Tribal Economic Development: Looking Through the Prism of Indian Taxation & Sovereign Immunity

Gabriel S. Galanda

Tribal Courts & Tribal Law, Prof. Austin

January 28, 2014 – Tucson, AZ

GALANDA BROADMAN

An Indian Country Law Firm

The Lynchpins to Tribal Economic Development

- Indian Taxation Power
- Tribal Sovereign Immunity Protection
  - Taxation is the Fist (Power)
  - Immunity is the Glove (Protection)
- Both inherent tribal rights are tied to Indian territorial rights
- All of these inherent rights are under siege

Indian Tax Power

- "[E]xcluding Indians not taxed" – U.S. Constitution, Art. 1, Sec. 2, Para. 3.
- Congress (not states) shall regulate commerce "with the Indian tribes" – Art. 1, Sec. 8. Cl. 3.
- Indians have been ripped off of this U.S. Constitutional right to American tax exemption.
- For the last nearly 250 years, the forefathers' language has created a psychology in Indian Country that Indians do not or cannot tax.
  - Not even non-Indians in our territories; and most certainly not our own.
- We must fundamentally shift our thinking about taxation – Indian Country must tax in order to diversify and sustain tribal economies. And you must help us.

The Power(s) of Taxation

Tribe, or Tribal Majority Joint Venture*, as Developer (51-100% **Income Tax-Exempt**)	**Tribal Personal Property & Excise Tax Abatement** (More Tax Savings)
Indian Trust Real Property Status (**Property Tax Exemption/Preemption**)	Accelerated Equipment/Infrastructure Depreciation ($100K+in **Tax Savings**/Year)***
Or, Joint Venture Land Lease (**Leasehold Tax Exemption**)	**Indian Employment Tax Credit** ($20K in Tax Savings/Year)***
New Market Tax Credits*** (Greatly Reduces Cost of Capital → 20-30% Cost Savings)	**Work Opportunity Tax Credit** (<$9K/ Employee in Tax Savings/Year)***
Tax-Exempt Bond Financing (Gap Funding) (Interest Income Exempt → Cheaper Capital)	Empowerment Zone Status (Various **Other Tax Credit Savings**/Year)
USDA or BIA Loan Guarantee (Credit Enhancement → Still Cheaper Cost of Capital)	HUBZone Status (Federal Contract Preferences)
Accelerated Permitting (Time/Cost Savings) & Little to No Development Fees	FTZ Status (Reduced Import/Export Duties & **State/Local Ad Valorem Tax Savings**)
Tailor-made Tribal Development Legislation (More Time/Cost Savings)	8(a)/Mentor-Protégé/Indian Incentive Program (Contract Preference & New Business Lines)

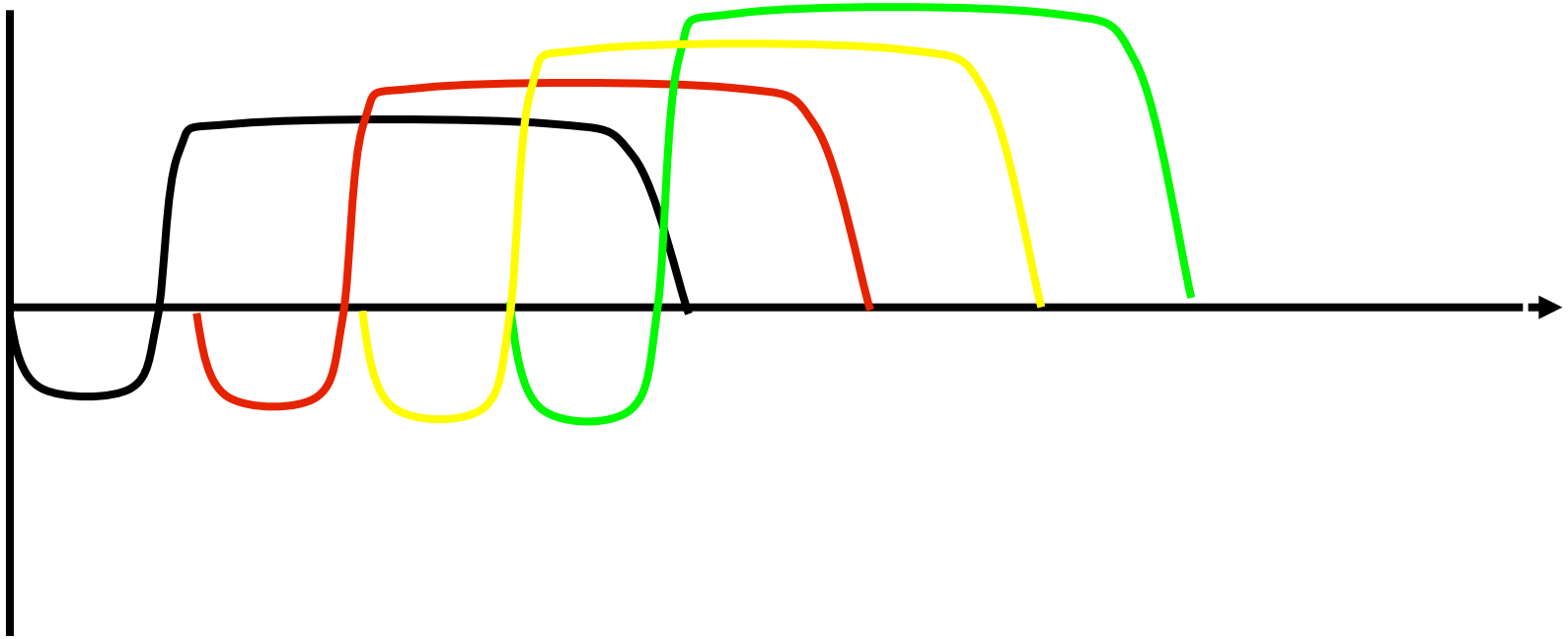
* All incentives depend on whether the Tribe or a Tribal JV is the developer

