Tribal Law

INDIAN LAW: PRINCIPLES AND PRACTICES

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PRINCIPLES

IN GENERAL

The Supreme Court once ruled that the laws of a state have no force within the territory of an Indian tribe. *Worcester v. Georgia*, 31 U.S. 515 (1832). Modern cases do not follow that ruling, using a more difficult to explain rule that state laws apply to Indian reservations unless doing so would impair a right granted or reserved by federal law or would infringe the rights of reservation Indians to make their own laws and be ruled by them. *Rice v. Rehner*, 463 U.S. 713 (1983). State laws apply to off-reservation activities unless Congress has expressly prohibited such taxes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). With regard to on-reservation application of state laws, the courts look to who is involved in an activity and the specific federal, state and tribal laws at issue.

Certain terms are ubiquitous in Indian law. An "Indian tribe" is an essential unit, but it is not uniformly defined by federal law. A tribe is not just an ethnic designation, and, indeed, a single tribe may contain more than one ethnic group. A tribe that has been recognized by the federal government as a distinct political entity is also a governmental unit. Some tribes are recognized, but have no land. Other tribes were officially terminated as governments during the 1950s and 1960s, but remain as ethnic and social groups. The process of recognizing tribes is described in federal regulations, not statutes, and is highly controversial. 25 C.F.R. Part 83.

Similarly, "Indian" is another term with various meanings and applications. A person must have some Indian blood and be regarded as an Indian by his community. A person may be an Indian for some purposes (federal health care), but not others (immunity from state jurisdiction) if the person is not a member of a recognized tribe. Indians who are not members of the governing tribe of the reservation have been held to stand on the same footing as non-Indians. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 162 (1980).

Determining what lands are subject to special federal responsibility and/or tribal control is also essential to most Indian law issues. Land purchased by individual tribal members in fee does not become Indian land for this purpose. Early federal law prohibited non-Indians from acquiring Indian land without federal permission. Trade and Intercourse Act, 1 Stat. 137 (1790). Violations of these laws are the root of the disputes over ownership of huge portions of the northeastern states. Reservations were established for tribes, but at one time federal policy was to divide the reservations between the tribal members and to sell the remaining lands to non-Indians. The result has been reservations that contain land held in trust by the federal government for the tribe and for individuals, alongside land owned by non-tribal members. Tribal and state authority may depend on who owns the land.

Tribal sovereignty is a concept that is often mentioned, but rarely defined. Much of the difficulties in Indian law arise from the overlapping and sometimes competing sovereignty of the federal, state and tribal governments. At its most basic level tribal sovereignty means that a tribe's governmental authority is not derived from the federal or state governments. Cities and counties are political subdivisions of a state, and derive their powers from the sovereignty of the state, but tribes are not political subdivisions of the federal government. *See Adams v. Comm'n on Appellate Court Appointments*, 254 P.3d 367 (Ariz. 2011). Beyond this, the scope and application of tribal authority is hard to establish. The Supreme Court has recognized this sovereignty, and one of its most visible attributes is that tribes have sovereign immunity from lawsuits, even for off-reservation activities. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The Supreme Court has held this immunity can be waived by an agreement to arbitrate a dispute. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).

CRIMINAL JURISDICTION

As mentioned above, early cases regarded Indian lands as separate and apart from state and even ordinary federal jurisdiction. History and practice have changed this. Now, general federal criminal statutes apply throughout the country, including to Indians within reservations. The federal courts are also given criminal jurisdiction over crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians by the General Crimes Act, 18 U.S.C. § 1152. Some state laws are incorporated into federal law by the Assimilative Crimes Act, 18 U.S.C. § 13, which fills gaps where federal criminal statutes are not comprehensive. If a non-Indian is subject to federal jurisdiction for crimes committed on a reservation, state courts do not have jurisdiction. *State v. Sorkhabi*, 202 Ariz. 450 (App. 2002). Major crimes by Indians against either other Indians or non-Indians are prosecuted in federal court under the Major Crimes Act, 18 U.S.C. § 1153. The act was enacted in reaction to a Supreme Court case holding the federal courts had no jurisdiction over the murder of an Indian by another Indian in Indian territory. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

