

Craig Peterson, President and
IAIABC Executive Committee
Hand Delivered
February 24, 2002

Re: Tribal Sovereignty Task Force Discussion Paper

The original charge for a project on the interaction between Workers' Compensation and Tribal Sovereignty issues dates back to former President Joann Karl. At the Washington DC Annual Convention, she requested that a paper be developed for presentation at the Seattle convention. A working group formed with participants including Brian Prindle representing the Mashpawtuckett Pequot Nation and Arita Yazzie representing the Navajo Nation Office of the Attorney General.

The original draft of that paper, which contained all of the first two sections of the current document and some of the third section, was approved by the working group after going through several drafts and was presented to large audience at Seattle by Brian Prindle, Rose Houk and myself. It was well received and I forwarded copies upon request to a number of people. No negative comments were received.

In anticipation of review in Portland, the paper was reviewed by Kevin Washburn, General Council of the National Indian Gaming Commission and various members of the legal community in New Mexico whose practice was primarily in the area of Indian Law.

The paper was also updated to reflect two U.S. Supreme Court and one Navajo Nation Supreme Court decisions that had occurred in the interim.

In Portland it was observed that the paper promoted a specific policy alternative and that that it needed to be restructured to comply with the new By-Laws. In the interim the single policy alternative discussed previously has been supplemented with a discussion of six other policy alternatives, and conforming typographical changes have been made.

The Regulation and Enforcement Committee voted the paper as complete and ready for presentation to the IAIABC Executive Committee on February 23, 2002. We believe that it will be a useful resource for Workers' Compensation Administrators dealing with a difficult area of the law.

We have not encountered any resistance or objection to the contents, tone or discussion of policy alternatives contained in this paper during the process of review of this or preceding drafts. We know of no person or group who objects to it in any respect, although it is always possible that, despite earnest efforts at cultural sensitivity and awareness, someone may find something to find objectionable.

We ask for the approval of the Executive Committee, pursuant to the By-Laws, of this document as an official document of the IAIABC, and for publication and dissemination of it by appropriate means. If the judgment of the Executive Committee is that further refinement is needed, we request that you direct our attention to areas of concern.

Sincerely

Robert M. Aurbach, Chair
Standing Committee on Regulation and Enforcement

INDIAN SOVEREIGNTY AND WORKERS' COMPENSATION

SOME QUESTIONS AND SOME POLICY OPTIONS

By the IAIABC Task Force on Tribal Sovereignty and Workers' Compensation¹

Interplay between the states' workers' compensation acts and the sovereignty of the Indian Tribes, Pueblos and Nations generates a series of related issues. Each of them arises from having two distinct legal authorities in close proximity with each other that do not share common principles concerning Workers' Compensation. The situation is exacerbated by the absence of a requirement for Full Faith and Credit to be given in between jurisdictions.² To understand the conflict between the states and sovereign Indian entities, it is necessary to gain some understanding of the nature of Indian sovereignty and Indian Tribal jurisdiction.

BACKGROUND

Indian Tribes, Pueblos, and Nations together form a special class of entities known as domestic sovereigns. Their sovereignty extends to Tribal government and all of its employees and to economic enterprises of the Tribe.³ Economic enterprises are those businesses whose profits (if any) constitute a revenue stream that goes directly into Tribal funds or otherwise represent an endeavor created by the Tribal sovereign to directly benefit itself or its members.

¹ Written by RobertM.Aurbach, General Counsel, N.M. Workers' Compensation Administration, with substantial and substantive assistance, editing and support from: Brian Prindle, Mashantucket Pequot Nation, Barney Taylor, Oklahoma Workers' Compensation Court, Kevin Washburn, Renee Blechner and others.

²In this regard, Indian Sovereignty issues are similar to those raised among the NAFTA trading partners. It is instructive for both the Indian Sovereignty and NAFTA issues to observe that they are avoided among the states by the expedient of giving the worker a choice among laws to apply in an environment where one jurisdiction gives full faith and credit to the judgments rendered by the courts of other jurisdictions. It should also be noted that the state of Michigan, at least, has negotiated a full faith and credit provision with many of its Tribal Sovereigns.

³ Padilla vs. Pueblo of Acoma, 107 NM 174, cert. denied, 490 US 1029 (1988.)

