DEVELOPING A MULTI-USE GAMING PROJECT ON NATIVE AMERICAN LAND

DEVELOPING PROJECTS IN INDIAN COUNTRY: UNIQUE ISSUES

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Introduction

The enactment in 1989 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., has resulted in substantial income for a number of Indian tribes throughout the Nation. Much of that income is being funneled into economic development and housing in Indian country.[1] As early as 2000, Wall Street saw several tax exempt bond issues for tribal projects.[2]

Notwithstanding the enthusiasm for developing tribal economies, doing business in Indian country is unique and sometimes is not easy or quick. Challenges to structuring and completing transactions with tribes include a lack of capital and source of repayment of debt, and a myriad of federal laws governing tribal activities. Even so, Indian country offers unique opportunities for broad economic development in concert with tribes that are committed to creating jobs on reservations and to creating a sound economic base for their people.

Doing business in Indian country involves a number of unique issues.

Investors, developers and lenders[3] for projects in Indian country should be familiar with federal law related to Indian tribes[4] and tribal law and custom.[5] Additionally, if the transaction involves a casino, counsel must be familiar with the Indian Gaming Regulatory Act ("**IGRA**")[6] and the IGRA regulations[7]. Failing to be familiar with the

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[1] Broadly speaking, Indian country is all land under the supervision of the United States government that has been set aside permanently for the use of Indians. It includes all Indian reservations and other areas under federal jurisdiction and designated for Indian use. Additionally it includes lands held by the United States in trust for tribes and lands owned by tribes subject to federal restrictions against alienation. See 18 U.S.C. § 1151; 25 U.S.C. § 81.

[2] Examples include the Quinault Nation in Washington: $25MM to finance construction of a beach-front casino and resort; Mashantucket Pequot Tribe of Connecticut: $20MM; White Mountain Apache Tribe in Arizona: $25 MM for housing. For additional information see "At a Crossroads: Indian Country Meets Wall Street and Vice Versa," 16 American Indian Report, June 2000, at 12.

[3] For ease of reference, investors, developers and lenders are referred to collectively in this paper as "investors."

[4] As used in this paper, "tribe" refers to federally recognized tribes. A list of federally recognized tribes is published periodically in the Federal Register. The most recent list is at 68 Fed.Reg. 68180 (Dec. 5, 2003).

[5] Of course, the law and custom varies from tribe to tribe, and can be very complex. Moreover, many tribes place a premium on privacy with respect to their customs and, in some cases, governance. The successful investor needs to balance the need for information and respect for different cultures.

[6] Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et. seq.

entirety of this body of law invites disaster. In reality, few people are familiar with federal Indian law or tribal law, governments and dispute resolution systems. Similarly, few people appreciate that there are approximately 570 federally recognized tribes, each of which enjoys limited sovereign status and each of which has a unique culture, language, laws, mores and traditions.

Federal Indian law gives rise to a number of issues to be addressed when entering into a transaction with a federally recognized tribe or tribal entity, a tribally controlled business enterprise, or an Indian-owned reservation-based business enterprise. They include (i) the organization of the tribe; (ii) the organization of the business; (iii) whether the project is located on restricted or trust land; (iv) limitations on the tribe's power to contract; (v) sovereign immunity; (vi) jurisdiction; (vii) remedies; (viii) governing substantive law; and (ix) required federal approvals. Additionally, if the loan is related to a gaming facility, IGRA and the IGRA regulations must be considered, together with the tribal-state compact and tribal ordinance adopted pursuant thereto.

Investors may hesitate to do business in Indian country for at least two reasons.

First, trust and understanding between the investor and the tribe are critical to the relationship. The investor needs to approach this relationship as more than a business deal. In Indian country, even more than traditional commercial transactions, investors must make a sincere effort to appreciate and work with the social and political aspects of the tribe. Typically, the relationship between investors and tribes is not built overnight. It results only from the passage of time and the efforts of the investor and the tribe -- time and effort that many investors are not willing to commit.

Second, a loan to an Indian tribe and/or an entity related to a tribe is not a conventional loan with conventional collateral. Non-Indians often are surprised to learn that Indian lands are held in trust by the United States of America and that they are not alienable.[8] In Indian country there may be no familiar law governing the granting and perfection of security interests. Typical remedies in the event of a default may not be available under applicable federal law and tribal law. Litigation may not be the preferred, or even an acceptable, method of dispute resolution.[9] Tribal law may not be codified. There may be no established formal judicial system for hearing disputes. There may be no written rules of court procedure. Court opinions may not be available for review by non-tribal members. On the other hand, there may be a body of tribal law and jurisprudence that can be researched in familiar ways, within which context non-Indians no doubt will be

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[7] 25 C.F.R. pts. 501 – 599.

[8] 25 U.S.C. § 464.

[9] Some tribes rely on "traditional courts", "family forums" or "community forums" that stress using traditional methods and cultural approaches to peacemaking and restorative justice. Others have hybrid systems in which peacemaker courts address some disputes and "modern" courts modeled after the United States' jurisprudence system address others. The Navajo Nation courts are an example of a hybrid system.

more comfortable. That comfort is in no way guaranteed, however, leaving non-Indians no choice but to be respectful, flexible and tolerant of differences in law, procedure, style and personality.

This paper is a brief summary of some of the issues related to doing business in Indian country. It is not intended to cover any issues in detail and omits entirely consideration of some issues.[10] This paper is, however, intended to provide counsel with a basic understanding of certain fundamental issues. The author urges anyone doing transactions and/or litigating in Indian country to consult with business and Indian country counsel.

