

Issues Relating to Leases on Native American Reservations

By: Don J. Miner, Esq.
Sarah Kubiak, Esq.
Almira Torralba, Esq.

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I. SCOPE OF MATERIALS

These materials will focus on the unique nature of Native American lands and issues that arise within the context of leasing land on Native American reservations for commercial development. Readers should bear in mind that the materials presented herein reflect only the viewpoints of the authors and are not intended as and may not be construed as legal advice or an opinion binding upon the authors or their firm. For legal advice, readers should consult with a qualified lawyer on the particular matter with which they may be confronted.

II. INTRODUCTION

In a foundational decision, Chief Justice John Marshall stated: "The condition of the Indians in relation to the United States in perhaps unlike that of any other two people in existence... marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). This statement is a useful lens for considering the many issues that arise in connection with development and leasing on Native American lands. For example, unlike the common law property regime, which presumes individual ownership interests and alienability of property, tribal land is collectively owned and unalienable; while the regulation of real property is typically the domain of the state, the field of the regulation of tribal land is almost exclusively occupied by the federal government. In addition, the principal of tribal sovereign immunity and the handling of this principal in agreements with tribes significantly affect the remedies, enforcements and obligations on Native American lands.

The following principles are central to all aspects of Native American law¹:

1. An Indian nation possesses powers of a sovereign state and enjoys a government-to-government relationship with the United States.
2. The federal government has broad authority to regulate Indian affairs, subject to constitutional constraints.
3. State authority in Indian affairs is limited.
4. Native American tribes constitute separate governmental authorities with regulatory authority.

III. SOURCES

Researching a Native American law issue may require consulting a broad variety of sources including: the United States Constitution, principles of international law, treaties with individual Native American tribes, federal statutes and regulations, executive orders, and judicial opinions. It is important to keep in mind that each tribe has a unique relationship with the United States government. Laws that affect one tribe may not necessarily affect all tribes. *See, e.g.*, 25 U.S.C. § 416(a) ("Any contract, including a lease, affecting land within the Salt River Pima-Maricopa Indian Reservation may contain a provision for the binding arbitration of disputes arising out of such contract.")

Sources that pertain to leasing tribal property include the following:

1. 25 U.S.C. § 415 et seq. (Indian Long-Term Leasing Act)
2. 25 CFR § 162 et seq. (Indians, Leases and Permits)
3. Each tribe's constitution, codes and ordinances. Tribal codes and ordinances often function much like a municipality or a county.
4. Case law of federal courts, especially the Supreme Court.

¹ The general principals outlined above are identified in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005), 1 - 3. Chapter 4 of COHEN'S ("Indian Tribal Governments") provides a detailed discussion of Indian tribal governments and their relationship to and interaction with federal and state governments.

IV. NATURE OF PROPERTY RIGHTS

Tribal property is a form of ownership in common that is not analogous to tenancy in common or other collective forms of ownership known to Anglo-American private property law. COHEN'S, 966. An individual tribal owner has no alienable or inheritable interest in the communal holding. *Id.* Tribal property interests are held in common for the benefit of all living members of the tribe. *Id.*

1. Tribal Trust Land: Tribal trust land is land held in trust by the federal government for the beneficial ownership of the tribe.² The land may be located within or outside the boundaries of the reservation. The Bureau of Indian Affairs (BIA) has been delegated the responsibility for the administration and management of 55.7 million acres of land held in trust by the United States for Native Americans, Indian tribes, and Alaska Natives.³

2. Allotments: Allotments consist of parcels of land that either the federal government holds in trust for individual tribal members ("trust" allotments) or tribal members hold in fee subject to a statutory restriction on alienation ("restricted" allotment).⁴ Many allotments remain within the boundaries of reservations. For example, the Gila River Indian Reservation includes 97,438 acres of allotted lands and the Salt River Reservation includes 25,158 acres of allotted lands.⁵

3. Other land interests that may be located within a reservation include: tribal fee lands, fee lands held by non-Indians, federal public lands, or county and state lands.

