

NEGOTIATING LOCAL AGREEMENTS FOR TRIBAL CASINOS

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An increasingly-important element to any Indian casino development is contracting with local governments for local services.

As with any commercial development, a tribal casino must have access to certain essential public services and they almost always will need to deal with the local government which has jurisdiction over the area in which the project will be located. There are some exceptions to this where tribes already have developed extensive infrastructure within the tribal lands on which the casino will be sited, but they are rare. Moreover, many tribes are now seeking to develop casinos on lands outside of established trust or reservation lands, in which case working with the local governments is becoming essential for political reasons at both the local and state level.

There are many good agreements already in place which have created the framework for working relationships between tribes and local governments. For the purposes of this discussion, I have attached to this paper the Municipal Services Agreement between the Los Coyotes Band of Cahuilla and Cupeño Indians and the City of Barstow, California, a document comprehensively covering the issues raised by the parties in conjunction with a proposed off-reservation casino proposed for siting on the main highway between Southern California and Las Vegas.¹

The need for local services is unquestioned. The problem for the tribe is in contracting with the local government to secure them. Tribes want the services while preserving their sovereignty, while the local governments want to be fully compensated for the services provided and will insist on written enforceable agreements through which those services will be provided. Of course, "enforceable" means a tribal waiver of sovereign immunity so that the local government can protect itself should disputes arise.

Typically, a sophisticated local government will have a good idea of the issues which it wished to have covered in the agreement. The following outline is a snapshot of the kinds of matters which may be proposed at the outset and the ensuing discussions will focus on the details of (1) what issues to include in the final document and (2) the specific agreement as to each. The following Table of Contents is the blueprint for tribal negotiation in which this writer currently is involved on behalf of a county government, and it offered as a general guideline.

As the reader reviews the Table of Contents, special attention should be paid to Item No.

¹ For an off-reservation casino on newly-acquired land, there are sensitive issues arising under IGRA Section 20, 25 U.S.C. § 2719, discussed later in this paper.

12 entitled "County Legal Fees Reimbursement." With efforts to secure approvals for off-reservation gaming, the tribes (and their developers) recognize the need for a local services agreement as a demonstration to the Governor and the Department of the Interior that (1) they have contracted with the local government to pay for the services they actually receive at the site and (2) are working closely with the local government and population to minimize the disruptions which the project would create. This is both politically and practically expedient, since both the state and federal governments will focus on local impacts in assessing any off-reservation project. The local governments in turn are increasingly taking the position that they are willing to work with the tribes, but must be reimbursed for the expenses incurred in doing so. Item No. 12 covers a critical part of this reimbursement since the local governments almost always feel it important to retain outside counsel with particular expertise in this area.

ILLUSTRATIVE TABLE OF CONTENTS FOR LOCAL SERVICES AGREEMENT

1. Definitions
2. Environmental Review
 - (a) Federal and state environmental laws (NEPA and CEQA)
 - (b) Traffic Study
 - (c) Aquifer Study
3. Tribal Ordinances
 - (a) Applicable Standards
 - (b) County Enforcement
4. Fire Protection Services
 - (a) County Fire Department
 - (b) County Inspections
 - (c) Payment Provisions for Fire Protection Services
5. Emergency Medical and First Responder Services
 - (a) [Covered services to be specified]
 - (b) Payment Provisions for Emergency Medical/First Responder Services
6. Law Enforcement
 - (a) Law Enforcement Matters
 - (b) Payment Provisions for Law Enforcement
7. Transportation Resources and Traffic Mitigation
 - (a)
 - (b) Transportation Network
 - (c) [Local Road(s)] Improvements Project
 - (d) Traffic Restrictions
 - (e) Payment Provisions for Transportation Requirements
8. Environmental Impacts Mitigation
 - (a) Land Use Restrictions
 - (b) Development Standards
 - (c) Storm Water and Flooding
 - (d) Solid Waste
9. Contribution/Payment Matters
 - (a) Payment Terms
 - (b) Deductions
 - (c) No Other Payments
 - (d) Annual Adjustment
10. Mutual Aid Arrangements
 - (a) Mutual Aid