Tribal courts have criminal jurisdiction over non-major crimes by Indians. The Supreme Court has held that tribal courts do not have criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Duro v. Reina*, 495 U.S. 676 (1990), the Court held that Indians who were not members of the governing tribe of the reservation where the crime occurred were not subject to tribal criminal jurisdiction. Congress sought to reverse this decision by affirming the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians. 25 U.S. C. § 1301(2). The Supreme Court has decided that "Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority" so a tribe's inherent authority now includes criminal authority over non-member Indians. *U.S. v. Lara*, 541 U.S. 193 (2004). This is important because tribes are generally not subject to the constitutional restrictions of the Bill of Rights, but an exercise of federal delegated authority would be. Also, double jeopardy does not normally bar separate federal and tribal prosecutions, *U.S. v. Wheeler*, 435 U.S. 313 (1978), but it would if the tribe were simply exercising delegated federal authority.

Recently, Congress reauthorized the Violence Against Women Act and included provisions authorizing tribes to prosecute non-Indian defendants involved in domestic violence against an Indian. Violence Against Women Reauthorization Act of 2013 (signed by the President March 7, 2013). Intended to fill a gap in law enforcement, the provisions will continue to require a detailed look at the identities of the parties and the nature of the offense.

State courts have criminal jurisdiction over crimes committed by a non-Indian against a non-Indian. *U.S. v. McBratney,* 104 U.S. 621 (1881). Victimless crimes by a non-Indian may also be prosecuted in state court. *State v. Burrola*, 157 Ariz. 181 (App. 1983).

The net effect of all this is that which government has jurisdiction depends upon the identity of the alleged perpetrator and the victim, the location of the crime, and the nature/severity of the offense. The positive part is that police and other law enforcement generally work together to catch the criminals and refer them to the right court. *See U.S. v. Patch*, 114 F.3d 131 (9th Cir. 1997). Some states have criminal (and civil) jurisdiction over Indians on reservations because in 1953 Congress gave certain states this authority in Public Law 280. Arizona was not one of those states, and it did not voluntarily assume such jurisdiction when it had the option to do so.

CIVIL JURISDICTION

State courts have no jurisdiction over claims by a non-Indian against an Indian when the claim arose in Indian country, because such an assertion of governmental power would infringe on the right of reservation Indians to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). Thus, any action against a tribal member must go to tribal court. Actions against a nonmember of the tribe will generally be in state court, rather than tribal, although all the issues in this area have not yet been worked out. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). Generally, a tribal member may sue a nonmember in state court even when the action originates on the reservation, because the exercise of jurisdiction over the defendant is the coercive part of the action, not the choice of forum by the plaintiff. *See State v. Zaman*, 190 Ariz. 208 (1997). *Zaman* is a significant case because it shows how the Arizona Supreme Court will examine issues of subject matter jurisdiction over cases involving non-Indians and the nature of interference with tribal sovereignty. Prior cases have recognized state jurisdiction over disputes between non-Indians, even when the subject is closely tied to Indian land. *Kuykendall v. Tim's Buick, Pontiac, GMC & Toyota*, 149 Ariz. 465 (App. 1985) (dispute over sublease of tribal land).

Similarly, a state process server has no authority to go onto a reservation to serve a summons and complaint on a tribal member. *Francisco v. State*, 113 Ariz. 427 (1976). A deputy sheriff may, however, serve a non-Indian even on a reservation. *State v. Zaman*, 194 Ariz. 442 (1999). The scope of state civil authority on reservations was made even more confusing by language in the Supreme Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001). The issue in that case involved tribal jurisdiction over state game inspectors carrying out official duties within the reservation. The Court held the tribal court did not have jurisdiction over tort claims against a state officer serving process on a reservation. The Court stated that the state's interest in execution

of process is considerable and does not impair the tribe's self-government. How this language will be applied and interpreted is unclear.

