inside

Drinker Biddle & Reath LLP

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A Message from the Editors

The launch of the *Tribal Business Journal* is timely and important. Indeed, the very name of the publication reflects healthy and welcome developments in Native America. The economies in Native communities are experiencing growth and diversification unlike any others in the United States. For decades Native economies were stagnant and viewed as bastions of poverty and hopelessness. Since the late 1960s, Indian Self Determination has resulted in a renaissance of Indian tribal governments, economies and cultures. Today, Native economies are witnessing healthy investment flows and job creation activities, increased incomes and higher standards of living.

Because of the uniquely federal nature of Indian law and policy, Indian tribal businesses are more susceptible to changes in federal law and regulation, agency actions and related policy initiatives. Successfully navigating these developments requires timely and relevant business information. The *Tribal Business Journal* will provide that information. The goal of this publication is to provide readers with up-to-date information about the many business and commercial developments that are of increasing interest to Tribal leadership, the growing community of private entities partnering with Indian Tribes and professionals working to strengthen tribal economies. The *Journal* will also present perspectives on Tribal business matters from Tribal leaders, key decision-makers in Congress and the Executive Branch and the private sector. Welcome to the *Tribal Business Journal*. **TBJ**

TRIBAL ENERGY MATTERS

Congress Gives Tribal Energy a Boost with FY2008 Appropriations; TERA Regulation Imminent

In fiscal years 2006 and 2007, the U.S. Congress failed to provide significant funding to breathe life into the Indian Tribal Energy Development and Self Determination Act of 2005. That changed in December 2007, when Congress passed and President Bush signed H.R. 2764, an Omnibus Appropriations Bill to fund the operations of the federal government, including the Departments of Energy and the Interior, for the period October 1, 2007, to September 30, 2008.

For "Tribal Energy Activities" in the U.S. Department of Energy, Congress appropriated $6 million - an increase of more than $3 million over President Bush's budget request. The Council of Energy Resource Tribes will be allocated $500,000 for the Tribal energy activities it undertakes on behalf of Indian Tribes across the nation. In addition, H.R. 2764 provides $2 million for Indian tribal energy activities at the U.S. Department of the Interior. Of that amount, $600,000 will be channeled to the Office of Indian Energy and Economic Development to review and process "Tribal Energy Resource Agreements" (TERAs) submitted by Indian Tribes pursuant to the new Indian energy law. For capacity building related to energy development and environmental protection, the bill includes $1.4 million to be allocated directly to Indian Tribes.

By February 1, 2008, the U.S. Department of the Interior intends to send to Congress for review final regulations to implement the

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THE TRIBAL LABOR CORNER

Appeals Court Upholds Application of Federal Labor Law to Tribal Casino

In September 2005, the National Labor Relations Board (NLRB) issued a final decision of its earlier case exercising jurisdiction over an unfair labor complaint filed by a labor union against the San Manuel Band of Mission Indians (the Tribe) relating to its casino operations. In *National Labor Relations Board v. San Manuel Band of Serrano Mission Indians*, the NLRB determined it had jurisdiction under the National Labor Relations Act (the Act) because there is no tribal exemption in the Act and because principles of federal Indian law and policy do not preclude the Act being applied. The NLRB based its decision on three factors: 1) whether the Tribe is fulfilling traditionally tribal or governmental functions; 2) whether these functions "involve" non-Indians or affect interstate commerce; and 3) whether the activity takes place on or off a Tribe's reservation. The NLRB concluded that jurisdiction in this case was appropriate because the casino is a "typical commercial enterprise" that employs non-Indians and caters to non-Indian customers and, therefore, its decision to exercise jurisdiction is appropriate.

On appeal, in February 2007, the U.S. Court of Appeals for the D.C. Circuit denied the petition for review filed by the Tribe (see *San Manuel Band of Serrano Mission Indians v. National Labor Relations Board et al.).* In so doing, the appeals court upheld the NLRB's conclusion that the Act is applicable because the Tribe's casino is a "purely commercial enterprise" that "employs significant numbers of non-Indians" and "caters to a non-Indian clientele that lives off the reservation." The Tribe's motion to reconsider the case was denied in June 2007, and the Tribe is considering an appeal of the decision to the U.S. Supreme Court.

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In the wake of the *San Manuel* decision, organized labor has begun an aggressive campaign to unionize casinos and resorts owned and managed by Indian Tribes. On November 26, 2007, in an action monitored by the NLRB, the United Auto Workers won a vote by dealers to organize a union at the Mashantucket Pequot's Foxwoods Resort Casino in Connecticut. A month later, on December 16, 2007, the housekeeping staff of the Saginaw Chippewa Tribe's Soaring Eagle Casino rejected a bid by the Teamsters Union by a two-to-one margin. TBJ

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The Indian Tribal Governments Practice at Drinker Biddle & Reath provides a full range of legal and federal legislative services pertaining to tribal governments, tribal organizations and gaming-related businesses in every region of the United States. For more information, visit our website at www.drinkerbiddle.com.

FEATURED ARTICLE

Asset Management and Indian Self-Determination

Since 1997, Indian Tribes have had the authority to assume a high degree of management and control over more than $2.5 billion in tribal funds now held by the U.S. government. A regulation issued by the U.S. Department of the Interior has as its goal the encouragement of tribal fund management, liberalization of investment options available to Tribes and greater returns on investments by having the Tribes manage their own funds - either directly or by using a commercial fund manager. The regulation was issued to implement the American Indian Trust Fund Management Reform Act of 1994. The "price" of this increased management authority is that the funds, once withdrawn, lose their trust status. For this and a number of other reasons, not more than 10 Tribes have made use of this authority, as of 2007.