² The federal government's control over Indian lands was first described by the Supreme Court in *Johnson v. M'Intosh*. 21 U.S. (8 *Wheat.*) 543 (1823). In this decision, the Supreme Court held that private citizens could not directly purchase land from Native Americans and that based on longstanding practices of European colonization, the United States had acquired exclusive title to all of the American lands, subject only to the Native American rights of use and occupancy.

³ The BIA has broad regulatory power over Indian affairs. 25 USC §§ 2, 9, 13.

⁴ The allotment process began with passage of the Indian General Allotment Act (Dawes Act). Ch. 119, 24 Stat. 388 (1887). This Act initiated the privatization of Indian land by removing ownership and control of land from the tribes, dividing it into fragmented parcels, and conveying the partitions to individual Native Americans in trust. Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 Iowa L. Rev. 595 (2000).

⁵ Indian Reservations: A State and Federal Handbook (1986), compiled by the Confederation of American Indians provides information on land status of most federally recognized tribes in the United States.

V. JURISDICTION

Determining the limits of tribal authority can be difficult. Not all Native American property is located within the geographical boundaries of a reservation and some property within a reservation may be individually owned in fee. The term "Indian country" has evolved over time to refer to "the territory set aside for the operation of special rules allocating governmental power among Indian tribes, the federal governmental, and the states." COHEN'S, 135. The term was formally defined by Congress in a federal criminal statute. *See* 18 U.S.C § 1151. Even though this definition by its terms applies to specific sections of a criminal statute, the Supreme Court has also employed this term to determine the geographical reach of the supremacy of tribal law in certain civil contexts. *See* AMERICAN INDIAN LAW DESKBOOK (1998, 2nd Ed.), 36-37. Courts have defined Indian country broadly to include formal and informal reservations, dependant Indian communities and Indian allotments, whether restricted or held in trust by the United States.

The state of Arizona has limited regulatory authority over tribal lands within the state. The Arizona-New Mexico Enabling Act, by which Congress allowed Arizona to enter the United States, provides as follows:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribe, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribe shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;

Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, § 20. *See also*, Ariz. Const. art. XX, § 4 (same language as above). However, the state does have limited regulatory

authority over activities of non-Indians in Indian country. *See, Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

While a full discussion of jurisdiction issues is beyond the scope of this presentation, within the context of leasing trust and restricted lands, this issue has been constrained by federal legislation.

1. State and local regulation of the use of Native American property is expressly prohibited. 25 CFR §1.4(a) states in pertinent part:

"[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property... shall be applicable to any such property leased... that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."

2. State law may apply to lease disputes, if the lease so provides. 25 CFR 162.109.

VI. LONG TERM LEASING OF NATIVE AMERICAN LAND

Due to the inalienability of Native American lands, ground leases have been critical in allowing for the development of such lands. Leasing of Native American lands, whether tribally or individually owned, is allowed by statute upon approval by the Secretary of the Interior. 25 U.S.C. § 415(a), 25 C.F.R. § 162.604(a). Ground leases have allowed the Bureau of Indian Affairs and Tribal Councils to lease tribal lands for an extended term to a tenant who intends to develop the property by constructing improvements or renovating existing improvements on the land.

A. Ground Lease

Black's Law Dictionary defines a ground lease as "a long-term (usually 99 year) lease of land only; such a lease typically involves commercial property, and any

improvements built by the tenant usually revert to the landlord." (8th ed. 2004). Ground leases differ from the typical commercial leases in that they are typically for much longer terms, the lessee constructs its own improvements, and the tenant usually needs mortgage loan financing secured by the improvements.

A distinguishing characteristic of a ground lease is that while the landlord holds fee title and a reversionary interest upon expiration of the lease in the land, the tenant owns the equity in the improvements. Further, because the tenant's ownership of the improvements and possessory interest in the land are "leasehold estates," his rights end upon termination or cancellation of the lease. Thus, when the lease ends, the landlord will obtain full ownership and possession of the land and the real property improvements installed on the land by the tenant.

Aside from the natural expiration of the lease term, the tenant's right to possession may be terminated in a number of circumstances and for a variety of reasons, including without limitation, failure to exercise an option to renew, defaulting on the rent without completion of a cure, defaulting on other, non-monetary obligations without completion of a cure, damage or destruction without rebuilding, and condemnation.

