TAIC ADVICE to MEMBERS

September 11, 2021
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Who Regulates Insurance on an Indian Reservation or Indian Trust Land, and How Are Those Lands Defined

Indian tribes have discovered insurance and reinsurance as a business to advance the economic security and self-determination of their tribes. States have historically regulated insurance. Congress has never wanted to occupy that field, for reasons that have never been clear. One possible reason is the complexity of insurance, and another possibility is pressure from an insurance lobby. The reality is that Congress agreed with powerful insurance interests that insurance was not interstate commerce.[1] When the Supreme Court changed the tide of judicial thinking on the matter, in *South-Eastern Underwriters*[2], and held that insurance is in fact interstate commerce and thus subject to federal regulation, Congress acted quickly to ensure continued state control, by passing the McCarran-Ferguson Act of 1945. This Act gives states the authority to regulate the "business of insurance" without interference from federal regulation, *unless federal law specifically provides otherwise*. The "business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[3] Federal law specifically provides otherwise. Under the Indian Commerce Clause, "The Congress shall have power…to regulate commerce with …the Indian tribes."[4] Plus, the express language of the McCarran-Ferguson Act only applies to commerce among the "several states".

The language of the Act begs the question whether Congress gave any thought to Indian tribes at the time. There is no documentation of tribes being in the business of insurance in 1945. Thus, a state insurance commissioner might argue that had Congress given any thought to Indian tribes in 1945, it would have abdicated from regulation of the business of insurance in not only the states but the Indian tribes as well. The better argument is that Congress would have, and did, maintain its authority to regulate all commerce with Indian tribes, including the business of insurance. This is because Congress did not expressly mention Indian tribes in the McCarren-Ferguson Act; the

[1] *Paul v. Virginia*, 75 U.S. 168 (1868).
[2] *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533.
[3] The McCarran-Ferguson Act of 1945 (15 U.S.C.A. § 1011 *et seq.*).

[4] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.")

federal government regulates the activity of Indian tribes; and Congress has a trust relationship with the Indian tribes, but does not have a trust relationship with states.

States Have No Regulatory Authority in Indian Country

"The state has no regulatory control over the reservation…".[5] "Because state regulation on a reservation must be expressly approved by Congress…defendant's argument that the McCarran-Ferguson Act, 15 USC § 1012, which does not mention Indians, gave the states the jurisdiction over insurance matters involving reservation Indians is without merit."[6] "Because state regulatory power does not normally extend into the reservation, [state] has no apparent interest in preserving the solvency of an insurer doing business outside of [state's] legislative jurisdiction."[7]

Definition of Indian Lands

What most people generally refer to as Indian Country can be distinguished between "reservations" and "land held in trust" or "trust land." Under 7 CFR 253.2, a "reservation" must meet two criteria:

Reservations:

Reservations (a) must be a geographically defined area, or areas, over which an Indian Tribal Organization (ITO) exercises governmental jurisdiction; and (b) must be an area, or areas, that is/are legally recognized by the federal or a state government as being set aside for the use of Indians.

Tribal Trust Lands:

In accordance with 25USC 2201[8], (4)(i) "'trust or restricted lands'" means lands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation…".

The Supreme Court affirmed that trust land qualifies as a reservation if it has been validly set apart for the use of tribes.[9] Therefore, land held in trust for the benefit of a federally recognized tribe would meet the definition of "reservation" for FDPIR purposes.

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[5] *Warm Springs Forest Products Industries v. Employee Benefits Ins. Co.,* 703 P.2d 1008, 1012 (1984)
[6] *Warm Springs, Id.*, at 1020.
[7] *Warm Springs, Id.*, at 1020-1021.

[8] https://www.govinfo.gov/content/pkg/USCODE-2019-title25/html/USCODE-2019-title25-chap24-sec2201.htm
[9] "[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " (United States v. John, 437 U.S. 634, 648-649, 98 S.Ct. 2541, 3549, 57 L.Ed.2d 489 (1978) (citing with approval *United States v. McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410 (1938)).

Individual Indian Trust Lands:

Land held in trust for individual American Indians does not qualify as a reservation.

Sovereign Immunity of Indian Tribes

Indian tribes enjoy sovereign immunity from suit, but those non-tribally owned corporations chartered by the tribes do not enjoy sovereign immunity. "Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation"[10] or other area that has been " validly set apart for the use of the Indians as such, under the superintendence of the Government".[11] Any claimed waiver of tribal sovereign immunity must be unequivocal and express.[12]

Civil Regulatory Jurisdiction of Indian Tribes Under Federal Indian Law - The Montana Case Guidance

Under federal Indian law, an Indian tribe may regulate the activities of non-Indians on the reservation, even on non-Indian-owned fee land, so long as such activities fall within one or both of two categories.[13]

First, an Indian tribe has civil regulatory authority over non-Indians, such as a non-Indian-owned insurance company or reinsurance company, who enter into consensual relationships with the tribe. When an Insurance Manager makes application to a tribe and receives authority from the tribe to so act, that is a consensual relationship whereby the Insurance Manager submits to the civil regulatory jurisdiction of the tribe. The same is true for an insurance company making application to, and receiving a certificate of authority to act as an insurer from, the tribal government. To this end, a tribe would be wise to make express reference to this in its application forms and certificates of authority, and any insurer or reinsurer wishing to be chartered by a tribe should be willing to submit to such civil regulatory authority.