Federal statutes routinely used by Tribes were once viewed as abdications of the federal government's obligation to provide services and programs to Tribal governments and Native peoples, including the Indian Self-Determination and Education Assistance Act, and the Tribal Self-Governance Act. These statutes do not require tribal participation. Rather, they provide a voluntary alternative to the continued provision of services and programs directly by the U.S. government. During the past 30 years, Tribes have embraced these statutes and now manage more than one-half of the budgets and functions of the Bureau of Indian Affairs and the Indian Health Service.

Comparing an investment made in government-backed securities versus the same investment in more robust securities is illustrative. From 1997 to 2006, investing in the U.S. government credit index of a major investment house would have returned 5.4% to the investor on an annual basis, while the same investment in Standard & Poor's 500 would have returned 8.4%. By any measure, a 3% differential is significant and it is one of the reasons Tribes should consider alternative investment management options.

A Tribe may withdraw and manage some or all funds that the U.S. Department of the Interior holds in trust if it submits a plan that meets the department's approval. The types of funds that may be withdrawn and managed include funds appropriated to satisfy judgments of the Indian Claims Commission and the Court of Federal Claims that are held under the Indian Tribal Judgment Funds Use or Distribution Act or other act of Congress. The Tribe must use the funds as specified in the previously approved judgment fund plan. Similarly, the Tribe is prohibited from withdrawing funds held for individual tribal members. Also, eligible are funds appropriated by Congress to satisfy settlement agreements related to certain tribal claims, provided that the Tribe uses the funds as specified in the previously approved judgment fund plan and that the Tribe withdraws funds held only for the Tribe, not those held for individual tribal members.

Last, a Tribe may withdraw and manage the "proceeds of labor" (*e.g.*, income from tribal trust resources) and manage them pursuant to the regulation. Proceeds of labor funds are quite common with nearly all Tribes having at least one such account. It is also likely that the proceeds of labor accounts will include the vast majority of funds that are held and currently managed by the federal government. These facts are important, given certain restrictions on the use of withdrawn funds that are discussed below. The regulation

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LEGISLATION AT-A-GLANCE

Tribal Government Tax-Exempt Bond Parity Act (S.1850). Under the bill, Indian tribal governments would be treated the same as state or local governments for purposes of issuing tax-exempt bonds to finance economic development facilities on tribal lands. S.1850 was introduced by Sen. Gordon Smith (Ore.) and co-sponsored by Sen. Max Baucus (Mont.), Sen. Tim Johnson (S.D.), Sen. Byron L. Dorgan (N.D.) and Sen. Jon Tester (Mont.). It currently is pending in the Senate Finance Committee.

Department of the Interior Tribal Self Governance Act (H.R. 3994). Rep. Dan Boren (Okla.) introduced H.R. 3994 to expand Tribal Self Governance within the U.S. Department of Interior. A hearing was held on November 8, 2007, by the House Committee on Resources. H.R. 3994 is cosponsored by Rep. Frank Pallone, Jr. (N.J.) and Rep. Nick J. Rahall II (W.V.).

Tribal Labor Sovereignty Act (H.R. 3413). This measure would amend the National Labor Relations Act to provide that any enterprise or institution owned and operated by an Indian Tribe and located on its Indian lands will not be considered an "employer" and, therefore, subject to the jurisdiction of the NLRB. H.R. 3413 is co-sponsored by Rep. Ken Calvert (Calif.), Rep. Tom Cole (Okla.), Rep. Ron E. Paul (Tex.), Rep. John Campbell (Calif.), Rep. Howard "Buck" McKeown (Calif.) and Rep. Charles "Chip" Pickering, Jr. (Miss.). It was referred to the Committee on Education and Labor. TBJ

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TERA provisions of the new Indian energy law signed by President Bush in August 2005. The final proposed regulations can be found in the *Federal Register*, Vol. 11, pp. 48625-48645 (August 21, 2006).

TERAs will pave the way for Indian Tribes to assume greater decision-making and management of their energy development decisions. Current law requires the Secretary of the Interior to review and approve each lease, lease renewal and related agreements, whereas the new law authorizes Indian Tribes to negotiate and enter these agreements largely free from secretarial review or approval. The new land leasing system is voluntary, and Tribes that prefer to operate under existing legal authority may continue do so. TBJ

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provides that "the trust responsibility ends" for withdrawn funds on the date of withdrawal. This means that the United States will not be liable for decisions or losses as a result of mismanagement or investment decisions it would otherwise make as trustee for funds remaining under its tutelage. Once a Tribe has withdrawn its funds, it may revise the plan without the Secretary of the Interior's approval. Under such circumstances, any change "should" conform to the Tribal Management Plan (TRIMP) that the secretary reviews for its adequacy.

With an approved TRIMP in hand, a Tribe may withdraw additional funds if it notifies the secretary of the funds to be withdrawn and if such notice is accompanied by a tribal resolution certifying that the funds will be managed under the same previously approved TRIMP and the most recent audit or investment report. After a review of these documents by the Secretary, the funds may be withdrawn. A Tribe may elect to return some or all of its withdrawn funds, but it must first notify the secretary of the date of the proposed return and specify the amount of funds to be returned. Further, the Tribe may return all or a portion of the principal withdrawn, in addition to earnings and profits.

In an era when Indian Tribes are assuming ever-increasing control over the programs and services for their members, their lands and their affairs, it makes sense for them to consider similarly aggressive management of tribal trust funds. The Act and the regulation can serve to afford Tribes wide latitude in how and under what circumstances they choose to manage their own funds. TBJ