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Tribal Economic Development: Nuts & Bolts

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TRIBAL ECONOMIC DEVELOPMENT: NUTS & BOLTS

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I. Introduction – The Need for Tribal Government Revenue

Tribal economic development is a product of the need for Indian tribes to generate revenue in order to pay for the provision of governmental services. Unlike the federal government or states, Indian tribes – in general – have no viable tax base from which to generate revenues sufficient to provide for tribal constituents. *See Pueblo of Santa Ana v. Hodel*, 1315 n. 21 (D. D.C. 1987) ("the Indians have no viable tax base and a weak economic infrastructure. Therefore, they, even more than the states, need to develop creative ways to generate revenue."); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 169 (2004) ("But few tribes have any significant tax base."); Milo Colton, *Self-Determination and the American Indian: A Case Study*, 4 SCHOLAR 1, 35 n.270 (2001) ("In order to be successful, tribal governments must generate revenue through the development of businesses because they are prevented from establishing a stable tax base."); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes only have a limited revenue base over which to spread any losses.") (citing *Atkinson v. Haldane*, 569 P.2d 151, 169 (Alaska 1977)); Janet I. Tu, *Economic Focus: As Casinos Struggle, Tribes Look to Other Industries*, WALL ST. J., Oct. 28, 1998, at 1 ("'Tribes don't have the funding base that other governments do,' says Jennifer

* Much of the material presented in this short paper is lifted or derived from my articles *The Supreme Court and Federal Indian Policy*, 85 NEBRASKA LAW REVIEW 121 (2006); *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 NORTH DAKOTA LAW REVIEW 759 (2004); and *Bringing Balance to Indian Gaming*, 44 HARVARD JOURNAL ON LEGISLATION __ (forthcoming 2006-2007), *draft available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895900. I also have lifted substantial portions of John Petoskey's article *Doing Business with Michigan Indian Tribes*, 76 MICHIGAN BAR JOURNAL 440 (1997). My thanks to him for these materials.

Scott, assistant director of Washington State's Governor's Office of Indian Affairs.").

Many tribes use gaming revenues to pay for governmental services, but Indian casinos are not strictly "for profit" ventures like a publicly or privately held corporation. The values and benefits of Indian businesses go far beyond mere payments to stockholders or even per capita distributions:

- "The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-219 (1987).
- "By providing exclusive rights to engage in class III gaming, California gives Indian tribes valuable tools to promote the general welfare of their members. Class III gaming helps generate jobs and revenues to support the governmental services and programs of the tribes that enter into compacts. Further, California's regulatory scheme benefits nongaming tribes because they receive distributions from the funds that the State requires gaming tribes to allocate to the Indian Gaming Revenue Sharing Trust." *Artichoke Joe's Grand California Casino v. Norton*, 353 F.3d 712, 741 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).
- "In fiscal year 2001, Turtle Creek provided approximately 89% of the Band's gaming revenue. The casino now employs approximately 500 persons, approximately half of whom are tribal members. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy." *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. of Michigan*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004).
- "Congress recognized that for many tribes, gaming income 'often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.'" *Chemehuevi Indian*

Tribe v. Wilson, 987 F. Supp. 804, 808 n. 4 (N.D. Cal. 1997) (quoting S. Rep. No. 100-446, at 2-3 (1988)).

- "[The] tribe obtains substantial revenue from Class III gaming, enabling it to expand the provision of governmental services to its members and to provide funds for operation and renovation of the school. The terms of the compact create a legitimate claim of entitlement and an expectation that plaintiffs will be permitted to continue generating revenue from Class III gaming." Forest County Potawatomi Community of Wisconsin v. Doyle, 828 F. Supp. 1401, 1408 (W.D. Wis. 1993), *aff'd*, 45 F.3d 1079 (7th Cir. 1995).
- "The revenues produced by tribal businesses fund services as diverse as utilities, including water, sewer, telecommunications and energy; health care; natural resource management; elders programs; social services; tribal court systems; law enforcement; tribal schools; and adult education. Some fear that tribal commercial activities such as gaming result in large windfalls for a few tribal members. However, the reality is that gaming is not a cash cow for most tribes, and federal law imposes restrictions on gaming revenues to ensure that the funds are used for governmental services." Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 716 (2004) (footnotes omitted).
- "Tribes establish tribal businesses in order to generate revenue that is needed for performing essential governmental functions. This is consistent with the federal policy of promoting tribal self-determination and economic self-sufficiency. Although tribal businesses such as casinos are often characterized as "for profit" and therefore presumed to be commercial enterprises, a majority of the profits are used to financially support tribal governments and fund governmental activities." Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291, 1315-16.
- "The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal service. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." Mark. J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 392 (2004).
- "Gaming revenues have allowed some tribes to establish or improve their own fully certified police departments; many of them are able to offer specialties such as bomb and drug-sniffing dogs and extra personnel, which are often loaned out too non-Indian police forces in the region. Many casino areas, especially those in rural regions, have higher ratios of law

enforcement to civilians than other parts of the state." *See* Renee Ann Cramer, *Perceptions of the Process: Indian Gaming as if Affects Federal Tribal Acknowledgment Law and Practices*, 27 L. & POL'Y 578, 596-97 (2005) (citations omitted).

