.C. 552a or other law restricting access to such records, or there are strong policy grounds for denying access where such access is not required by the Freedom of Information Act [FOIA], 5 U.S.C. 552." As a matter of BIA policy, "unless specifically authorized, monetary considerations will not be disclosed insofar as leases of tribal land are concerned."<sup>265</sup>

<sup>258</sup> 25 C.F.R. § 150.2(m) (2012).

<sup>259</sup> 25 C.F.R. § 150.2(l) (2012).

<sup>260</sup> 25 C.F.R. §§ 150.4 and 150.5 (2012).

<sup>261</sup> 25 C.F.R. § 150.6 (2012).

<sup>262</sup> 25 C.F.R. § 150.8 (2012) (the phrase "Title status report" is defined in 25 C.F.R. § 150.2(o)).

<sup>263</sup> 25 C.F.R. § 150.10 (2012). See Michael Webster, *Examination of Title to Indian Lands, Natural Resources Development and Environmental Regulation in Indian Country*, Rocky Mountain Mineral Law Foundation (1999).

<sup>264</sup> 25 C.F.R. § 150.11(a) (2012).

<sup>265</sup> 25 C.F.R. § 150.11(a) (2012). See Philip Lear and Christopher Jones, *Access to Indian Land and Title Records: Freedom of Information, Privacy and Related Issues*, Natural Resources

Because BIA Land Titles and Records Office documents are agency records, they are subject to FOIA and countervailing mandates of the Privacy Act. In some cases, BIA Land Titles and Records Offices require requesters to submit written FOIA requests before providing copies of documents or making documents available for inspection and copying. Where it is clear that a request does not seek information exempt from disclosure under law or policy and the request is not burdensome, BIA staff may provide uncertified documents upon request without requiring a FOIA request.

Title records to reservation fee land are maintained by the applicable state and local agencies. Because it is not always clear from the BIA's land records and title document regulations, or other law, where the appropriate place of recording is located, out of an abundance of caution, parties occasionally record documents with the state or local place of recording, in addition to recording through the BIA.

Under the Indian Self-Determination and Education Assistance Act<sup>266</sup> and similar laws,<sup>267</sup> Indian tribes may contract with the BIA to take over certain BIA programs. Under this authority, several tribes have assumed responsibility for managing land title records on their reservations. Where this is so, access to land title records may be obtained through the applicable tribe or if that proves impractical through the BIA at its applicable agency or region office.

### VIII. FORM OF THE TRANSACTION

Sophisticated parties design business transactions, consistent with the business purpose and need of the transaction, to minimize government regulatory burdens and taxes. In so designing business transactions, parties evaluate options on how to organize the transaction, including the form of the transaction, to these ends.

The same can be done in contracts with Indian tribes. An entire paper, and more, could be written on the subject of the form of the transaction with an Indian

Development and Environmental Regulation in Indian Country, Rocky Mountain Mineral Law Foundation (1999).

<sup>266</sup> 25 U.S.C. § 450 (2012).

<sup>267</sup> *E.g.*, Tribal Self-Governance Act, 25 U.S.C. §§ 458aa - 458aaa-18 (2012).

tribe and its practical consequences for all parties (and some non-parties as well). To illustrate the point, listed below are comments on certain transactions forms which can have significant consequences for the parties (and, as noted, others as well). As is true in the general business world, due diligence should be conducted before selecting a particular form in assessing its benefits and risks compared to other alternatives.

- Lease versus Management Agreement – a state may impose a business activity tax on a tribe's lessee measured by sale of natural resources produced under the lease,<sup>268</sup> while the state could not impose a tax on a tribe's production and sale of the same natural resource with the assistance of a non-member under a management, service or operating agreement; a state's tax on compensation paid to a non-member for services under the management, service or operating agreement likely would be substantially less than a state business activity tax imposed on a non-member lessee.
- A state may tax the leasehold interest of a non-member lessee of tribal land but not the tribal land itself<sup>269</sup>
- A tribal lease requiring BIA approval cannot be approved until the BIA complies with applicable federal procedural environmental laws while a section 17 corporation may grant a lease without BIA approval
- Financing secured by leasehold mortgage of a lease granted under 25 U.S.C. § 415 versus financing secured by a letter of credit or otherwise not encumbering tribal land
- An encumbrance less than 7 years does not require BIA approval while an encumbrance of 7 years or more does and cannot be approved until the BIA complies with applicable federal procedural environmental laws

<sup>268</sup> Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). See also Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011) (2-1 decision in favor of state, despite Tribe's proof that state tax imposed a substantial economic burden on Tribe and of near zero on-reservation state services or interests other than revenue collection), *cert. denied*, 132 S. Ct. 1557 (2012).

