CONSTRUCTION AND BONDING ON INDIAN RESERVATIONS: SPECIAL ISSUES AND CONSIDERATIONS

Edward Rubacha

JENNINGS, HAUG & CUNNINGHAM
2800 N. Central Ave., Suite 1800
Phoenix, Arizona 85004
(602) 234-7800
On the Web: www.jhc-law.com

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JENNINGS, HAUG & CUNNINGHAM

I. INTRODUCTION

In almost every construction project, the contractor is faced with a number of questions. Are the plans and specifications sufficient to build the contract as bid? Are there unknown site conditions? Are competent subcontractors available? Does Davis-Bacon apply? Does the owner have adequate funding? What happens if there is a material breach? Each of these questions, and many others, are addressed under a given set of applicable statutes, contract language, and court decisions. The contractor also depends on basic assumptions arising from experience to provide a solid ground on which to make the decision to agree to build a specific project. What the contractor agrees to also affects its surety.

A different scenario awaits the contractor and its surety contemplating a construction project on a reservation. The basic assumptions, such as the ability to get paid, what law applies, what subcontractors and suppliers will be used, and how disputes will be resolved may no longer be true. Contractors and their sureties contemplating projects with Native American tribes and tribal entities must be aware of the special issues and considerations that arise on reservation projects: sovereign immunity; subordinate tribal entities; cultural differences; and, most importantly, the difficulty, in case of breach, of collecting contract funds. Contractors and their sureties also face the inherent unfamiliarity of tribal court and tribal law, codes, and customs that often are either unpublished or subject to unexpected changes.

This paper will identify those special issues and considerations that contractors and their sureties must address before entering into a construction project on a reservation. Some can be addressed by the use of specific contract language. Others cannot be easily resolved. However, knowing where the trouble may be is the first step in avoiding it. With the information in this paper, the contractor and its surety can ask the right questions and make an informed business decision whether to bid and bond a project on the reservation.

II. WHAT ENTITY IS THE CONTRACTING PARTY?

Every contractor and surety is familiar with the various forms of business organizations with which it normally contracts: corporations, partnerships and joint ventures, and limited liability companies, to name a few. In turn, the law defines for each of these entities which specific individuals are authorized to execute contracts on behalf of the entity.

Further, each entity owns specific but limited, identifiable assets. A different scenario exists on the reservation.

Native American tribes, and their subordinate tribal entities, do not follow the established business entity template. Tribes may be organized under different sections of federal law and may form subordinate entities, either corporate or unincorporated, under various federal, state, and tribal laws. The form and function of the subordinate entity may determine whether it enjoys the tribe's sovereign immunity, who can execute the contract on behalf of the entity and any waivers of sovereign immunity, what forum any disputes will be resolved in, whether sales taxes (either state or tribal) apply, and what the contractor can do in case of breach. Therefore, the contractor must identify the specific entity it is contracting with before it bids the project and especially before it signs the contract.

A. Recognized Federal Tribal Entities

Under federal law, 25 U.S.C. ß 1 et seq. compiles the majority of statutes, acts, and laws relative to Native Americans. To come under this title, a "tribe" must be "federally-recognized." The Secretary of the Interior (the "Secretary") is required to publish a list of the federally recognized tribes in the Federal Register. If a tribe is federally recognized, applicable sections of Title 25 will apply. When construing Title 25 and other federal Indian statutes, the applicable canon of construction is "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of Indians."[1] Indeed, federal preemption of state laws regarding Native American tribes is broader than traditional federal preemption.

Two types of tribes and tribal entities can exist under Title 25: "Section 16" and "Section 17." A tribe may vote to be included under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. ß 461, et seq. (hereafter, "IRA"). A Section 16 tribe is governed by a tribal constitution adopted pursuant to Section 16 and approved by the Secretary. A tribe can also form as a corporate entity under Section 17 of the IRA, 25 U.S.C. ß 477. Under Section 17, the tribal corporation operates under a corporate charter granted by the Secretary. A Section 16 tribe can form a separate corporate entity under Section 17 with powers to contract, to pledge assets, and to be sued. The Section 17 corporate entity is a separate legal entity from the tribe. As noted by the Alaska Supreme Court:

> Recognition of two legal entities, one with sovereign immunity, the other with the possibility for waiver of that immunity, would enable the tribes to make maximum use of their property. The property of the corporation would be at risk, presumably in an amount necessary to satisfy those with whom the tribe deals in economic spheres. Yet some of the tribal property could be kept in reserve, safe from a judgment execution which could destroy

the tribe's livelihood, in recognition of the special status of the Indian Tribe.[2]

However, the Section 17 entity may not perform exclusively as the tribe's business arm. Often the Section 16 entity "may have as broad or broader economic powers as its business corporation counterpart acting pursuant to section 17."[3]

Although Section 17 corporate charters often include a clause that the corporate entity has the power "to sue and be sued," by including such language, the corporate entity may or may not have consented to a blanket waiver of sovereign immunity. Section 17 corporate charters may include a limitation that "the grant or exercise of such power to sue and to be sued shall not be deemed a consent . . . to the levy of any judgment, lien or attachment upon the property of the tribe other than income or chattels specifically pledged or assigned." In that instance, suit may be allowed against the corporate entity but the judgment creditor may not execute on the judgment. These clauses may or may not determine whether the corporate entity enjoys the protections of sovereign immunity.