- "More importantly, Indian gaming brings steady revenue to tribal governments. Indian gaming is not regarded as a commercial activity. Unlike commercial activities, IGRA requires that all revenues from gaming operations be reinvested in the tribal community to further economic development. For example, the Sycuan tribe in East San Diego County, California, has used gaming proceeds to invest in nongaming economic activities that will further long-term self-sufficiency. The projects that were funded by gaming include, among other things, a day-care center, ambulance service, library, fire department, and automotive shop. In 1992, all seven of the federally recognized Michigan tribes had funded similar services. Thus, as a result of gaming, Indian tribes have been better able to achieve the self-sufficiency necessary to become self-governing and sovereign peoples." Jason D. Kolkema, Comment, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361, 365, 367-68 (1996).
- "Typically, tribes have used the profits from gaming to build schools, construct roads, finance scholarships, and make other community investments. a handful of cases, formerly poor tribes have become wealthy practically overnight. The Sycuan Band of Mission Indians in California grossed an estimated $120 million from its casino in 1992. It has used the casino's profits to fund police and fire services and to build a day care center and library. The Mashantucket Pequot tribe in Connecticut has used casino gambling to rescue itself from near extinction." Mark Neath, Comment, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 692 (1995) (footnotes omitted).

II. Federal Support for Tribal Economic Development

Congressional policy is also strongly in favor of tribal economic development. Congress is fully aware that few Indian tribes have a sufficient tax revenue base to fund a necessary array of governmental functions. In the enactment of the Indian Reorganization Act in 1934 (IRA), Congress and the President stated that one of the key purposes of that act was to encourage tribal economic development. An Indian tribe with business operations sufficient to pay for its own administration, social services, education, health care, housing, etc.,

reduces tribal member dependence on the federal, state, and local safety net. Section 17 of the IRA allowed Indian tribes to form economic development corporations under federal law.

Congress enacted numerous pieces of legislation since the 1970s to encourage tribal economic development and ease tax burdens on Indian tribes. In each piece of legislation, Congress made findings of fact and strong statements of support for tribal economic development. For Congress, the long-term solution to tribal dependence on federal programs lies in reservations with economic strength. Congress's recent commitment to encouraging tribal economic development has been unwavering.

Congress's first piece of legislation designed to bolster tribal economic development in the self-determination era was the Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (*codified at* 25 U.S.C. §§ 1451-1544 (2000)). Section 1 of the Act provides:

> It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

The House Report accompanying the Act made clear that Congress's intent was to promote tribal economies through the development of individual and tribal capital structures. The House Report elaborated by noting, "On every reservation today, there is almost a total lack of an economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be provided or facilitated." In short, tribal economic development, according to Congress, is critical to tribal self-sufficiency.

In 1982, Congress enacted the Indian Tribal Government Tax Status Act, Pub. L. No. 97-473, 96 Stat. 2607 (*codified in part at* 26 U.S.C. § 7871 (2000)), further cementing its support for tribal economic development efforts. In this Act, Congress extended many (but not all) of the tax advantages enjoyed by state and local governments to Indian tribal governments. Congress intended the Act to "create the development environment necessary for true economic and social self-sufficiency."

In perhaps the strongest and most explicit statement in favor of tribal economic development, Congress codified and validated Indian gaming operations in the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (*codified at* 25 U.S.C. §§ 2701-2721 (2000)). Congress made an explicit statement of federal Indian policy strongly favoring tribal economic development by stating that IGRA is intended "to provide a statutory basis for the operation of

gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."

In short, explicit congressional statements of federal Indian policy, as well as legislative history related to Indian affairs legislation, strongly support the tribal economic development activities of Indian tribes. This is critical given that the only textual support within the Constitution for congressional authority is the Indian Commerce Clause.

III. Tribal Business Organizations

Indian tribes (and individual Indians) engage in business activities using several different legal entities. "Four models of economic organization have emerged in Indian country: federally controlled or sponsored activity, tribally owned enterprises, individual or family-owned enterprises, and nonmember enterprises." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.01 (Nell Jessup Newton et al. eds. 2005). This part describes the different kinds of tribal business organizations or entities.

A. Indian Tribe as Business Operator

Indian tribes organized as Section 16 governments or through their own inherent sovereign authority can operate businesses like any other entity or person. Regardless of a tribe's model (or lack thereof), economic development has been and will remain a mainstay of Indian policy. Prior to gaming, tribes tried many other kinds of businesses. The purpose of establishing these businesses was to develop "their own commercial ventures as a way of escaping the squalor and hardship to which many have become inured since the white man began his massive westward migration…." Michael Winerip, *Jump-Starting Capitalism*, N.Y. TIMES, Aug. 7, 1994, § 4A, at 25. Private investors rarely come to the reservation. For tribes in resource-poor, arid regions, particularly in the west, economic development is extraordinarily difficult. Many tribal businesses fail. The San Carlos Apache Tribe, for example, saw cosmetics, tourism, and timber concerns fail in the early 1980s. The Confederated Salish and Kootenai Tribes of the Flathead Reservation saw its hot-springs resort and modular housing businesses fail over time. Before gaming, the Mashantucket Pequot Nation "tried various enterprises on the reservation—a swine farm, maple syrup production, sale of firewood. All failed." Micah Morrison, *Casino Royale: The Foxwoods Story*, WALL ST. J., Aug. 21, 2001, at A18.