*** Congress renewed these in the Fiscal Cliff Bill of 2012, 126 Stat. 2313

GALANDA BROADMAN

An Indian Country Law Firm

Business(es) Growth Trajectory



Leonard Greengalgh, Phd, Dartmouth Tuck School of Business

Indian Tax Power

- Tribal power to tax is "fundamental attribute of sovereignty." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980).
- Taxation, i.e. property taxation, is how state and local government fund programs, including economic development.
- But Tribes cannot tax Indian real property or permanent improvements thereto. 25 U.S.C. 465; *see Chehalis v. Thurston County* (9th Cir. 2013).
- So Tribes must look to other modes of taxation, and to tax exemption and abatement, to create sustainable economic development . . .
  - and to diversify away from Indian gaming, through quicker than usual new business development.

Indian Tax Power

- Property tax exemption/abatement is how local governments attract anchor tenants.
  - For example, Miller Park, home of the Milwaukee Brewers
  - The Counties of Milwaukee, Ozaukee, Racine, Washington, and Waukesha formed the Southeast Wisconsin Professional Baseball District, via state legislation, in 1995.
  - The District jointly developed the Park with the Milwaukee Brewers, owning a 70.91% majority of the Park.
  - The Counties abated property taxes on the Park, in order to realize 0.5% sales tax and 0.25% food/beverage tax, and the multiplier effect (more jobs, income, spending, taxes, etc.)
- Non-Indian governments routinely forsake property taxation, to reap the greater benefit of sales/excise taxation.

Indian Tax Power

- But when Indians abate taxes, non-Indian governments and U.S. Supreme Court Justices pejoratively call it "marketing their tax exemption." *Colville*.
- "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

Washington State Pitches More Help for Boeing

OLYMPIA, Wash. January 15, 2014 (AP)

By MIKE BAKER Associated Press

State officials identified more than $4 billion in possible transportation projects that they deemed "key to Boeing's success in Washington state." Lawmakers have yet to approve a transportation package proposed last year that would include those projects.

AP

Even after giving Boeing Co. one of the largest packages of tax breaks in U.S. history, state leaders in Washington told the aerospace giant in a proposal released Wednesday that they are ready to do even more

Washington leaders approved nearly $9 billion in tax breaks in November to aid Boeing, and the additional written proposal was designed to woo Boeing as the company considered competing bids from other states interested in attracting work.

State officials identified more than $4 billion in possible transportation projects that they deemed

Indian Tax Power

- In the spirit of judicial realism, federal court judges have recently gone out of their way to allow state taxation in Indian Country
  - *Mashantucket Pequot Tribe v. Town of Ledyard* (2013): 2nd Circuit affirmed town's property taxes on Tribally leased slot machines
    - But 25 U.S.C. 2710(d)(4) says states cannot "impose any tax, fee, charge, or other assessment" on class III gaming activity.
    - *See Cabazon II* (9th Cir. 1994): "IGRA preempts the State of California from taxing offtrack betting activities on tribal lands."
    - *Rincon* (9th Cir. 2010): "[N]othing in IGRA can reasonably be construed as conferring on states the power to impose anything [fees or taxes]; all the states are empowered to do is negotiate."
    - Still, the 2nd Circuit Panel reasoned: "IGRA does not directly preempt, by its text of by plain implication. . . . IGRA addresses state taxation, without prohibiting taxes."

