

KIMBLE, MacMICHAEL & UPTON
NEWS BRIEF

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SO YOU ARE THINKING OF BUILDING ON INDIAN LAND... ..
[make sure you have done your homework first...]

With the recent surge in Indian Tribes desiring to build casinos on their lands, contractors face new challenges and opportunities. Separate and apart from the mundane issues such as which building code applies (if any) and what department issues building permits (if any) is the all important question: how can I make sure I (and my subs/suppliers) will be paid? The answer to this question is you can never guarantee full payment on an Indian casino or related project on Indian Land. However, you can significantly increase the odds by recognizing the issues and trying to negotiate resolutions to them prior to contracting to do the work. Moreover, to the extent you cannot resolve the issues in a satisfactory manner before entering into the contract, you may decide your best course of action is to simply forego the work.

A casino project on Indian Land is different from (and more risky than) other types of public and private projects because, all other things being equal, a contractor generally has fewer remedies to collect payment on an Indian casino project. There are two primary reasons for this lack of meaningful remedies. First, federally recognized Indian Tribes are generally immune from lawsuits in both federal and state courts for civil matters. Second, the land upon which the project is built may be owned in such a manner that a contractor may not be able to successfully enforce a lien upon it.

How these may affect you is different based upon several factors such as: 1) the nature and title to the land on which the project is to be built (i.e., is it "Indian Land", and, if so, what type: reservation land, Indian country, trust land, or some combination of the above?); 2) the payment delivery system (i.e., is there a traditional construction loan, will bond funds pay for construction, is the construction self financed, will the funds be held on or off Indian land?); 3) with whom are you contracting (i.e., with an Indian tribe, a separate management company, a general contractor?). While there are other questions, the answers to these will often dictate the probability of payments arriving on time, or not at all. However, in all Indian Tribe projects, regardless of your particular role in the project, the issues of the Tribe's sovereign immunity and the enforceability of your lien rights are of primary importance in ensuring your payment.

As a matter of background, most Indian Tribes, and many courts, consider various types of Indian Land as essentially land held by a sovereign nation. In other words, you might as well be building in the Balkans. The rules of a "sovereign nation" may "trump" the laws of the State of California or those of the U.S. Government. The purpose of this article is not to split hairs over the difference between Indian Country, Reservation Land, land held in Trust by the U.S. Government for the benefit of the Tribes, Rancheria land, and the like. For the purpose of this article, the contractor should just presume

if he or she is intending on building on land owned or purported to be owned by an Indian Tribe, he or she will be dealing with a separate sovereign nation and a different type of real property. While a court of law may later disagree and find all of the laws of the State of California and the U.S. Government apply and enforce a lien on the Indian Land, these authors subscribe to the age old adage “it is better to be safe than sorry”. In other words, prepare for the worst and hope for the best.

OK, so we assume the Indian Tribe is immune from a lawsuit in federal or state court, the state and federal laws do not apply and the land is Indian Land upon which we cannot enforce our liens. Now what? The undersigneds recommend the following actions be taken for the following reasons:

1. Obtain a waiver of sovereign immunity from the Tribe. You should also make sure the waiver is approved by the tribal council and applies to you as well as all junior tier subs and suppliers and all tribal members, organizations and entities. In obtaining a waiver of sovereign immunity make sure the waiver is expressly broad enough to cover all potential disputes between all potential parties. A court will likely enforce only an express waiver of sovereign immunity and only to the extent of its clear and unambiguous language. Absent a valid, enforceable, waiver of sovereign immunity, you can safely assume the tribe will argue it is immune from all laws but its own, and demand you submit any issue to the tribal council. Understandably, contractors are uncomfortable submitting any disputes or concerns to an Indian Tribe for a binding decision, considering their dispute is often with the Indian Tribe.

2. Obtain a non-Indian Tribe source to pay claims or damages should the Indian Tribe fail to fully pay you for your work. As noted above, the major source of risk on Indian Tribe projects is the potential (and likely) immunity of both the Tribe and Indian Land from state and federal remedies. One way around this problem is to contract for a non-Indian third party source of revenue to satisfy your claims should there be a dispute. A payment bond with sufficient and proper terms issued by a financially solvent and independently liable surety is one way around this issue. A letter of credit is another possible solution.

3. Ensure all contract funds are held “off reservation” in an escrow account which is not subject to tribal laws. You should also receive adequate assurances the funds held are sufficient to complete the project. Again, the sovereign immunity protection must be explicitly waived and your authority / right to the construction funds specifically vested in you by the tribe. The authors recommend a specific recitation in the agreement establishing the construction fund escrow account that the funds therein are subject to stop notice remedies (which themselves carry constitutional protections) and must be disbursed to you, the contractor, on the accomplishment of certain milestones, schedule of values, or some other clearly defined disbursement criteria.

4. Obtain a clear written acknowledgement the property on which the project will sit is subject to mechanic’s liens. Many tribes will argue their land is not subject to mechanic’s liens because they are a “sovereign nation” subject to “sovereign immunity”. Rather than go down this road, obtain a clear waiver as well as an affirmative representation by the land owner (generally the tribe) that the land is indeed subject to lien. Recording this agreement could not hurt.

5. Even though you should assume that California’s and the U.S. Government’s laws will provide you no assistance, you should act as if they do. This means that you should take all precautions and perform all the prerequisites to enforce your rights to collect your money under state and federal law. For example, you should properly serve a preliminary lien notice on all required parties. Serving such a notice does not entail a great expense and it may keep intact a remedy that a court will enforce. Also, do not forget to record your lien if you would otherwise be entitled to do so.

6. Finally, we are aware that the Indian Tribe may not agree to all (or even some) of the foregoing. In that case, you should seriously consider not doing the project. Regardless of how lucrative the project may appear to you going in, you must remember that a project is only lucrative if you actually get paid.

While the above precautions will not guarantee you will be paid (there is no such guarantee for any project), they should improve your odds. Any time one can improve ones odds against the "house", one should consider oneself fortunate.

Happy Contracting and good luck.

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