The Mescalero Apache tribe started a telecommunications business, ski resort, elk-hunting grounds, a lumber company, and a resort with a golf course, some of them prior to the expansion of gaming. That tribe believed that the development of an industrial infrastructure would "'attract investment in the same way an emerging market needs to lure foreign capital.'" Simon Romero, *Tribe*

Seeking Phone System As Step to Web, N.Y. TIMES, Oct. 2, 2000, at A1. As then-Chairman of the Federal Communication Commission William E. Kennard noted, "'[when] a tribal government establishes its own telephone company, it is creating an economic development nucleus.'" *Id*. The Winnebago Tribe in Nebraska has been enormously successful in its non-gaming business enterprises, operated under Ho-Chunk Enterprises, Inc. (HCI). HCI's "portfolio has grown to include part-ownership of a bank and its new used-car dealership, 'Rez-Cars.'" John J. Fialka, *Tribe Finds Ways to Create Jobs*, WALL ST. J., Feb. 18, 2004, at A4. The Fort Mojave Indians have invested in power plants with gaming revenues. "The Fort Mojave plant, perched on a sand dune on the 33,000-acre reservation, brings in $4 million a year from Calpine Corp., a San Jose, California-based energy firm. That's as much as the two casinos combined." David L. Greene, *Power Plants Sprout on Indian Reservations; Tax Breaks Abound; Approval is Routine*, BALT. SUN, Mar. 3, 2002, at 1A. The Muckleshoot Tribe near Seattle "is building an office park across from its casino and has plans for a music amphitheater and a 24-hour fast food restaurant to feed hungry gamblers." Danny Westneat & Jim Simon, *Success of Tribal Casinos Raises Taxing Question: Indian Leaders Claim Government Has No Right to a Share of Profits*, STAR-LEDGER (NEWARK, N.J.), Nov. 23, 1995, available at 1995 WL 11799673.

In operating businesses, Indian tribes must choose between several directions: whether to use the business as a revenue generator to pay for tribal government services; whether to use the business as a job creation mechanism for tribal members; simply whether to seek profit for its members in the same way a corporation or partnership seeks profit for its partners or shareholders; or a combination of any of the above. *See* Frank Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN. L. REV. 195 (1984). Rarely do tribes exist merely to make money. However, some tribes may form businesses that intend to maximize profit, money that is then returned to the tribal government or to tribal members through a per capita payment. *E.g.*, Grand Traverse Band of Ottawa & Chippewa Indians Revenue Allocation Ordinance, 18 GRAND TRAVERSE BAND CODE ch. 16, *available at* http://doc.narf.org/nill/Codes/gtcode/travcode18bgaming.htm. Some tribes do a little of both: profit maximizing and job creation. The gaming enterprises of the Hoopa Valley Tribe, for example, are modest and mostly serve as a job-creation program for tribal members. *See* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land Indian Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, (2002-2003) (noting that the Hoopa Valley Tribe's gaming consists of "tiny card rooms and bingo halls"). Unfortunately, most tribes are not in the position to market a very profitable enterprise and resort to operating businesses merely as a public employment project.

B. Indian Tribe as Business Owner

Indian tribes can form separate entities – often corporations or other closely held partnerships – that can own businesses as well. The advantages of separating tribal business interests from the tribal government include safeguarding tribal government assets from business losses and keeping tribal business decisions insulated from tribal politics. This section details a few legal options for tribes in this vein.

1. Section 17 Corporation

The 1934 Indian Reorganization Act (also known as the Wheeler-Howard Act or the IRA) authorized IRA Indian tribes to petition the Bureau of Indian Affairs for a federally chartered corporation known as a Section 17 corporation. *See* IRA § 17, *codified at* 25 U.S.C. § 477. Section 17 provides:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

According to one commentator:

> A tribe that has established a Section 17 corporation may have transferred to that entity some or all of the responsibilities of carrying out tribal business activities. Many Section 17 corporations exist, but most have been inactive since creation. This is the result of the use, in the early years after passage of the IRA, of standard-form corporate charters promulgated by the Bureau of Indian Affairs (BIA) that were quite restrictive in what a Section 17 corporation could do and quite expansive in the oversight and approval powers granted to the Secretary of the Interior. The restrictive nature of the BIA-generated charters is not required by the statute, and some tribes have adopted new charters for their Section 17 corporations that are designed to make those entities useful tools for tribal business activity.
>
> Much as a state-chartered corporation's articles of incorporation and bylaws spell out the corporation's authorized

> purposes and its method of acting, a Section 17 charter spells out the authorized purposes of the Section 17 corporation--its ability to borrow money, to encumber its assets, to sue, be sued and to waive its sovereign immunity—and how autonomous it is from tribal governmental control. When dealing with a Section 17 corporation, it is essential to review the charter provisions and any bylaws of the corporation, to determine any limits on the corporation's powers to act, who can act for the corporation, the extent to which corporate action must be approved either by tribal government or the Secretary of the Interior, the extent to which assets of the corporation can be used as collateral to secure corporate obligations, whether the corporation enjoys sovereign immunity and the ability of the corporation to waive sovereign immunity.

Rion Ramirez, *Doing Business in Indian Country*, ADVOCATE (IDAHO STATE BAR JOURNAL), Oct. 2003, at 23.