Unique Issue #1: Federal Trust Responsibility

One of the most fundamental principles of federal Indian law is that of the federal government's trust responsibility to Indian tribes and pueblos.

The trust relationship between the federal government and Indians first was characterized in the United States Supreme Court by Chief Justice Marshall. "[The Indians'] relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants …." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The Chief Justice provided no authority for this proposition and did not specifically identify the source of the duty that he recognized in the federal government. In United States v. Kagama, 118 U.S. 375 (1886), however, the Court indicated that the duty of guardianship arose from treaties and was in the nature of a moral obligation to protect those whom the federal government had weakened.

This role as guardian carries with it a fiduciary obligation. "[The federal government's] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

Where the fiduciary obligation is given expression in statute, a breach of that fiduciary obligation may expose the federal government to liability.[11]

The federal government's trust responsibility to tribes is manifest in, among other things, its responsibility to manage trust assets on behalf of tribes.[12] Currently, trust asset

[10] E.g., without limitation, issues related to gaming, taxation, labor, water and land claims.

[11] See, e.g., United States v. Mitchell, 463 U.S. 206 (1983) (government is liable in damages for breach of fiduciary duty created by statutes and regulations that give government full responsibility to manage Indian resources for benefit of Indians).[11] But see United States v. Navajo Nation, 537 U.S. 488, (2003) (government not liable in damages where statute merely gives Secretary approval rights and not "comprehensive" managerial role.)

[12] While Mitchell recognizes the government's exploitation of Indians as the source of the government's fiduciary obligation, the holding in Mitchell appears to be a function of a fiduciary obligation

management involves approximately 11 million acres held in trust by the United States, or in restricted status, for the benefit of individual Native Americans, and 45 million acres held in trust for tribes. The land produces income from more than 100,000 active leases for 350,000 individual Indian owners and 315 tribal owners. Leasing and sales revenues of approximately $300 million per year are distributed to more than 225,000 open Individual Indian Money Accounts and revenue of approximately $800 million per year is distributed to 1,400 tribal accounts.[13]

The government's trust relationship with Indians does not extend merely to the government's role as asset manager. For example, without limitation, 25 U.S.C. § 415, requires that the Secretary of the Interior approve encumbrances of trust and restricted land; and 25 U.S.C. § 81, for instance, provides that certain types of contracts with an Indian tribes[14] must be approved by the Secretary in order to be valid. The Secretary's role as overseer of transactions involving tribes arises directly from the government's fiduciary relationship to Indians.[15]

The trust relationship between the federal government and Indians can have extreme consequences. For example, without limitation, failing to obtain the Secretary's requisite approval of leases, mortgages, easements, permits and other interests in trust or restricted land can cause the conveyance to be invalid. Additionally, claims that the Bureau of Indian Affairs breached its trust responsibilities in managing Individual Indian Money Accounts caused five plaintiffs to file suit in 1996 against the Departments of Treasury and Interior. <u>Cobell v. Norton</u>, No. 96-1285 (D.D.C. filed June 10, 1996). The Cobell plaintiffs claim damages of up $100 billion. Also, in December, 2001, the plaintiffs obtained a court order that shutdown of the Department of Interior's computer system and, for a time, made it impossible to file with the BIA any documents affecting Indian lands. While it is now possible to file documents, the suit continues; and the public has yet to regain access to the BIA's website.

While the entire landscape of the government's obligation to Indians may not yet have been mapped, investors must be mindful of the special relationship between the federal government and Native Americans and must consider how that relationship could affect the dynamics or terms of a business transaction.

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arising from control over tribal property. <u>Mitchell</u>, 463U.S. at 225. ("Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the common elements of a common-law trust are present: a trustee (United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds.)"

[13] Testimony of Jim Cason and Neal A. McCaleb to the Senate Committee on Indian Affairs, February 26, 2002.

[14] See *Unique Issue #4*, below.

[15] "'[Section 81] has its origin in the long-standing trust relationship between the federal government and Indian tribes.'" <u>Penobscot Indian Nation v. Key Bank of Me.</u>, 112 F.3d 538, 552 (1st Cir. 1997) (quoting <u>Narragansett Indian Tribe v. RIBO, Inc.</u>, 686 F. Supp. 48, 50 (D.R.I. 1988) <u>aff'd</u>, 868 F.2d 5 (1st Cir. 1989)); <u>see also</u> <u>United States ex rel. Harlan v. Bacon</u>, 21 F.3d 209, 212 (8th Cir. 1994).

Unique Issue #2: Tribes Are Dependent Sovereign Nations

Power to Regulate Non-Members

The essence of sovereignty is that it the inherent right to govern. Tribal sovereignty has been defined by the United States Supreme Court. Among other things, Chief Justice Marshall held that Indian tribes are "domestic dependent nations"[16] whose independence has been limited in two ways: tribes may not convey land to anyone but the United States government and tribes may not deal with foreign powers. While Marshall's characterization of tribes remains a fundamental principal in Indian law, it has been further defined, and limited, by the Court. Nonetheless, certain basic tenets remain, including that tribes have the right to regulate means, activities of non-members who enter into consensual relationships with the tribe or its members (e.g. in commercial transactions) by taxation, licensing or other.[17]

Immunity from Suit

As sovereign nations, tribes also enjoy immunity from suit.[18] The general rule is that, absent an effective waiver or consent, a tribe may not be sued in tribal, state or federal court.[19] The sovereign immunity of tribes is almost uniformly upheld by courts.[20]
While tribal governments are immune from suit with respect to both governmental and commercial functions, not all tribal business entities may have such immunity. Section 17 corporations (discussed below) are inherently from suit, but may include in their charters a "sue or be sued" provision, consenting to suit in courts of competent jurisdiction. Whether such a provision operates as a consent, however, will be a function of the peculiar language of the provision, the exact nature of the lawsuit and other facts and circumstances of each case.