<sup>269</sup> Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (same); Ute Mountain Indian Tribe v. Rodriguez, 660 F.3d 1777 (10th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1557 (2012); Fort Mohave Tribe v. San Bernardino County, 533 U.S. 1253 (9th Cir. 1976); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); Pimalco, Inc. v. Maricopa County, 937 P.2d 1198 (Ariz. App. 1997). *But* See Seminole Tribe of Florida v. Florida, Department of Revenue, 2014 WL 4388143 (S.D. Fla. 2014), relying in part on 25 C.F.R. § 162.017 (2012), to hold that Florida's rental tax on non-member tenants leasing property from the Seminole Tribe of Florida is preempted by federal law.

- Rights of way granted by BIA, with tribal consent, may restrict tribal authority more than a linear lease granted by a tribe with BIA approval

This is not to suggest that form can be elevated over substance, particularly when doing so would frustrate congressional policy. In *Utah v. Babbitt*<sup>270</sup> the Tenth Circuit held that an operating agreement between the Navajo Nation and Chuska Energy Company was subject to requirements of a 1933 act mandating that 37½% of net royalties accruing from production of oil and gas derived from “tribal leases” on the Aneth Extension of the Navajo Nation in Utah should be paid to the State of Utah, which was statutorily bound to use such “tribal lease” revenue “for the health, education, and general welfare” of Navajo Indians living in San Juan County, Utah.<sup>271</sup> Although the 1933 act, as amended, did not and no regulations implementing that act defined “tribal leases,” the court of appeals held that the agreement “bears many of the most significant characteristics of a typical lease.” Moreover, not applying the royalty sharing requirements of the 1933 act, as amended, to the agreement “would contravene Congress’ intent to provide aid to Navajos residing on the added lands . . . simply because such royalties were derived from an instrument basically similar to a tribal lease but bearing a different title.”<sup>272</sup> As a result, the court of appeals held the district court did not err in ordering the BIA to administer royalties under the Navajo-Chuska operating agreement and require payment to Utah consistent with the 1933 act.

Form of the agreement issues should be evaluated by and among relevant parties, some of whom may not be parties to the main transaction agreement (such as state tax authorities), as early as possible in the transaction process. Once parties commit to negotiation of a particular transaction form, internal approvals and investments of time and other resources, as well as changes in federal, tribal and state laws and governmental officials, may limit the ability or willingness of relevant parties to change direction.

<sup>270</sup> *Babbitt*, 53 F.3d 1145 (10th Cir. 1995).

<sup>271</sup> Act of March 1, 1933, 47 Stat. 1418, as amended, 82 Stat. 121 (1968). See *Pelt v. Utah*, 539 F.3d 1277 (10th Cir. 2008).

<sup>272</sup> *Roy Al Boat Mngt Corp.*, 57 F.3d at 1149-1150.

## IX. WATER RIGHTS

When a reservation is established, water rights sufficient for the purposes of the reservation are impliedly reserved.<sup>273</sup> Tribal water rights often are the most senior water rights in a stream or groundwater area.<sup>274</sup> As a result, tribal water rights would be among the last to be interrupted during periods of drought or shortage based on over-use of a water resource. These qualities can make tribal water rights quite valuable.

