

Negotiating with a Tribe or Tribal Entity: Practical Tips for Franchisors

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Indian gaming has exploded in the more than twenty-five years since Congress passed the Indian Gaming Regulatory Act (IGRA). According to the 2014 *Casino City's Indian Gaming Industry Report*, Indian tribes received \$28.1 billion in gaming revenue in 2012.¹ Less well documented is the growth and development of non-gaming enterprises supported by casino customers. These enterprises, located on tribal lands, include quick-service restaurants, entertainment, and recreation.

The historical stigma associated with gaming has disappeared,² and customers view Indian casinos as a destination retreat where they can gamble, shop, eat, and relax. This presents an opportunity for both a franchisor, which can expand its geographic footprint and expose its brand to new customers who may not otherwise visit their local franchisee, and a tribal franchisee, which may value partnering with a franchisor with a strong brand that is widely known to non-Indian customers.³



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1. ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT (Casino City Press 2014), available at <http://www.casinocitypress.com/gamingalmanac/indiangamingreport/> (last visited May 6, 2014).

2. 2013 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT (2013), available at http://www.americangaming.org/sites/default/files/uploads/docs/aga_sos2013_fnl.pdf (last visited May 6, 2014).

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Because every franchise system is unique and every tribe is unique, this article is not intended to provide a one-size-fits-all template for franchisors considering franchising on Indian land. Rather, it is intended to provide a high-level picture of issues that a franchisor should consider in the context of its own system with its own individual tribal franchisee. This article begins with a discussion of tribal sovereignty, which informs not only the laws that apply to a franchise on Indian land but also mechanisms for dispute resolution. Next, the article discusses the applicability of various laws—federal, state, and tribal—that a franchisor should consider in negotiating an agreement. Finally, this article concludes with a discussion of various dispute-resolution venues if the transaction goes south.

I. Understanding the Importance and Effect of Tribal Sovereignty

Indian tribes are domestic sovereigns, that is, individual nations enjoying federal common law sovereign immunity.⁴ As a result, an Indian tribe “is subject to suit only where Congress has authorized the suit or where the tribe has waived its immunity.”⁵ A franchisor (or anyone else doing business in Indian Country) must understand that absent (1) an unequivocal authorization from Congress⁶ or (2) a clear waiver⁷ of the tribe’s sovereign immunity, the tribe,⁸ tribal entity,⁹ or tribal official or employee acting within the scope and course of authorized employment¹⁰ may not be subject to a lawsuit in tribal, state, or federal court (or demand for arbitration). To protect themselves, franchisors must understand the scope and nature of tribal sovereignty and be prepared to seek during negotiations an enforceable waiver (to both suit and enforcement) to permit recourse and remedies as deemed necessary.¹¹

A. Broad Scope of Tribal Sovereignty

The U.S. Supreme Court has held that tribes “enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial

4. 25 U.S.C. § 450 (2014).

5. *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998).

6. *Id.*

7. *Id.*

8. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

9. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996).

10. *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1982).

11. *See, e.g., Md. Cas. Co. v. Citizens Nat’l Bank of W. Hollywood*, 361 F.2d 517 (5th Cir. 1966) (holding that the incorporated tribe was immune from garnishment proceedings because its waiver of immunity contained within its bylaws was expressly qualified and excluded from the waiver the levy of any judgment, lien, or attachment against tribal property); *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980) (holding that allowing a garnishment proceeding to go forward would result in the impingement of tribal sovereignty because, in part, the tribe code did not provide for garnishment of wages as part of its judicial code authorizing the enforcement of judgments obtained in tribal courts).

activities and whether they were made on or off a reservation.”¹² In addition, sovereign immunity extends to claims of tortious conduct.¹³ In the franchising context, whether a franchised unit lies within the boundaries of the reservation or whether the conduct has an impact outside Indian lands (for example, payment of royalties or post-termination covenants not to compete) has no effect upon the doctrine of tribal sovereignty.

Tribal sovereignty also may protect tribal officials and employees who act within the scope and course of approved tribal employment.¹⁴ As such, a franchisor will not be able to sidestep tribal sovereignty by naming a tribal official or tribal employee in a lawsuit in lieu of naming the tribe or tribal entity itself.¹⁵ There is one exception: if tribal officials or employees act outside the scope and course of their functions or tribal employment, courts are willing to apply the *Ex Parte Young* doctrine to find that such activities are not protected by tribal sovereignty.¹⁶

Tribal employees do not need to be high-level government officials for tribal immunity to attach,¹⁷ and tribal sovereignty applies equally to employees of tribal corporations and employees of tribes.¹⁸ However, franchisors should be aware that there is a circuit split as to whether or not sovereign immunity applies to suits for declaratory and injunctive relief. The Fifth Circuit holds that sovereign immunity applies to bar suits for damage awards only,¹⁹ while the Ninth and Tenth Circuits hold that sovereign immunity precludes suits for declaratory relief and injunctive relief.²⁰

Because tribal sovereignty effectively precludes recourse in the event of a breach by the tribe or tribal entity, it is important for a franchisor to negotiate a valid and enforceable waiver of tribal immunity prior to entering into an agreement with a tribe or tribal entity.

12. See *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 760 (1998).

13. See *M.J. v. United States*, 721 F.3d 1079 (9th Cir. 2013) (“Johnson is also immune from tort liability by application of NVK’s sovereign immunity as an Indian tribe.”).