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[16] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[17] William C. Canby, American Indian Law in a Nutshell, 78 (4th ed. 2004), (citing Montana v. United States, 450 U.S. 544 (1981).

[18] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977); United States v. U. S. Fid. & Guar. Co., 309 U.S. 506 (1940); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (recognizing that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States").

[19] E.g., Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977); See also Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson, 874 F.2d 709 (10th Cir. 1989), (holding that federal law, federal policy and federal authority are paramount in the conduct of Indian affairs in Indian country). In that case, tribes brought an action seeking declaratory relief against the State of Oklahoma, which was seeking to enjoin the operation of bingo games on Indian trust land. The court further held that Oklahoma state courts lacked jurisdiction to hear a suit against the Indian tribes to enjoin the operation of bingo games on trust lands where the tribes had refused to waive sovereign immunity.

[20] See Sac & Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995).

It is even more difficult to evaluate whether an entity is immune from suit when a tribal government creates the entity pursuant to special legislation or general tribal authority. Evaluating whether the tribally created entity is immune from suit is a complicated problem that has not been uniformly addressed by courts.[21]

Waiver of Immunity from Suit

It is generally held that immunity may be waived contractually by a tribe or tribal entity.[22]

The general principle of waiving sovereign immunity is relatively simple: the waiver must be unambiguous and "unequivocally expressed."[23] As a general rule, an implied waiver is insufficient[24], even when the most reasonable interpretation of the language used in the agreement is an intent to waive sovereign immunity[25].

Tribes regard their sovereign immunity as an essential feature of their sovereign status, and they may resist waiving it. In such cases, if a transaction is to be consummated,

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[21] Compare, e.g., Smith Plumbing Co. v. Aetna Cas.& Sur. Co., 720 P.2d 499 (Ariz. 1986) (White Mountain Apache Development Enterprise is a subordinate business organization which enjoys sovereign immunity) with Dixon v. Picopa Constr. Co., 772 P.2d 1104 (Ariz. 1989) (Picopa Construction Co. is not a subordinate economic organization but a separate corporate entity that does not enjoy and may not assert tribal sovereign immunity). See also William V. Vetter, Doing Business with Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction, 36 Ariz. L. Rev. 169 (Spring 1994) (setting out a number of factors, no one of which is determinative, used by the courts to conclude that an organization is immune from suit).

[22] United States v. Oregon 657 F.2d 1009 (9th Cir. 1981); Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth., 395 F Supp. 23 (D. Minn. 1974), aff'd, 517 F.2d 508 (8th Cir. 1975); Weeks Constr. Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986); Am. Indian Agricultur. Credit Consortium Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985).

[23] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)). Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)). A waiver of sovereign immunity will not be implied even where the facts and circumstances in support of waiver are compelling. Even when a tribe "welshed" on a loan and attempted to "hide under the blanket of tribal immunity" by raising "the shield of sovereign immunity" to avoid an express obligation, the unambiguous expression of a waiver must be present. Am. Indian Agricultur. Credit Consortium, 780 F.2d at 1379.

[24] See Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989).

[25] See Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982); see also Am. Indian Agricultur. Credit Consortium, 780 F.2d at 1375-76 (holding that the Sioux tribe had not waived immunity or consented to suit by executing an $80,000 promissory note that included the following provisions: Interest and such "other and further rights and remedies as provided by law"; reimbursement of attorneys' fees in collection efforts; and an election of law provision); id. at 1377 (concluding that immunity should be "deemed waived" if the tribe "clearly and unequivocally indicate[d] its willingness to expose itself to suit on the note," (quoting the district court)). The Eighth Circuit rejected that approach as contrary to the rule of Santa Clara Pueblo. Compare, however, C&L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411 (2001) (holding that a waiver of immunity from suit to enforce an arbitration award was implied by the tribe agreeing to arbitrate disputes under its contract with C&L Enterprises).

middle ground must be found and a compromise reached, often resulting in a limited waiver of sovereign immunity or agreeing to arbitrate disputes with the tribe. In any case, it is important to review the underlying organizational documents of the tribe and the tribal entity because they may limit the tribe's and/or the entity's ability to waive immunity; and any waiver made in violation of the organizational documents may be void.[26]

It is important to remember that the issue of sovereign immunity is jurisdictional. If successfully raised, the defense of sovereign immunity bars the court's jurisdiction, thus leaving the party with whom the tribe or tribal entity contracted without means by which to enforce its rights in court.

Unless the waiver of sovereign immunity extends to activities of the tribe off its reservation, the tribe or tribal entity may have a jurisdictional defense. There is authority that tribes do not enjoy the protection of sovereign immunity for actions arising out of their off-reservation business activities.[27] However, a recent Tenth Circuit case casts serious doubt on that proposition and commends investors to ensure that any tribal/entity waiver of sovereign immunity includes a waiver for actions arising from the tribe's/entity's off-reservation business activities.[28]

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[26] See, for example, Boyer v. Shoshone-Bannock Indian Tribes, 441 P.2d 167 (Idaho 1968), in which the charter of the tribal entity provided that the "sue or be sued" clause was not a consent to levy of judgment, lien or attachment upon the tribe's property. However, compare Boyer to Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975), in which the court held that the "sue or be sued" clause implied a consent to a levy of judgment upon the tribe's property.

