Kinship Commerce: New Developments in Inter-Tribal Trade

By Debora Juarez and Sharon Haensly

Tribes have engaged in kinship commerce – i.e., inter-tribal trade – since time immemorial. The following national news headline, however, recently helped bring these activities further into the forefront: "Economic Consortium of Indian Tribes Launched; The Native American Group to Buy from and Sell to Member Tribes."[1] As reported in *Business Wire*, the Seminole Tribe and Mashantucket Pequot Tribe announced the formation of Native American Consortium. Consortium tribes intend to buy from and sell to American Indian-owned vendors and producers for their needs whenever possible. Nine other tribes from various regions are participating. Northwest tribes include the Jamestown S'Klallam Tribe and the Sun'aq Tribe of Kodiak, the latter marketing its seafood products to tribal casinos as well as health food outlets in the Seminole's territory in Florida. The Consortium's foremost goal is economic development throughout Indian country.

To assist in its efforts, the Consortium has entered into a Memorandum of Understanding with the Department of the Interior's Office of Indian Energy and Economic Development ("IEED"). IEED will help connect (1) producer tribes and Indian-owned businesses with purchaser tribes, and (2) participating tribes with federal procurement opportunities and commercial markets worldwide.[2] The Consortium will also foster business transactions, joint ventures, and other economic development initiatives. Early efforts are focusing on trade in paper products and beef. Tribes and Indian-owned businesses are also exploring trade in seafood, agricultural products, raw materials and mineral assets.

Inter-tribal e-commerce is another exciting area for inter-tribal commerce, particularly from a tax perspective.[3] States seeking to tax e-commerce in Indian country will likely encounter legal hurdles relating to Indian tax immunity. For example, states that want to impose use taxes on inter-tribal trade activities will have to demonstrate a sufficient physical connection to the state.

Modern business terms such as consortiums and joint ventures are merely extensions of tribes' historic kinship activities. Well before the Europeans arrived, tribes had engaged in reciprocal exchanges of raw materials and finished products.[4] In *United States v. Washington*, Judge Boldt recognized, "At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area."[5]

In fact, inter-tribal trade was so integral to the Yakama and Nez Perce peoples that they insisted that their treaties include express language reserving an unrestricted right to travel the public highways. Accordingly, Article 3 of the 1855 Treaty with the Yakama provides in part:

> And provided, that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, *the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways*. (emphasis added)

Although the Yakamas used foot and horse for travel at treaty time, the United States made them aware that new modes of transporting goods would soon be available – i.e., new wagon roads and a transcontinental railroad that the United States intended to construct across Yakama lands. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238, 1240-1241 (E.D. Wash. 1997). Governor Stevens repeatedly assured the Yakamas that they would be allowed to travel the public roads outside the Reservation "to pasture animals on land not occupied by whites, to kill game, to get berries and to *go on the roads to market*." *Id.* at 1264 (emphasis added).

> [S]TATES WILL GENERALLY FACE SERIOUS LEGAL HURDLES IF THEY WANT TO TAX TRIBE-TO-TRIBE COMMERCE. OPTIMAL TAX BENEFITS ACCRUE IF THE TRADE ACTIVITIES OCCUR WITHIN INDIAN COUNTRY, INVOLVE VALUE GENERATED ON THE RESERVATION, AND IMPLICATE THE FEWEST STATE OR LOCAL GOVERNMENTAL SERVICES POSSIBLE.

Accordingly, tribes and Indian-owned businesses further increase their tax and business advantages if they enter into trade and transport relationships with the few tribes that possessing a treaty-reserved travel right. Through hard-fought litigation, the Yakama Nation has obtained federal court rulings recognizing that the Nation has a Treaty right to transport goods to market over the public highways "*without payment of fees for that use*." *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998). State fees on Treaty-covered drivers and vehicles are prohibited if the fees restrict trade on the public highways. To date, courts have declared the following Washington state fees invalid: (1) truck registration and licensing fees according to gross weight, with higher weights bearing higher license fees; (2) log tolerance permits for certain overweight trucks, with payment of an accompanying fee; and (3) traffic infractions for violations of these requirements, with monetary penalties for violations. *Yakama Indian Nation*, 955 F. Supp.