B. Sovereign Immunity of Tribes and Tribal Entities

As a basic premise, Native American tribes, as separate sovereigns, enjoy sovereign immunity and are immune from suit. Native American tribes cannot be sued absent an express and unequivocal waiver of immunity. If a tribe's sovereign immunity is intact, a court lacks the power to hear or decide the litigation. Indeed, at least one tribal court has held that a tribe cannot be sued even in its own tribal court if sovereign immunity has not been waived.[4] Although sovereign immunity is jurisdictional in nature, it operates essentially as a defense to be asserted by the tribe if sued.

Tribes and their tribal entities can waive their sovereign immunity but are, for the most part, reluctant to do so. As stated by the United States Supreme Court, the waiver must be "unequivocally expressed and cannot be implied."[5] Citing cases dealing with the federal government, some courts have held such waivers must be liberally construed in favor of the tribal entity and restrictively against the claimant. However, numerous courts have upheld contractual waivers of sovereign immunity. Finally, at least one tribal court appears to treat all waivers as suspect.[6]

If the language of the contract expressly states "The Tribe hereby waives its right of sovereign immunity as to all disputes arising from this agreement," a federal or state court will more than likely find an effective waiver. As noted by the Eighth Circuit, "while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity."[7] However, the extent of contractual waivers is determined on a case-by-case basis.

A waiver of sovereign immunity does not necessarily include the right to sue in a particular court nor the right to execute on a judgment once entered against the tribal defendant. The contract must contain additional language identifying the dispute resolution process and how any judgment or arbitration award will be enforced, which language may include a waiver of sovereign immunity as to certain assets or an agreement that tribal court process may be used to execute on the judgment or to enforce the award.

C. Is The Entity The Tribe Itself, A Subordinate Tribal Organization, A Tribal Corporation, Or Some Other Entity?

Often, tribal governing bodies form what will be referred to in this paper as “subordinate tribal entities.” These subordinate tribal entities are usually formed for specific functions or projects. Such subordinate tribal entities may be incorporated under tribal, state, or federal law. The courts apply various factors to determine whether a "subordinate tribal entity" created by a tribe for economic purposes enjoys the tribe's sovereign immunity. A subordinate tribal entity may enjoy sovereign immunity even though its commercial activities take place off the reservation. However, in Dixon v. Picopa Construction Co.,[8] the Arizona Supreme Court held that although "Picopa Construction Company" was incorporated under tribal law and wholly owned by the Salt River Pima Maricopa Indian Community, because Picopa's off-reservation activities were independent of any activity connected to or designed to promote tribal self-government, Picopa did not have sovereign immunity and was subject to suit in state court.

The form of the contracting tribal entity can determine whether it has sovereign immunity, who is authorized to sign on behalf of the entity, and whether the entity has any funds of its own. For example, in Ramey Construction Co. v. Apache Tribe,[9] a general contractor, Ramey, entered into a contract with the Apache Tribe of the Mescalero Reservation (the "Tribe") to build a $10,000,000 resort to be called the "Inn of the Mountain Gods." A subordinate tribal entity also called "Inn of the Mountain Gods" ("IMG") was to operate the resort and was also a party to the contract. A third entity existed, Mescalero Apache Tribe, Inc. ("MATI"), a Section 17 tribal corporation that had included in its corporate charter a "sue and be sued" clause, but was not a party to the contract. After completing the project, the Tribe refused to pay Ramey. When Ramey sued in federal district court, the district court dismissed the tribal entities on sovereign immunity grounds. The court of appeals affirmed the district court's rulings that Ramey had contracted with both the Tribe--a Section 16 entity that had not waived its sovereign immunity--and IMG, a subordinate tribal enterprise, but that both were entitled to assert the defense of sovereign immunity. As to the waiver contained in MATI’s corporate charter, the court found that the corporation was an entity separate from the Tribe and IMG and, therefore, any waiver via the "sue and be sued" clause in MATI’s corporate charter could not operate as a waiver by the Tribe.

Even if an investigation is conducted, the status of the entity may also depend on the forum in which the determination is made. In Stock West, Inc. v. Confederated Tribes of the Colville Reservation,[10] the Ninth Circuit found a tribal entity named "Colville Tribal Enterprises Corporation" ("CTEC"), organized under Colville Tribal law, was a corporation that was separate from the tribal Business Council. In a related tribal court proceeding, however, the Colville Tribal Court characterized CTEC as follows:

> CTEC is a corporation formed under the laws of the Colville Tribe, CTC Chapter 25. The tribes' intent in forming CTEC [and other corporate entities]. . . was to use these corporations to carry out the tribes' constitutional duties in providing for the economic welfare and security of the Colville members.
>
> The tribes may use a corporate forum, such as CTEC . . . to carry out its constitutional duties, and when it does so, the corporate organization becomes part of the tribal government and benefits from the privileges and immunities of the tribal government.[11]

The Tribal Court also concluded that CTEC was "interwoven with the business arm of Colville Tribe." As such, CTEC could assert the tribe's sovereign immunity.