Tribal water rights are generally considered to be appurtenant to trust land. In consequence, transactions involving use of tribal water rights must be made with consideration for restraints on alienation of tribal land imposed by 25 U.S.C. § 177. That said, the most common way in which rights to use tribal water may be secured is through those agreements relating to use of tribal land enacted by Congress, such as 25 U.S.C. §§ 81, 477, and 415.<sup>275</sup>

The water rights of some tribes and reservations have been determined through general stream adjudications<sup>276</sup> or other litigation<sup>277</sup> and water right settlement agreements<sup>278</sup> or other legislation approved by Congress. Where this is

<sup>273</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>274</sup> *Arizona v. California*, 547 U.S. 150 (2006) (consolidated decree identifies priority based on dates certain Indian reservations were established and expanded); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (establishing priority of “time immemorial for certain aboriginal uses and as of the date the Klamath Reservation reserved by treaty for other uses).

<sup>275</sup> Section 415 provides that restricted tribal land may be leased for various purposes, “including development or utilization of natural resources in connection with operations under such leases.” Water is a classic natural resource. Regulations issued by the BIA in 2012 under 25 U.S.C. § 415(a) (2012) acknowledge that the right to use of water may be incorporated into a surface lease. 25 C.F.R. § 162.006(b)(2) (2012).

<sup>276</sup> *Department of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993) (Treaty rights, including but not limited to fishing rights).

<sup>277</sup> *U.S. ex rel. Lummi Nation v. Washington*, 2007 WL 4190400 (W.D. Wash. 2007), *aff’d*, 328 Fed. Appx. 462 (9th Cir. 2009).

<sup>278</sup> Congressionally approved settlement agreements include White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010); San Juan Navajo Water Rights Settlement, Omnibus Public Lands Management Act, Title X, Part IV, Omnibus Public Land Management Act of 2009, Pub. Law No. 111-11 123 Stat. 991 (2009); Gila River Indian Community Water Rights Settlement, Title II, Arizona Water Rights Settlement Act, Pub. Law. No. 108-451, 118 Stat. 3478 (2004). Other Indian water rights settlement agreements entered without congressional action include the Settlement Agreement Regarding Uses of Groundwater on the Lummi Peninsula, Order and Judgment, *United States and Lummi Nation v. State of Washington*, CV. 01-00147 (W.D.Wash. 2007), Moapa Paiute Water Settlement (2006) and the Warm Springs Reservation Water Rights Settlement Agreement (1997).

so, tribal water rights available for commitment to a particular transaction should be evaluated in light of rights secured by litigation or legislation, including legislation that may authorize tribes to lease water for off-reservation uses. Where tribal water rights have not been quantified by litigation, legislation or other agreements, the priority, nature and extent of tribal water rights available for commitment to a particular transaction should be carefully evaluated.

## X. TAXATION

Tax considerations play an important and sometimes determining role in significant business transactions. Those who do business with Indian tribes or Indians in Indian country may be subject to tribal taxes,<sup>279</sup> tribal political subdivision taxes,<sup>280</sup> some but not all state and local taxes,<sup>281</sup> and, of course,

<sup>279</sup> Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

<sup>280</sup> Quil Ceda Village (Tulalip Tribes) Municipal Tax Code, Resolution 02-0015; Navajo Nation Local Governance Act authorizes Navajo Chapters to adopt ordinances establishing local taxes, 26 NNC § 103(E)(8).

<sup>281</sup> States may not impose gross receipts or similar taxes on non-member sales to Indian tribes and tribal members on their respective reservations. Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) (based on the Indian Traders Act, 25 U.S.C. §§ 261 – 264 (2012), preemptively regulating non-member sales to Indian tribes and tribal members). States also may not enforce state taxes against non-members for on-reservation activities where a particularized inquiry into federal, tribal and state interests leads a court to determine in a case-specific context that the exercise of state law would violate federal law. Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 ((1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (preempting state fuel tax on entity harvesting tribal timber under comprehensive federal regulations, where vehicles consuming fuel never used state highways and state conceded its only interest was in raising revenue). In Ramah Navajo as in Bracker, the state taxing entity conceded that the state's only interests in the transactions at issue, taxation of a contractor building a school serving Navajo students, was state revenue collection.

