

Sports, Deals, and Indian Country

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Indian Country has reached the Big Leagues. Jacoby Ellsbury, who is Navajo, plays centerfield for the Boston Red Sox, and Joba Chamberlain, a Winnebago tribal member, pitches for the New York Yankees. University of Oklahoma quarterback and Heisman Trophy Award winner Sam Bradford, who recently competed for the Bowl Championship Series, is a member of the Cherokee Nation. Professional golfer Notah Begay, who is also Navajo, has won four PGA tournaments.

The Seminole Tribe, which owns the Hard Rock International franchise, opened a Hard Rock Cafe at the new Yankee Stadium when it was unveiled. The Mohegan Tribe of Connecticut owns the Women's National Basketball Association's Connecticut Sun franchise. Before the Seattle SuperSonics were whisked away to Oklahoma City, the Muckleshoot Tribe weighed its options for keeping the team in Washington, including developing a state-of-the-art venue for the Sonics on their reservation. NASCAR has looked hard at developing racetracks on several Indian reservations.

The socioeconomic catalyst for the tribal sports revolution is Indian gaming, a \$26 billion industry. Tribal casinos in 28 states are giving their nontribal counterparts in Las Vegas and Atlantic City a serious run for their money, having obtained a significant portion of the national gaming market share. But as the growth of all domestic gaming slows due to the economy, gaming tribes are increasingly looking to nongaming sources of income to supplement revenue and keep gamblers at the tables and machines. Thus, the tribes' parlay into tribal professional sports.

Like their nontribal counterparts, Indian casinos have become consumer meccas for professional mixed martial arts, boxing, basketball, golf, rodeos, and anything else you can promote on an interstate billboard. Not only do tribes host mega-sporting events, but Indian Country is producing world-class athletes, as shown by the rosters of some of the biggest franchises in professional sports.

Event promotion, sports team ownership, and athlete representation combine some of the most complex and emotionally charged aspects of contract law. Add the jurisdictional complexity of Indian Country to the mix, and the Sonics litigious exit from Seattle begins to seem tame. Sports clients and their attorneys operating in Indian Country must grasp the political, regulatory, legal, and financial ramifications of operating under the authority of, and contracting with, the "third" sovereigns. For all of the reasons discussed below, a sports deal in Indian Country, big or small, is the wrong time to rely on a standard contract.

SOVEREIGNS FIRST, BUSINESSES SECOND

The rest of the rules governing tribal contracting stem from the inherent sovereignty of federally recognized Indian tribes. In most cases, tribes are subject to laws that only they are capable of making. The basis for tribal sovereignty goes to the heart of what it means to be an Indian tribe. But the practical embodiments of such sovereignty are the diverse forms of tribal government among the more than 560 U.S. tribes. Often a tribe will elect its leadership to a tribal council. The council may have individual officers who act as executives. Tribal judiciaries tend to resemble their nontribal counterparts, with some notable exceptions, as described below.

The most important legal and practical effect of tribal sovereignty for sports lawyers lies in the fact that tribes can only be sued for breach of contract if Congress has unequivocally authorized the suit or the tribe has "clearly" waived its immunity. This tribal sovereign immunity protects tribal officials (acting within the course and scope of their position) and tribal businesses on and off the reservation.

Some tribes may partially waive immunity for purposes of a torts claim ordinance, but in the contract context, a limited waiver will typically need to be negotiated in each transaction. Do not presume that a limited waiver will be given lightly or as a

matter of course. Immunity is the tool by which tribal councils protect tribal coffers meant to provide for their constituents. Imagine the most sacred contract provision you could ask for—say a deed of trust on Fenway Park—and you are approaching the importance placed by tribes on sovereign immunity.

Tribes have been organized in different ways. For the purposes of negotiating with the business side of a tribe, recognize that tribal governments can incorporate tribal businesses under a tribal or state corporate code. Neither route necessarily dictates whether a corporation enjoys the tribe's immunity. In some jurisdictions, incorporation via state law can raise immunity problems. Some tribal corporations may be expressly subject to suit to both encourage business and buffer tribal coffers. In any case, if a client is a tribal corporation or is signing a contract with a tribal corporation, understand specifically what that means in your client's case.

WHO'S THE BOSS?

