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RE: Section 17 Corporations

The Indian Reorganization (Wheeler-Howard) Act ("IRA") provided that any tribe or tribes "residing on the same reservation" had the right to organize and adopt a constitution and by-laws which became effective upon a majority vote of the adult members of the tribe and upon approval by the Secretary of the Interior. (Section 16, 25 U.S.C. § 476). The Act also permitted the tribe to incorporate under a charter issued by the Secretary and approved by a majority vote of the members. (Section 17, 25 U.S.C. § 477).

Specifically, Section 17 provides a means of forming federal corporations allowing tribes to take advantage of the corporate structure and limited liability exposure thereof. Additionally, the provision was intended to allow tribes to assure outside business of its accountability while not waiving immunity to all tribal government assets. Section 17 was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit." *William V. Vetter, Doing Business With Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169 (1994).

Interplay of Section 17 with Section 16

A tribe organized under Section 16 of the IRA may also be incorporated under Section 17. If a tribe is incorporated under Section 17, it will have a charter issued by the Secretary of the Interior in addition to its constitution under Section 16. However, an Indian tribe organized pursuant to Section 16 of the IRA and an Indian tribe incorporated under Section 17 of the IRA are regarded as two different legal entities even though they may constitute the same Tribe. (Opinion of the Solicitor of the Department of Interior, 1958; Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977)). The Section 16 entity is a political body or governmental entity that possesses sovereign immunity. The Section 17 entity is a business corporation and may lack sovereign immunity if it has been waived in the charter establishing the business corporation (Maryland Casualty Company v. Citizens Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966); Cohen's Handbook of Federal Indian Law, 1982). Thus, incorporation creates a separate legal entity with respect to which the powers to contract, to pledge assets, and to be sued may differ from the governmental entity established under the tribal constitution.

In other words, Section 16 of the IRA authorizes tribes to organize a constitutional entity, while Section 17 authorizes organization of a corporate entity. The courts have recognized that these two entities are distinct, and that a consent to suit clause in a corporate charter in no way waives

the sovereign immunity of a tribe as a constitutional entity. Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 705, 715 n.9 (10th Cir, 1989); Ramey Constr. v. Apache Tribe of Mescalero, 673 F.2d 315, 320 (10th Cir. 1982); Kenai Oil & Gas, Inc. v. Department of the Interior, 522 F. Supp. 521 (C.D. Utah 1981), aff'd and remanded, 671 F.2d 383 (10th Cir. 1982); Gold v. Confederated Tribes, 478 F. Supp. 190, 196 (D. Ore. 1979); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977); *but see* Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962). Further, the Eighth Circuit has held that consent to suit clause in a Section 17 corporate charter does not waive immunity for actions taken pursuant to a tribe's constitution. American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379-1380 (8th Cir. 1985).

Procedures for forming a Corporation Pursuant to IRA

The first step in forming a corporation pursuant to Section 17 is to adopt a resolution/petition requesting the Secretary of the Interior to issue a charter of incorporation to such tribe. The charter will not become operative until ratified by the governing body of such tribe. 25 U.S.C.A. § 477. The charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange for interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding 25 years any trust or restricted lands included in the limits of the reservation.

Advantages

The principal reason for incorporation is to address the concern that non-Indian entities would not enter into commercial dealings with the tribal government because of its immunities. *65 Interior Dec. 483, 484 (1958); R. Strickland, et al., Felix Cohen's Handbook of Federal Indian Law* 325-326 (1982) (hereinafter 1982 Cohen). Accordingly, charters of incorporation issued under Section 17 of the IRA often contain a clause allowing the corporation to sue or be sued, but this waiver is limited to the business dealings and assets under the control of that corporation and does not extend to the Tribe in its sovereign capacity, as organized under Section 16 of the IRA. 1982 *Cohen* at 325-326; Kiefer & Kiefer v. RFC, 306 U.S. 381 (1939) (discussing "sue and be sued" clauses applicable to government corporations).

Incorporation allows the tribes to specify under what circumstances sovereign immunity will be waived, because for a waiver to be effective, it must be expressly waived by a tribal entity with the lawful power to do so. If there is no clear or express waiver of immunity, no suit can be brought. The courts have determined that "[i]t is settled law that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed" Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). There are two kinds of clear or express waivers that have been found to be effective. The first type of express waiver occurs if the United States Congress or a tribal legislative body enact the waiver into law. United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981); Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1974); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986); American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985). The second type of express waiver may be created through an action by an authorized tribal body, the natural consequences of which are binding on the tribe. In regards to Section 17

business corporations, any express waivers of sovereign immunity would be found in the corporation's charter. Hence, the clearly defined waivers would ensure non-Indian entities that remedies would be available in the event of non-compliance, and therefore, such entities would be more attracted to transacting business with tribal corporations.