Cases holding that specific state and local taxes on non-members are not preempted include: Wagon v. Prairie Band of Potawatomi Nation, 546 U.S. 95 (2005) (applying legal incidence of the tax test, finding the tax was on a non-member, and rejecting a preemption challenge to that tax due to the economic burden of state tax on the Nation, which relied on Bracker); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (rejecting Bracker as basis for preemption); Mashentuket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013); Ute Mountain Indian Tribe v. Rodriguez, 660 F.3d 1777 (10th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1557 (2012); Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008) (same); Yavapai-Prescott Indian Community v. Scott, 117 F.3d 117 (9th Cir. 1997) (same); Gila River Indian Community v. Waddell, 91 F.3d 1232 (9<sup>th</sup> Cir. 1996); Salt River – Pima Maricopa Indian Community v. Arizona, 50 F.3d 734 (9th Cir.). *cert. denied*, 516 U.S. 868 (1995); Fort Mohave Tribe v. San Bernardino County, 533 U.S. 1253 (9th Cir. 1976) (pre-Bracker), *cert. denied*, 430 U.S. 983 (1977); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) (pre-Bracker), *cert. denied*, 405 U.S. 933 (1972); Calpine Construction Finance Company v. Arizona

applicable federal taxes. Whether and to what extent these taxes or tax credits or abatements apply can vary significantly with the nature, form, and location (within or outside Indian country, state-to-state and from Indian reservation-to-Indian reservation) and specific parties involved in transactions with tribal entities and Indians.<sup>282</sup> Indian tribes like other sovereigns have the power both to impose taxes

Department of Revenue, 211 P.3d 1228 (Ariz. App. 2009) (holding a state may tax a non-member's interest in improvements it owned under a lease of tribal land); *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198 (Ariz. App. 1997).

In *Confederated Tribes of the Chehalis Indian Reservation v. Thurston County*, 724 F.3d 1153 (9th Cir. 2013), the Ninth Circuit held that a county tax on permanent improvements owned by a Delaware limited liability company of which the Chehalis Tribe was a 51 percent owner with the balance owned by a non-Indian entity could not be applied under a BIA-approved lease. The Ninth Circuit cited *United States v. Rickert*, 188 U.S. 432 (1903), which held that a county tax on permanent improvements on land owned by the United States in trust for Indian allottees was preempted by the same logic preempting a state tax on the land owned by the United States. The Ninth Circuit also relied on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). There the Supreme Court held that a state compensating use tax on permanent improvements to ski resort land held in trust by the United States for the Mescalero Apache Tribe or its section 17 corporation under a lease authorized by 25 U.S. § 465 (exempting land or interests in land from state taxes), where the Court observed that it was “unclear from the record whether the [Mescalero Apache] Tribe has actually incorporated itself as an Indian chartered corporation pursuant to” 25 U.S.C. § 477 (Section 17 of the IRA) as “the two entities have apparently merged in important respects.” 411 U.S. at 157 n. 13. Following the Ninth Circuit's decision, the Washington Department of Revenue issued Tax Advisory, *Taxation of Permanent Improvements on Tribal Trust Land*, No. PTA 1.1.2014 (March 31, 2014, stating that state and local governments may not tax permanent improvements on trust lands regardless of ownership of the improvements; noting the advisory does not address applicability of state and local excise taxes to activities or transactions occurring on trust land, including but not limited to the leasehold excise tax or taxes on possessory interests).

A regulation issued by the BIA that became effective in January 2012 states that “Subject only to applicable Federal law,” lessees of tribal and will not be liable for state and local taxes on activities conducted by the lessee in Indian country on the leasehold or for state and local taxes on the lessee's leasehold interest in trust property. 25 C.F.R. § 162.017 (2012). The “applicable Federal law” primarily relied upon in the preamble to the BIA's rule is *White Mountain Apache Tribe v. Bracker*, 77 Fed. Reg. §§ 72440, 72447 - 72449 (December 5, 2012). The practical economic effect of this rule in negotiations of lease terms dealing with cumulative burdens of tribal, state and local taxes on non-member lessees as well as legal actions that may be brought to challenge state and local taxes on non-member lessee of leases approved by the BIA under its new regulation, given the record of Bracker-based challenges, remains to be determined. See *Seminole Tribe of Florida v. Florida, Department of Revenue*, 2014 WL 4388143 (S.D. Fla. 2014), relying in part on 25 C.F.R. § 162.017 (2012), to hold that Florida's rental tax on non-member tenants leasing property from the Seminole Tribe of Florida is preempted by federal law.