14. *Oregon*, 657 F.2d at 1013 (extending tribal immunity to tribal officials acting in an official capacity); *Davis v. Little*, 398 F.2d 83, 85 (9th Cir. 1968) (holding that general counsel of tribe enjoyed executive immunity from liability).

15. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983).

16. In *Ex Parte Young*, the Supreme Court permitted a court to recognize an official’s unconstitutional conduct as state action notwithstanding the sovereign immunity doctrine. 209 U.S. 123 (1908).

17. *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 277–78 (D. Conn. 2002).

18. *Filer v. Tohono O’Odham Nation Gaming Enters.*, 129 P.3d 78, 85–86 (Ariz. Ct. App. 2006).

19. See *Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571–72 (5th Cir. 2001); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680–81 (5th Cir. 1999).

20. *Matheson v. Gregoire*, 161 P.3d 486, 491 (Wash. Ct. App. 2007) (“We recognize that the Fifth Circuit has held that *Kiowa Tribe* preserves tribal sovereign immunity from damage awards only; under that rule, tribal immunity does not protect tribes from declaratory and injunctive relief. However, neither the Ninth Circuit nor Washington State has adopted a similar rule. . . .”); *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998).

B. Waiver of Tribal Sovereignty

From a drafting perspective, there are no magic words sufficient to create a valid waiver. However, the best practice is to be clear and concise, or the franchisor risks a court not enforcing the waiver. Importantly, the waiver must be viewed as clear, express, and unequivocal. For example, in *Sanchez v. Santa Ana Golf Club*,²¹ the court held that a “sue or be sued” clause in the tribal corporate charter permitting the tribe to sue or be sued acted as a waiver only when the clause “clearly expresses an intent to waive immunity.”²² Conversely, in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the U.S. Supreme Court determined that the inclusion of an arbitration provision in a form contract constituted a clear manifestation of the intent to waive sovereign immunity.²³

In *C & L Enterprises*, the tribe proposed that the parties use a standard form contract containing an arbitration provision and a choice-of-law provision. After a dispute arose, the tribe tried to avoid enforcement of the arbitration provision by claiming that it had not waived sovereign immunity. Although the waiver at issue in *C & L Enterprises* did not clearly mention “immunity” or “waiver,” the court found that the tribe’s contractual agreement (1) to submit any contract disputes to arbitration, (2) to be decided by Oklahoma law, and (3) to permit any arbitration award to be enforced in “any court having jurisdiction” constituted sufficient intent to waive immunity.²⁴

In addition to obtaining a clear and unequivocal written waiver of sovereign immunity, a franchisor should confirm that the waiver is a valid act of the tribal governing body and is not the result of “unapproved acts of tribal officials.”²⁵ For example, in *Calvello v. Yankton Sioux Tribe*, the court invalidated a purported waiver of tribal sovereignty because the chairman of the tribal business committee lacked authority to waive tribal sovereignty.²⁶ Similarly, in *Chance v. Coquille Indian Tribe*, the court found that the tribal corporation president lacked authority to bind the corporation to a contract waiving sovereign immunity.²⁷

From a practical perspective, franchisors may find that tribes and tribal entities will not agree to a complete waiver of sovereign immunity that could

21. 104 P.3d 548 (N.M. Ct. App. 2004).

22. *Id.* at 552.

23. 532 U.S. 411 (2001).

24. *Id.* at 423.

25. See *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286–87 (11th Cir. 2001) (reasoning that the tribal chief lacked authority to waive tribal sovereignty where tribal code provided procedure for obtaining a valid waiver and to permit finding implied authority would “be directly contrary to the Supreme Court’s statement that ‘a waiver of sovereign immunity cannot be implied but must be unequivocally expressed’”) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (internal quotation omitted)).

26. 584 N.W.2d 108, 114 (S.D. 1998); see also *Hydrothermal Energy Corp. v. Ford Bidwell Indian Cmty. Council*, 170 Cal. App. 3d 489 (1985).

27. 963 P.2d 638 (Or. 1998).

impact all tribal assets or other rights. In this instance, a franchisor should consider negotiating a limited waiver of sovereign immunity in which the tribe or tribal entity will permit recourse to certain assets or claims.²⁸ Specifically, the parties may negotiate that recourse may be obtained from the casino revenues or that claims are limited to actual damages but not special or punitive damages. As a further alternative, a tribe or tribal entity may establish another entity under state law with the written understanding that assets belonging to the state-chartered entity are not protected by sovereign immunity.

II. Practical Tips for Dealing with Indian Tribes

A. *Who Will Be the Franchisee?*

A primary consideration for a franchisor seeking to enter into a franchise relationship with a tribe or tribal entity is to determine who the putative franchisee will be. Many tribes are organized under the Indian Reorganization Act (IRA).²⁹ Tribes organized under Section 16 of the IRA adopt a constitution and bylaws establishing the tribe's governmental structure.³⁰ If the franchisee is organized under Section 16, the franchisor should carefully review all governance documents as well as any applicable tribal codes or laws. This will help to identify the key players in the tribal government and ensure that all procedural requirements for executing a valid contract are properly taken, including who has the power to sign such an agreement.