As noted previously, the form of the contracting entity often determines who has authority to bind the entity to contracts. Given the importance placed on sovereign immunity, the standard business model and/or agency law appears to be inapplicable to Native American tribes or tribal entities. The contractor and its surety must determine not only what entity it is dealing with, but also who or what has authority to bind whatever entity is on the other side. Otherwise, a contract may be not be binding on the tribal entity with which the contractor is dealing.

For example, in Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council,[12] plaintiff HEC entered into a contract to provide services to the tribe. The tribe was governed by the Fort Bidwell Indian Community Council. The contract was executed by the council's chairwoman and chief executive officer. The contract contained an arbitration clause and could be enforced by "any court of competent jurisdiction." When the tribe refused to pay, HEC demanded arbitration. Although the tribe argued there had been no waiver of immunity, the arbitrator found a waiver and entered an award in favor of HEC. When the superior court confirmed the award, the tribe appealed. The court of appeals reversed in favor of the tribe because it found no valid waiver. The appellate court held that the chairwoman did not have the authority to waive the tribe's sovereign immunity unless the Council expressly had granted such authority to her. From a review of the tribe's constitution and by-laws, the appellate court determined no such authority had been granted.

Finally, although contracting with a economically viable tribe may seem prudent, if a subordinate entity is the actual contracting party, that entity may be a mere shell without assets. For example, in S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community,[13] the plaintiff contracted to supply herbicides to Gila River Farms ("GRF"), a subordinate tribal enterprise operated by the Gila River Indian Community (the "Tribe"). A related tribal corporation, Gila River Pima-Maricopa Indian Community (the "Tribal Corporation") worked with GRF to broker the deal. The Tribal Corporation's charter included a "sue and be sued" clause in "courts of competent jurisdiction within the United States." GRF accepted delivery of the herbicides but never paid plaintiff.

Plaintiff sued the three entities, GRF, the Tribe, and the Tribal Corporation. The trial court dismissed the Tribe and GRF and plaintiff appealed. The Arizona Court of Appeals affirmed. Although GRF was a separate subordinate organization created solely for business purposes of the Tribe, the Tribe's sovereign immunity extended to GRF because it was not a separate legal entity as was the Tribal Corporation. The court did find the "sue or be sued" clause in the Tribal Corporation made it amenable to suit in state court but noted it had no assets. The court concluded its opinion as follows:

> Because of the doctrine of tribal immunity, businesses that deal with Indian tribes do so at great financial risk. In this case appellant could only have protected itself by investigating the [Tribe's] Constitution and Bylaws, by investigating GRF's Plan of Operation and by investigating the [Tribal] Corporation's Corporate Charter. This investigation would have revealed that GRF was not a subsidiary of the [Tribal] Corporation but, rather, was a subordinate organization of the [Tribe] acting under its . . . tribal immunity. Confronted with this fact, appellant only then could have taken steps to protect its interests.[14]

In summary, the contractor and its surety must investigate whether the contracting party is the tribe itself, a subordinate tribal organization, a tribal corporation, or some other entity. Once that investigation is performed, the contractor must determine who or what has authority to bind the specific contracting tribal entity. The contractor and surety should insist on not only an officer's signature but also a resolution passed by the tribe's governing body authorizing the officer to execute the document and affirming any waiver of sovereign immunity.

III. WHERE CAN DISPUTES ON RESERVATION CONTRACTS BE RESOLVED?

Assuming an appropriate waiver of sovereign immunity has been negotiated, the next step must be to determine the appropriate forum to resolve any disputes that may arise. Standard contract forms often contain arbitration clauses. Absent such a clause, state court and, less often, federal

court are usually available. Reservation contracts, on the other hand, often require the tribal court to be the sole forum for dispute resolution. Alternatively, if no forum is defined in the contract, any disputes will end up in tribal court. As outlined below, a contractor that wishes to successfully contract on the reservation is well-advised to avoid tribal court as the primary forum for dispute resolution. Better alternatives exist.

A. Tribal Courts

Many tribes have established tribal courts, which may be courts of general or of limited jurisdiction. Most often, the jurisdiction of a tribal court is set forth in the tribe's charter, code, or constitution. In most charters and constitutions, the tribe grants the tribal court subject matter jurisdiction in the first instance over every suit regarding a reservation-related contract. Yet tribal courts, created by pre-Constitution sovereigns, are not controlled by the long-accepted legal principle of due process or the Bill of Rights, except as set forth in the Indian Civil Rights Act of 1968, 25 U.S.C. ßß 1301, et seq.

Tribal courts have exclusive jurisdiction over reservation affairs involving tribal members. They also have jurisdiction over civil suits against tribal members that arise on the reservation. The U.S. Supreme Court has noted that civil jurisdiction over activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute."[15] The Ninth Circuit holds "the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation."[16]

If an action is brought first in tribal court, state and federal courts most often will abstain from asserting jurisdiction until the litigant has exhausted all tribal court remedies. Resort by the non-Indian party to federal or state court will face a claim of abstention until the tribal court first decides its jurisdiction and all tribal court remedies are exhausted. Only after litigating all issues in tribal court can the non-Indian can appeal the tribal court's assertion of jurisdiction to federal court. However, as will be noted, the federal court may apply a "clearly erroneous" standard to the tribal court's factual findings, all but foreclosing any chance of success on appeal. The only exception to this "exhaustion rule" is where no functioning tribal court exists.