<sup>282</sup> Federal tax provisions of interest to those engaged in business transactions on Indian reservations include the Accelerated Depreciation Investment Tax Credit, 26 U.S.C. § 168(j) (extended through December 31, 2013) and Credits for Employment of Indians on Indian



and grant credits, abatements, waivers,<sup>283</sup> and limitations on tribal and tribal political subdivision taxes. Several states afford limited tax abatements and credits for certain on-reservation business transactions.<sup>284</sup> Indian tribes and states also have entered tax compacts or agreements addressing tax burdens for certain business activities on Indian reservations. All parties involved in significant tribal transactions should assess the full range and cumulative possible tax burden on their transactions and evaluate options that may exist for sharing, limiting or allocating those tax burdens and risks in order to improve their respective contractual objectives.

### XI. EMPLOYMENT ISSUES

In general, private employers are subject to generally applicable federal employment and labor laws on Indian reservations.

In any significant contract with an Indian tribe for the use or development of reservation natural resources, a term or condition of the contract will likely require the non-tribal party to grant preferences in employment to Indians. Most Indian tribes also have enacted Tribal Employment Rights Ordinances (TEROs)<sup>285</sup> or similar laws<sup>286</sup> requiring employers on Indian reservations to grant preferences in employment to Indians. The Indian Self-Determination and Education Assistance Act<sup>287</sup> requires contracts and subcontracts let under the Act and any other act “authorizing Federal contracts with or grants to Indian organizations of for the benefit of Indians, shall require that to the greatest extent feasible – (1) preferences and opportunities for training and employment in connection with the administration of contracts or grants shall be given to Indians.”

reservations, 26 U.S.C. § 45A (extended through December 31, 2013). Whether and if so how these provisions will be extended depends congressional action.

<sup>283</sup> *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

<sup>284</sup> See California Rule 1616; RCW 82.29A.130(7) (establishing an exemption from Washington’s leasehold tax for lease of trust land for which rent is at least (90% of “fair market rental” as determined by Washington Department of Revenue) and WAC 458-20-192 (generally describing state and local taxes which apply or do not apply in Indian country in Washington); NRS 361.157(2)(e) (establishing an exemption from Nevada’s leasehold tax for lease of trust land); NMSA 7-9-88.1; Taxation Compact between the Southern Ute Indian Tribe, LaPlata County, and the State of Colorado, CRS 24-61.

<sup>285</sup> *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

<sup>286</sup> *E.g.*, Navajo Preference in Employment Act (NPEA), 15 NNC §§ 601-619 (2007).

<sup>287</sup> 25 U.S.C. § 450e(b) (2012).

Title VII of the 1964 Civil Rights Act prohibits employment discrimination by covered employers. Indian tribes are excluded from Title VII's definition of covered employers.<sup>288</sup> The specific provision describing unlawful employment practices by covered employers provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>289</sup>

Subsection (i) of the same section provides covered employers an exemption from liability for certain Indian preference practices. That subsection provides:

(i) Businesses or enterprises extending preferential treatment to Indians  
Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.<sup>290</sup>

Many TEROS or similar tribal laws require preferences in employment for members of the tribe enacting such laws, and in some cases non-member spouses, before preferences in employment are afforded to other Indians.<sup>291</sup> Many

<sup>288</sup> 42 U.S.C. § 2000e(b)(1) (2012).

<sup>289</sup> 42 U.S.C. § 2000e-2(a) (1964).

<sup>290</sup> 42 U.S.C. § 2000e-2(i) (1964).

<sup>291</sup> Where a tribal specific preference may be prohibited by an applicable federal law, some TEROs require preferences first for Indians who are local residents and second for other Indians. Tulalip Tribes TERO, Ordinance 60 and 89, §§ 4.1 and 4.2.

leases, some approved by the BIA, and contracts with Indian tribes and tribal entities include tribal member preference requirements.