[27] See Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988) (holding that a business activity engaged in by a sovereign tribe off its reservation is not clothed in sovereign immunity and that state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct). The court based its decision on its analysis of federal law, finding that there was no provision under federal law that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct. Thus, the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity. Since it is the policy of the State of New Mexico to allow breach of written contract actions against the state, the district court could exercise jurisdiction over an Indian tribe when the tribe is engaged in an activity off the reservation as an unincorporated association registered and authorized to do business in the state, and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe.

[28] See Sac & Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995). The Sac and Fox Nation ("Nation"), a federally recognized tribe of Native Americans residing in Oklahoma, brought suit in district court under 28 U.S.C. § 1362. Claiming sovereign immunity, the Nation sought to enjoin an Oklahoma state court proceeding in which defendants had filed third-party suits against the Nation. The district court entered a permanent injunction prohibiting the Oklahoma state court from holding proceedings involving the Nation. The Tenth Circuit affirmed, holding that the Nation did not explicitly waive its sovereign immunity, as required by well-established precedent, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); United States v. Testan, 424 U.S. 392 (1976); United States v. King, 395 U.S. 1 (1969). Additionally, the court found that a waiver of sovereign immunity cannot be inferred from the Nation's engagement in a commercial

Unique Issue #3: Is There Requisite Power and Authority?

Caveat: When dealing with tribes or tribal entities, do NOT rely on apparent authority. It is not a viable alternative to actual authority.

There are a number of options available to tribes for carrying out their business activities. A tribe may choose to contract or to borrow money itself, or it may separate its governmental and business functions, giving control of its business activities to a tribally-related entity. The nature of the entity with whom the investor is dealing affects its rights and remedies.

Regardless of the form of the entity with which the investor is doing business, the investor's due diligence should include a review of the entity's organizational documents and tribal law (including custom, tradition and opinions of its courts). In connection with that review, an investor should require the tribe to adopt resolutions specifically authorizing the transaction and granting authority to execute and deliver documents. The investor also should request that counsel for the tribe to deliver opinions regarding the organization of the tribe, the organization of the tribal business and the respective power and authority of each.
The following is a brief discussion of entities commonly used in Indian country transactions. [29]

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activity, concurring with American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) and Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1993). Since there was neither an express nor an implied waiver of sovereign immunity, the court turned to the predicate question of whether the Nation had sovereign immunity in the first place.

The defendants argued that the Nation was not entitled to sovereign immunity at all because the commercial activity at issue took place outside the Indian reservation. The court found that the location of the commercial activity is determinative. This finding is in accord with Richardson v. Mt. Adams Furniture (In re Greene), 980 F.2d 590, 596 (9th Cir. 1992), in which the court held that "sovereign immunity, as it existed at common law, had an extra-territorial component."

The Court in Sac & Fox Nation concluded that the extraterritorial nature of the Nation's business does not strip it of its right to assert sovereign immunity and thus held that without an explicit waiver, the Nation was immune from suit in state court even though the suit resulted from a commercial activity occurring off the Nation's reservation.

Notwithstanding the Sac & Fox Nation case, there may be sufficient lack of clarity for this issue to be ripe to be heard by the United States Supreme Court. See, e.g., Potawatomi Tribe, 498 U.S. at 515 (Stevens, J., concurring) ("I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory"); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (stating that, in the context of state taxation, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

[29] The choice of entity may be driven by the tribe's concerns about federal and state taxation. These issues are outside the scope of this discussion.

- **Government or Governmental Instrumentality**. Tribal governments and their governmental instrumentalities (e.g., housing authorities, departments of economic development, land commissions, gaming commissions) may contract directly for goods and services. Of course, Indian tribes are organized in different ways. The organization will affect how powers are distributed, who can act for the tribe, and what approvals, if any, are necessary to enter into the transaction.

  Tribes organized under Section 16[30] of the Indian Reorganization Act of 1934 ("**IRA**")[31] are governed by a constitution. The constitution often is analogous to corporate articles of incorporation and bylaws and/or a partnership agreement. It describes the governing body of the tribe, the powers and authority of that the governing body and any limitations on that authority. In some instances, the governing body may be granted all the power and authority to adopt legislation and carry on the activities of the tribe; in others, certain powers may be reserved to, and certain activities may require approval of, the general council of the tribe (which may be comprised of all of the adult members of the tribe).

  A tribe also may be organized under IRA Section 17[32], and will have a corporate charter issued by the Secretary of the Interior. In other words, the tribe may be both a governmental entity and a corporate entity. The Section 17corporation may have powers to contract, to encumber assets, and to waive sovereign immunity that are different from the powers of the tribe as a governmental entity. Thus, the Section 17corporation may be the vehicle carrying out tribal business activities subject, in some cases, to the approval by the tribal council or by the tribe as a whole.

  Tribes not organized under the IRA have neither a constitution nor a corporate charter. Instead, their governing structure may have been developed by tribal history, ordinances, resolutions or other actions.