Alternatively, a tribe may form a tribal corporation under Section 17 of the IRA by which the Secretary of the Interior issues the tribe a federal charter.³¹ A Section 17 corporation is a separate tribal entity created by the tribe charged with carrying out official functions of the tribe.³² A tribal corporation created under Section 17 will adopt corporate governance documents similar to an incorporation certificate and bylaws.³³ Similarly, if a tribal corporation is to be the franchisee, the franchisor should review all organizational documents to ensure proper procedures for negotiating and executing an enforceable contract.

Finally, tribal entities may be incorporated under tribal law or state law.³⁴ If formed under tribal law, the tribe will have done so under its own business code³⁵ or through a tribal resolution or ordinance (i.e., a specific piece of tribal legislation to create the entity). If a tribal corporation is chartered under state law, as opposed to tribal law, that tribal incorporation is generally not

28. *See Campo Band of Mission Indians v. Super Ct. of San Diego Cty.*, 137 Cal. App. 4th 175 (2006) (holding that tribe only waived its sovereign immunity for claims of negligence).

29. 25 U.S.C. §§ 462–479 (2014).

30. 25 U.S.C. § 476 (2014).

31. 25 U.S.C. § 477 (2014).

32. 25 U.S.C. § 477 (2014).

33. 25 U.S.C. §§ 476–477 (2014).

34. *Am. Vantage Co. Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 (9th Cir. 2002).

35. *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993).

immune from suit under the doctrine of tribal sovereignty and may be sued in state court.³⁶ A franchisor should review the tribe's governmental and corporate information, including treaties, constitutions, federal or state charters, and tribal codes, which will identify the proper contracting party and the authority of that party to enter into a binding agreement.

B. *Applicability of Federal Laws*

As a general rule, federal statutes of general applicability that do not mention Indians are nevertheless usually held to apply to them.³⁷ There are exceptions: a statute of general applicability will be held inapplicable to a tribe if

(1) the law touches “exclusive rights of self-governance in purely intermural matters”; (2) the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended [the law] should not apply to Indians on their reservations.”³⁸

In those situations, courts look for a “clear and plain” expression signaling Congress's intent to abrogate Indian treaty rights.³⁹

Experienced Indian law counsel can determine which laws apply to each specific tribe. Below is a short discussion of key federal laws and regulations that a franchisor should consider in negotiating a transaction with a tribal entity.

1. FTC Rule

To date, no court has determined that the regulations promulgated by the Federal Trade Commission, commonly known as the FTC Franchise Rule, apply to Indian tribes. The regulations themselves are silent on the issue.⁴⁰ However, Part 436.2 of the Amended Rule makes clear that the disclosure requirements are limited to “the offer or sale of a franchise to be located in the United States of America or its territories.”⁴¹ Moreover, the Compliance Guide to the Franchise Rule provides:

Sales of Franchises to Be Located Outside of the United States and its Territories

As a matter of policy, the amended Rule reaches only the offer or sale of franchises to be located in the United States or its territories. Accordingly, the amended Rule does not apply, for example, to the sale of a franchise to an American citizen living

36. See *Bldg. Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 818 N.E.2d 1040, 1049–50 (Mass. 2004).

37. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (“A general statute in terms of applying to all persons includes Indians and their property interests.”).

38. *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462–63 (10th Cir. 1989) (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893–94 (9th Cir. 1980)).

39. *United States v. Dion*, 476 U.S. 734, 738–39 (1986).

40. See 16 C.F.R. §§ 436, 437 (2014).

41. See 16 C.F.R. § 463.2.

in Paris (or in Chicago), or to a French citizen in Paris, when the outlet will be located in Europe.⁴²

There is a credible argument that the sale of a franchise to be located on tribal lands is not one “located in the United States of America.” After all, Indian tribes are “distinct, independent political communities, retaining their original natural rights.”⁴³ A non-Indian franchisor would still be subject to the FTC’s jurisdiction and should continue to comply with the FTC Rule with regard to its disclosure obligations.⁴⁴

2. Federal Labor and Employment Statutes

Most federal labor and employment statutes are silent regarding their application to tribes. This has resulted in a split of legal authority as to the applicability of the various statutes. In *Federal Power Commission v. Tuscarora Indian Nation*,⁴⁵ the Supreme Court announced the “Tuscarora Rule,” holding “that federal statutes of general applicability, that do not mention Indian tribes, apply to Indian tribes.”⁴⁶ *Tuscarora* does not specifically address employment statutes; it addresses only statutes of general applicability and has been criticized, leading to circuit splits.

For example, the Tenth Circuit in *Donovan v. Navajo Forest Products Industries*⁴⁷ held that the Occupational Safety and Health Act (OSHA), which is silent as to its applicability to Indian tribes, “[did] not . . . apply to a tribal business manufacturing wood products.”⁴⁸ The court based “its decision on [the] existence of specific treaty rights protecting tribal sovereignty,” including the “rights of [the] Navajo Nation to exclude non-Indians and [the] self-governance rights of [the] Navajo Nation.”⁴⁹ In contrast, the Ninth Circuit held that OSHA applied to Indian tribes,⁵⁰ concluding that operation of a tribal farm was not an aspect of self-government.

In other instances, Congress expressly excludes applicability to Indian tribes: (1) Title VII of the Civil Rights Act of 1964,⁵¹ (2) Title I of the Americans with Disabilities Act,⁵² and (3) the Workers Adjustment and Retraining Notification Act.⁵³ Sometimes, Congress specifically includes Indian tribes,

42. FRANCHISE RULE COMPLIANCE GUIDE 7 (May 2008), available at <http://www.business.ftc.gov/documents/bus70-franchise-rule-compliance-guide>.