A United States Equal Employment Opportunity Commission (EEOC) Policy Statement on Indian Preference Under Title VII provides that tribal member employment preferences are not the equivalent of Indian preference.<sup>292</sup> Relying in part on EEOC's policy statement, the Ninth Circuit held in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District* that a tribal members' specific employment preference is national origin discrimination under section 2000e-2(a) and not Indian preference under section 2000e-2(i).<sup>293</sup> Subsequent litigation in the Ninth Circuit held that where an employment preference is required under a tribal lease, tribal sovereign immunity bars a direct action by an aggrieved employee against the employer but that EEOC is not barred by a tribe's immunity from suing the employer and joining the tribe in order to ensure complete relief between the parties.<sup>294</sup> In still further litigation, the Ninth Circuit held that where a tribal member employment preference is included in a lease approved by the BIA, and where duties of the lessee run to and can be enforced by the Secretary of the Interior on behalf of the United States as owner of the fee, the Secretary of the Interior may be impleaded under Federal Rule of Civil Procedure 14 for injunctive relief, but not damages. The court remanded the case to the district court for consideration of arguments by the Secretary of the Interior on the legality of a tribal specific preference included in a lease approved by the Secretary.<sup>295</sup>

Drawing on the *Morton v. Mancari* holding that the BIA's granting of Indian preference in initial employment appointments and promotions pursuant to 25 U.S.C. § 472 is a political classification rather than racial classification,<sup>296</sup> the District Court held on remand that the Navajo employment preference implemented by Peabody under its BIA and Navajo Nation-approved leases is a political classification rather than national origin discrimination prohibited by Title VII.<sup>297</sup> In October 2014, the Ninth Circuit affirmed.<sup>298</sup> Recognizing that *Morton v.*

<sup>292</sup> EEOC, Policy Statement on Indian Preference Under Title VII (May 16, 1988).

<sup>293</sup> 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000).

<sup>294</sup> EEOC v. Peabody Western Coal Company, 400 F.3d 774 (9th Cir.), *cert. denied*, 546 U.S. 1150 (2006).

<sup>295</sup> EEOC v. Peabody Western Coal Company, 610 F.3d 1070 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 91 (2011).

<sup>296</sup> 417 U.S. 535 (1974).

<sup>297</sup> Equal Employment Opportunity Commission v. Peabody Western Coal Company, No. 01-1050 (D. Ariz. October 18, 2012).

*Mancari* addressed general Indian preference by the federal government authorized by federal law rather than tribal member specific employment preference by a private employer, the Ninth Circuit held that “*Mancari*’s logic applies with equal force where a classification addresses differential treatment between or among particular tribes or groups of Indians.”<sup>299</sup> The court added that Title VII, as a “general antidiscrimination statute,” should not be read as disapproving the Department of the Interior’s “longstanding and settled practice of approving tribal hiring preferences in mineral leases.”<sup>300</sup> In December 2012, the BIA issued a new regulation, 25 C.F.R. § 162.015, stating that a surface lease approved by the BIA under 25 U.S.C. § 415 may include a provision, consistent with tribal law, requiring a lessee to give a preference in employment to qualified tribal members.

The Ninth Circuit’s most recent decision did not overturn its earlier holding that a tribal-specific employment preference is actionable national origin discrimination under Title VII. Thus, a tribal membership employment preference granted by a covered employer outside an Indian reservation may be actionable under Title VII. In addition, federal government contractors should be aware that Office of Federal Contract Compliance Program regulations and Federal Acquisition Regulations provide that federal contractors extending Indian preference on or near an Indian reservation “shall not, however, discriminate among Indians on the basis of . . . tribal affiliation.”<sup>301</sup> Thus, employment issues continue to require careful attention.

## **XII. CORPORATIONS AND OTHER ENTITIES ESTABLISHED UNDER TRIBAL AND STATE LAW BUT NOT TRIBALLY OWNED**

Many Indian tribes have corporation codes allowing any person to incorporate a private business corporation, nonprofit business corporation, or limited liability company under tribal law.<sup>302</sup> An Indian tribe in the exercise of its governmental authority also may issue a corporate charter to one or more persons

<sup>298</sup> E.E.O.C. v. Peabody Western Coal Co., 768 F.3d 962 (9th Cir. 2014).