- **Section 17 Corporation**. Although IRA Section 17does not strictly permit a tribe to form a wholly-owned federally chartered corporation[33], federal

[30] 25 U.S.C. § 476

[31] 25 U.S.C. § 461 et seq.

[32] 25 U.S.C. § 467

[33] "The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, that such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. 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

charters are frequently issued by the Department of the Interior. Typically, Section 17 charters vest in the corporation the tribe's immunity from suit and responsibilities for carrying out tribal business activities. The charter will describe the authorized purposes of the corporation and whether the corporation is able to borrow money, encumber assets, sue and be sued and waive its sovereign immunity. Additionally, the charter will address the degree of autonomy the corporation enjoys. The corporation's bylaws also may address and limit the corporation's power to act, who can act for the corporation, the ability of the corporation to waive sovereign immunity, corporate action that may be taken without approval of the tribe or the Secretary of the Interior, and the extent to which corporate assets may be encumbered.

- **Tribally Chartered Corporation or Tribal Enterprise**. Many tribes have formed wholly-owned tribally chartered enterprises or other business entities in lieu of Section 17corporations to conduct the tribe's business activities. As with a Section 17corporation, the organizational documents (the enabling resolution of the tribal council, charter, articles of incorporation, bylaws) of the entity and the tribe's laws, ordinances and/or resolutions under which the entity is organized are critical to understanding the scope of the power and authority of the entity and the individuals executing documents on its behalf.

  If the entity is organized under tribal law, the tribe may have a corporate code or similar statute pursuant to which the entity is organized.[34] Alternatively, the tribe may have created the tribal entity by special resolution or ordinance based on the inherent power of the tribal council to do so pursuant to its constitution or tribal law. In either case, the investor should examine the underlying authority for creating the entity; should determine whether formation of the tribal corporation was authorized in the first instance and, if so, whether it was properly formed; and should satisfy itself that the entity has the requisite power and authority to transact business with the investor.

If the entity is tribally owned (as opposed to owned by tribal members), it may enjoy the sovereign immunity and other privileges of the tribe itself. Thus, the power of the corporation to sue and be sued may be restricted, and the investor should insist upon the corporation granting a specific waiver of any sovereign immunity that it may enjoy.

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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 ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress." 25 U.S.C. § 477.

[34] E.g. the Navajo Nation Corporation Code, 5 NNC § 3100 et.seq.

<u>Unique Issue #4: Restrictions on Alienation; Federal Approval of Leases, Easements, Permits and Other "Encumbrances"</u>

25 U.S.C. § 415

Title to reservation land typically is held by the United States in trust for the tribe, or is subject to restrictions on alienation. Determining whether land is held in trust entails reviewing treaties, Acts of Congress, proclamations of the Secretary of the Interior, title records maintained by the jurisdiction in which the land is located, and title records maintained by the Land Titles and Records Office of the Bureau of Indian Affairs.

Federal law generally prohibits the sale, taxation or encumbrance of trust land and requires the approval of the Bureau of Indian Affairs ("BIA") for a tribe to lease, to grant easements, or permits for use of trust lands.[35] Additionally, any leasehold mortgage of trust land must be approved by BIA.[36] Thus, although a tribe cannot grant a mortgage on trust lands, it may lease trust lands and, subject to BIA approval, grant a mortgage on the leasehold interest. Generally (with exceptions for certain tribes and pueblos), leases are limited to a term of 25 years, with one renewal option for an additional 25 years.[37] It is common for a tribe to lease trust land to a tribally-mandated business entity, which, in turn, grants a leasehold mortgage to a lender as part of the lender's collateral for a loan to the business entity.

Generally, non-trust lands owned by individual Indians may be freely leased or mortgaged.[38] Additionally, 25 U.S.C. § 483a allows individual Indian owners of trust lands, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust in accordance with the laws of the state in which the land is located. Thus a lender may foreclose on the property and obtain unrestricted fee simple title. Finally, trust lands may be leased to private parties under 25 U.S.C. § 415. These leases are mortgageable, subject to BIA approval.

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[35] Strictly speaking, leases of trust and restricted land may be granted by tribes, with the BIA's approval. Grants of easement and permits are made by the Secretary of the Interior (acting through the BIA), with the tribe's approval. <u>See</u> 25 U.S.C. §§ 464, 415; <u>see</u>, <u>e.g.</u>, 25 C.F.R. pts. 162, 166-169, 211, 213-214, 216-217, 225-227. General leasing regulations are in 25 C.F.R. pt. 162. However, as of February, 2005, the subparts thereof for business and leasing regulations are reserved. Final regulations for those subparts are expected to be published in 2005.

[36] 25 U.S.C. § 415

[37] 25 U.S.C. § 415; 25 C.F.R. pt. 162.

[38] 25 U.S.C. § 483a.

25 U.S.C. § 81

On March 14, 2000, the Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46 (2000) ("**New § 81**") became law, amending 25 U.S.C. § 81 and 476(e) (§ 16(e) of the Indian Reorganization Act of 1934).

Before the March, 2000 amendment, § 81 ("**Old § 81**") required Secretarial approval of many contracts involving payments between non-Indians and Indians for contracts "relative to [Indian] lands." It also provided that any agreement was null and void of it was subject to Old § 81 and had not received Secretarial approval.