B. Special Issues

Aside from the issues that normally arise as a result of the special nature of ground leases, the added complexities of leasing Native American lands lead to an additional layer of issues a tenant or developer will have to consider before entering into a ground lease on Native American lands.

1. Identifying the Landlord and Negotiating the Lease.

Negotiating the leases for Native American land may take substantially more time than a typical ground lease because of the number of landowners involved and because of the additional layers of governmental agency review and approval.

a. **Problem of Fractionation:** Since the Dawes Act, ownership of allottees land has become increasingly fractionated. Lands allotted to individual Native American have passed from generation to generation. Because of

the restraints on alienation and the application of intestacy laws to the land interests of deceased property owners (wills are not commonly used by Native Americans), the size of land interests are continually diminished as they are divided among heirs. For example, a land parcel of 160 acres once owned three generations or so ago by a single Native American head of a family may now have more than 70 owners with each individual beneficiary having an undivided fractional interest in the parcel.⁶ Identifying signatories and gathering signatures may take a considerable amount of time. For example, one joint venture's lease of 160 acres of land from the Salt River Pima-Maricopa Indian Community involved 200 families in the community. Sheila Muto, *Development Increases at Indian Reservations*, Wall Street Journal (October 11, 2004).

b. Government approval required: Generally, all leases must be approved by Secretary of the Interior. 25 U.S.C. § 415(a). Among other things, the Secretary must consider "the effect on the environment of the uses to which the leased lands will be subject" before approving a lease under §415.

2. Restraints of Alienation & Length of the Lease Term

The length of the term of the ground lease on trust or restricted Indian lands is governed by statute. 25 U.S.C. § 415. "Trust or restricted lands" means lands, title to which is held by the United States in trust for one or more Native Americans, a tribe, or lands title to which is held by one or more Native Americans or a tribe subject to a restriction by the United States against alienation. 25 U.S.C. §2201(4). Restricted lands cannot be sold by any individual or tribe and lease terms are regulated by federal statute and applicable federal case authority.

⁶ Beginning with the passage of the Indian Land Consolidation Act of 1983, the federal government has been trying to reduce the problem of fractionation by consolidating individual Indian land ownership interests into tribal ownership. 25 USC §§ 2201 – 2219. Since its passage, the ILCA has been amended several times and provision of the ILCA have been struck down by the Supreme Court as unconstitutional takings without just compensation. In 2004, Congress enacted the most recent amendments to the ILCA (The American Indian Probate Reform Act of 2004, Pub. L. No. 108 – 374, 118 Stat. 1773 (2204)). Among other things, the legislation provides a clearer method to pass individual Indian land ownership from one generation to the next by creating a uniform federal Indian probate code.

a. 25 U.S.C. § 415(a) regulates leases for general business purposes, such as commercial development. This section applies to "[a]ny restricted Native American lands, whether tribally, or individually owned..." and provides that restricted land may be leased by the Indian owners for "public, religious, educational, recreational, residential, or business purposes.." for limited durations of time. The duration of such leases is generally limited to a maximum of 50 years. *Id.*

(i) Initial lease term "not to exceed 25 years". *Id.*

(ii) Lease may include provisions authorizing renewal for "one additional term not to exceed 25 years". *Id.* (emphasis added).

(iii) Specific tribes are exempt from the 25 year restriction and may enter into leases for a term "not to exceed 99 years" (e.g. Salt River, Pima- Maricopa, San Carlos Apache Reservation, Yavapai-Prescott, Gila River Reservation). *Id.*

(iv) With respect to lands for which the lease term may extend for up to 99 years, however, if the initial lease term extends for more than 74 years, it may not be renewed. *Id.*

3. Tribal Sovereignty & Dispute Resolution

a. Waiver of Immunity Required: Tribes possess common law immunity from suit similar to that traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Absent an express and unequivocal waiver of immunity by the tribe or Congress, a Native American Indian tribe cannot be sued in federal, state or tribal courts. *Id.* Under certain circumstances, a Native American tribe may be deemed to have waived its sovereign immunity from suit in state courts by both agreeing in a lease or agreement to submit certain claims to arbitration and also by including a choice of law provision designating which court shall have jurisdiction over the proceedings and enforcement of the award. *C & L Enterprises v. Citizen Band Potawatomi*