2. Tribally-Chartered Corporation

Indian tribal governments can enact their own corporations code that parallels or even deviates from state corporation laws. And in accordance with their own code, tribes can form a corporation that is owned by either the tribes itself or a Section 17 corporation. The Chitimacha Tribe of Louisiana has adopted their own tribal corporations code[1] as has the Winnebago Tribe of Nebraska.[2] The proposed corporations code of the Confederated Tribes of Siletz Indians provides a list of advantages to incorporating under tribal law:[3]

> The benefits to the Tribe of having a Corporations Code are:
>
> - The Tribe exercises its regulatory authority over businesses that affect the Tribe, tribal members and/or tribal lands;
> - The Tribe itself can incorporate tribal businesses under the Code;
> - The ability to incorporate under Tribal law may attract increased business and job opportunities; and
> - The Tribe will be in a better position to issue licenses and/or levy taxes on businesses incorporated under tribal law.
>
> For tribal members, they may benefit from:
>
> - The ability to incorporate their businesses under tribal law,
> - The ability to take advantage of the corporate form – for example, the potential for a "perpetual" life and a shield from personal liabilities for business debts and suits….

[1] http://www.narf.org/nill/Codes/chitimachacode/chitimcodet9gov.htm.
[2] http://www.narf.org/nill/Codes/winnebagocode/winncode11.htm.
[3] http://ctsi.nsn.us/Corp_Code_Home/Corp%20Code%20Faq.pdf#search=%22tribal%20corporation%20code%22.

- Increased opportunity for new businesses, including acting as Registered Agents for businesses without offices in the 11 County Service area.

3. State-Chartered Corporation

Indian tribes or their Section 17 Corporations also may charter a corporation under state law. According to some commentators, a state-chartered corporation must follow state law and may not have sovereign immunity. *See* Heidi McNeil Staudenmeier & Matchi Palaniappan, *The Intersection of Corporate American and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 598 (2005) (citing *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery*, 818 N.E.2d 1040, 1049-50 (Mass. 2004); *Airvator v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983)).

C. Individual Indians as Business Owners in Indian Country

According to the Cohen Handbook, "[o]ne of the fastest growing sectors in the economic is the private native-owned business sector. Some of these enterprises have found a niche fulfilling local needs; others rely heavily on exports." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at § 21.01.

D. Nonmembers as Business Owners in Indian Country

According to the Cohen Handbook, "[a]nother growing area in the private sector is nonmember enterprises. … Indian nations have adopted a range of strategies, from encouraging the development of individual businesses to providing for nonmember management of tribal resources, or entering into joint ventures and partnerships. … To attract outside investors to the reservation, tribes provide many of the same incentives that states do—tax breaks, reduced labor costs, and regulatory relief." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, at § 21.01.

IV. Relevant Federal Indian Law Principles

No survey of tribal business activities is complete without a quick rundown on relevant federal Indian law principles.

A. Sovereign Immunity

The best short summary of tribal summary comes from John Petoskey's classic 1997 article:

SOVEREIGN IMMUNITY'S BASIC RULE: LIKE IT OR NOT SOVEREIGN IMMUNITY FOR INDIAN TRIBES IS STRONG!

Without congressional authorization for suit against them, the Indian nations are exempt from suit. *Santa Clara Pueblo v Martinez*, 436 US 49 at 58 (1978), quoting *US v United States Fidelity & Guaranty Co*, 309 US 506, 512 (1940), *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 (1991). The sovereign can consent to suit or waive its immunity, but such a waiver must be "unequivocally expressed." Limited waivers are also recognized, but then the extent of the waiver is not settled. COHEN HANDBOOK OF FEDERAL INDIAN LAW, Ch. 6 Sec. A4C (1982 ed). Tribes also can institute suits while maintaining immunity from cross-claims and counterclaims. 28 USC 1362, *US v United States Fidelity & Guaranty Co*, 390 US 506 (1940).

A waiver or sovereign immunity, or lack thereof, should be viewed in two distinct contexts. The focus of this article is on doing business with an Indian tribe, which generally means the parties structuring their relationship in the form of an expressed contract or an implied contract. Under such an arrangement the tribe may elect to waive its sovereign immunity by the terms of the contract, consistent with the tribe's organic documents.

The U.S. Supreme Court has held that immunity may be waived by an Act of Congress. *Santa Clara*, *supra*. The statute defining civil rights detention, 28 USC 1343, provides specific jurisdiction and waiver for federal actions under Santa Clara. Although the Supreme Court has not expressly addressed whether tribes have the authority to waive their sovereign immunity, lower federal courts have held that tribes have such authority. *United States v Oregon*, 657 F2d 1009 (9th Cir 1981); *Namekagon Development Co v Bois Forte Reservation Housing Authority*, 395 F Supp 23 (D Minn 1974), *aff'd* 517 F2d 508 (8th Cir 1975); *Merrion v Jicarilla Apache Tribe*, 617 F2d 537 (10th Cir 1980), *aff'd* 455 US 130 (1982); *Weeks Construction Inc v Oglala Sioux Housing Authority*, 797 F2d 668 (8th Cir 1986).

Tribal officials are immune if acting in their official capacity. *Hardin v White Mountain Apache Tribe*, 779 F2d 476, 478 (9th Cir 1985); *Tenneco Oil Company v Sac & Fox Tribe of Indians*, 725 F2d 572, 574 (10th Cir 1984); *Romanella v Hayward, et al.*, 23 ILR 3323 (1996). Tribal officials are amenable to suit, however, if the subject of the suit is not related to the official's performance of official duties. *Puyallup Tribe, Inc v Department of Game*, 433 US 164 (1977), *Oklahoma v Potawatomi*, 498 US 505, 111 S Ct 905 (1991) (dicta), and *Department of Taxation & Finance of New York v Milhelm Attea & Brothers*, 114 S Ct 2028, 2031 (1994), indicates

Supreme Court dissatisfaction with the immunity of tribal officers. Also see, "*Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*," Joranko, 26 ARIZ ST L J 987 (1994).