The federal charter granted to Indian tribes incorporated under Section 17 frequently provides that the corporate entity may "be sued in courts of competent jurisdiction" (Anderson, 1993a). If the corporate charter authorizes the corporate entity to be sued, creditors may bring suit to obtain a judgment and otherwise enforce their lien or contractual rights. However, in such suits only the corporate entity's assets are subject to judgment.

Another advantage to incorporating pursuant to Section 17 is the tax exempt status bestowed upon the participating tribes. In Revenue Ruling 81-295, 1981-2 C.B. 15, the IRS supplemented Revenue Ruling 67-284. The ruling concerned an Indian tribal corporation organized under both sections 16 and 17 of the IRA. It had a constitution and by-laws and a separate corporate charter which organized a federal membership corporation consisting of the present and future members of the tribe. The purpose of the corporation was to conduct communal economic effort to support the tribe's members and to enable the tribe to be self-sufficient. The ruling holds that the corporation shares the tribe's immunity from federal income tax. The ruling quotes a line from the Supreme Court's decision in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), as follows: "The question of tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct its business." Id. at 157 n.13. In Revenue Ruling 94-12, 1994-12 I.R.B., however, the IRS did use the particular form in which a tribe chooses to conduct business as the determining factor. In that ruling, the IRS confirmed that the business income of Indian tribes doing business under either section 16 or 17 of the IRA, whether earned on or off the reservation, would be exempt. It ruled, however, that income of a tribally-owned state corporation would not be exempt.

Note that an IRS General Counsel Memorandum issued in 1982, Gen. Couns. Mem. 38,853 (May 17, 1982), questioned whether off-reservation income of tribes should be taxed, citing the Supreme Court's decision in Mescalero. However, Revenue Ruling 94-12 indicates that the IRS has abandoned this approach in favor of an approach that analyzes the form in which the tribe chooses to do business. Thus, the business income of a tribe, including income of an unincorporated commercial business and income of a corporation under section 17 of the IRA, is exempt whether earned on or off reservation.

The rationale behind Revenue Ruling 67-284 is that Congress never intended to impose income tax on tribal income. Tribes, as sovereign governments, should not be restricted or guided by the income tax laws when they perform sovereign functions. Also, tribes should not be forced to pay income tax in order to provide general revenue funds for the federal government when the tribe would otherwise use the same money to provide local governmental services. In addition, imposition of income tax is inconsistent with federal trust responsibilities and the federal policy of encouraging tribal independence and self-determination. Given these policy considerations, the absence of any code provision expressly imposing income tax on tribes simply reinforces the IRS conclusion concerning the intent of Congress.

As noted above, Revenue Ruling 94-12 holds that income earned from commercial business by a corporation (and perhaps any other legal entity recognized under state law) organized by a tribe under state law is subject to federal income tax, whether earned on or off the tribe's reservation.

This ruling confirms two private letter rulings issued in 1987, Priv. Ltr. Rul. 88-02-017 (October 9, 1987) and Priv. Ltr. Rul. 88-03-013 (October 19, 1987). The corporations involved in these letter rulings were both state-chartered corporations. The rulings concluded that tribally-owned corporations were subject to federal income tax for off-reservation activities.

As previously stated, an unincorporated Indian tribe or an Indian tribal corporation organized under section 17 of the IRA is not subject to federal income tax on the income earned in the conduct of commercial business on or off the tribe's reservation. In the alternative, a corporation organized by an Indian tribe under state law is subject to federal income tax on the income earned in the conduct of commercial business on and off the tribe's reservation, because as a general rule, a corporation is a legal personality, separate from its owners. Therefore, when a corporation is formed pursuant to state law, a danger exists that the tribe may lose the benefit of its Indian tribal status for state tax purposes. The following cases will illustrate how courts address tribal corporations vs. tribal entities incorporated under state law.

1. Eastern Navajo Industries v. New Mexico Bureau of Revenue, 552 P.2d 805 (N.M. 1976). The argument that state taxation of an Indian-controlled state corporation interferes with Indian self-government has been successfully argued in the State of New Mexico. In that case, the Tribal Council formed a corporation with the help of federal funds from the Indian Business Development Fund. A majority of the stockholders were Indians. The New Mexico Supreme Court stated that sales taxes could not be imposed on this corporation, even though it was formed under state law. Under the Indian Business Development Fund Act, a corporation can be considered an Indian corporation if at least 51% of the stock is owned by an Indian tribe or Indians. Since the corporation qualified as an Indian corporation under this act, the court gave it the same tax status as an Indian tribe.

2. United States v. Tax Comm'n of Mississippi, 535 F.2d 300 (1974). In United States v. Tax Comm'n of Mississippi, the federal government brought suit on behalf of the Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from imposing a sales tax on a tribal construction company, Chata Development Company, a state-chartered corporation, doing business on the Choctaw Indian Reservation. The Fifth Circuit Court of Appeals upheld the state's tax, resting its decision on two grounds. First, the court held that under the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), the Mississippi Choctaws lost their status as a federally-recognized tribe, their reservation lost its status as an Indian reservation, and the Indians lost their immunity from state regulation. Second, the court noted that a state always has authority to tax state-chartered corporations because they are separate entities from the people who own them.