<sup>299</sup> *Id.* at 972.

<sup>300</sup> *Id.* at 971.

<sup>301</sup> 41 C.F.R. § 60.15(a)(7) (1975); 48 C.F.R. § 22.807(b)(4) (1983).

<sup>302</sup> See discussion of tribal entities in Section II above. *E.g.*, Colville Nonprofit Corporations Chapter, Title 7, Chapter 7-2, Colville Tribal [Business] Corporation Chapter, Title 7, Chapter 7-3, Colville Limited Liability Company Act, Title 7, Chapter 7-4.

or otherwise authorize incorporation of private business entities owned by individuals, tribal members or not, under tribal law.<sup>303</sup> These business entities are not Indian tribes or arms and instrumentalities of Indian tribes.

Any person, Indian or non-Indian, may incorporate or otherwise organize a business under state law to transact business in whole or in part on an Indian reservation. These business entities are not Indian tribes or arms and instrumentalities of Indian tribes.

### XIII. ALASKA NATIVE CORPORATIONS AND ALASKA INDIAN TRIBES

The Alaska Native Claims Settlement Act of 1971 (“ANCSA”)<sup>304</sup> directed the incorporation under Alaska law of Alaska Native regional and village corporations (ANCs) whose shares were issued to Alaska Natives.<sup>305</sup> ANCs are not Indian tribes. As Alaska law corporations, ANCs do not have sovereign immunity. With the exception of the Metlakatla Indian Reservation established by 25 U.S.C. § 495, ANCSA extinguished Indian reservations previously established in Alaska<sup>306</sup> and aboriginal Indian title in Alaska.<sup>307</sup> ANCSA authorized transfer of land to ANCs. Land transferred to ANCs under ANCSA is not “Indian country” and is subject to statutory restraints on leasing, sale, or transfer of tribal land held in trust and under federal supervision.<sup>308</sup>

ANCSA did not terminate the political relationship between Alaska Indian tribes and the United States. Pursuant to 25 U.S.C. § 479a-1, the BIA periodically publishes in the Federal Register a list of federally recognized Indian tribes. This list includes over 200 Alaska Indian tribes as federally recognized tribal governments.<sup>309</sup> Alaska Indian tribes are vested with tribal sovereign immunity.<sup>310</sup>

<sup>303</sup> King Mountain Tobacco Company, owned by Yakama Tribal Members Delbert Wheeler and Richard “Kip” Ramsey, was formed and licensed under the laws of the Yakama Indian Nation. *Phillip Morris USA, Inc. v. King Mt. Tobacco Company*, 569 F.3d 932, 935 (9th Cir. 2009). First American Petroleum, owned by Robert Ramsey, a member of the Confederated Tribes and Bands of the Yakama Nation, formed and licensed under the laws of the Yakama Nation. *Salton Sea Venture, Inc. v. Ramsey*, 2011 U.S. Dist. Lexis 120145 (S.D. Cal. 2011).

<sup>304</sup> 43 U.S.C. §§ 1601 – 1629h, as amended (2007).

<sup>305</sup> 43 U.S.C. §§ 1606 (regional ANCs) and 1607 (village ANCs) (2007).

<sup>306</sup> 43 U.S.C. § 1618(a) (2007).

<sup>307</sup> 43 U.S.C. § 1603 (2007).

<sup>308</sup> *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

<sup>309</sup> Department of the Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs*, 79 Fed. Reg. § 4748 (January 29, 2014).

#### XIV. CONCLUSION

Contracts by and with Indian tribes and tribal entities invoke a broad range of tribal, federal and state laws, regulations and policies. This is in addition to the usual business and legal considerations that drive contracting decisions, agreements, and actions by Indian tribes and others. The aphorism that knowledge is power has added meaning for all involved parties when it comes to understanding and applying applicable laws, regulations and policies governing business transactions by and with Indian tribes.

<sup>310</sup> McCreary v. Ivanof Bay Village, 265 P.3d 337 (Alaska 2011), *cert. denied*, 132 S. Ct. 1977 (2012).