- (b) Law Enforcement (c) Level of Responses
- 11. Other Utilities and Services
- 12. County Legal Fees Reimbursement
- 13. Term
 - (a) Effective Date
 - (b) Expiration Date
- 14. Termination
 - (a) Termination Events
 - (b) Effect of Expiration or Termination
- 15. Suspension Events
- 16. Renegotiation Provision
 - (a) Tribe Renegotiation Events
 - (b) County Renegotiation
 - (c) Renegotiation Procedures
- 17. Dispute Resolution Provisions
 - (a) Informal Negotiation
 - (b) Mediation
 - (c) Arbitration
 - (d) Actions
 - (e) Other Dispute Resolutions
 - (f) Confidentiality
- 18. Expedited Procedure for Imminent Threats to Public Safety
 - (a) Judicial Litigation
 - (b) Consent to Jurisdiction
- 19. Limited Waiver of Sovereign Immunity
 - (a) Waiver
 - (b) Limitations on Tribe's Waiver
- 20. Notice
- 21. Miscellaneous Provisions
 - (a) Severability
 - (b) Scope
 - (c) Governing Law
 - (d) Construction of MOU
 - (e) Binding MOU
- 22. Review by the Department of the Interior pursuant to 25 U.S.C. § 81 for approval, or determination that Section 81 approval is not required.

At the outset of discussions between the tribe and local government, the primary concerns will focus on the most critical issues for any casino development, and they often are called the Big Four: **(1) water, (2) waste disposal, (3) transportation and (4) parking.** While there are some cases where tribes felt they did not need to contract with the local government for water and waste disposal, it is reality that the tribes almost always have to do so since the costs of providing these services independently can be enormous and the service often unsatisfactory, even to the point of failing applicable federal standards.

In contrast to the tribal needs and desires, the local governments will have their priority items. Among their principal objectives will be compliance with local building and zoning requirements – or, more reasonably, a project which is developed in a manner “**consistent**

with” those requirements so that the tribes are not actually agreeing to be bound by local codes and ordinances. Other major concerns are environmental compliance and consistency with local and state construction codes. Added to this is the fact that the local governments almost certainly will be confronted with complaints from neighbors and organized anti-gaming groups about the evils of development in general and casinos and gaming addictions in particular. And, the importance and of police and fire protection cannot be underestimated.

One frequent concession is a tribal agreement to make annual payments dedicated to treatment of “problem gaming” or “compulsive behavior problems.” While there is considerable debate as to the extent to which casinos actually contribute to such problems, these payments are becoming increasingly-common and demand for them is not likely to abate.

Finally, in the past, the parties have agreed to payments in lieu of taxes in local agreements; however, these payments are increasingly affected by demands for revenue sharing from states looking for new sources of revenues. This is becoming a political issue in several jurisdictions, most notably California with a Governor who has vowed that he will not raise taxes and has suggested that the casino tribes should pay to the state as much as 25 percent of their gaming revenues. This is complicated by a provision of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* (“IGRA”), which prohibits the imposition of taxes upon Indian gaming, and this matter is unfolding as this paper is written. The common vehicle for payments from gaming revenues to the state is a Compact provision which offers some “exclusivity” in gaming opportunity to tribes in return for the payments. The Department of the Interior has examined such provisions very carefully and a number of Compacts have been rejected by the Secretary upon a determination that the payments required by them were nothing more than disguised taxes since there was nothing in the gaming opportunity to which the term “exclusivity” would apply. There is a series of administrative rulings from Interior which are public documents and can be obtained upon request.

One creative method of revenue sharing is found in the current Compact model in Oregon in which the gaming tribes agree to commit a percentage of their Net Income to local foundations created and managed by the tribes; the foundations make grants to local arts and education activities twice a year and those funds have been essential parts of funding for the eligible entities. A further refinement of this will be found in a local services agreement recently negotiated in Western Washington between a tribe and the county agreement, in which the tribe will establish an Arts and Education Fund to be funded with a dedicated percentage of casino revenue and administered by a board consisting of both tribal and local government representatives. However, there must be a careful review of the tribal concessions in the Compact as the local government is assessing its requirements since some of the tribal payments to the states already are mandated to be shared with the local communities.