Two federal circuit courts have held that the doctrine of tribal sovereign immunity extends to tribal commercial activities conducted beyond the reservation borders. *Sac & Fox Nation v Hanson*, 47 F3d 1061, 1064-65, *cert den* 116 S Ct 57 (1995); *In Re Greene*, 980 F2d 590, 598 (9th Cir 1992), *cert den* 510 US 1039 (1994).

Subordinate entities created by the tribe for economic purposes also may be immune. So-called Section 17 and tribally chartered corporations are generally immune if their charters or by-laws do not waive immunity. By contrast, corporations chartered under state law owned by Indian tribes are not immune, and also are subject to federal income taxation. See IRS Rev Rul 94-16, 1994-1(C)(B) 19, issued March 1994.

John F. Petoskey, *Doing Business with Michigan Indian tribes*, 76 MICH. B. J. 440, 442 (1997).

Shortly after the previous article was released, the United States Supreme Court validated the major points of the article in *Kiowa Tribe of Oklahoma v. Manufacturing Industries, Inc.*, 523 U.S. 751 (1998).

B. Employment – Application of Federal Law

A major source of litigation relating to tribal business activities relates to whether federal employment statutes will apply to tribal businesses. Some federal statutes, such as Title VII of the Civil Rights Act of 1964 and the Americans Against Disabilities Act, exclude Indian tribes from the statute. Most other federal employment statutes, such as the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Occupational Health and Safety Act, and the National Labor Relations Act, are silent as to whether the statute will apply to Indian tribes and their businesses. *See generally* William J. Buffalo, & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291; Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

Currently, the federal Court of the Appeals for the District of Columbia, the second most important federal court behind the Supreme Court, is deliberating over whether the National Labor Relations Act will apply to the San Manuel Indian Bingo and Casino. *See San Manuel Indian Bingo and Casino v. National*

Labor Relations Board, Nos. 05-1392 & 05-1432 (D.C Cir.), *appeal from San Manuel Indian Bingo and Casino*, 341 NLRB No. 138 (May 28, 2004); D.C. Circuit Briefs available at http://www.narf.org/sct/caseindexes/current/sanmanuel-dccir.htm. This case is significant for future determinations of whether federal statutes will apply to tribal businesses. Professor Wenona Singel's study of the application of federal employment laws to tribal business activities – particularly in the context of the *San Manuel* litigation – also is critical. *See* Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

C. Employment – Tribal and Indian Preferences

Tribal business activities often provide more opportunities than mere tribal governmental revenue. Many tribes operate businesses for little or no profit, but they continue to operate these businesses because they employ many tribal members. Critical to this important opportunity for Indian tribes is Indian preference in employment and, for some tribes, tribal preference in employment. "Indian preference" is an affirmative action program mandated by Indian tribes that requires employers in Indian Country to hire qualified Indians. These laws typically apply to the tribe, its businesses, and even nonmember owned businesses in Indian Country. "Tribal preference" is an affirmative action program where businesses in Indian Country must give preference in employment to a qualified tribal member Indian over all other qualified Indians. *E.g.*, *Equal Opportunity Employment Commission v. Peabody Western Coal Co.*, 2006 WL 2816603 (D. Ariz., Sept. 30, 2006) (applying the Navajo Nation's tribal preference provisions as against a Hopi Indian).

V. Barriers to Tribal Economic Development that Can & Must Be Overcome

A. Structural Discrimination against Tribal Governments in Financing

Indian tribes are still hamstrung by the lack of financing available to stimulate the reservation economy. The first tax-exempt municipal bond offering by an Indian tribe in accordance with the Tax Status Act was announced in 1985. More and more tax-exempt financings followed, albeit slowly. Lenders forced tribes to pledge their limited gaming revenues and anticipated government funds and still could not participate in the tax-exempt financing projects. To advance the spread of tribal financings, some of the more wealthy tribes formed the Native American National Bank in 2000. The founders of the Bank suggested that commercial banks "'are a little fearful of giving Indians loans.'" Paul Zielbauer, *Tribes Agree to Underwrite Proposal for Nation's Largest Indian Bank*, N.Y. TIMES, Aug. 26, 2000, at B1. By 1995, the Mohegan Tribe had become the first Indian tribe to raise money on Wall Street by partly financing the deal with an

institutional placing on capital markets. By the first years of the new century, large banks began to lend to Indian tribes flush with casino revenue. Despite these advances, even by the turn of the century, many tribal governments still were forced to rely on "high-yield bankers" and "junkbond financing." Dena Aubin, *Native Americans Face Hurdles for Financing*, WALL ST. J., June 26, 2000, at A43. "Relying on a single source of funding—as profitable as it may be—[tribes] rarely meet criteria for investment-grade ratings." *Id*.