If judgment results against the contractor and/or its surety in tribal court, at least four state courts and one federal circuit court have held that tribal judgments are entitled to full faith and credit in the state courts. Other states, like Arizona, South Dakota, and Wisconsin, do not grant full faith and credit status *per se* but apply the principle of comity to tribal court judgments. The United States Supreme Court has not directly addressed the issue but has noted that "judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts."[17]

B. Federal Courts

Even if a tribe or tribal entity has waived its sovereign immunity and has consented to jurisdiction in federal court, parties cannot, by contract or stipulation, grant subject matter jurisdiction to a federal district court because it is a court of limited jurisdiction. A number of cases involving Native American tribes have been brought in federal court based, in part, on federal question jurisdiction under 28 U.S.C. ß 1331. For example, whether a particular contract is a management contract under the Indian Gaming Regulatory Act, 25 U.S.C. ß 2711, presents a federal question. However, merely because a Native American tribe is involved does not invoke federal question jurisdiction. Nor does 28 U.S.C. ß 1362 provide a basis for federal jurisdiction for every suit brought by a Native American tribe, especially a standard breach of contract action involving construction projects on the reservation.

Section 1332 often does not provide a basis for suit against an Indian tribe organized under Section 16 of the IRA because the tribe is not a "citizen" of the state for purposes of diversity jurisdiction. However, a tribal entity incorporated under Section 17 may be considered a "citizen" of the state of its principal place of business. Note, however, that misrepresentations by the tribe or its officials as to the corporate status of a tribal entity does not constitute a sufficient basis to sustain federal jurisdiction.

If the tribal enterprise is incorporated under state corporation laws, there is no question the entity is a citizen of the state in which it is incorporated. If the jurisdictional minimum is met, and the parties are truly diverse, a federal district court can properly assert jurisdiction over a dispute between a non-Indian and a tribal enterprise incorporated under state law. Tribal entities formed for economic purposes pursuant to tribal law may be "citizens" of the state in which they are incorporated for purposes of diversity jurisdiction.

However, even if a litigant is successful in finding a basis for federal jurisdiction, if a prior action is pending in tribal court, or the federal court believes the action should be brought first in tribal court, the district court will likely abstain until the litigant has exhausted all tribal court remedies. Abstention, comity, and exhaustion doctrines prevent a district court from assuming jurisdiction until the litigant has exhausted all tribal court remedies, including appeal to a tribal appellate panel. In fact, the Ninth Circuit has stated "[s]ince the Supreme Court decided *National Farmers Union* and *LaPlante*, the reported cases have been virtually unanimous in expressing the exhaustion requirement in mandatory terms."[18] On appeal of the decision by the tribal court, the federal court may apply a "clearly erroneous" standard to the tribal court's factual findings, all but foreclosing any chance of success on appeal.

In summary, the contractor cannot rely on a proposed contract stating that jurisdiction will lie in the federal district court. Even if federal jurisdiction exists, district courts may not entertain a dispute if concurrent jurisdiction lies in tribal court. Review of a tribal court's decision on its jurisdiction presents a federal question but appeal from that decision first may require exhausting all tribal court remedies.

C. State Courts

In direct contrast to the jurisdictional limitations of federal district courts, most state courts are courts of general jurisdiction. However, issues of sovereign immunity and subject-matter jurisdiction arise in state court. Certain state courts have held that tribes operating as business entities off-reservation are subject to the jurisdiction of the state court and the court has the power to resolve the dispute. However, other state courts have held the opposite, whether the tribe is operating on or off the reservation. Therefore, even if sovereign immunity is waived, there may be some question whether the state court will entertain a dispute involving a project built on reservation land for a tribal entity.

In general, state courts have little trouble entertaining jurisdiction over disputes between Native Americans and non-Indians whether occurring on or off a reservation if brought by the tribe or tribal member in state court in the first instance. However, there are three caveats to a blanket assertion of jurisdiction over every dispute between a Native American tribe and a non-Indian. First, there is an "ever-present, overriding principle: State jurisdiction must not interfere with Indian self-government, absent some compelling state interest."[19] Generally, a dispute between Native Americans and non-Native Americans that occurs entirely on the reservation may require tribal court relief whereas a state court may assume jurisdiction of a dispute concerning a commercial transaction where the underlying transaction occurred entirely off the reservation.

Second, 28 U.S.C. ß 1360 specifically excludes jurisdiction by the state court over a dispute involving "ownership or right to possession of [Native American] property or any interest therein." Three state courts interpret this section to mean any dispute involving ownership of land that is arguably "Indian land" or "trust land" is outside their jurisdiction. Such authorities would preclude mechanic's lien foreclosure actions of Indian lands.

Third, if a tribal court has already asserted jurisdiction over a dispute or has concurrent jurisdiction, a state court may decline jurisdiction if the dispute involves tribal sovereignty or issues of tribal law. If a separate suit has been filed in tribal court, the state action may be dismissed in favor of the tribal court or, at least, stayed pending resolution in tribal court based on the exhaustion doctrine.