The returns from such local agreements are clear. The tribes get services and benefits quickly and without dispute, and the local governments get concessions which are economically and politically attractive. Moreover, the tribes may be able to negotiate for active support of the local governments for land acquisitions which otherwise could be tied up in disputes and controversy, with delays which cost both time and money. And, perhaps, most importantly, the parties ideally are establishing a working relationship which will benefit both sides to the agreement over time.

The Land Issue

One of the first issues which certainly will arise will concern the site being proposed for the casino.

Contrary to popular perception, tribes do not have the right to conduct gaming on randomly-selected land. IGRA limits site selection at 25 U.S.C. § 2701(5) where it states that tribes may only conduct gaming on "Indian lands," as defined at 25 U.S.C. § 2703(4):

The term "Indian lands" means - (A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

[Emphasis supplied.] Both IGRA and the Department of the Interior make clear that a site must have been "Indian land" as of October 17, 1988, the date on which IGRA became law. In addition to the federal requirements, every state Compact which this author has seen incorporates the same requirement that gaming only be conducted on "Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act."

The land status requirement often is at odds with the facts of a tribe's geographical location. Many tribes are located in areas far from populated areas or otherwise not easily unaccessible and -- thus -- not commercially viable for casino development; they understandably want to locate their casino projects on lands in more desirable locations. In addition, tribes which have gained federal recognition since 1988 also want to acquire land for gaming which would be in the most commercially-viable location, even though it may not be in the immediate area of tribal occupancy. The resulting search for new land takes the tribes and state/local governments into the world of IGRA Section 20, 25 U.S.C. § 2719, which establishes the circumstances under which Indian gaming can be conducted on land acquired subsequent to 1988. That section provides in pertinent part:

Section 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless -

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; ***

(b) Exceptions

(1) Subsection (a) of this section will not apply when -

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of -

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the

Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

[Emphasis supplied.]

What this means in plain English is that tribes can only conduct gaming on newly-acquired lands if those lands are located within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988 – as stipulated at Subsection (a) – or if the lands qualify for one of the exceptions set forth at Subsection (b).

Subsection (b)(1)(A) is fairly straightforward and allows gaming on a site which has been approved by the “two part determination” requiring that the Secretary of the Interior first make a finding that the trust acquisition would be in the best interests of the tribe and then concurrence by the Governor to the off-reservation casino. This process has been used only a few times nationally, in part because the Governors have total discretion in agreeing to or rejecting the land acquisition. There is no standard of reasonableness or fairness imposed on the Governors by this provision, and the refusal to concur is beyond judicial review as a practical matter.²

Subsection (b)(1)(B) provides special exceptions which primarily benefit newly-recognized tribes. If a proposed site satisfies the criteria for any of the three exceptions set forth, then the tribe has a right to conduct gaming on that site. However, for reasons not relevant to this discussion, qualification for these exceptions can be extremely difficult since both the National Indian Gaming Commission and the Department of the Interior are extremely conservative in their assessments of requests for approval under the exceptions of Section 20. Still, many tribes are pursuing land acquisitions on the assumption that they can secure federal concurrence that one of the three exceptions in this subsection would apply.³

The need to confirm land status is real. There always is a need to examine the legal status of the land proposed for a casino to confirm that it in fact qualifies for gaming, despite tribal representations and even the apparent history of the land. A prime example is found in California where many tribes have long occupied federal land which may not qualify for gaming. This is the product of a unique and largely-unknown federal law enacted in 1864 to deal with the state's “Indian problem” in the face of gold discoveries and a growing non-Indian population. This law is the California Indian Reservation Act of April 8, 1864, 13 Stat. 39 (“1864 Act”).

The 1864 Act is commonly referred to as the “Four Reservations Act” because it specifically limited to four the number of Indian reservations that could be established within the State of California. This was specifically legislated at Section 2, which states in pertinent part:

² In this regard, the Confederated Tribes of the Siletz Reservation contested the refusal of former Governor Barbara Roberts to concur through the United States Court of Appeals for the Ninth Circuit, arguing that her refusal was both unreasonable and unlawful. The litigation was unsuccessful.