Indian Tax Power

- In the spirit of judicial realism . . .
  - *Ute Mountain Ute Tribe v Rodriguez* (2012): 10th Circuit affirmed state taxes on oil/gas extracted from tribal lands by developers
    - Tribe excluded the state from tribal lands so there were no on-reservation impacts that justified the state taxes.
    - Because New Mexico "provides substantial services by regulating the **off-reservation** infrastructure that makes transport of oil and gas possible."
  - *Fond du lac Band of Lake Superior Chippewa v. Frans (2011)*: 8th Circuit allowed Minnesota to tax retired Indian's pension earned in Ohio and drawn on the Reservation
    - *Mescalero Apache Tribe v. Jones* (U.S. 1973): "Absent express law to the contrary, Indians going beyond reservation boundaries have generally been subject to non-discriminatory state law otherwise applicable to all citizens of the state."
    - As for 14th Amendment Due Process: "Minnesota citizenship created a constitutional nexus for the taxation."

Chehalis v. Thurston County (9th Cir. July 30, 2013)

- 51% majority Chehalis/49% minority non-Indian LLC
- Chartered in Delaware
- Tribe the LLC Managing Manager (today; not in 2008)
- Tribal Chairman the LLC Board Chair (always); Board majority controlled by the Tribe (today; not in 2008)
- Tribal "veto power" over capital and operating budgets
- Non-Indian partner empowered to manage day-to-day operations
- Tribe contributed $88M of $172M in development monies
- Tribe guaranteed 51% of $102M construction loan
- Tribe bears 51% of profits/losses/taxes

Chehalis v. Thurston County

- On a preliminary injunction motion in October 2008, the District Court reasoned:
  - "Assessing a tax against a partially private and partially Indian-owned limited liability company is not an injury."
  - "While the Tribe may have immunity from state taxation, **the question of whether CTGW may also have [tax] immunity is unclear** . . ."
  - "[U]ntil the Court decides the merits of the [tax] immunity issue, there is no reason to consider CTGW anything but a limited liability company."
- Or *is* there reason to treat a 51/49 joint venture immune/ exempt from state taxation?

Chehalis v. Thurston County

- *Mescalero Apache Tribe v. Jones* (U.S. 1973): "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business."
  - The SBA deems a business "Indian" if it is 51% Indian. 13 CFR 124.109(c)(3).
  - For purposes of the Indian Financing Act of 1974, Indian-owned economic enterprise means any Indian-owned business established or organized for the purpose of profit, with at least 51 percent Indian ownership. 25 U.S.C. 1452(e); 48 C.F.R. 26.101.
  - In a 1989 private letter ruling, the IRS deemed a corporation "Indian" where the Tribe organized the corporation under a state charter and at the time there were some minority shareholders who were not Indian. PLR 8937036 (9/15/1989).

Chehalis v. Thurston County

- On the flipside:
  - Washington State Department of Revenue Opinion:
    - "There are no cases of which we are aware that identify the "non-Indian" as anything other than totally non-Indian, as opposed to the situation here where the LLC, as an entity, is technically a non-Indian, but there is no denying that the Tribe has a direct and substantial ownership interest in the LLC."
  - *City of Kennewick v. Benton County*, 131 Wn.2d 768, 769 (1997) (property taxes apportioned on taxable component of public/private joint venture).
- **Tomorrow's Indian lawyers must responsibly push the envelope on Indian taxation power.**

Oneida Tribe of Wisc. Indians v. City of Hobart (7th Cir. Oct. 18, 2013)

- Village of Hobart assessed stormwater "fees" on on-reservation Oneida trust lands
- "And there is another reason [Hobart] must lose. Because federal law forbids states and local authorities to tax Indian lands, the tribe can't be forced to pay the assessment decreed by the challenged ordinance if the assessment is a tax."
- "Tribal trust land . . . may not be taxed by either state or local governments. 25 U.S.C. § 465."
- And, "the imposition, let alone the foreclosure, of liens on land to which the federal government holds legal title is out of the question."

Indian Territorial Power

- Indian land status vis-a-vis tax immunity is *now* (i.e. post-*Chehalis*) more important than ever.
  - Tribes are not winning in any other tax context, yet.
- *Colville*, practically speaking, forbade state tax collection in Indian Country
  - "It is significant that these [tax-related] seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries."
- But tax exemption and territorial authority hinge on another right: sovereign immunity.

Tribal Sovereign Immunity

- The single most important Supreme Court case regarding tribal economic development, is?
- *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi* (1991), which held that tribes are immune from state tax collection actions.
  - "Oklahoma complains that . . . decisions such as *Moe* and *Colville* give them a **right without any remedy**. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives."
  - The Court outlined four solutions for state's dilemma, but tax enforcement was not one of them; therefore not likely viable legally.