Although Old § 81 was originally intended to protect Indians from "improvident contracts,"[39] the phrase "relative to [Indian] lands" was interpreted broadly by the courts[40] and, in some instances, produced severe results. Hence, in spite of opinions of the Solicitor General that § 81 approval was not required for certain contracts, neither tribes, their business partners nor the BIA could predict with any certainty whether a court might ultimately conclude that a transaction was void because it was not approved under Old § 81. Moreover, many viewed Old § 81 as rooted in paternalism, contrary to the more modern policy of tribal self-determination.[41]

New § 81 requires approval of the Secretary of the Interior or his/her designee[42] only for agreements that "encumber" [43] Indian lands[44] for seven years or more. A contract requiring Secretarial approval under § 81 is not valid until the Secretary approves it.[45]

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[39] H.R. Rep. 106-501 (2000).

[40] For example, in Wisconsin Winnebego Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985), the court ruled that § 81 approval was required for a five year agreement to manage a bingo facility notwithstanding that the proposed agreement had been submitted to the BIA area office and the Department of Interior field solicitor, who concluded that § 81 did not apply to the agreement and refused to give its approval. The Ninth Circuit followed suit in A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986).

[41] H.R. Rep. 106-501 (2000).

[42] 25 U.S.C. § 81(b); 25 C.F.R. § 84.003.

[43] "Encumbers" means "to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by [Part 84] may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land." 25 C.F.R. § 84.002. The difficulty comes in the breadth and inexactness of the definition. For example, a lender may finance a transaction in Indian Country and receive an interest in a facility on tribal lands as part of the transaction. If, for example, one of the remedies for default allows the lender to operate the facility, that would constitute adequate encumbrance to bring the contract within New § 81. In contrast, if the transaction is a "limited recourse financing" and the lender merely acquires a first right to all of the revenue derived from specific lands for a period of years, that would not constitute a sufficient encumbrance to bring the transaction within New § 81. The more difficult case involves a situation where a designated third-party would operate the facility in case of default. Legislative history for New § 81 indicates that, with the exception of tribes exempted pursuant to the Self Governance program, New § 81 applies to those transactions that

A central component of understanding New § 81, then, is determining the meaning of "encumbering" Indian lands. According to New § 81 and its regulations at 25 C.F.R. Part 84, the phrase "encumbering Indian lands" is intended to cover contracts that allow a third-party to exercise exclusive or nearly exclusive proprietary control over Indian lands.

A number of types of agreements are excluded from § 81, including without limitation, (i) contracts or agreements otherwise reviewed and approved by the Secretary under, for example, 25 CFR Parts 152 (patents in fee; certificates or competency), 162(non-mineral leases; leasehold mortgages), 163 (timber contracts), 166 (grazing permits), 169 (rights-of-way), 200 (coal leases), 211 (mineral leases), 216 (surface mining permits and leases) and 225 (mineral development agreements)[46]; (ii) leases that are exempt from Secretarial approval under 25 U.S.C. § 415 or 25 U.S.C. § 477[47]; (iii) subleases and assignments of leases that so not require approval of the Secretary under 25 C.F.R. Part 162[48]; (iv) contracts or agreements that convey to tribal members rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or customs[49]; (v) contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven or more years[50]; (vii) contracts or agreements that are exempt from Secretarial approval under the terms of a corporate charter authorized by 25 U.S.C. § 477[51] and (viii) contracts that are subject to approval by the National Indian Gaming Regulatory Commission under the IGRA.[52]

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are not leases per se, but that could result in the loss of tribal proprietary control. Hence in the situation where a designated third party could operate the facility in case of default, § 81 approval would be indicated. See H.R. Rep. 106-150, at 9 (1999). Similarly, if a third party contracts to enjoy rights with respect to Indian lands that might be characterized as rights similar to an owner (e.g., without limitation, the right to control access, the right to hire and fire employees, unlimited access, the right to all or most of the income received from the property), that third party might be deemed to have rights that "encumber" Indian land, and federal approval is required.

[44] "Indian lands" means lands, the title to which is held by the United States in trust for an Indian tribe or land to which title held by a tribe subject to a restriction against alienation by the United States. 25 U.S.C. § 81(a)(1); 25 C.F.R. § 84.002.

[45] 25 C.F.R. § 84.007.

[46] 25 C.F.R. § 84.004(a)

[47] 25 C.F.R. § 84.004(b)

[48] 25 C.F.R. § 84.004(c)

[49] 25 C.F.R. § 84.004(d)

[50] 25 C.F.R. § 84.004(e)

[51] 25 C.F.R. § 84.004(f)

[52] 25 C.F.R. § 84.004(i)

If a contract is subject to Section 81, approval generally is obtained from the Area Director of the BIA Area Office having jurisdiction over the tribal land involved. The Secretary will not approve contracts that are not subject to § 81. If the Secretary determines that an agreement does not require approval, the Secretary will so advise the parties.[53]

25 U.S.C. §§ 261-264 (Indian Trader Licenses)

The Indian Trader Act and regulations[54] is a relic if the days when trading posts dotted Indian lands. While some have suggested repeal of the Indian Trader Act, it remains law.[55]

The act and regulations, which define "trading" very broadly,[56] require any "trader" with Indians to be licensed by the federal government. Penalties for failing to obtain a license include forfeiture and fine.[57] Applications for traders licenses are made to the BIA, for a fee of $5.00, are not transferable, and limit the right to trade to a particular location.

Some tribes also have separate business licensing requirements.[58]

<u>Unique Issue #5: What is the Governing Law?</u>

In structuring a commercial transaction with a tribe, the investor almost certainly will be concerned about what law governs the construction and enforcement of the transaction documents.