D. Alternative Dispute Resolution

Given the careful contractor will not subject itself to tribal court jurisdiction, and given that tribes entering into contracts with non-Indians are reluctant to subject themselves to state or federal court jurisdiction, often the parties can agree on third-party arbitration or mediation of disputes. Certainly, there are no jurisdictional problems with such well-established groups as the American Arbitration Association. The sole condition on bringing an action before the AAA is that the parties did, in fact, agree to arbitrate their disputes. The courts have upheld the parties' rights to include arbitration as a viable alternative to resolve disputes.

The law had been less-settled whether an agreement to arbitrate all disputes amounts to a waiver of sovereign immunity. Recently, the United States Supreme Court in C & L Enterprises v. Potawatomi Indian Tribe resolved the split of authority on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitration award, "'in any court having jurisdiction thereof,'" a tribe has waived its sovereign immunity from suit.[20] The Court concluded that agreement to such contract language constitutes an explicit waiver of tribal sovereign immunity.

Of course, as noted previously, the tribe can refuse to arbitrate and resort to tribal court to determine the scope of any agreement to arbitrate. Given state and federal courts' reluctance to interfere with a tribal court's assertion of jurisdiction, resort by the non-Indian to federal or state court to enforce the arbitration provision may be met with an assertion of abstention and/or exhaustion. Further, the prevailing party ultimately has to enforce any arbitration award. Therefore, although arbitration may provide a valid forum from a jurisdictional perspective, the parties may end up litigating in federal, state, or tribal court anyway. However, in general, tribes prefer arbitration for dispute resolution.

E. Forum Selection and Choice of Law Clauses

Given the tribal court venue is often presumed on reservation projects, the contractor should be wary of proffered agreements that set venue in tribal court and apply tribal law. Many of the contracts offered by tribal entities contain a choice of law clause applying tribal law and tribal custom or "tribal law and/or custom in the first place and, then state law." If the contractor agrees to such language, the contract, its interpretation, and any disputes will be governed by tribal common law, codes, and custom. Tribal common law exists only to the extent there are reported decisions from a tribal court of the particular tribe. Further, state or federal decisions, or decisions by other tribal courts have little or no value as precedent when dealing with a particular tribal court, such as the Navajo Nation Supreme Court.

As to tribal codes, certain law libraries contain a compilation of tribal codes. Unfortunately, the collection is not up-to-date, is incomplete, and is only as good as the tribes' efforts to send amendments to the compiler. A

number of websites are available with tribal constitutions, by-laws, and codes. While these sources may be good starting points, the constitution, charter, or by-laws of any particular tribe may have been amended many times since the code was placed with the compiler. Additionally, a tribe could pass a new ordinance that could severely impact the contractor's operations after the contract is signed. For example, during construction, a tribe could decide to impose a "construction tax" on construction activities on the reservation, effectively turning a profitable project for the contractor into a loss. The effect of such a change on contract balances and/or retention would seem apparent.

As to tribal custom, one Navajo Supreme Court associate justice has noted: "You don't find it in a book . . . . We still have many elders who don't speak English. They have a lot of knowledge about common law, and we bring them in as expert witnesses."[21] In fact, some tribal codes specifically require the employment of tribal elders to explain tribal custom and usage. Therefore, if the contractor executes a contract that contains a choice of law clause that tribal law and tribal custom applies, it or its surety may be forced to litigate in tribal court where a tribal elder, who does not speak English, will tell a tribal judge, through an interpreter, what the custom is that controls the outcome of the dispute. Unless the contractor and its surety appreciate the risk of the unknown, an appropriate choice of law clause applying state law, rather than tribal custom, should be negotiated.

While there are few decisions construing choice of venue/choice of law clauses in Native American/non-Native American agreements, in the only cases directly on point, non-Indian courts have upheld the clauses while the tribal courts question them. In Altheimer & Gray, the Seventh Circuit upheld a section in a letter of intent entitled "Sovereign Immunity" whereby the tribe and its subordinate entity, after having waived sovereign immunity, also agreed that all agreements under the letter "will be executed and interpreted in accordance with the laws of the State of Illinois," and that all parties "agree to submit to the venue and jurisdiction of the state and federal courts located in the State of Illinois."[22] The Seventh Circuit noted that where the parties agreed that state law would govern, it made little sense to force the tribal court to interpret state law in the first instance. Further, where no issues of tribal law were involved and no pending tribal court proceeding, there was no direct attack on the tribal court's jurisdiction.

In the only reported tribal appellate court decision found, Fuller v. Blaze Construction Co.,[23] the tribal appellate court remanded to the tribal trial court to determine the validity of a choice of venue provision. The Rosebud Sioux Court of Appeals noted two "obstructions" to such choice of venue clauses: (1) the clause offends the public policy of the forum in which the suit is originally brought or (2) would otherwise gravely inconvenience the party contesting the clause. Because a tribal ordinance required all businesses on the reservation to obtain a license and consent to tribal court jurisdiction, the appellate court stated "it appears to us that the venue selection clause does in fact contravene a public policy of the Rosebud Sioux Tribe . . . ."[24] The

court remanded for an "affirmative showing" that the clause did not contravene the public policy of the United States and the Tribe.