Second, under federal Indian law[14], a tribe may regulate the activities of non-Indians that "threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe."[15] The authority of the tribes to regulate insurance has a "direct effect on the political integrity" of the tribe. As sovereigns, tribes are entitled to make their own laws and to be governed by them.[16] Self-government is the hallmark of sovereignty. The "economic security" of the tribes depends upon engaging in economic enterprises of the tribes; choosing. The "health and welfare of the tribe" will be benefited by the revenue streams from insurance company filing fees and renewal fees.

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[10] *Kiowa Tribe of Oklahoma v. Manufacturing Tech*., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)
[11] See *John,* note 9, *supra.*
[12] C & L Enterprises, Inc. v. Citizen Band Potawatomie Tribe of Oklahoma, 532 U.S. 411 (2001)
[13] *Montana v. United States*, 450 U.S. 544 (1981).
[14] *Id.*
[15] *Id*, at 566.
[16] *Williams v. Lee*, 358 U.S. 217.

Based upon the above analysis, the tribes satisfy both prongs of the *Montana* case analysis.

Suggested Tribal Legislation:

Based upon the foregoing, any Resolutions of the Tribal Council authorizing legislation on insurance and reinsurance, should contain a Preamble/Whereas Clause that states something to the effect that the tribe acknowledges the federal government's role in regulating the affairs of Indian tribes under the Indian Commerce Clause. This should have some helpful effect if an Insurance Commissioner from one or more states starts to take a hostile view of what the tribe is doing in the business of insurance.

Also, based upon the foregoing, any Resolution of the Tribal Council authorizing the legislation on insurance and reinsurance should contain a Preamble/Whereas Clause that states something to the effect that Agents, Insurance Managers, Insurance Companies, and Reinsurance Companies enter into consensual relationships with the tribe; that the business of insurance is an exercise of tribal sovereignty that has a direct effect on the political integrity of the tribe; that the business of insurance affects the economic security of the tribe; and that the business of insurance affects the health and welfare of the tribe.

Tax Treatment of Indian Tribes and Their Wholly-Owned Corporations

Income earned by an Indian tribe or a wholly-owned tribal corporation conducting commercial business is exempt from federal income tax.[17] A corporation organized by an Indian tribe under state law is not the same as an Indian tribal corporation organized under federal Indian law or tribal law and does not share the same tax status as the Indian tribe for federal income tax purposes.[18] Income earned by a tribally-owned corporation, regardless of the location of the business activities producing such income, is not subject to federal income tax. But, a corporation organized by an Indian tribe under state law does not enjoy the same tax status as the tribe for federal income tax purposes and is subject to federal income tax on any income earned, regardless of the location of the business activities producing the income.[19]

Apart from tax considerations, care should be taken by Indian tribes never to organize tribally-owned businesses under state law for risk of losing status as a sovereign.[20]

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[17] See Revenue Ruling 94-16. See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, n.13 (1973). Indian tribes can be recognized in various ways, including by Congress, by treaty, and by federal court cases. There is no case law disallowing these benefits to a treaty-recognized tribe that is not listed on the CFR list of federally-recognized tribes. A treaty tribe is federally recognized. The very act of entering into a treaty is recognition by the U.S. of the separate government status of the tribe with whom it is making the treaty.

[18] See *Moline Properties v. Commissioner*, 319 U.S. 436 (1943).

[19] Revenue Ruling 94-16.

[20] *Somerlott v. Cherokee Nation Distribs., Inc.,* 686 F.3d 1144, 115 Fair Empl. Prac. Cas. (BNA) 1085 (10th Cir., 2012) ("…no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued. And it doesn't matter whether the *sovereign owning the business is the federal government, a foreign sovereign, state – or tribe.") See also*

Tax Treatment of Private Insurance Companies Chartered Under Tribal Law

Private insurance companies do not enjoy the same exemption from federal tax that pertains to business conducted by tribally-owned corporations. The federal government recognizes corporations formed under tribal law.[21] "A business entity organized…under a statute of a federal recognized Indian tribe." The tribal law should refer to the business as "incorporated, or as a "corporation", "body corporate", or "body politic."[22] The federal government also recognizes companies limited by guarantee.[23]

A benefit to an insurance company or a reinsurance company is permitted under the Internal Revenue Service rules. As allowed by IRS section 831(b), small nonlife insurance companies that meet the requirements, including a premium amount threshold, may elect to be subject to an alternative tax based solely upon taxable investment income. Under this alternative tax, the underwriting profits of the electing insurance company or reinsurance company are exempt from federal income tax. An insurer or reinsurer must make an election to be taxed pursuant to 831(b).

Tax rules are complex and constantly changing or being clarified. Qualified tax counsel should be consulted before creating and operating an insurance company or reinsurance company in any market. If a company is chartered in a tribal domicile, qualified federal Indian law and tribal law counsel should be consulted. Guidance can also be obtained from the Tribal Association of Insurance Commissioners Global, Inc.[24]

Wright v. Colville Tribal Enterprises Corp., "[A] tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law." 147 P.3d 1275, 159 Wn.2d 108 (Wash. 2006).

[21] 26 CFR Sec 301.7701-2(b)(1).

[22] I*d.*

[23] I*d.*, (b)(8)(1v). "…any reference to a Limited Company includes, as the case may be, companies limited by shares and companies limited by guarantee."

[24] https://www.TAIC.online