Tribal Sovereign Immunity

- The reason that *Oklahoma Tax Comm'n* is so critical is that it **generally prevents non-Indian judges from hearing state tax (and tribal territorial) authority cases against tribes on the merits**—and thus from ruling against tribes as they are predisposed to do.
  - *See e.g. Mashantucket Pequot* (a suit against non-Indian machine lessors), *Ute Mountain* (non-Indian oil/gas developers), *Frans* (a tribal member without immunity).
- Tribal immunity allows the Indian taxation envelope to be pushed.
- Without tribal sovereign immunity, Indian taxation power, if not economic development, *will* be eroded, if not destroyed.
- Indeed, "the power to tax is the power to destroy."

Michigan v. Bay Mills Indian Community (U.S. 2014)

- Tragically, the destruction of tribal sovereign immunity vis-à-vis states could happen *very* soon, in *Michigan v. Bay Mills Indian Community*, __ U.S. __ (U.S. 2014).
- Issues under review:
  - (1) Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands; and
  - (2) Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.
- Be afraid, be very, very afraid. Why?

Oklahoma Tax Comm'n v. Citizen Band of Potawatomi (U.S. 1991)

- "[I]f Oklahoma and other States similarly situated find that none of these alternatives produce the [tax] revenues to which they are entitled, they may of course seek appropriate legislation from Congress."
  - i.e., abrogate tribal sovereign immunity (or territorial authority)
- Justice Stevens, concurring:
  - "The doctrine of sovereign immunity is founded upon an anachronistic fiction."

Kiowa Tribe of Okl. v. Manufacturing Technologies (U.S. 1998)

- "[We] doubt the wisdom of perpetuating the doctrine. . . . [T]ribal immunity [now] extends beyond what is needed to safeguard tribal self-governance. . . ."
- "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. . . . We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment."
- What was happening in 1998?

Kiowa Tribe of Okl. v. Manufacturing Technologies

March 21, 1998

A Threat to Indian Sovereignty

Senator Slade Gorton has once again declared war on the Indians. Having failed last year to undermine the concept of Indian sovereignty with a sneaky amendment to an appropriations bill, the Washington State Republican has now offered a freestanding bill, erroneously labeled the "American Indian Equal Justice Act," that is a reprise of last year's rider. The bill would, among other things, deprive Indian tribes of their sovereign immunity against civil lawsuits.

C&L Enterprises v. Citizen Band of Potawatomi (U.S. 2001)

- Despite reiterating the rule of "unequivocal" Congressional abrogation, or "clear" Tribal waiver, of tribal sovereign immunity, the Court found a waiver in boilerplate arbitration language that does not even mention "immunity" or "waiver."
- Because ten years after *Oklahoma Tax Comm'n*, Congress had not yet done anything about immunity, and with and after Slade Gorton having gotten dumped since *Kiowa*, the Justices took it upon themselves to do something.

Nevada v. Hicks (U.S. 2001)

- Meanwhile: "[T]he Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border."
- "[T]he principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Colville*.
- "When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land."
- "While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation . . . for enforcement purposes, several of our opinions point in that direction." Citing *Colville*.

Oneida Indian Nation v. Madison County (U.S. 2011)

- Whether sovereign immunity precluded county from foreclosing on Oneida-owned fee lands for delinquent tax debt.
- While the case was pending before the Supreme Court, Oneida notified the Court that it had voluntarily waived its tribal sovereign immunity from suit.
- Accordingly, the Supreme Court vacated a lower court judgment in favor of Oneida on immunity grounds, and remanded for further proceedings. Bullet dodged.

Michigan v. Bay Mills Indian Community (U.S. 2014)

- Bay Mills has refused to moot its case like Oneida did.
- NIGC and DOJ have refused to enforce federal law.
- Congress will not touch tribal sovereign immunity; the Tribes (i.e. gaming tribes) are too powerful (wealthy).
- So, will the anti-Indian Supreme Court now "abrogate tribal immunity, at least as an overarching rule?"
- Will the Justices now somehow confer to states some "corollary right" that will allow them *carte blanche* access to Indian Country?

Conclusion

- Go forward, as the next generation of Indian lawyers warrior-developers, responsibly but zealously.
- Leverage inherent tribal taxation, immunity and territorial rights, for as long as they exist.
- Leverage the grey area in the law.
- Minimize the uncertainty at law; create hedges against the worst case scenario.
- The transaction is never static; it is always dynamic.

Thank You

Gabriel S. Galanda

gabe@galandabroadman.com

(206) 300-7801