In summary, the contractor should negotiate for and include a forum selection clause naming the state courts as the preferable forum and a choice of law clause applying state law. However, as the previous section pointed out, the tribe or tribal entity can simply ignore the clause and bring an action in tribal court. However, given a forum selection clause setting venue in state court and a choice of law clause applying state law, a stronger argument can be made that state court is the proper forum in the first instance. Given the lack of reported tribal court decisions, limited access to tribal codes, and the almost singular lack of codified "tribal customs," the contractor and the surety should assess the risks involved before agreeing to bond any contract applying tribal law or customs in the first instance.

IV. WHAT OTHER LEGAL REQUIREMENTS MAY BE APPLICABLE?

A. "Federal Approval" is no longer necessary for standard construction contracts on the reservation.

Before the passage of the latest amendment, 25 U.S.C. ß 81 required contracts with "any tribe of Indians . . . for the payment or delivery of any money or other thing of value . . . in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or things, under law or treaties with the United States . . ." had to meet certain requirements including "approval of the Secretary of the Interior and the Commissioner of Indian Affairs." Id. If Section 81 applied to the agreement, the statute provided that "All contracts or agreements made in violation of this section shall be null and void . . . ." Id.

All this has now changed with the passage of the amendment to Section 81 on March 14, 2000. The amendment expressly dictates what contracts are within the section's scope. Under Section 81, as amended, the only agreements that must have the approval of the Secretary are those that encumber Indian land, as defined in the amendment, for a period of seven years or more. In addition, the law requires the BIA to promulgate regulations to further clarify the scope of its review. In summary, if the contract term is less than seven years, Section 81 approval won't be needed.

The contractor should also be aware of the Native American Grave Protection and Repatriation Act, 25 U.S.C. ß 3001 et seq. ("NAGPRA"). NAGPRA protects "cultural items" of Native American peoples, which are defined as "human remains" and "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony."[25] NAGPRA governs both the intentional excavation and removal and, as in the case of most construction projects, the inadvertent discovery of Native American remains and objects. In addition to requiring the discoverer to report the inadvertent discovery of Native American remains and objects, the

regulations implementing ß 3002(d) impose six additional obligations on responsible federal agency officials who receive notification that Native American cultural remains have been inadvertently discovered on federal lands. 45 C.F.R. ßß 10.1 et seq. Tribes take these duties very seriously and the contractor should inform its subcontractors of the requirements under federal and, most likely tribal law, concerning such items.

B. Some states impose additional requirements for casino construction.

Given the proliferation of Indian gaming, one of the most likely projects on the reservation will be the construction of a casino. There are numerous federal and state statutes that apply to Indian gaming and an exhaustive list is beyond the scope of this paper. However, contractors need to be aware that additional requirements may be imposed on them by the state if they construct a casino versus some other construction project.

For example, in Arizona, A.R.S. ß 5-602 requires the state Department of Gaming to certify, as provided in tribal-state compacts, "providers of gaming services." Although not defined by the statute, Arizona's standard form of tribal-state gaming compact defines "gaming services" broadly as "the providing of any goods or services . . . to the Tribe in connection with the operation of Class III Gaming . . . ." Under the recently amended statute, the Department of Gaming may impose civil penalties on certificate holders up to $5,000 per day for violations. Whether the failure of a contractor to acquire a certification to construct a casino falls within the scope of the standard compact and whether the department might seek civil penalties for such failure is an unanswered question.

C. Additional tribal code requirements.

At least one court has held that notwithstanding a state's requirement that all contractor's be licensed or be barred from bringing suit to recover unpaid amounts, contractors do not have to be licensed to perform work on reservations. However, some tribal codes require the contractor to be licensed by the state and/or the tribe to perform construction work on the reservation. The contractor is well-advised to check the individual tribe's tribal code for any additional licensing requirements.

Many tribal codes provide for a Tribal Employment Rights Office, or TERO, which promulgates quotas and, sometimes, purchasing requirements, for contractors doing business on the reservation. TERO rules may require the contractor to hire a set percentage of the tribal members or to purchase specific construction materials, i.e., sand and rock, concrete, or lumber, from tribal business enterprises. Often, the contract simply states that the contractor shall comply with all TERO requirements with little or no specification of those requirements. The TERO office may also set wages rates for specific categories of workers. The contractor should inform itself fully of the requirements and, if possible, address potential problem areas by

specific contract language prior to signing the contract and agreeing to all TERO requirements.

Tribal codes also address the discovery of Native American remains and articles. As discussed previously, although NAGPRA is the applicable federal law, tribal codes may impose additional duties on contractors that inadvertently uncover remains or artifacts. The code may also impose severe penalties if the remains or artifacts are disturbed or removed without tribal involvement.

V. CULTURAL CONSIDERATIONS RELATED TO NATIVE AMERICAN TRIBES

Native American tribes are, for the most part, egalitarian societies. That is, they believe that there should be structurally a degree of equality in access to control, influence, and direction over events that affect them. They also believe there should be a degree of similarity of rights, duties, responsibilities, treatment, protection, and rewards for all members of the tribe as a whole. This translates into a few simple truisms: (1) everyone in the tribe is equal; (2) the tribe's welfare prevails over the individual's welfare; and (3) the tribe is tied to the land and the environment.