³ There is no legislative history explaining congressional intent with regard to the “restored lands” provision, but there are two important federal court decisions reviewing and analyzing its meaning. See *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*, 46 F. Supp. 2d 689, 696 (W.D. Mich. 1999); *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155 (D.C. 2000).

SEC. 2. *And be it further enacted*, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations ***

[Emphasis supplied.]

That the 1864 Act established a federal statutory limitation to four reservations within California was unequivocally confirmed by the United States Supreme Court in the case of *Mattz v. Arnett*, 412 U.S. 481, 489 (1973).⁴

The only general statutory exceptions to the four reservation limitation of the 1864 Act are found in the Mission Indians Relief Act of January 12, 1891, 26 Stat. 712, and the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* **The Mission Indian Relief Act** provided for the establishment of reservations for Mission Indians residing in Southern California, which were to be set aside from lands then in the public domain. The identity of Mission Indians was and is well-known: they are the Indians historically residing adjacent to or near the Catholic missions in Southern California. As for **the Indian Reorganization Act**, there are provisions at 25 U.S.C. § 467 for the creation of Indian reservations but they apply only to land acquired pursuant to the provisions of that same law -- a threshold requirement which does not apply to lands in the public domain or otherwise in federal fee ownership. This means that anyone dealing with a tribe in a matter for which the nature of tribal land ownership could be an issue should fully understand the specific situation before proceeding. It is a fact that many California tribes are claiming reservation status for lands they occupy which are in federal fee ownership only; thus, they are not in trust status and they cannot be "reservation" by virtue of the restrictions of the 1864 Act. Still, the tribes and their business partners are proceeding with gaming developments and being allowed to do so by the Department of the Interior which has not yet confronted the matter. This is the kind of potential problem which should be avoided and can be with the appropriate due diligence.

Sovereign Immunity Discussion

The question of enforcement of a local agreement will arise and often is the subject of heated dialogue because tribes stand firmly opposed to waiving any element of sovereignty and the local government will (or at least should) insist on a waiver which would insure its right to enforce the agreement should a problem arise. The government which does not secure a waiver is making a serious error since tribes now understand that a waiver is an essential part of doing business.

The elements for a waiver can be simply stated. The waiver must be limited to disputes arising under the specific agreement since the courts have said that a broad, non-specific waiver is not valid. In addition, the waiver should be in the form of a formal resolution adopted by the tribe's governing body, since anything less could easily be rejected as not being a tribal waiver. A local government should never accept a promise to waive immunity in an agreement signed by a tribal official in the absence of a specific formal resolution of waiver adopted by the

⁴ *Mattz v. Arnett* recites the history of the 1864 Act at 412 U.S. 489-91, and identified the reservations established pursuant thereto as (a) Hoopa Valley, (b) Round Valley, and at various times the (c) former Klamath River, (d) Mendocino and (e) Smith River Reservations.

tribe's governing body. To do so is an invitation to dispute and litigation over whether a valid waiver exists.

With the broad principles stated, the following discussion explains the issue in detail and with legal citation.

As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).⁵

As the Supreme Court noted in *Kiowa Tribe*, the doctrine was developed almost by accident, going back to a resolution of issues concerning Indian lands in Oklahoma in the case of *Turner v. United States*, 248 U.S. 354 (1919).⁶ Nonetheless, it has become firmly established and today is "settled law."⁷

Although sovereign immunity may be waived by a tribe or abrogated by Congress,⁸ its relinquishment "*cannot be implied* but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976). [Emphasis supplied.] Also, see *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 546 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991).

Whether the principle applies to a given situation properly is determined by the courts, especially where a tribe asserts its immunity from suit and application of the rule of sovereign immunity is not clear.

Illustrative of the problem is the dispute resolved in favor of the tribe in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, *supra*. The tribe had executed a promissory note, and suit on the note was defended with the affirmative claim that there was no waiver of sovereign immunity. Despite the fact that the note was executed off-reservation and in conjunction with on-going commercial activities, the court found that the tribe was immune from the suit. The result was probably inevitable in that there was no clear waiver of sovereign immunity in the note.