Indian Tribe of Oklahoma, 532 U.S. 411 (2001). Some tribes, such as the Salt River Pima-Maricopa Community, have lobbied for and obtained a congressional amendment to the U.S. Code that expressly provides that a lease agreement may contain an arbitration clause. 25 U.S.C. § 416(a) ("Any contract, including a lease, affecting land within the Salt River Pima-Maricopa Indian Reservation may contain a provision for the binding arbitration of disputes arising out of such contract."). If given the opportunity to draft or negotiate a contractual waiver of sovereign immunity, do not rely on an implied waiver of sovereign immunity. A valid contractual waiver should identify the tribe waiving immunity, expressly waive sovereign immunity and specifically designate a forum that will have jurisdiction over disputes arising from the lease agreement.

b. Arbitration: Some tribes do not want a lease agreement to be governed by state law nor do they want to submit to state courts. Dispute resolution by arbitration governed by federal law and procedures is often used to resolve disputes where arbitration can be utilized. To ensure that arbitration proceedings provided for are enforceable, the lease should contain a clear and unequivocal waiver by the Indian tribe of its sovereign immunity from suit in federal or Arizona courts or Congress must have otherwise waived its sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58.

c. Enforcement of Arbitration: United States District Courts have jurisdiction over disputes arising under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331. Binding arbitration provisions may be enforceable in federal courts under the Federal Arbitration Act, 9 U.S.C. § 1, et. seq.. If a party fails to arbitrate under an agreement with a binding arbitration provision, the opposing party may petition any United States District Court that would otherwise have jurisdiction under the agreement to compel arbitration. 9 U.S.C. § 4. As long as the binding arbitration provision is in writing and the dispute arises out of the agreement, a sufficient provision should be valid and enforceable under federal law. 9 U.S.C. § 2.

d. Applicable Law: Leases of Indian lands are subject to federal laws of general applicability. 25 C.F.R. § 162.109(a). Tribal laws also generally apply to land under the jurisdiction of the tribe enacting such laws. 25 C.F.R. § 162.109(b). If the tenant would prefer to have state law apply to lease disputes or define the remedies available to the Indian landowners in the event of a lease violation by the tenant, the lease must specifically provide for state law to apply and Indian landowners must have expressly agreed to the application of state law. 25 C.F.R. § 162.109(c). It is important to note that even if a lease may provide for lease disputes to be resolved in tribal court or any other court of competent jurisdiction, or through arbitration or some other alternative dispute resolution method, the United States Bureau of Indian Affairs “may not be bound by decisions made in such forums” but “will defer to ongoing proceedings, as appropriate, in deciding whether to exercise any of the remedies available.” 25 C.F.R. § 162.612(c).

4. Protecting Tax Advantages

Tribes have the power to tax except when limited by federal law. COHEN'S, 714. The power to tax is an essential part of tribal sovereignty. Lessees who have challenged the tribal authority to tax have failed. *See, e.g., Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). Tribes and states have concurrent authority to tax with respect to some non-Indian activity within Indian country boundaries. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). This gives rise to the problem of multiple taxation in which the state and tribe both tax the same activity or property. Therefore, the lease should clearly allocate the parties responsibilities with respect to taxes.

5. Financing

When negotiating a ground lease, a tenant will want to ensure that the lease terms allow for the leasehold estate to be one that a lender will be willing to finance. Most tenants would like for a landlord to allow his fee interest in the land to be subjected to the tenant's mortgage on the land and building for purposes of financing the project. Such an

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arrangement is not possible with tribal lands. Thus, in negotiating a ground lease, it becomes critical that the tenant keep a lender's interests in mind and provide adequately for them if he would like to obtain financing.

From the lender's perspective a leasehold mortgage contains additional risks. Upon foreclosure of a leasehold mortgage, the lender becomes the tenant under the ground lease and does not acquire any other interest in the fee. Thus, upon foreclosure, the lender will be required to pay the rent and comply with the terms and conditions of the ground lease. However, there is also a risk that the landlord will choose to simply cancel the lease upon tenant's default, thereby resulting in the lender's loss of collateral.