If one phrase could typify the contractor, it's "Time is money!" The longer the contractor is on the jobsite, the more overhead and expenses increase. There is pressure to adhere to the schedule. The contractor is constantly attempting to plan for the future to meet contract goals. Decisions must be made and a project manager or project superintendent is appointed to make those decisions. In general, however, Native Americans value individual relationships more than time. Native Americans also, in general, value family over work. While Anglo society lives today and looks to the future, Native Americans, for the most part, live for today but look to the past for answers. Tribal leaders look to the experiences of others as a guide but do not wish to think about potential problems or pitfalls.

In dealing with a tribe as a potential partner, the contractor and surety must realize that pointed, direct questions are unwelcome at the beginning of the bargaining sessions. Native Americans, in general, like to "background," in speaking; that is, they want to show the listener how much history they know and, by telling them a number of stories, they believe the listener will understand what they mean and how it relates to the topic at hand. The contractor may get frustrated at this, what could be called, "beating around the bush." The contractor must realize that this manner of addressing issues is how the tribe and its members operates on a day-to-day basis. The successful contractor must become a listener as opposed to an interrogator.

Additionally, in attempting to fulfill TERO requirements, contractors should recognize that Native Americans, in general, may not function well as superintendents or managers of their own tribal members. Nor do they

relish the opportunity to make singular decisions. Also, traditionally, Native Americans have learned by watching and listening, with any practice done in private. Training, if required, must be done to match these requirements, instead of forcing what could be a foreign method and expecting results. Finally, given their traditional hierarchy that places family, ex-family, and tribe/community well before work, family requirements may take precedence over work schedules. Of course, the individual's background and history, i.e., raised on or off the reservation, affects how strongly traditional values influence behavior. More isolated tribes tend to be more traditional than tribes that have had frequent or on-going interactions with non-reservation societies.

VI. RECOVERY IN EVENT OF BREACH

From the previous sections, a contractor contemplating bidding a tribal project and procuring the issuance of a bond for such a project must address, prior to signing any contract: (1) what entity/entities it is contracting with; (2) what waiver(s) of sovereign immunity are needed; (3) who can execute any agreements/waivers on behalf of the tribal entity/entities; (4) the location of the project (on or off the reservation); (5) where disputes will be resolved and what law will apply; (6) what issues are involved under the specific tribe's laws, i.e., sales and income taxes; TERO requirements; (7) what cultural considerations need to be addressed; and, finally, (8) whether the contractor or its surety will be able to recover in case of a breach by the tribe or tribal entity.

Tribal property is either owned by the United States and held in trust for all members of the tribe or owned in common by the tribe for the benefit of all living members. To protect this class (which changes with each birth and death) and the Native American land base, there are restraints against alienation of tribal lands. Under 25 U.S.C. ß 177, regardless of whether the tribe or the United States government holds title, "[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution."

Given this protection, and, more importantly, ownership of the land by the federal government, it may be obvious--but not often thought of by the contractor--that state's mechanic lien laws have no application to reservation land or to trust lands held by Native American allottees. Indeed, it has been held that these anti-alienation principals apply likewise to land held in fee by a Native American tribe or tribal entity. It could be argued that state mechanic's lien laws do not apply even to lands off the reservation if owned in fee simple by a Native American tribe.

Certain alienations are authorized by 25 U.S.C. ß 415. Indian lands can be leased for "public, religious, educational, recreational, residential or business purposes" with Secretary approval. However, unless specifically

authorized, leases cannot exceed a term of years; however, renewal and extension for additional years are allowed. Finally, while Native American land itself cannot be encumbered, leasehold interests can be encumbered and assigned, with Secretary approval. In fact, state mechanic's lien laws can be applied to such leasehold interests if held by other than a tribal entity.[26]

Given this state of the law, the contractor most likely cannot resort to the standard practice of filing a mechanic's lien in case of a dispute. Indeed, it may be forced to litigate the dispute in tribal court notwithstanding a forum selection clause to the contrary. Proceeding through tribal court and then to federal court simply to appeal the assertion of jurisdiction by a tribal court may take years. The contractor must understand this risk and have the financial wherewithal to survive it.

Contract language alone does not guarantee the contractor will be allowed to execute on available funds even if it is awarded judgment against a tribal entity. In Maryland Casualty Co. v. Citizens National Bank,[27] Maryland Casualty sued its obligee, Seminole Indian Tribe, Inc. ("SIT"), a Section 17 entity. SIT's corporate charter contained a "sue and be sued" clause and Maryland Casualty was able to recover a judgment against SIT. Unfortunately, the charter allowed execution on only such "income or chattels especially pledged or assigned." To enforce its judgment, Maryland Casualty garnished SIT's off-reservation bank account. The funds were subject to a special deposit agreement between the United States and the tribal corporation. The district court dismissed the garnishment action.

On appeal, the Fifth Circuit affirmed the dismissal and held the specific limitation on execution in the corporate charter "must be liberally construed in favor of the Seminole Tribe and all doubtful expressions therein resolved in favor of the Seminole tribe." The court also held immaterial that the Seminole Tribe was engaged in commercial enterprise rather than governmental operations: "It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between Indian tribes and Indian with whites demonstrates such need." In summary, although funds were available, because the court construed the corporate charter in favor of the tribal corporation, the surety's judgment was essentially useless.