Authority will be the most important issue of tribal contract law if it is lacking. As with other governments, tribes may be bound only through valid exercises of actual authority.

Before you delve into research about actor authority under state law, recognize that tribal, not state, law dictates what constitutes actual authority for a particular tribe. If a tribal council delegates contracting authority to a subordinate corporation, it may be for contracts of a certain type or up to a certain threshold. Some contracts will be so important that only the tribal council or, if the tribe is one in which all members are legislators, the voting membership must authorize them. Those questions should be answered through review and research of tribal law. Authority is critical if a tribe has waived its immunity, even to the smallest degree. Often tribal law dictates specifically how a tribal government can waive or delegate waiver of tribal immunity.

WHAT DO CONSENSUAL RELATIONS HAVE TO DO WITH IT?

If a tribal sports contract becomes the subject of litigation, the tribal entity will most likely push for a tribal forum and vice versa for a nontribal entity.

Unless the contract dictates otherwise, federal law will determine whether a tribal court has exclusive authority to hear a case concerning the contract.

The Supreme Court's seminal jurisdictional decision, *Montana v. U.S.*, synthesized the rule that tribes can only assert jurisdiction over a non-Indian in Indian Country if the nonmember has entered into a consensual relationship

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with the tribe or its members or partaken in conduct that threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe. For sports contracts, the most common way for a nonmember to find itself subject to tribal jurisdiction is through a consensual commercial relationship with a tribe or a member. The Court and others have taken every

opportunity to narrow this seemingly simple rule, but for anyone transacting in Indian Country, especially with a tribe, *Montana* is likely in play and will subject a non-Indian business or person to tribal jurisdiction.

For sports promotion companies, the *Montana* requirements, if met, give Indian tribes robust regulatory authority over them. From taxes to athletic commissions, companies operating in Indian Country will be subject to potentially different regulatory requirements. Compliance is crucial, since often the regulatory body will be at least related to the contracting tribal entity. Tribal athletic commissions should not be viewed as barriers to entry. Often these local tribal agencies are responsive, professional organizations, which, recognizing the burden of regulation on industry, ensure that athletics are represented with integrity and without overbroad regulation as fundraising.

As opposed to regulatory jurisdiction, adjudicatory jurisdiction presents a potentially greater impact if an event promoter or other contractor is subject to a tribe's authority. If a tribal court does have jurisdiction over a case, the parties must litigate in tribal court before attempting to seek relief (including challenging jurisdiction) in another court. There are exceptions to the tribal court exhaustion rule, but if a deal goes south, understand that unless the contract successfully dictates otherwise, tribal court may be the only avenue for relief. Fear of tribal court can be reasonable in some cases but alarmist in others. Tribes, like states or countries, are different, and tribal judges reflect that diversity.

LOCATION, LOCATION, LOCATION

Indian land often represents one of the most valuable assets of a tribe (which explains NASCAR's interest in building racetracks in Indian Country) and one of the most crucial threshold issues for any Indian law question.

As outlined above, the location of a deal can have enormous implications for almost every legal aspect of a contract with tribal entities. Matters may be further complicated by a federal law (Public Law 280) that opens up some parts of Indian Country in certain states to concurrent state court jurisdiction, depending on the character of land.

Land and its character further complicate deals because not only are contracts touching land politically delicate, but federal law can make them contractually difficult. If a franchise agreement, for example, contains a lease (or other encumbrance of seven or more years) on land held in trust for a tribe, it must be approved by the secretary of interior. Trust status is beneficial for many reasons, including tax benefits and protection from alienation. So, if a sports facility is located on trust land and leased or the land it sits on is otherwise encumbered, ensure that secretarial approval is secured because, if not, the contract could be rendered null and void.

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Sports teams, events, and sponsorship present valuable opportunities for tribes to diversify beyond gaming and for nontribal business partners like leagues and promotion companies to profit. For the foreseeable future, tribal governments will enjoy dependable income streams from gaming, and they will never lose the need to attract off-reservation consumers to tribal lands. The shrinking economy and less out-of-state travel could drive more of the events typically found in Las Vegas and Atlantic City to regional tribal casinos. When that happens, be prepared to negotiate carefully on behalf of tribal and nontribal sports clients. ❖

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