Tribal governments are "treated differently from local governments under federal tax and securities laws. . . ." *Id*. The legal presumption regarding tribal financing is that it is taxable unless the tribe shows that the funded project is for some "essential government function." State and local governments do not have to make the same showing. Also, the Securities Act of 1933 "requires tribes but not state or local governments . . . to register public offerings." *Id*. According to the Wall Street Journal, "[b]ecause registering bonds would be prohibitively expensive, most tribal financing has come from bank loans or privately placed bonds, which are exempt from the [S]ecurities [A]ct." *Id*.; *see also* Dennis Walters, *Standard & Poor's Announces Its First Public Rating on Indian Bond Issue*, BOND BUYER, Apr. 30, 1993, available at 1993 WL 7137018 ("Unlike state and local government bonds, tribal bonds are not exempt from registration with the Securities and Exchange Commission. As a result, most tribal bonds are either privately placed or secured with a letter of credit to avoid the often time-consuming and expensive nature of the registration process."). In addition to statutory and regulatory barriers, the Supreme Court has followed the prodding of state governments and sharply limited the ability of Indian tribes to exploit their tax advantages for business purposes.

Another major hurdle tribes must face is capital flight. "Because most tribal communities do not have a comprehensive economic structure, tribal dollars are spent mainly in non-Indian communities where they support the tax base of these neighboring local governments." Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources, 105th Cong. (1998) (statement of Kevin Gover, Assistant Sec'y of Indian Affairs, United States Dept. of Interior), available at 1998 WL 12761658. In Navajo, for example, members "receive paychecks and Government assistance totaling $1 billion a year, and spend an estimated $800 million of it outside the reservation." Keith Bradsher, *In Navajos' Towns, A New Tactic to Fill A Void in Banking*, N.Y. TIMES, Nov. 25, 1994, at A1.

B. Common Law Limits on the Ability to "Market the Exemption"

"As tribes become more of an economic presence in a state, they are competing with the state in many respects, and the state wants to see how far it can extend its regulatory jurisdiction on the reservation." Robert A. Hamilton, *Connecticut Q&A: Patrice Kunesh; Defining How a Tribe Governs Its Land*, N.Y.

TIMES, June 11, 1995, § 13CN, at 3. The most common argument behind extending the reach of state taxes or regulations is to "level the playing field." States routinely object to tax-free tribal sales of cigarettes to non-Indians, known as "tax arbitrage" or, in federal Indian law, as "marketing the exemption." Amity Shlaes, *Cigarette Tax Adds Fuel to an Old Fire*, FINANCIAL TIMES (LONDON), Oct. 17, 2002, at 22. In 2002, the conservative Financial Times implicitly compared Indian tribes to New York City gangsters, although the paper conceded that cigarette smokers strongly support Indian tribes who provide them with cheaper product.

The Supreme Court first explicitly decided that tribes could not "market the exemption" in *Washington v. Confederated Tribes and Bands of the Colville Indian Reservation*, 447 U.S. 134 (1980). The Court held that,

> What these smokeshops offer the customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere. [447 U.S. at 155.]

The Court repeated this doctrine in later cases.

However, tribes may "market the exemption" if they can prove that they have added value to a product from the reservation, or, in other words, created "reservation-based value." As the Wall Street Journal described a California regulation defining reservation-based value, "Indian retailers will be exempt from sales tax if they make a 'substantial contribution' to the product, or if the product has a 'substantial connection' to the retailer through financing, manufacturing or marketing." Editorial, *Casino Royale Politics*, WALL ST. J., May 30, 2002, at A14. The Squaxin Island Tribe recently began to market their own brand of cigarettes in order to take advantage of this doctrine.

C. Backlash against Tribal Business, Particularly Gaming

"When the status quo of the last 100 years is disrupted, someone's ox gets gored." Barry Siegel, *Tribes Seek to Govern Non-Members; Indians' New Powers Bring Gains, Conflicts*, L.A. TIMES, May 27, 1986, available at 1986 WL 2197630.

There is a long history of non-Indians complaining vigorously about the so-called tax exemptions that many Indian tribes, individual Indians, and Indian-owned businesses enjoy. As one commentator noted, "Indians are a good whipping boy because they don't pay taxes or get regulated." Ken Geppfert, *Gambling Advocates See Payoff in Cherokee Casino*, WALL ST. J., July 12, 1995, at 1. Business papers like the Wall Street Journal devote a great deal of space to local governments who, often unrealistically or unreasonably, fear they will lose sales and property tax revenue. Congressional leaders often claim the sky is falling when it comes to Indian tax exemptions, sometimes even accusing tribes that market the exemption of being criminal tax evaders:

> Any business can reduce its prices dramatically if they simply ignore the laws on how they and competitors must operate. It is wrong to let law-breakers profit, while those who follow the law are driven out of business because they cannot compete against law-breakers. Omitting taxes from the price enables anyone to undercut competitors dramatically. The steep discount price is a powerful lure attracting customers from nearby non-tribal businesses (and even from great distances). Thus, the tribes can sell gasoline without charging the typical $.20- .30 per gallon state fuel tax or the $.40-.60 per pack cigarette tax. They even flaunt this by advertising to general public that they don't collect taxes . . . . The first problem is that this drives legitimate, tax-paying competition out of business for miles around. The second problem is that it destroys the tax base that states and cities use to finance roads, schools, parks, housing, public health and safety etc. [Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources, 105th Cong. (1998), (statement of Rep. Ernest J. Istook, Jr.,), available at 1998 WL 12761802.]

Some states, such as Idaho, have proposed taxes on reservation sales in order to try to abate state budget problems. Tribes argue that such taxes would reduce reservation sales, which also hurt the state imposing the taxes. Some tribal leaders suspect that state governments, accountable to large special interests such as convenience store and tobacco lobbies, are basically paid to try and shut down tribal smokeshops. Fortunately, there are some states, like Washington, that do not see a problem, as long as the tribe manufactures its own smokes.