The lesson of Maryland Casualty is that the contractor may wish to include a clause that the tribe/tribal entity agrees to allow execution on assets posted as collateral, especially if on tribal land, and agrees to allow the contractor to file any judgment with the applicable tribal court to execute on the judgment. However, as to such "foreign" judgments, tribal law may be less than sympathetic towards the non-Indian. If the governing tribal code contains language that a tribal judge has discretion to determine that a foreign judgment against the tribe may be detrimental to the tribe, the judgment may not be allowed full faith and credit. Finally, decisions regarding execution of state court judgments on the reservation are less than

favorable. One alternative that has been utilized successfully, although yet to be subjected to scrutiny in a reported decision, is to set up a joint escrow account that is maintained off the reservation at a non-reservation bank. The escrow agreement requires the bank to pay pursuant to an arbitration award or state court judgment. However, such an arrangement is no guarantee that subsequent disputes are not contested in tribal court.

VII. CONCLUSION

This article has outlined the types of tribal entities, general aspects of federal law, sovereign immunity, available fora, and the risks inherent in contracting with Native American tribes and tribal entities. For the contractor considering bidding a project for a Native American tribe or tribal entity, the negotiation process can be an important tool to acquire the information needed to make an informed business decision. The surety should join in this process as much as possible. A number of tribes are governed by sophisticated business people who are anxious to come to a mutually satisfactory agreement. However, if the tribal officers refuse to address the issues and concerns outlined in this paper, the contractor must seriously evaluate whether to go forward.

Every proposed reservation project involves different facts, different tribal entities, and different funding arrangements, not to mention a potentially different set of laws. Contracting on the reservation requires that the special issues and concerns outlined in this paper be addressed prior to executing a contract with a tribe or tribal entity. If the contractor employs competent counsel to address the issues and concerns before committing to a project, the amount of risk can be reduced, the project can be bonded, and, potentially, the project will be profitable to both the contractor and the tribal owner.

[1]ENDNOTES:

Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

[2] Atkinson v. Haldane, 569 P.2d 151, 174-75 (Alaska 1977).

[3] S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 384, 674 P.2d 1376, 1382 (App. 1983).

[4] TBI Contractors, Inc. v. Navajo Tribe, 16 Ind.L.Rep. 6017 (Navajo Sup.Ct. 1988).

[5] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[6] See, e.g., Confederated Tribes of the Colville Reservation v. Stock West, Inc., 15 Ind.Law.Rep. 6019 (Colv.Tr.Ct.1988)(language in agreement did not result in a waiver).

[7]Rosebud Sioux Tribe v. Val-U Construction Co., 50 F.3d 560, 563 (8th Cir. 1995).

[8]Dixon v. Picopa Construction Co., 160 Ariz. 251, 772 P.2d 1104 (1989).

[9]Ramey Construction Co. v. Apache Tribe, 673 F.2d 315 (10th Cir. 1982).

[10]Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 673 F.2d 315 (10th Cir. 1982).

[11]Confederated Tribes of the Colville Reservation v. Stock West, Inc., 15 Ind.Law.Rep. 6019, 6020 (Colv.Tr.Ct.1988).

[12]Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council, 170 Cal.App.3d 489, 216 Cal.Rptr. 59 (1985).

[13]S. Unique, Endnote 3, *ante*.

[14]Id. at 387, 674 P.2d at 1375.

[15]Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

[16]R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985); accord Stock West Corp. v. Taylor, 737 F.Supp. 601, 603-04 (D.Or. 1990)(tribal courts "presumptively have civil jurisdiction over disputes directly implicating tribal affairs or arising on tribal reservations.").

[17]Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, n.21 (1978).

[18]Stock West Corp. v. Taylor, 942 F.2d 655, 660 (9th Cir. 1991); see also Brown v. Washoe Housing Auth., 835 F.2d 1327 (10th Cir. 1988)(contractor suing tribal housing authority required to exhaust remedies in tribal court even though no pending tribal court proceeding).

[19]See, *e.g.*, Duluth Lumber & Plywood v. Delta Dev., Inc., 281 N.W.2d 377 (Minn. 1979).

[20]C & L Enterprises v. Potawatomi Indian Tribe, 532 U.S. 411, 121 S.Ct. 1589 (2001).

[21]"Tribal Justice," California Lawyer, November, 1995, p. 39, quoting Navajo Supreme Court Associate Justice Raymond Austin.

[22]Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1993).

[23]Fuller v. Blaze Construction Co., 20 Ind.L.Rep. 6011 (Rosebud Sioux Ct.App. 1993).

[24]Fuller, 20 Ind.L.Rep. at 6012.

[25]25 U.S.C. ß 3001(3); see also Yankton Sioux Tribe v. United States Army Corps Of Engineers, 209 F.Supp.2d 1008 (D.S.D. 2002) for a good overview of the application of the statute to a construction project.

[26]See, *e.g.*, Red Mountain Machinery, 29 F.3d at 1412 (mechanic's lien on leasehold of Indian land can be foreclosed on).

[27]Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517 (5th Cir. 1965), cert. denied, 385 U.S. 918 (1966).