Nevada v. Hicks discussed in some detail the scope of tribal authority over non-Indians. Applying the principles set out in *Montana v. U.S.*, 450 U.S. 544 (1981), as discussed in *Strate*, the Court found tribal authority limited to what is necessary to preserve self-government, with exceptions for those who enter consensual relations with the tribe and authority necessary to protect the political integrity, the economic security, or the health or welfare of the tribe. In *Montana* this test was applied to non-Indian owned fee land. In *Strate* the property at issue was a state-highway right-of-way. *Hicks* is important because it did not involve fee land, but trust property. Applying these tests is difficult, and the lower courts are not entirely consistent. The current Supreme Court has generally applied its rules to limit tribal authority, but the exact boundaries are still unclear. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S 316 (2008)(holding bank had not consented to tribal court jurisdiction over discrimination claim regarding loan related to fee land); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001) (holding Navajo Nation lacked authority to impose tax on nonmember guests of hotel located on fee land within boundaries of reservation).

Domestic relations are subject to variations on these rules designed to give tribes jurisdiction over their internal affairs. Congress has added to the complexity through the Indian Child Welfare Act, which governs placement and adoption of Indian children. *See Valerie M.*, 219 Ariz. 331 (2009).

A major subject in recent years has been Indian water claims. In the future there are likely to be disputes involving tribal environmental regulation. Several federal statutes allow tribes to be treated as states for purposes of delegating primary responsibility for enforcement of clean water and air regulations.

TAXATION ON RESERVATIONS

In reviewing on-reservation taxes on tribal members, the Supreme Court has adopted a *per se* rule as to taxation of tribes and tribal members. Direct state taxes on tribes or tribal members are presumed to be invalid. *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *California v. Cabazon Band of Mission Indians*, 480 U.S. 1083 n.17 (1987). Exceptions are where Congress has authorized the tax, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), or where the tax is "narrowly tailored" to funding state services provided in connection with activities taking place on the reservation. *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992).

The courts have recognized that states have extensive jurisdiction over persons who are not members of any tribe. Non-Indians are generally taxable by a state even for on-reservation activities. In Indian law cases, however, the courts will look beyond the legal incidence of the tax, ie., even though the tax is legally imposed on a non-Indian it may still be barred if it is preempted by federal law or interferes with tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Supreme Court held the Arizona transaction privilege tax could not be applied to a sale by a

licensed Indian trader for sales to Indians, even though the legal incidence of the tax was on the non-Indian seller.

Sovereign immunity is an important issue in taxation because of the difficulties of enforcement. The Supreme Court has ruled that fee land owned by a tribe is subject to state property taxation, *City of Sherrill, NY v. Oneida Indian Nation*, 544 U.S. 197 (2005), but the Second Circuit recently ruled that the tax could not be enforced through the normal mechanism of foreclosure because the tribal owner had sovereign immunity. *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), vacated, 131 S.Ct. 704 (2011). The U.S. Supreme Court granted review, but remanded the case to the lower courts after the Nation voted to waive its sovereign immunity. The Second Circuit decision may be of questionable force in Arizona, but it highlights some of the difficulties of enforcing state tax laws against tribes.

The Supreme Court has emphasized that there is no rigid rule governing the determination concerning the validity of a state tax, but a court must make "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Supreme Court recently clarified that this particularized inquiry will not be required for taxes imposed outside reservations. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). While the economic effects of a state tax are one factor to be taken into account, the Supreme Court has noted that a state can impose a nondiscriminatory tax on private parties with whom a tribe does business, even though the financial burden of the tax may fall on the tribe. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 176 (1989); *see also Barona Band v. Yee*, 528 F.3d 1184 (9th Cir. 2008) (holding California could tax construction materials purchased by non-Indian contractor from non-Indian vendor and delivered for use in casino expansion on tribal land).

Tribes and states have been recognized as having concurrent taxing authority over non-Indian transactions. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 176 (1989); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

Property Taxes

Most tribal land is not subject to state property tax because it is technically owned by the federal government in trust for the tribe. A state cannot directly tax the federal government, so no tax may be imposed. Tribal land outside Indian country is subject to state taxes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (New Mexico use tax on personal property that a tribe had purchased and used to construct a ski lift off-reservation was taxable). Under federal law state taxation of tribal property within Indian country is allowed only when Congress has made its intention to allow taxation unmistakably clear. *County of Yakima v. Confederated Tribes*, 502 U.S. 251 (1992); *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). The prohibition on state taxation of Indian tribes has been described as a "per se" rule. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). There are exceptions, based on history and federal law. The Supreme Court has held that land purchased by a tribe within the boundaries of its former reservation continue to be taxable by a state because federal statutes removed any bar to state taxation. *City of Sherrill, NY v. Oneida Indian Nation*, 544 U.S. 197 (2005). This ruling

may not apply in Arizona, however, because the Arizona Constitution specifically bars taxation of land within Indian reservations owned or held by Indians. Ariz. Const., art. XX, par. 5. State constitution provisions have independent force and should be analyzed carefully.