Any waiver must come from a tribe's governing body in order to be clearly effective because there can be no incidental waiver of sovereign immunity – even when a waiver ostensibly had been made by tribal officials and not the tribe's governing body. *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997). In this regard, an apparent waiver made by a tribal entity other than the tribe's governing body was found to be no waiver at all in the case of *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1100-01 (9th Cir. 1994).

For non-Indian entities dealing with tribes, it is critical that waivers of sovereign immunity be clearly and unequivocally adopted by the tribe's governing body. Otherwise, the effectiveness of any waiver becomes an issue which invariably must be litigated, requiring the expenditure of time and money which could be avoided with a definite and unambiguous waiver

⁵ This rule is so firmly settled that one could cite scores of federal decisions affirming it. We have limited the citations to some of the most widely-cited cases relevant to this principle.

⁶ 118 S.Ct. at 1703.

⁷ *Ibid.*

⁸ See, e.g., *Oklahoma Tax Commission* at 111 S.Ct. 910.

adopted by the tribe's governing body in a formal resolution.

Illustrative of the problems faced by tribal business partners was the situation in the case of *Arizona Public Service Company v. Aspass*, 77 F.3d 1128 (9th Cir. 1995). Although the unequivocal waiver in a lease document was ultimately declared, the company had to litigate the matter through the Ninth Circuit before it was able to enforce the lease provisions.

Similarly, another company also had to go to the Eighth Circuit for confirmation of a waiver stated in its contract but not specifically made the subject of a formal tribal resolution. And, even then its right to enforce the contract was not final until the tribe unsuccessfully had petitioned for Supreme Court review. *Rosebud Sioux Tribe v. Val-U Construction Company*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 516 U.S. 819 (1995).

Notwithstanding certain intrusions into sovereignty by IGRA,⁹ the same problems arise in gaming projects as shown by the case of *Sakaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996). Even though there was an explicit waiver in the disputed contract, the company had to go to the Ninth Circuit for relief because the lower court had dismissed the action with a finding that a waiver was not clearly executed by the tribe. This further points out the dangers of relying on a waiver in contract without an independent formal action to that same effect by the tribe's governing body.

In light of the foregoing, it is clear that a formal waiver should be executed in conjunction with any tribal business undertaking with a non-Indian entity. The Resolution of Limited Waiver of Sovereign Immunity should specifically reference and attach the contract to which it applies, and should approve the document and all of its terms.

In response to suggestions that a formal resolution approving a contract could simply approve the document and all of its terms, the failure of the governing body to expressly and unequivocally waive sovereign immunity leaves room for the suggestion that the waiver was *implicit* rather than *explicit*,¹⁰ or even that the Tribal Council was unaware that the resolution

⁹ Those intrusions are not relevant to this discussion. However, as a point of interest for the reader, they provide for the participation of state Governors in both the development of Class III Gaming Compacts and the approval of off-reservation gaming projects.

¹⁰ As noted above, the implied waiver is not valid and so the failure to explicitly waive sovereign immunity is no waiver at all. See *United States v. Testan, supra*; *Fluent v. Salamanca Indian Lease Authority, supra*.

Exhibit A

Municipal Services Agreement
between
City of Barstow (“City”)
and
Los Coyotes Band of Cahuilla and Cupeño Indians

Exhibit B

Letter Dated December 20, 2004

being adopted incorporated a waiver of sovereign immunity through reference (a contention which could be troublesome). It well may be that such a resolution would be effective, but it also is possible that the absence of waiver language in the resolution could mean that the agreement is not enforceable.

The only certainty is specific waiver language in a formal resolution adopted by a tribe's governing body. This should be accompanied with the underlying contract as an attachment and incorporated by reference in its entirety. Anything less than this leaves room for an argument that there is ambiguity, in which case the non-Indian business partner runs the risk of having an unenforceable agreement.

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END NOTES

from Peter Siggins, Legal Affairs Adviser
to the Governor of California,
Concerning Off-Reservation Gaming