43. *Worcester v. Georgia*, 31 U.S. 515 (1832).

44. See FRANCHISE RULE COMPLIANCE GUIDE, *supra* note 42, at n.3.

45. 362 U.S. 99 (1960).

46. FEDERAL EMPLOYMENT AND LABOR LAWS APPLICABLE TO TRIBES OR TRIBAL COMMERCIAL ENTERPRISES 4 (2013), available at <http://www.nahmus.org/fedemploylaborlaws.pdf>.

47. 692 F.2d 709 (10th Cir. 1982).

48. FEDERAL EMPLOYMENT AND LABOR LAWS, *supra* note 46, at 9 (emphasis omitted).

49. *Id.*

50. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

51. 42 U.S.C. § 2000e(b)(1) (2014). *But see* *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F. Supp. 753 (D.N.D. 1989) (holding that Title VII does not provide an exemption to enterprises that have mixed ownership of Indians and non-Indians).

52. 42 U.S.C. § 12111(5)(b) (2014).

53. 20 C.F.R. § 639.3(a)(1) (2014).

such as a recent amendment to the Employee Retirement Income Security Act (ERISA).⁵⁴

C. *Government Approval of Certain Contracts: 25 U.S.C. § 81*

Franchisors should be aware that some agreements with tribes or tribal entities may be subject to federal government approval in order to be valid and binding. Specifically, 25 U.S.C. § 81 provides “[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”⁵⁵

Failure to address the applicability of 25 U.S.C. § 81 may lead to serious, negative consequences. In *United States of America ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*,⁵⁶ the district court held that 25 U.S.C. § 81 invalidated two casino agreements. Enterprise, a bingo management company, had a management agreement and a lease executed by the tribe.⁵⁷ The management agreements were never approved by the Secretary of the Interior, and, in October 1987, the Secretary specifically disapproved of the 1985 management agreement.⁵⁸ The district court concluded that the management agreements were void pursuant to 25 U.S.C. § 81 even though (1) the Bureau of Indian Affairs (BIA) had approved the leases and (2) Enterprise argued that the Tribe failed to honor its promise to seek approval of the management agreements by the Secretary.⁵⁹

Under existing regulations,

[t]he Secretary will disapprove [of] a contract or agreement . . . if the Secretary determines that such contract or agreement: (1) [v]iolates federal law; or (2) [d]oes not contain at least one of the following provisions that: (i) [p]rovides for remedies in the event the contract or agreement is breached; (ii) [r]eferences a tribal code, ordinance[,] or ruling of a court of competent jurisdiction that discloses the right of the tribe to assert sovereign immunity as a defense in an action brought against the tribe; or (iii) [i]ncludes an express waiver of the right of the tribe to assert sovereign immunity as a defense in any action brought against the tribe, including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action.⁶⁰

“The Secretary will [also] consult with the Indian tribe as soon as practicable before disapproving a contract or agreement regarding the elements of the contract or agreement that may lead to disapproval.”⁶¹ “A contract . . . require[ing] Secretarial approval . . . is not valid until the Secretary approves it.”⁶²

54. See 29 U.S.C. § 1002(32) (2014).

55. 25 U.S.C. § 81.

56. 734 F. Supp. 455 (W.D. Okla. 1990).

57. *Id.* at 456–57.

58. *Id.*

59. *Id.*

60. 25 C.F.R. § 84.006(a) (2014).

61. 25 C.F.R. § 84.006(b) (2014).

62. 25 C.F.R. § 84.007 (2014).

There are three prerequisites that must be met before 25 U.S.C. § 81 applies, and a discussion of each element follows.

1. “With an Indian Tribe”

The statute applies only to contracts “with an Indian tribe.” Whether a contract is with an Indian tribe is a fact-based inquiry not limited solely to the named parties of the contract.

In *Pueblo of Santa Ana v. Hodel*, the tribe brought an action “challeng[ing] [the] decision of the Secretary . . . denying its proposal to construct and operate a dog racing facility on its reservation.”⁶³ The tribe was governed by a Tribal Council.⁶⁴ The Tribal Council, in turn, enacted an ordinance establishing the Santa Ana Enterprise, which, according to the ordinance, was a “non-profit instrumentality of the Pueblo of Santa Ana.”⁶⁵ The ordinance empowered the Enterprise to buy and sell non-tribal trust land and assign, mortgage, lease, or otherwise encumber any interest in tribal trust lands that were assigned or leased to it by the tribe.⁶⁶ The Enterprise was also empowered to make contracts, receive governmental grants, and sue or be sued in its organizational name.⁶⁷ The Enterprise had no shareholders and was managed by a board of directors selected by the council.⁶⁸

The court held that, under these circumstances, the contract with the Enterprise was a contract with an Indian tribe under 25 U.S.C. § 81.⁶⁹ In a footnote, the court noted:

The Court does not question the tribe’s power to set up a separate entity to act in the interests of the sovereign tribe. It does, however, raise issue with the tribe’s chameleon-like effort to clothe itself with an Indian status for § 177 purposes and non-Indian status for § 81 purposes.⁷⁰

In contrast, in *Inecon Agr incorporation v. Tribal Farms, Inc.*, the tribe entered into agricultural land development and management contracts with Inecon.⁷¹ Potential lenders refused to deal with the tribe because it was not subject to federal or state court jurisdiction.⁷² Consequently, the tribe created a separate corporation and incorporated it under Arizona law.⁷³ The corporation was wholly owned by the tribe, and its board of directors was composed entirely of its council members.⁷⁴ Later, Tribal Farms lost an arbitration award under the contracts and Inecon sought to enforce the arbitration

63. 663 F. Supp. 1300, 1301 (D.D.C. 1987).