Non-Indian property within reservations will generally be subject to tax. *Calpine Constr. Fin. Col. v. ADOR*, 221 Ariz. 244 (App. 2009) (power plant on tribal land owned by operators under the terms of the lease); *Pimalco, Inc. v. Maricopa County*, 188 Ariz. 550, 937 P.2d 1198 (App. 1997) (possessory interest tax on leasehold estate). At times, improvements may be owned separately from the underlying land, but it requires a detailed analysis of the lease documents to determine whether the lessor or lessee actually owns the improvements for tax purposes.

The Department of the Interior recently adopted a final regulation that purports to bar state taxes of property on leased Indian lands, as well as excise taxes on activities on those lands. 25 CFR § 162.017 (effective Jan. 4, 2013). This regulation is at odds with a number of court decisions that hold federal statutes do not preempt taxation of non-Indian property, so its validity is likely to be an issue in litigation. A federal district court in Florida relied on the new regulation to find state rental taxes were preempted, and the 11th Circuit recently affirmed. *Seminole Tribe of Florida v. Florida*, __ F.3d __, 2015 WL 5023891 (11th Cir. Aug. 26, 2015). The same court found a utility tax was valid, so the scope of the new regulations remains unclear.

A recent decision from the Ninth Circuit Court of Appeals also creates uncertainty about taxation of property on reservations. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153 (9th Cir. 2013). The dispute was over taxation of buildings and other improvements owned by a Delaware limited liability company on trust land leased from the tribe. The LLC was 51% owned by the tribe. The court held the property was exempt, not because LLC was mostly owned by the tribe, but because 25 U.S.C. § 465 exempted land and permanent improvements from state taxation "without regard to the ownership of the improvements." Whether this decision will be applied broadly or narrowly is an open question. .

Sales Taxes/Luxury Taxes

The Arizona transaction privilege tax is imposed on the seller of the taxed goods or services, not the buyer. If the seller is a tribal member the general rule applies that a state tax does not apply to an Indian on a reservation. It may be, however, that the a state or local use tax will apply to purchases by non-Indians from a tribal member if the property will be stored, used or consumed in the state.

Tobacco Products. It has been recognized that a state may shift the legal incidence of a tax to the buyer, so the tax may be applicable even though the seller is an Indian or Indian tribe. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). These cases upheld the imposition of collection and recordkeeping requirements on the Indian sellers. The Supreme Court has also held that a state may impose collection and recordkeeping requirements on a wholesaler who sells to Indian retailers who in turn sell to non-Indians. *Department of Taxation and Finance v. Milhelm Attea*, 512 U.S. 61 (1994).

Retail Sales. Even if the seller is a non-Indian or non-tribal member, an on-reservation sale of goods to a tribe or tribal member is not subject to state tax. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). This is true even if the seller is not a federally licensed Indian trader, and does not have a place of business on the reservation, so long as the essential elements of the transaction take place on the reservation. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *compare Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division*, 759 P.2d 186 (N.M. 1988)(gross receipts tax valid on law firm for legal services performed off the reservation on behalf of Indian tribes).

Services performed for a tribe or tribal member on a reservation are not taxable. *Ramah Navajo School Bd. v. New Mexico*, 458 U.S. 832 (1982). The New Mexico Supreme Court has held that federal preemption based on the federal Indian trader statutes and regulations extends to trade in services as well as goods. *N.M. Tax. & Rev. Dept. v. Laguna Industries, Inc.*, 855 P.2d 127 (N.M. 1993).

Retail sales between non-members will generally be taxable, particularly if the goods sold are imported from outside the reservation. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995).