There is no body of substantive federal law that governs commercial transactions generally. State law generally does not apply to tribal Indians on reservation except where Congress has expressly so provided.[59]. Under the <u>Montana</u>[60] rule, when non-

[53] Under 25 C.F.R. § 84.005, if BIA determines that an agreement is not covered by Section 81, that determination has the affect of making subsection (b) inapplicable. It is not clear how this provision will affect litigation regarding applicability of the statute.

[54] 25 C.F.R. pts. 140-141.

[55] See <u>Cent. Mach. Co. v. Ariz. State Tax Comm'n</u>, 448 U.S. 160 (1980).

[56] "Trading means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services." 25 C.F.R. § 140.5(a)(6).

[57] 25 C.F.R. § 140.3

[58] <u>E.g.</u>, 25 C.F.R. pt. 141 (federal regulations governing business licenses applicable to the Navajo Tribe, the Hopi Tribe and the Zuni Pueblo. For an example of tribal law requiring business licenses, see Navajo Nation Code, Title 5, Chapter 3, 5 NNC § 401 et. seq.

[59] <u>See</u> <u>McClanahan v. Ariz. State Tax Comm'n</u>, 411 U.S. 164 (1973); <u>Bryan v. Itasca County</u>, 426 U.S. 373 (1976) (28 U.S.C. § 1360, which applies in only certain states (see discussion below), is an

Indians enter into consensual agreements with tribes, they subject themselves to the dominion and control, including the tribe's law.

Although contracts can be drafted to include a state choice of law provision, a court may choose not to enforce such a provision, with the result that tribal law could be found to control. Investors are well advised to ensure that before entering into a business transaction with a tribe, tribal legislation is in force adequate to protect the investor's rights as a matter of tribal law. If a tribe does not have a commercial legal infrastructure that permits, for example, foreclosure of a leasehold deed of trust or perfection of liens on personal property, or that assures that construction will be undertaken in accordance with acceptable building standards, the parties should consider either selective adoption of state law for the transaction or adoption by the tribe of its own codes.

Unique Issue #6: Who Has Jurisdiction to Adjudicate Disputes?

The common perception is that the federal courts have jurisdiction to adjudicate commercial disputes involving tribes or tribal entities. That perception is not accurate.

Federal court jurisdiction must be established by showing that the case presents a federal question[61] or is based on the diversity of state citizenship.[62] The parties to a contract cannot, by agreement, confer subject matter jurisdiction. Generally, most disputes and/or actions to enforce contracts and business transactions with tribes or tribal entities will not present a federal question.[63] One notable exception, however, is a dispute arising under IGRA, which provides that disputes under IGRA shall be resolved in federal court.[64]

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example of such Congressional action.); Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986); see generally, Felix S. Cohen, Handbook of Federal Indian Law 273 (Rennard Strickland ed. 1982).

[60] Montana v. United States, 450 U.S. 544 (1981)

[61] 28 U.S.C. § 1331

[62] 28 U.S.C. § 1332

[63] See Weeks Constr. Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986) (held that the housing authority's waiver of sovereign authority under the tribal ordinance's "sue or be sued" language did not confer jurisdiction on the federal courts; there was no question of federal jurisdiction merely because the housing authority was created by and operated on behalf of an Indian tribe; to confer federal jurisdiction, a claim must require an interpretation of the validity, construction or effect of federal law).

[64] See 25 U.S.C. § 2714; see also Rita Inc. v. Flandreau Santee Sioux Tribe, 798 F. Supp. 586 (D.S.D. 1992), (finding subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2714 over a dispute between the tribe and a casino management company that arose out of operation of the casino where the action involved construing federal laws (i.e., IGRA) and the casino management agreement). Compare Rita to Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503 (11th Cir. 1993), in which the court held that the district court lacked federal question jurisdiction over a contractual dispute between an Indian tribe and non-Indian operator of a gaming facility where the cause of action was a mere breach of contract claim but did not involve interpreting IGRA.

An Indian tribe is not a citizen of any state and thus cannot sue or be sued in federal court under diversity jurisdiction.[65] The same principle holds true for a tribal enterprise that does not have a legal existence apart from the tribe. However, a tribally or state-chartered corporation is subject to the normal rule regarding diversity.[66] Additionally, individual Indians born in the United States are United States citizens and citizens of the state in which they reside.[67]

State courts do not have subject matter jurisdiction over suits brought by non-Indians against Indians with respect to matters arising in Indian country when such jurisdiction would infringe "on the right of reservation Indians to make their own laws and be governed by them."[68] Thus, state courts lack jurisdiction to hear lawsuits brought by non-Indians against tribes, tribally created entities, and reservation Indians with respect to transactions arising on the reservation. Certain exceptions to this rule are found under 25 U.S.C. § 483a (which allows individual owners of trust land, subject to approval by the Secretary, to execute mortgages or deeds of trust in accordance with the laws of the state in which the land is located and may constitute a waiver of sovereign immunity and may confer jurisdiction in state court),[69] and 28 U.S.C. § 1360 (which grants six states - Alaska, Minnesota, Nebraska, Oregon, Wisconsin and California -- jurisdiction over civil actions in specified areas of Indian country).

Many tribes have established tribal courts that are courts of general limited jurisdiction and that have the power to decide disputes involving the tribe and/or tribal members. In some instances, tribal courts have jurisdiction to hear disputes involving non-tribal members.[70] In many tribes, the tribal council sits as the tribal court. In other tribes,

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[65] See Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974).