64. *Id.* at 1302.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1306.

70. *Id.* at 1305 n.7 (internal citations omitted).

71. 656 F.2d 498 (9th Cir. 1981).

72. *Id.* at 499.

73. *Id.*

74. *Id.* at 501.

award.⁷⁵ Tribal Farms attempted to avoid liability by arguing that the contracts were void because they had not been approved under 25 U.S.C. § 81.⁷⁶ The Ninth Circuit ruled that 25 U.S.C. § 81 did not apply, and therefore approval had not been necessary, because “Tribal Farms is an Arizona corporation and thus does not fall within the protected class of ‘tribe of Indians or individual Indians’ covered by the statute.”⁷⁷

2. “Encumbers Indian Lands”

The second prerequisite is that the contract must “encumber[] Indian lands.” The Department of the Interior defines “encumber” as “to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances).”⁷⁸ Encumbrances “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.”⁷⁹

In *GasPlus LLC v. U.S. Department of the Interior*, the U.S. District Court for the District of Columbia provided guidance on whether an agreement encumbers Indian land within the meaning of the statute.⁸⁰ The dispute in *GasPlus* arose because, “[u]nder former New Mexico law, bulk [gasoline] distributors . . . could avoid the state’s excise tax by selling their gasoline to a Registered Indian Tribal Distributor and then buying the gasoline back at a slightly higher price.”⁸¹ The tribe owned a gasoline distribution business.⁸² The Nambe Pueblo Development Corporation (NPDC) “[was] a federally chartered corporation that the . . . tribe created in order to operate their gasoline distribution business . . . located on tribal land.”⁸³ GasPlus was a New Mexico limited liability company managing distribution businesses.⁸⁴

GasPlus and the tribe signed a management agreement “under which GasPlus agreed to ‘manage, supervise, and operate [the tribe’s] Gasoline Distribution Business.’”⁸⁵ Under the management agreement, GasPlus assumed duties to (1) “[s]upervise and direct the general operations of the . . . business,” (2) “[s]elect and train personnel to run the daily operations’ of the business,” (3) “[n]egotiate prices and coordinate deliveries,” (4) “[d]evelop policies for the purpose of maximizing net income,” (5) maintain proper records, (6) “[b]ill and collect revenues and fees,” (7) pay expenses, (8) advertise,

75. *Id.* at 500.

76. *Id.*

77. *Id.* at 501 (interpreting an earlier version of 25 U.S.C. § 81).

78. 26 C.F.R. § 84.002 (2014).

79. *Id.*

80. 510 F. Supp. 2d 18 (D.D.C. 2007).

81. *Id.* at 21 (quoting *GasPlus, L.L.C. v. U.S. Dep’t of Interior*, 466 F. Supp. 2d 43, 44 (D.D.C. 2006)).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

and (9) prepare and file reports.⁸⁶ Later, the newly elected governor of the tribe submitted the contract for approval, and it was declared void.⁸⁷

After administrative appeals, the district court focused on what it meant to encumber Indian lands within the meaning of the statute and concluded that “a contract that ‘encumbers Indian lands’ is a contract that, by its terms, provides a third party with a legal interest in the land itself; that is, a right or claim attached to the real property that would interfere with the tribe’s exclusive proprietary control over the land.”⁸⁸

Turning to the management agreement at issue, the court concluded:

[I]t is clear that the Agreement is not directly concerned with tribal land: nowhere in the Management Agreement is GasPlus given any legal right or interest in the Nambe Pueblo’s real property. The Agreement is a straightforward contract regarding the management of NPDC’s gasoline distribution business; it does not, by its terms, “encumber” Nambe Pueblo property by giving GasPlus an interest or right attached to the Tribe’s lands. Thus, any effect the Management Agreement might have on tribal lands is necessarily incidental or secondary to the Agreement’s purpose.

....

Nothing in the Management Agreement explicitly or implicitly gave GasPlus a legal right attached to the real property on which the gasoline distribution business was located. The Nambe Pueblo retained all the rights of ownership over both the gasoline distribution business and the land. Had the Tribe wished to mortgage the land (or facilities) during the term of the contract, the Management Agreement would have given GasPlus no power to stop the transaction or to place a cloud on the title. The legislative history of the 2000 amendments to Section 81 makes it clear that as long as the land itself remains within a tribe’s proprietary control, an agreement that merely relates to the land does not require the BIA’s approval. The Court cannot agree that the right to manage the “day-to-day” operations of a business, by itself, is tantamount to an “encumbrance” on the land upon which the business is located.⁸⁹

A franchisor should give careful attention to whether or not the franchise agreement (or a related contract) encumbers Indian land—and particularly the circumstances (if any) under which a franchisor has the right to operate a unit upon default.