The validity of these holdings may be undermined altogether by the decision of the United States Supreme Court in United States v. John, 437 U.S. 634 (1978), in which the Supreme Court held that the Mississippi Choctaw Tribe had not lost its status as a federally-recognized tribe living on a federal Indian reservation and organized under the Indian Reorganization Act of 1934. However, at least in Mississippi, this case may still stand for the proposition that a state-chartered corporation, even owned 100% by a federally-recognized Indian tribe, is subject to state tax on business performed wholly inside the reservation. As you can see, using a state-chartered corporation form is still risky from a tax standpoint because courts in other states may not follow the New Mexico Supreme Court's decision in Eastern Navajo Industries, 552 P.2d 805 (N.M. 1976).

In conclusion, Indian tribes possessing sovereign powers clearly have the authority to charter corporations. There does not appear to be any authority on the question of whether a state can tax a tribally-chartered corporation doing business on the reservation. Significantly, courts usually look to the law of the government which created the corporation to answer questions about its status. Accordingly, some tribes have enacted tribal corporate codes which provide that tribally-chartered corporations hold the same privileges and immunities from state interference as their stockholders possess. Such laws should be sufficient to stop attempts by states to tax or regulate the on-reservation activities of the corporation, but are not likely to prevent attempts by states to tax or regulate off-reservation activities. Remember that in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Supreme Court held that whenever an Indian tribe does business off the reservation, its gross receipts are subject to state tax the same as non-Indians. It is likely that the courts would hold that a tribally-chartered corporation, even if 100% tribally owned, possesses no greater tax immunity than the tribe itself.

Disadvantages

The disadvantages to incorporating pursuant to Section 17 are few and can be avoided by properly drafted charters, ordinances, etc. First, if the Tribal Council plans on closely managing the business entity, a Section 17 corporation should not be formed, because an inadequate separation of governmental activity from the business entity may lead to problems such as: (1) the inability of creditors of such an enterprise to sue the tribe because of the doctrine of sovereign immunity; and (2) business proposals having to be presented to the elected officials of the tribe which may create difficulty if the elected individuals do not have a business background or if they have their own hidden agendas. For many tribes, the distinction between the corporation and the tribal government has been lost along with its intended benefits. When a tribal corporation and government are not completely distinct, the immunity of the latter extends to the business operations of the former. In addition, corporations formed under tribal law tend to be even more indistinct from the tribe. "In practice, the functions and features of I.R.A. § 16 governments and I.R.A. § 17 corporations were confused and commingled by both federal and tribal officials, to the extent that some tribes' governing bodies are called the Business Committee or Business Council." citing, Stock West, Inc. v. Confederated Tribes of Colville Reservation, 873 F.2d 1221 (9th Cir. 1989); Namekagon Development v. Bois Forte Reservation Hous. Auth., 517 F.2d 508 (8th Cir. 1975); Leigh v. Blackfeet Tribe, Fed. Sec. L. Rep. (CCH) 95,436 (D. Mass. 1990); Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521 (D. Utah 1981); *aff'd and remanded*, 671 F.2d 383 (10th Cir. 1982).

Today it is more difficult to determine if a tribal corporation is immune from suit than it is to evaluate the effectiveness of a tribal government's waiver. Part of the problem is the diversity of tribal organizational forms and the lack of strict organization maintained by tribes. Perhaps the greater problem is the complexity of the law governing whether a tribal business organization shares its creator's immunity. Courts have used a multitude of subtle factors to determine if the corporation is adequately separated from the tribe and therefore not immune to suit. See, e.g., Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982); Althiemer & Gray v. Sioux Mfg. Corp., 780 F. Supp. 504 (N.D. Ill. 1991), rev'd on other grounds, 983 F.2d 803 (7th Cir. 1993); Dixon v. Picopa Constr. Co., 772 P.2d 1104 (Ariz. 1989); Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 720 P.2d 499, *cert. denied*, 479 U.S. 987 (1986); White Mountain Apache Tribe v. Industrial Comm'n of Arizona, 696 P.2d 223 (Ariz. 1985); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. Ct. App. 1983), *review denied* (1984); Southwest Forest Industries v. Hupa (Hoopa) Timber Corp., 198

Cal. Rptr. 690 (Ct. App. 1984) (opinion withdrawn by court order); White Mountain Apache Indian Tribe v. Shelly, 480 P.2d 654 (Ariz. 1971); Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (Ariz. 1968). Generally, courts will not even begin to consider whether a Section 17 corporation is exposed to a suit unless the tribe has declared the corporation to be a separate business entity. As the foregoing illustrates, carefully prepared legal documents can dramatically reduce disadvantages associated with incorporating pursuant to Section 17.

Please contact me if there are any questions.