In light of this risk, a lender will want to see certain provisions in the ground lease. Some of the important provisions to a lender will include: (i) the mortgagee having the legal right to exercise options to extend the lease, (ii) increases in the base rent must be limited so as not to impact the project's ability to pay debt service, (iii) the right to assign in connection with financing, including leasehold mortgages, foreclosure sale and refinancing, (iv) reasonable ability of the tenant to sell or transfer the leasehold estate, (v) ability to lease space in the improvements for occupancy by rent-paying subtenants, (vi) right to assign the lease to the lender in the event of tenant default (instead of automatic termination of the lease), (vii) a provision that the lease will not be amended or voluntarily terminated without the consent of the leasehold mortgagee, and (viii) a provision by which a ground lease will not be terminated as long as the lender cures default after the failure of the tenant so to do.

Subleasing, assignment, amendment or encumbrance of any lease may only be made upon the approval of the Secretary of the Interior. 25 C.F.R. § 162.610(a). Thus, the tenant may want the provisions important to a lender to be included in the original ground lease submitted to the Secretary for his approval so as to prevent having to obtain subsequent approvals for amendments.

6. Subleasing & Assignment

The Secretary allows a ground lease to contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. 25 C.F.R. §

162.610(b). Including provisions for subleasing and sub-subleasing is important given the length of time it may take to obtain federal and tribal approval of subleases.

With the Secretary's consent, the lease may also contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. 25 C.F.R. § 162.610(c). The encumbrance instrument, however, will need to be approved by the Secretary. *Id.*

In the event that the tenant defaults and the lender has to take the place of the tenant, the Secretary will allow the lender to assign the leasehold without the Secretary's approval or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by the terms and conditions of the ground lease. 25 C.F.R. § 162.610(c).

7. Rent

Since the tenant owns the improvements on the property, the rental fee to be paid is typically only based on the fair market rental value of the land, exclusive of improvements or development required by the contract or the contribution value of the improvements. Aside from a minimum annual rent or base rent, the Native American tribe may also require an additional rent over and above the minimum annual rent. One typical calculation for the additional rent is a sum equal to the difference between the minimum annual rent and a previously-determined percentage of the gross receipts of the businesses operated on the leased lands.

The Secretary mandates that all leases must be at the present fair annual rental, subject to certain exceptions. 25 C.F.R. § 162.604.

8. Renewal Term

Leases on Native American lands sometimes require periodic review, sometimes at not less than 5-year intervals, of the "equities" involved. The Secretary of the Interior requires these reviews to "give consideration to the economic conditions at the time, exclusive of improvements or development required by the contract or the contribution value of such improvements." 25 C.F.R. § 162.607.

9. Permitting Process/Pre-Construction

The special circumstance of the Native American lands and tribal sovereignty may lead to uncertainties regarding jurisdiction. It may not be apparent whether city or county ordinances apply to tribal lands. This becomes an issue that a tenant/developer will have to deal with during the pre-construction phase. The developer will have to ensure that the landlord, in this case the tribes and the Secretary, are involved in the permitting process. In addition, the developer will also have to determine which governmental authorities have jurisdiction over the leased lands.

10. Surety Bonds

The tribe or the Secretary may require a lessee to provide a surety bond in an amount that will reasonably assure performance of the contractual obligations under the lease. A bond may be used to guarantee a year's rental, the estimated construction cost of any improvements to be placed on the lease lands, or to insure compliance with additional contractual obligations.

C. Other Issues:

1. Whether an unincorporated association created as a tribal enterprise to develop and manage the Indian community's real property has a distinct legal status and the ability to enter into contracts or hold property.
2. Whether a sufficient number of the allottees holding particular Native American lands have property executed a lease agreement or related document.
3. Compliance with applicable tribal law for business and other activities conducted on reservations or Native American lands.
4. Recognition and compliance with employment performance obligations that many tribes seek to impose upon non-Indian business operating on tribal lands.

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