Salt River involved the state tax on retail sales, amusements, restaurants and commercial leasing at a mall on the reservation, the Scottsdale Pavilions. The tribe was not the landlord of the project, but collected tax revenue, and argued the imposition of the state tax prevented it from increasing its own tax since competition would not permit the on-reservation retailers to bear a higher tax than that imposed off-reservation. The federal courts rejected this claim, holding that Arizona may tax the non-Indian businesses at the Pavilions.

The rule is not so clear when a tribe is actively involved in providing the goods or services, or the product transferred is value generated on the reservation. *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992)(*Gila River I*). *Gila River I* involved the state tax on concerts and races taking place at Firebird Lake and Compton Terrace, just south of Phoenix on the reservation. The tribe sued to enjoin the tax, and the district court dismissed its complaint. The Court of Appeals reversed, holding the tribe should be permitted to prove the broad allegations made in its complaint that it was directly involved in providing the service and the tax had direct and severe impacts on it. On remand, the district court upheld the state tax, and this judgment was affirmed by the Ninth Circuit. *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996)(*Gila River II*).

In *Gila River II* the court held that a state tax on entertainment events on a reservation was neither preempted by federal law nor an interference with tribal self-government. The sellers of the service were non-Indians leasing tribally owned facilities, and the buyers were non-Indians residing off-reservation. The court held federal regulation of reservation leases is "insufficient to preempt a state tax imposed on non-Indians for transactions with other non-Indians." The court also distinguished cases barring states from regulating tribal bingo, because those situations included active involvement by the tribe, tribal employment and total tribal dependence on the revenue, none of which were present in the non-Indian/non-Indian transactions in *Gila River II*. The court

also noted that the state tax would have very little, if any, effect on the tribe because the entire amount is passed on to the non-Indian ticket purchaser.

Prime Contracting. Contracting will generally be subject to state tax if the contractor is a non-member and the property owner, the buyer of the services, is not a tribal member. The balancing of interests may lead to a different result if the property constructed will be owned by a tribe or tribal member, or if there are significant federal interests expressed through funding or statute. The Arizona Court of Appeals has held that a non-Indian contractor was taxable on its work for public schools located on the Navajo Reservation, even though most of the students were Navajos and a significant portion of the schools funds were provided through federal impact aid. *Arizona Department of Revenue v. M. Greenberg Constr*., 182 Ariz. 397, 897 P.2d 699 (App. 1995). The school districts were state political subdivisions, and state financial support exceeded that provided by the federal government. The Court distinguished *Ramah* by noting that Arizona had not abandoned these schools and provided significant financial support.

The United States Supreme Court has ruled that Arizona may tax a contractor on its proceeds from road construction contracts for the Bureau of Indian Affairs, holding the state tax was not preempted by federal law. *Arizona Dep't of Revenue v. Blaze Construction Co., Inc.*, 526 U.S. 32 (1999). Resolving a conflict between the Arizona and New Mexico courts, the Supreme Court ruled that a state has the authority to tax federal contractors unless Congress expressly acts to prohibit the tax. No balancing of interests will be done if the purchaser of the goods or services is the federal government.

Transient Lodging. The Ninth Circuit Court of Appeals has rejected claims that a non-Indian company operating a hotel on tribal land is not subject to the state tax on its room rental and restaurant receipts from its non-Indian customers. Prescott Convention Center, Inc. (PCC) leased land near Prescott from the Yavapai-Prescott Indian Tribe and built the hotel. The tribe receives a base rent, a percentage of the gross receipts, and, as compensation for a loan of federal grant monies, will receive a percentage of the net cash flow at some point in the future. The lease also provides that if the leasehold interest is ever sold, the tribe will receive a percentage of the proceeds. PCC argued the tax was on the tribe and the state had no interests in the hotel apart from taxing it.

The Yavapai-Prescott Indian Tribe brought an action in federal district court against the State and PCC seeking to enjoin the enforcement or payment of the tax. In an unpublished order, the district court ruled for the tribe. The Ninth Circuit reversed. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998). The court rejected the argument that the State could not tax the on-reservation activities unless the taxes were "narrowly tailored" to funding services to the activities taking place on the reservation. The court stated that "[i]t is evident that once a requirement of proportion between state services and state tax is not the criterion, the requirement of narrow tailoring is elusive and its appropriateness remains dependent on the strength of the tribal and federal interest found to exist."