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at 1261. The Ninth Circuit, in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), upheld a presumption that the state's imposition of a fee "would be compelling evidence of an impermissible revenue generating purpose on top of the regulatory purpose."

Treaty travel rights aside, states will generally face serious legal hurdles if they want to tax tribe-to-tribe commerce. Optimal tax benefits accrue when the trade activities occur within Indian country, involve value generated on the reservation, and implicate the fewest state or local governmental services possible.[6]

In one of the first court decisions to touch upon inter-tribal trade, both the federal courts and Kansas Supreme Court determined that Kansas' fuel distributor tax did not apply to HCI, the Winnebago tribal corporation's sale of motor fuel to three Kansas tribes, for retail sale to non-Indians. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202 (10th Cir. 2003). Kansas, claiming that HCI (located in Nebraska) owed it $1.25 million for distributing gas to three Kansas tribes, had seized HCI's gas trucks and other property.

While the Tenth Circuit and district court largely based their decisions on the wording of a Kansas statute as applied to "distributors," the significance of the case was not lost. First, the Tenth Circuit, in upholding the lower court's injunction, confirmed that the issue of whether the state could tax the sale of fuel between the Winnebago Tribe and the Kansas tribes was a matter of federal, not state, law. Second, the court fully recognized the importance of the Tribe's business enterprise to tribal self-sufficiency and the devastating impact of the state's tax:

> For example, the contention that the district court "failed to particularize in any meaningful way" the significant interference with tribal self-government simply ignores the district court's consideration of evidence of loss of business, reputation, future viability, and access to credit, *all of which interfered with the tribes' self-sufficiency and economic development*. [cite omitted] The state further ignores the district court's explicit recognition that *more than economic damages were at stake*. [cite omitted] Hence, the state has failed to persuade us the district court abused its discretion in granting the injunctive orders in favor of the tribe.

Id. (emphasis added).

From a lawyer's perspective, the trading tribes' agreements should carefully lay out where and how disputes will be resolved. For example, which tribal court and which tribe's law will govern intertribal commercial disputes? Tribes can decide whether to apply more traditional approaches to resolving intertribal disputes, can allow modern commercial law principles to govern, or can develop some combination of the two. And, inter-tribal agreements and trade activities should be carefully thought through to avoid state tax liability whenever possible.

The modern-day growth of kinship commerce is exciting from many perspectives. Old trade routes are being re-established, and new ones formed as tribes and Indian-owned businesses grow their economies and strengthen self-sufficiency in Indian country.

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1 Business Wire, *Economic Consortium of Indian Tribes Launched; The Native American Group to Buy from and Sell to Member Tribes* (Sept. 23, 2008).

2 Department of the Interior, Office of the Assistant Secretary - Indian Affairs, Media Advisory: *Artman To Host Kick-Off Event For DOI Intertribal Economic Consortium Initiative*, 2008 WL 345397, (February 8, 2008).

3 Jonathan D. Robbins, *Advising e-Businesses* at § 10:15 (current through September 2008).

4 *See, e.g.*, R. Ruby, J. Brown, *The Chinook Indians: Traders of the Lower Columbia River (University of Oklahoma Press,* 1988).

5 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd.*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

6 Two "independent but related" barriers block states from regulating in Indian country: (1) federal enactments, and (2) Indian sovereignty. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982). There are two alternative analyses, depending upon where the legal incidence of the tax falls. First, a state tax is *per se* invalid and unenforceable if its legal incidence falls on a Tribe within Indian country, unless Congress instructs otherwise. *See Oklahoma Tax Comm'n* v. *Chickasaw Nation,* 515 U.S. 450, 453 (1995). If, however, the legal incidence of the tax falls upon a non-Indian doing business in Indian country, "(s)tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324 (1983).