D. Political Limitations of Indian Tribes to Engage in Economic Development

Professor Robert A. Williams, Jr. adequately summed up the "tangible and intangible barriers" to tribal economic growth in 1985: "[territorial] remoteness, an inadequate public infrastructure base, capital access barriers and ownership patterns, and an underskilled labor and managerial sector combine with

paternalistic attitudes of federal policymakers to stifle Indian Country development and investment." Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribe Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 335-36 (1985).

Indian tribes did not develop as ready-made economic growth machines, ready to dominate in business. In fact, most Indian tribes are forced to import the values and expertise required to make a profit. Still, business experts routinely predict that Indian tribal businesses will fall flat because of the tribes' relative inexperience in concepts such as marketing. As the Financial Times argued, "general lack of business skills within the tribes, combined with still-powerful mistrust of outsiders, could slow expansion [of gaming in California]." Even where Indian tribes retain their traditional business practices, the paper predicted that the tribes' traditional values will "inevitabl[y]" be "displaced by public relations, marketing and conventional business methodology…." The Wall Street Journal asserted in 2001 that Indian tribes "are unschooled in the ways of high finance and distrust anything involving Wall Street." Ianthe Jeanne Dugan, *Gold Rush: A Former Actress Links Worlds of Wall Street and the Reservation*, WALL ST. J., Sept. 6, 2001, at A1.

The concept of Indian tribes in the nation's political discourse as businesses arose only within the past few decades. By some defenders of tribal rights, economic development on Indian reservations amounted to merely corporate exploitation, making only a few individual Indians wealthy. As recently as 1983, the venerable New York Times printed a letter asserting that tribal governments are merely "administrative authorities imposed by the Government and managed by the Bureau of Indian Affairs." William A. Means, Letter to the Editor, *The Government's Bad Deal for U.S. Indians*, N.Y. TIMES, Feb. 6, 1983, § 4, at 16. The letter argued that the 1982 Tribal Tax Status Act would not bring Indians back from poverty and asserted, "it is clear that, far from being concerned with the social problems of the Indians, the [Reagan] Administration seeks only to facilitate corporate opportunities for the exploitation of resources on Indian lands." The letter noted the example of the Anaconda Corporation, which "exhausted the resources" on the Laguna Pueblo and then ceased operation of the Jackpile Mine.

Tribes have come a long way from the days where non-Indian-owned corporations, with the consent, assent, and collusion of federal agencies, bureaucrats, and appointed officials, would routinely exploit the natural resources of Indian reservations. Though the Navajo Nation recently lost a claim for $600 million plus interest against the federal government for cheating it out of royalties it should have earned from Peabody Coal, the Nation's claim against the coal company for the same amount is progressing nicely in federal courts. Other tribes, such as the Southern Utes, have taken control of their natural resources and are using them for their own, significant benefit.

However, there are dangers to Indian tribes forced to operate businesses in order to raise revenue to fund and operate governmental services. The 1983 New York Times letter raised some of these issues in its crude manner, noting that "the majority of Indian people have expressed time and time again their unwillingness to exploit their economic resources for profit…." Moreover, the letter added, "Indians who benefit economically from this exploitation are being coerced into the abandonment of their traditional view of the relationship between human society and nature as one of cooperative support…."

The Times later suggested that only non-Indian "critics of the tribal governments argue that elected chairmen and councils are creatures of white interests in need of legally binding signatures of trade agreements and leases." Iver Peterson, *Should Majorities Rule Reservation?,* N.Y. TIMES, Sept. 29, 1985, § 4, at 4. Though these words sound in obvious paternalism and (unintentional) condescension, the editors had a point, to a degree. There are tribes, the Hoopa Valley Tribe for example, that will virtually run out of natural resources to sell to the dominant society. While it is unrealistic to assume that the tribes in this situation will expire, as the New York Times seemed to assert in the early 1980s, these issues must be addressed by any tribe with finite natural resources. Tribal members on the outside looking in on tribal business projects may oppose the projects because they feel the tribal government is not providing adequate information to the membership or for other political reasons. Many Oklahoma Seminoles opposed a tribal project to open a bingo hall in Florida because they said "the project [wa]s moving too fast and without enough details." Pat Beall, *Exiled Seminoles Meet Resistance to Bingo Plan*, WALL ST. J., Aug. 7, 1996, at F1.

The tribes that have most fit into the non-Indian style of business, by taking control of the businesses away from the tribal government, have been given kudos from the business newspapers as successful. The Wall Street Journal wrote up the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) as an example of this mode of thinking. The Journal asserted that "tribal politicians still get in the way too often, micromanaging their way down to who gets hired, who gets fired and what color the walls should be painted." Dan Morse, *Tribal Pursuit: The Salish-Kootenai Tribe Has Succeeded Where Others Have Failed; Its Secret; Think Business, Not Bureaucracy*, WALL ST. J., Mar. 27, 2002, at 16. According to the Journal, CSKT fit the bill for outside businesses:

> "I thought we were going to get into a situation where there was a lot of bureaucracy," admits John Willis, an Air Force executive who brought S&K Technologies in with only a one-year contract at first. But "right off the bat we saw the bureaucracy was not there, and they could make quick decisions," Mr. Willis says. One likely reason the company is so efficient: the tribal politicians

> stay out of it. "I've never met any of the tribal council or any of that stuff," Mr. Willis says.