3. “For a Period of 7 or More Years”

Finally, the statute applies if the contract is for a period of seven or more years. Thus far, there is no case law interpreting whether or not a renewal option could be calculated in determining if the contract exceeds seven years, and the statute itself is silent on the issue. In *GasPlus*, the government asserted that it had the right to tack on renewal periods, relying upon *Scott v. Acting Albuquerque Area Director*,⁹⁰ which interpreted 25 U.S.C. § 415. The

86. *Id.* at 22.

87. *Id.*

88. *Id.* at 29.

89. *Id.* at 29–30.

90. 29 I.B.L.A. 61 (U.S. Dep’t of Interior Feb. 7, 1996).

court in *GasPlus* did not reach the renewal issue. Because the statute is silent as to renewal periods, it is reasonable to conclude that renewal periods should not be considered in determining whether the contract is covered by the statute.

D. *Indian Long-Term Leasing Act (25 U.S.C. § 415) and the HEARTH Act*

Franchise systems with a real estate component need to be aware of the Indian Long-Term Leasing Act, 25 U.S.C. § 415, which requires the Secretary to approve most leases. Under the Indian Long-Term Leasing Act, every lease of an Indian's land must undergo federal review and approval by the Secretary of the Interior.⁹¹ A lease can be granted only on the terms and forms that the Secretary dictates, and a lease cannot be canceled without the Secretary's prior approval.⁹² The approval process has been known to take months, if not years. In the past, this has been a substantial hurdle in doing business on Indian land.

In recognition of the foregoing hurdles, the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012 amended the Indian Long-Term Leasing Act.⁹³ The HEARTH Act authorizes Indian tribes to lease their land for business and other purposes for up to seventy-five years (twenty-five-year base terms with two renewal terms of twenty-five years each for business and agricultural leases)⁹⁴ without the Secretary's review and approval. To apply, Indian tribes must adopt their own leasing regulations that in turn must be approved by the Secretary.⁹⁵

E. *Applicability of State Laws*

In addition to federal laws, there are three general categories of state laws regulating the sale of franchises: disclosure laws, registration laws, and relationship laws. However, "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."⁹⁶ As with the federal regulations, a franchisor would likely remain subject to a state's jurisdiction for any existing franchise sales that are being conducted within the state (and off of the reservation) and should continue to comply with all state franchise laws.

Indeed, compliance with federal regulations and state franchise laws regarding disclosure of the Franchise Disclosure Document may offer a franchisor some protection in the event that a franchisee attempts to create a common law claim out of what would normally be a disclosure violation.

91. 25 U.S.C. § 415(a) (2014); *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891, 894 (10th Cir. 1991) ("In order for the [section 415(a)] lease to have been valid, the [Interior] Department's approval was required.")

92. 25 C.F.R. § 162.470 (2014).

93. 25 U.S.C. § 415(h) (2014).

94. 25 U.S.C. § 415(h)(1)(A) (2014).

95. *See* 25 U.S.C. § 415(h)(1) (2014).

96. *See, e.g., McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973).

Of course, if the parties agree that they will comply with specific state or federal laws, those representations may be binding upon the parties.

F. Tribal Laws, Regulations, and Licensing Requirements

Aside from complying with federal and state laws, franchisors seeking to do business on Indian land should understand that each tribe has its own set of laws, licenses, and regulations that need to be analyzed and adhered to. For example, a franchisor who wants to require a franchisee to use a particular architect for a build-out needs to determine whether there is a Tribal Employment Rights Ordinance (TERO). Many tribes have adopted their own TERO ordinances, and all employers who operate a business on Indian land or offer jobs may be required to comply with the applicable TERO, which generally requires Indian preference in matters of employment.

A franchisor should also determine any applicable licensing requirements if the franchise is to be located within or contiguous to a tribal casino, which includes review of the tribal gaming ordinances and regulations. In some instances, a general business license or other permit is required by the tribe, in addition to a gaming license. Each tribe has its own specific procedures and requirements for obtaining applicable licenses, and the tribe's codes and laws must be reviewed to determine compliance.

Finally, each tribe may have its own set of substantive laws, including tax, employment, and health and safety requirements. Because every tribe is different, this article does not purport to cover every possible tribal law that may apply to a transaction. The franchisor must conduct careful due diligence and research pertinent to the specific tribe to confirm all applicable requirements for lawfully conducting business with the tribe or tribal entity.

III. Considerations for Dispute Resolution

Before entering into a franchise relationship, both franchisor and franchisee should negotiate and memorialize in a written integrated agreement the process for dispute resolution in the unfortunate event the deal goes bad. There are three possible judicial forums: federal court, state court, and tribal court. In addition, the parties could agree to arbitration or other alternative dispute resolution. Each of these forums has its own opportunities and challenges as detailed below.

A. Federal Court Jurisdiction

Because federal courts are courts of limited jurisdiction, there must be a jurisdictional linchpin for any claim filed in federal court.⁹⁷ To establish federal court jurisdiction, the plaintiff must establish that either (1) the suit poses a federal question⁹⁸ or (2) there is complete diversity and the amount

97. See U.S. CONST. art. III, § 2.

98. See 28 U.S.C. § 1331 (2014).

in controversy is met.⁹⁹ The fact that litigation arises with a federally recognized tribe does not mean that the suit presents a federal question.¹⁰⁰ Rather, the course of action must present a federal question.¹⁰¹ A franchisor may also be able to convince a federal court to exercise supplemental jurisdiction over state law claims if the state law claims are so related to the federal claims that they form the same case or controversy.¹⁰²