Severance Taxes. The fact that the taxed item is a product of the reservation, such as timber, coal or oil, has been given great weight by the courts, yet even here the precedents are not totally consistent. Fuel taxes on a contractor doing logging for a tribe have been struck down

because of the tribe's interests in obtaining the full benefit of its timber resources. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Ninth Circuit has ruled in several cases that taxes which burden a product of the reservation will only be upheld if narrowly tailored to the provision of services to the reservation activities. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), however, the Supreme Court upheld a state tax on oil production, rejecting the argument that federal statutes governing leasing of tribal oil and gas interests preempted the tax. These statutes were that same ones the Court previously relied upon to strike down mineral taxes of other states. The Court distinguished its previous rulings by noting that the tax at issue was not extraordinarily high, the state was involved in regulating the oil and gas activities, and the state provided services to the non-Indian lessees and the tribe itself. In a more recent decision the Supreme Court has stated severance taxes have been struck down when they were "extraordinarily high," not simply because a state lacked the power to impose any tax on the mining activity. *Montana v. Crow Tribe*, 523 U.S. 696 (1998).

The Ninth Circuit has refused to apply the "narrowly tailored" requirement to strike down transactions between non-Indians, finding that federal and tribal interests are weak with regard to the non-Indian transactions and that there is no requirement that a tax imposed on non-Indians for reservation activities be proportional to the services provided by the state. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995).

Tribal Taxes

Indian tribes have the authority to levy taxes. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). A tribe may, however, waive this power if it does so in sufficiently clear contractual terms. *Arizona Public Service v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995).

It is now clear that tribes will have difficulty taxing activities located on fee land within a reservation. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001). The Court held that *Montana's* general rule that tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation applies to tribal taxes. The Court rejected the contention that *Merrion* established a rule for taxation more generous that in other civil regulatory contexts, holding that an "Indian tribe's sovereign power to tax - whatever its derivation - reaches no further than tribal land." The Court went on to find that neither of *Montana's* exceptions to the general rule against the existence of inherent tribal authority with respect to nonmember conduct on nontribal lands applied to a nonmember operated hotel serving nontribal members. With respect to the first, consent, exception, the Court held that the consensual relationship must stem from commercial dealings, contracts, leases, or other arrangements, and merely receiving tribal services is not enough. With respect to the second exception, that jurisdiction is necessary to protect tribal self-government or control internal relations, the Court found that there can be no assertion of civil authority beyond tribal lands unless the drain of the nonmember=s conduct upon tribal services is

so severe that it actually imperils the political integrity of the tribe. The Court's reasoning significantly restricts tribal ability to tax activities by nonmembers on nontribal land. *See also Nevada v. Hicks*, 533 U.S. 353 (2001) (ownership of land is only one factor to consider in determining tribal authority).

PRACTICES

For entrepreneurs and bankers economic development is a matter of dollars and cents, with business decisions driven by practical evaluations of costs and rates of return. For lawyers, economic development often becomes a question of jurisdiction – what law will apply and which government has regulatory and licensing jurisdiction. Economic development on Indian reservations and other Indian lands presents difficulties and opportunities because of the special legal issues associated with tribal sovereignty, expansive federal authority, and the limited nature of state powers and obligations. Recognizing these difficulties and addressing them upfront makes it possible to safely pursue the opportunities presented in reservation development. Ignoring them invites future problems.

TRIBAL INSTITUTIONS:

The tribes that have had the most success in developing reservation economies have built legal and political institutions that promote positive and sustainable projects and businesses. Research has shown that effective governing institutions that establish "rules of the game" encourage successful developments. Cornell & Kalt, Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't (2006) (http://www.jopna.net/pubs/jopna_2005-02_Approaches.pdf). Effective institutions are stable, separate politics from business management, provide fair courts, and provide efficient and reliable bureaucracies. *Id*. States and countries seeking to promote economic development pursue the same goals.