The Journal added that CSKT started the business and made itself the owner and sole shareholder, but appointed non-tribal council members to sit on the company's board of directors, a development the Journal praised. In this circumstance, the managers of the tribal company complimented the arrangement as being less "hierarchical" than other businesses, coupled with more "urgency" and "teamwork." In the event the tribal politicians attempt to regain more control over the business, the Journal reported that the tribe's attorneys step in and talk them out of it:

> Tribal council members—particularly those new to office—occasionally make plays to gain more control. "It does ebb and flow," says Mr. [Greg] DuMontier. "But their own tribal attorneys are quick to step in." The lawyers' argument: staying out of day-to-day operations maintains a liability wall between the tribe's private ventures and the deep pockets of its land holdings. "At that point," Mr. DuMontier says, "the tribal council's thinking becomes, 'Oh yeah, OK, we better retreat.'"

Another tribal business that has succeeded, especially in the eyes of the Wall Street Journal, is the Winnebago Tribe in Nebraska, which operates Ho-Chunk Industries, Inc. Business managers chose to seek "profit first" and then focus on a jobs creation strategy. John J. Fialka, *Tribe Finds Ways to Create Jobs*, WALL ST. J., Feb. 18, 2004, at A4. Prior to the rise of HCI, "the tribe often agonized before making business moves and focused on creating jobs for tribe members[,] . . . including . . . day long meetings" to make business decisions. Once the politicians were pushed out the way, the money began to flow.

Economists claiming special expertise in tribal politics like Terry Anderson pounce on any financially successful tribe that has concomitant political problems. For these experts, "[t]ribal council meetings become a vehicle for political patronage." Terry L. Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A10. The Journal recently published a story on the Southern Ute tribe in Colorado, treating the story like an exposé rather than mere coverage. The article summarized the fabulous successes of the tribe by noting that "[t]he tribe's business plans and newfound wealth have led to environmental controversies, racial tensions, even a murder. And many Southern Utes are uneasy and resentful about how the tribe's wealth is distributed, a topic that inspires shouting matches at tribal meetings and requests for order of protection." Ianthe Jeanne Dugan, *Gold Rush: A Former Actress Links Worlds of Wall Street and the Reservation*, WALL ST. J., Sept. 6, 2001, at A1. Reporting that the tribe's business decisions are generally made by "white executives, who dominate the tribe's top business posts," the article emphasized the complaints of tribal members who view themselves as out of the loop, quoting one member as asserting that "tribal leaders

and white executives are gaining too much power, creating a 'nouveau riche banana republic."' Again asserting that tribes are socialists, the paper quoted one of the tribe's business managers as alleging, "I'm a capitalist working for a bunch of socialists."

When a tribe begins to see economic success, its members quickly demand accountability, a democratic institution not seen in today's business climate (nor, it appears, in today's democracy), and readily criticized by the business experts. In the case of the Southern Utes, the Journal characterized this form of political pressure as paranoia: "[S]ince big business moves were made without the input of tribal members, they began to suspect they weren't getting their fair share of the profits." Such reportage evidences the focus of business papers on the limitations of tribal governments qua business because of their status as tribal governments qua governments. This emphasis is beside the point.

In addition to criticizing any tribe that allows its tribal government to control the tribal businesses, the business papers assume that tribal courts are inherently political and biased. The Wall Street Journal reported the point of view of non-Indian business interests sued in tribal court: "[companies] say the tribal-court experience is like litigating in a foreign country. Tribes generally have no established business law, and cases can turn on unwritten custom and tradition." Non-Indian litigants in tribal courts (usually with weak cases) sometimes refuse to even try tribal court, labeling them "kangaroo courts." James Bandler, *Tribe Gets Bigger Shield Against Suits*, WALL ST. J., Mar. 22, 2000, at 1 (discussing *Bassett v. Mashantucket Pequot*, 204 F.3d 343 (2d Cir. 2000)). In the case of CSKT, the Wall Street Journal praised the tribe for instituting reforms that made the tribal court "less-political." However, "Indian courts generally have light dockets and provide relatively swift justice."

Finally, economic development strategies are bound to affect tribal culture, though there is no agreement on how traditional culture will suffer or survive in these circumstances. Unlike non-Indian businesses, where corporate structure intends to keep politics out of the equation, tribal governments are directly accountable to their constituents. Tribal governments' democracy is far more advanced and effective than American democracy (and corporate democracy, which is an oxymoron). One of the positive side effects of economic development revenues is that tribes have begun to think about restructuring themselves in a more culturally compatible way.

E. Threat of Physical Violence to Stop Tribal Businesses

State governments have a method of backing up their authority that tribes may never have, certainly not in the foreseeable future. States have the authority to sanction violence against Indians and tribal business. Recent history strongly suggests that states will use this force against Indians and tribes—even on their own land. If a state official believes enough in his or her legal position, he or she

may literally call on attack dogs to force the law down tribes' throats. In the words of Professor Robert N. Clinton, the Supreme Court's recent history of voting down tribal government rights to regulate and tax non-Indians has "'creat[ed] a climate which gives state officials the belief that they could do what they did, which is not a healthy development.'" Michael Corkery, *Indians Say it May Be Fighting Time Again*, PROVIDENCE J. (R.I.), Aug. 25, 2003, at A1.