It is more difficult to establish diversity jurisdiction because courts have held that a tribe is not a citizen of any state for purposes of diversity jurisdiction.¹⁰³ However, a state-chartered tribal entity may be sued under diversity jurisdiction assuming complete diversity.¹⁰⁴ Moreover, there is authority that—at least in the Seventh, Ninth, and Tenth Circuits—an Indian corporation may be a citizen of the state where it has its principal place of business.¹⁰⁵ Finally, the plaintiff must allege that the controversy exceeds the minimum amount (currently, \$75,000).¹⁰⁶

B. State Court

State courts do not usually have jurisdiction over matters that arise on a reservation or on tribal lands where a tribe or tribal entity is involved.¹⁰⁷ However, that does not preclude a tribe or tribal entity from agreeing to state court jurisdiction by contract.¹⁰⁸

C. Tribal Court

Jurisdiction in a tribal court largely depends on whether the defendant is a tribal member or tribal entity¹⁰⁹ and whether the dispute occurred in Indian Country. The term “Indian Country” includes (1) “all land within the limits

99. See 28 U.S.C. § 1332 (2014).

100. See *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) (“The federal courts do not have jurisdiction to entertain routine contract actions involving Indian tribes.”).

101. *Gen. Motors Corp. v. New A.C. Chevrolet Inc.*, 263 F.3d 296 (3d Cir. 2001).

102. 28 U.S.C. § 1367 (2011).

103. See *Am. Vantage Co. Inc. v. Table Mt. Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002); *but see Warn v. E. Band of Cherokee Indians*, 858 F. Supp. 524, 526 (W.D.N.C. 1994) (holding that the court had diversity jurisdiction over a breach of contract claim by a non-Indian against a tribe and tribal council members); *Tribal Smokeshop, Inc. v. Ala.-Coushatta Tribe*, 72 F. Supp. 2d 717, 718 n.1 (E.D. Tex. 1999) (stating that Indian Tribes are deemed to be citizens of the state in which they are located for purposes of diversity jurisdiction).

104. See *Inecon Agricornp. v. Tribal Farms, Inc.*, 656 F.2d 498 (9th Cir. 1981).

105. *Cook v. AVI Casino Inc.*, 548 F.3d 718 (9th Cir. 2008); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (explaining that a “tribe may . . . charter a corporation pursuant to its own tribal laws, and such a corporation will be considered a citizen of a state for purposes of diversity jurisdiction”); *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev.*, 658 F.3d 684 (7th Cir. 2011) (“We join our colleagues in the Ninth and Tenth Circuits and hold that a corporation chartered under Native American tribal law should be treated as a citizen of a state.”).

106. 28 U.S.C. § 1332(a) (2014).

107. *But see* 28 U.S.C. § 1360(b) (excluding jurisdiction of state courts over a dispute involving “ownership or right to possession of [Indian] property or any interest therein”).

108. *Puyallup Tribe v. Dep’t of Game*, 433 U.S. 165, 172 (1977).

109. See *Montana v. United States*, 450 U.S. 544, 566 (1981) (“Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reserva-

of any Indian reservation,” (2) “dependent Indian communities” within the United States, and (3) all Indian allotments, including rights-of-way.¹¹⁰

Under *Montana v. United States*, a tribal court can assert jurisdiction over a claim against non-Indians (in this context, a franchisor) only when “necessary to protect the tribal self-government or to control internal relations.”¹¹¹ A private contract would permit a tribal court to exercise jurisdiction under the *Montana* rule.¹¹²

Many franchisors may be apprehensive about litigating in a tribal court and can avoid this possibility through the negotiation process. In the event that a franchisor finds itself in tribal court, a basic understanding of the court’s jurisdiction is necessary.

Many tribes have their own unique judicial system rules and procedures. The qualifications of tribal court judges vary widely depending upon the court.¹¹³ Some tribal court judges are required to have law degrees, while others are not; some tribes require the judge to be a member of the tribe, while others do not.¹¹⁴ Most tribal law and order codes contain procedural rules as well as statutes and regulations,¹¹⁵ but tribal laws may also include traditional practices, including commercial customs based upon oral history that may not be written down.

Tribal court judges may follow precedent set by their own courts and may cite to decisions from other tribal courts. Conducting legal research into those decisions may be difficult. There is no official tribal court reporter that compiles all published decisions from the various courts. Further, not all tribal courts maintain prior written opinions in an easily researchable format. The Tribal Court Clearinghouse, located at <http://www.tribal-institute.org/lists/decision.htm>, does publish many tribal court decisions and can be valuable. In addition, federal and state court opinions may

tions. . . .”); *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005) (holding that the tribe has jurisdiction over defendant because he was an Indian by political affiliation).

110. See 25 U.S.C. § 1151 (2014); *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520 (1998) (expanding statute to cover civil jurisdiction).

111. *Montana*, 450 U.S. at 564.

112. *Strate v. A-1 Contractors*, 520 U.S. 438, 473 (1997).