SOVEREIGN IMMUNITY:

The Supreme Court has recognized that tribes have sovereignty. One of sovereignty's most visible attributes is that tribes have sovereign immunity from lawsuits, even for off-reservation activities. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The Supreme Court has held this immunity can be waived by an agreement to arbitrate a dispute. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *see generally* Irvine, P., Tribal Sovereign Immunity and Economic Development, *Arizona Attorney*¸ Vol. 29, No. 11, p. 17 (July 1993). A recent Arizona decision, however, highlights the importance of ensuring a waiver of sovereign immunity is actually executed by someone authorized to do so. *MM&A Productions, LLC v. Yavapai-Apache Nation*, 234 Ariz. 60, 316 P.3d 1248 (App. 2014), *rev. denied; pet. for cert. filed* 10/9/2014.

The importance of sovereign immunity as a consideration in economic development planning cannot be overstated. As discussed below, sovereign immunity may become an issue in

almost any kind of commercial dealing. If dispute resolution becomes necessary, and it will, an inability to sue one of the parties to a deal may prove to be an insurmountable barrier to solving problems. Consideration of sovereign immunity, including whether waivers are necessary, and possible, must be done before the deal goes bad. No tribe is likely to waive sovereign immunity at the request of someone who already plans to sue it.

LAND USE:

It is essential to determine how property is owned within a reservation, because the nature of the ownership interest and the identity of the owner(s) often controls jurisdiction. Trust land is property held in trust by the federal government, often for a tribe but sometimes in the form of an "allotment" held for an individual Indian who may or may not be a member of the tribe. Land may also be owned in fee by the tribe, tribal members, or non-members. Fee land may be subject to tribal jurisdiction, but recent decisions by the Supreme Court have limited tribal jurisdiction over fee land owned by non-tribal members.

Because most reservation land is held in trust, the role of the U.S. Department of the Interior must be considered. Federal law allows leases of trust land with the approval of the Secretary. 25 U.S.C. § 415(a). Federal approval, however, does not mean the federal government is a party to the leases or will protect the interests of the lessees. *See Hollywood Mobile Estates Ltd. v. Seminole Tribe*, 641 F.3d 1259 (11th Cir. 2011) (holding a lessee lacked standing to sue the Secretary of the Interior to force compliance with a lease because federal law and regulations protect Indian landowners, not nontribal lessees). Lessees must therefore consider the tribe or allottees as the other party or parties to the lease and build appropriate dispute mechanisms into the lease. For leases with tribes, this means careful consideration of sovereign immunity.

Federal approval is also important because waivers of sovereign immunity are often included in the leases, not as separate documents. If federal approval is not obtained, both the lease and the waiver are invalid. Several recent court decisions have dismissed lawsuits against tribes because the waivers of sovereign immunity were included in unapproved leases.

Federal involvement may also trigger the application of federal environmental laws, such as the National Environmental Policy Act, the National Historic Preservation Act, and the Endangered Species Act. There are also several federal statutes that may apply to specific economic development plans. For example, the Energy Policy Act of 2005 (25 U.S.C. § 3504), provides for Tribal Energy Resource Agreements giving tribes authority to review, approve, and manage leases, business agreements, and rights of way for energy development on tribal lands without the approval of the Secretary.

GAMING:

Gaming has been one of the most active sources of economic development in Indian country during the last thirty years. Although many tribes have benefitted from gaming, many have not. Location has been an essential element of success, with many remote reservations receiving few benefits.

The key law applicable to gaming is the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701 et seq., which provided a basic framework for federal, state and tribal regulation. In Arizona, gaming compacts first took effect in 1993. The revised compacts that are now in effect were negotiated in 2001. Voters approved the current compacts at the 2002 general election. Under the compacts tribes may operate casinos with certain limits, and are obligated to contribute a percentage of their gaming revenue each year to the State, cites, towns and counties.

Contracts involving gaming have sometimes led to litigation, which has in turn led to numerous cases where sovereign immunity is raised as a defense. IGRA requires approval of certain contracts related to gaming, such as casino management contracts. 25 U.S.C. § 2711. Consequently, litigation involving waivers of sovereign immunity contained in a contract has sometimes centered on whether the contract required approval and whether approval was obtained.

A major issue in several states is where casinos may be located, particularly whether tribes can acquire land outside their regular reservation and open a casino. In each case, the issues involve not only the general laws governing taking land into trust and allowance of gaming, but unique statutes applicable to a particular tribe. Generalizations about the law or results is therefore difficult.

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