[66] See Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993), in which the court held that an Indian tribe may charter a corporation pursuant to its own tribal laws and that corporation will be considered a citizen of the state for purposes of diversity jurisdiction. Thus, a § 17 corporation is, for purposes of diversity jurisdiction, a citizen of a state, but a tribe organized under IRA § 16 is not.

[67] See 8 U.S.C. § 1401(b); U.S. Const. Amend. XIV, § 1.

[68] Williams v. Lee, 358 U.S. 217 (1959).

[69] See Northwest S.D. Prod. Credit Ass'n v. Smith, 784 F2d 323 (8th Cir. 1986), in which the court found that § 483a does not create a federal cause of action and that state courts lack jurisdiction to hear an action for foreclosure against trust lands because § 483 does not confer jurisdiction upon them. Thus, the creditor's remedy was to pursue foreclosure through the tribal court, which then had to determine whether it had jurisdiction. Compare to Federal Land Bank v. Burris, 790 P.2d 534 (Okla. 1990), in which the court held that where no tribal court existed, the state did have jurisdiction to hear a foreclosure action under § 483a. The court reasoned that even though § 483a does not specifically mention "jurisdiction" with respect to the states, it does specifically refer to the laws of the state, thereby making the substantive provisions of state law applicable to a foreclosure action. The court held that to find otherwise would mean that § 483a is useless, since the lender would be without a remedy to exercise its rights upon a default.

[70] Typically, non-tribal members assume that they will not be subject to the jurisdiction of a tribal court. That may not be true. However, a recent Tenth Circuit case, MacArthur v. San Juan County, 309

judges appointed by the tribe hear cases brought before the tribal court. Appeals to tribal court may be to a tribal appellate division, or if the tribe has not established an appellate court system, to a designated appellate court, like the Southwestern Intertribal Court of Appeals, which sits in Albuquerque.

Under the "exhaustion of remedies doctrine," state and federal courts may abstain from proceeding until the tribal court proceedings have concluded[71].

Some non-Indians insist that tribes and tribal entities waive tribal court jurisdiction or agree to submit disputes to state court. When an impasse is reached with a tribe that is unwilling to subject itself to state court jurisdiction and when federal courts are without jurisdiction, it may be better to enter into an agreement to submit to binding arbitration as an alternative to court proceedings.

Key Issue #7: What Remedies Are Available?

Whether a creditor can execute against tribal property is limited by federal law, tribal law[72] , the scope of the tribe's waiver of sovereign immunity and the power and authority of the debtor.

F.3d 1216 (10th Cir. 2002), affords to non-Indians some comfort that they will not be subject to the jurisdiction of a tribal court. In MacArthur, the federal court stepped in to nullify certain of the Navajo Nation Court's rulings against a non-tribal member. The case includes an excellent discussion of Montana v. United States, 450 U.S. 544 (1981), and other federal cases dealing with the scope of tribal sovereignty and, hence, cases that are properly and not properly adjudicated by tribal courts. Similarly, in Ford Motor Co. v. Todcheene, 221 F.Supp.2d 1070 (D. Ariz. 2002), aff'd, No. 02-17048, 2005 U.S. App. LEXIS 398 (9th Cir. Jan. 11, 2005), the district court granted Ford's request for a preliminary injunction, set bond and enjoined defendants from taking action in the District Court of the Navajo Nation, relying heavily on the exceptions to tribal court jurisdiction set forth in Montana.

[71] See Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993) (holding that the tribal exhaustion doctrine requires that litigants, in some instances, exhaust their remedies in tribal courts before seeking redress in federal courts). The doctrine of tribal exhaustion (as explained in Altheimer) requires litigants, in some instances, to exhaust the remedies in tribal courts before seeking redress in federal courts. The leading cases on tribal exhaustion are National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987). The doctrine of tribal exhaustion is based on the notion that Congress intends to support tribal self-government and self-determination. In Iowa Mutual, the court's decision was motivated by (1) the federal policy of encouraging tribal self-government; (2) the view that tribal courts "play a vital role in tribal self-government"; and (3) the recognition that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts." 480 U.S. at 14-15. The Court went on to say: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Id. at 18 (citations omitted). One factor seized upon by the Altheimer court to avoid exhausting remedies in tribal court was that the dispute did not consider tribal ordinance as much as it did state and federal law, and there was no case pending in tribal court. Altheimer, 983 F.2d at 814.

[72] See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983).

In some cases, where there is no tribal law affording desired remedies (for example, repossession or foreclosure), the investor should insist that new ordinances or resolutions be drafted and enacted by the tribal government to ensure that desired remedies are available. Additionally, if a tribe does not have an ordinance or resolution analogous to the Uniform Commercial Code establishing how perfection and priority will be assured, the investor might consider requiring adoption of such ordinance, as well.

IRA § 16 authorizes an IRA tribe to include provisions in its constitution "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe."[73] Thus, in order to enforce a judgment, lien or right of repossession against assets belonging to an IRA tribe, the tribe must first have obtained all appropriate consents, next have waived its sovereign immunity with respect to the action, and last have pledged those assets to the satisfaction of such claim, thus permitting the creditor's remedies to be exercised against them. Similarly, the extent to which an investor may exercise remedies against a § 17 corporation may be limited by the terms of the § 17 charter.

Thus, the investor must consult both tribal law and the entity's organizational documents to ensure that the transaction is being structures with satisfactory and enforceable remedies.

[73] 25 U.S.C. § 476.