113. See Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401–02 (1985).

114. Compare LAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES, at 1-2-202(5) (2013) (“A person shall be eligible to serve as a Tribal Court Judge only if the person (i) is a member of the Confederated Salish and Kootenai Tribes, and (ii) has never been convicted of a felony, or, within one year then past, of a misdemeanor, with the exception of minor traffic violations.”), available at <http://www.cskt.org/gov/docs/CSKT.Laws.Codified.2013.pdf> (last visited May 30, 2014), with POARCH BANK OF CREEK INDIANS TRIBAL CODE § 3-1-3 (2004) (“(a) To be eligible to hold the office of Tribal Judge, a person must be: 1) physically able to carry out the duties of the office; 2) of high moral character and integrity; 3) capable of preparing the papers and reports incident to the office of Tribal Judge; 4) an Attorney licensed to practice law in the state of residence; 5) sensitive to the needs of the American Indian; and 6) demonstrate an awareness of and sensitivity to the goals of the Poarch Band of Creek Indians.”), available at <http://www.narf.org/nill/Codes/poarchcode/poarchsec3jud.htm> (last visited May 30, 2014).

115. See, e.g., TRIBAL COUNCIL OF THE E. BAND OF CHEROKEE INDIANS, THE CHEROKEE CODE (updated June 8, 2010), available at <http://narf.org/nill/Codes/ebcicode/index.htm>.

serve as persuasive authority, particularly in the context of commercial litigation.¹¹⁶

D. Arbitration

Many franchisors seek to include arbitration provisions in their agreements. Although an arbitration clause (coupled with necessary waivers) should be enforceable, a franchisor should also consider where any arbitration provision, or resulting award, would need to be enforced. For instance, in *Val/Del, Inc. v. Superior Court*,¹¹⁷ the Arizona Court of Appeals held that an arbitration agreement that did not draw a distinction between the tribal court system and a state court system may mean that the tribal court also has jurisdiction to hear a dispute regarding the enforceability of the agreement to arbitrate. In addition, if a franchisor believes that assets necessary to confirm and satisfy an arbitration award may be found in Indian Country, the franchisor should draft the agreement to clearly provide for this option and should not assume that courts will permit this without a clear agreement by the parties.¹¹⁸

E. Exhaustion of Remedies Doctrine

If a franchisor is sued by a tribe or tribal entity in a tribal court, the franchisor could challenge jurisdiction in federal court if it believes that jurisdiction is not appropriate.¹¹⁹ The question of whether a tribe has jurisdiction over a non-Indian party must be answered by federal law and thus presents a federal question jurisdictional linchpin under 28 U.S.C. § 1331. However, a federal court will not hear a dispute arising on tribal lands until the tribal court has determined the scope of its own jurisdiction and entered a final ruling.¹²⁰ It is only after a tribal court has ruled on the merits of the case and all tribal appellate options have been exhausted that the nontribal party can file suit in federal court, where the question of federal jurisdiction is reviewed *de novo*.¹²¹

There are a few exceptions to the exhaustion doctrine. First, federal courts are not required to defer to tribal courts when (1) “an assertion of tribal jur-

116. See e.g., *Mamiye v. Mashantucket Pequot Gaming Enter.*, 1 Mash. 245, 247–49 (Mashantucket Pequot Tribal Ct. 1996).

117. *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 703 P.2d 502 (Ariz. Ct. App. 1985).

118. See e.g., *Md. Cas. Co. v. Citizens Nat'l Bank of W. Hollywood*, 361 F.2d 517 (5th Cir. 1966) (rejecting attempt to garnish funds in an off-reservation bank account to pay a judgment); *Joe v. Marcum*, 621 F.2d 358, 361–62 (10th Cir. 1980) (holding that state court did not have jurisdiction to garnish wages earned on the reservation because Navajo Tribal Code did not permit garnishment). *But see Cherokee Nation v. Nations Bank*, 67 F. Supp. 1303, 1307–08 (E.D. Okla. 1999) (rejecting *Maryland* and *Joe* because the tribal court had adopted state law regarding enforcement of judgments, thereby establishing a mechanism for garnishment).

119. As explained above, in general, the act of entering into a consensual contractual relationship with a tribe or tribal entity will permit an exercise of tribal court jurisdiction to the extent that the actions forming the basis of the tribal lawsuit arise from that relationship.

120. See *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007).

121. See *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852–53 (1984).

isdiction is motivated by a desire to harass or is conducted in bad faith,” (2) “the action . . . is patently violative of express jurisdictional prohibitions,” or (3) “exhaustion would be futile because of the lack of an adequate opportunity to challenge the . . . court’s jurisdiction.”¹²² Further, when “it is plain that no federal grant provides for tribal governance of nonmembers’ conduct on land covered by *Montana’s* main rule,” exhaustion would serve no purpose other than delay.¹²³

If the federal court affirms the tribal court determination that jurisdiction was proper, the franchisor may not relitigate issues already determined on the merits by the tribal court. As the tribal court may be the only court to hear the merits of the dispute, the franchisor should thoroughly present its case before the tribal court. To avoid this potential situation, the parties can include in the contract an express waiver of the tribal court exhaustion doctrine.

IV. Conclusion

Economic growth and development engendered by Indian gaming has created economic opportunities for franchisors to enter into franchise relationships with tribes and tribal entities. To maximize the chance of success, franchisors should confirm that the documents contain clear and unambiguous provisions addressing the rights and remedies of each party in the event of a breach. In addition, the franchisor should engage experienced franchise and Indian law counsel to ensure that the agreements have been properly executed by people with authority and are thus enforceable. Paying attention to these careful details will promote a long-standing beneficial relationship for franchisor and franchisee alike.

122. *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir. 1997) (quoting *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 n.21 (1985) (internal quotation and citation omitted)).

123. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997).