The sovereign power of Indian Nations also extends to the affairs of non-Indians while they are on reservation land, subject to certain limitations.⁴

Some controversy exists as to whether Tribal sovereignty extends to off reservation activities of Tribal enterprises. The U.S. Supreme Court has recognized a geographical component to the limitations of sovereignty in the context of taxation by the state.⁵ But absent a recognized ground for state infringement of Tribal sovereignty rights, the general rule appears to be that sovereignty extends to off reservation activities of Tribal enterprises.⁶

Congress has “plenary Power” over Indian Nations.⁷ Under this doctrine, Congress has the power to regulate Indian sovereigns or to abrogate Tribal sovereignty altogether.⁸ PL83-280 (18 USC 116 11360) is an example of such congressional regulation. It provides the courts of Minnesota, California, Alaska, Oregon, Nebraska and Wisconsin with civil and criminal jurisdiction over individual Tribal members in state courts for events taking place in “Indian Country” within those that have no more power over Tribal affairs than Tribes have over state affairs. Generally, the state may not infringe on Tribal sovereignty by its enactments.⁹ Where state law appears to conflict with Tribal law, the Supreme Court has announced a “preemption test” which requires a particularized balancing of the state’s interests against Tribal and federal government interests.

¹⁰ Since the overriding goals are Tribal self-sufficiency and economic development,¹¹ the

⁴ Montana vs. United States, 450 US 1014 (1982).

⁵ Mescalero Apache Tribe v. Jones, 411 US 145 (1973)

⁶ Sac and Fox Nation v. Hanson, 47 F3rd 1061 (Circuit, 1995)

⁷ Santa Clara Pueblo v. Martinez, 436 US 49, 56 (1978)

⁸ New Mexico v. Mescalero Apache Tribe, 462 US 324 (1983)

⁹ New Mexico v. Mescalero Apache Tribe, *supra*.

¹⁰ McClanahan v. Arizona Tax Commission, 411 US 164 (1972)

¹¹ California v. Calazone Band of Mission Indians, 480 US 202 (1987)

balance is heavily weighted toward the preemption of state law. Arguably, the state must have a “compelling” interest to assert its authority. The preemption of state law will occur if the state regulatory scheme would effectively nullify or substantially disturb the Indian regulatory scheme.

Within that context, Congress has acted with respect to workers’ compensation. 40 USC 290 says the states’ workers’ compensation laws apply to injuries on federal lands, including Indian lands, with respect to businesses that are not part of the sovereign entity.¹² However, the exemption for the Tribal sovereign almost always extends to non-Indians who enter into consensual relations with the Tribe.¹³ Accordingly, Tribal law with regard to workers’ compensation injuries almost always covers non-Indian employees of Tribal economic enterprises, such as Indian gaming establishments established by a Tribe, Pueblo or Nation.

To complicate matters even further, except in states that have statutory jurisdiction over Tribal members pursuant to Public Law 83-280, civil cases involving “reservation affairs” must be tried in Tribal courts rather than in state courts.¹⁴ Even the federal courts must defer to Tribal court in the first instance for resolution of civil matters occurring on reservation land. The federal courts obtain jurisdiction in such cases only after exhaustion of Tribal court remedies (with certain limited exceptions).

The right to assert sovereignty may be waived, and tribal jurisdiction over workers’ compensation can be given up by Tribal action. The waiver must be explicit and cannot be

¹²Begay v. Kerr McGee Corporation, 682 F.2d 1311 (9th CA 1982)

¹³Washington v. Confederated Tribes of Colville Indian Reservation, 447 US 134 (1980)

¹⁴National Farmer’s Union Insurance Co. v. Crow Tribe, 471 US 845 (1985) and Iowa Mutual Insurance Co. v. LaPlante 480 US 9 (1987). But see Muscogee (Creek) Nation v. Smith 940 P. 2d 498 (Okla. 1997) and Dominic v. State Insurance Fund 1997 OK 41, 936 P. 2d 935 (Okla. 1997) for the proposition that the Indian claimant may chose to go into state court to enforce a right under a state fund insurance contract voluntarily purchased by a Tribal entity after a waiver of sovereignty.

implied by mere inaction.¹⁵ Waiver cannot be implied from the conduct of business affairs off reservation lands by an economic entity of the Tribe.¹⁶ However, at least one state case has held that the payment of workers' compensation insurance policy premiums effectively waives Tribal sovereignty.¹⁷ The effect of a waiver of sovereignty will bring an otherwise exempt Tribal sovereign or Tribal enterprise under the umbrella of a state's workers' compensation system.

CURRENT ISSUES

The most common circumstance where a conflict between a state's workers' compensation system and Tribal sovereignty arises occurs where the sovereign entity hires non-Indians for work on reservation land.¹⁸ As Indian gaming spreads through the states, the circumstance occurs with increasing frequency.

Indian gaming enterprises are regulated under federal laws and by compacts between the states and the Tribal sovereigns. Most often those compacts call for "equivalent" protection to the state's workers' compensation systems or are entirely silent with respect to the issue. The concept of equivalence between state and Tribal workers' compensation system has proven to be complex and difficult. Some commercial insurers (and insurers that are, themselves, Indian-owned enterprises) have responded by marketing to the gaming Tribes with a combination of insurance policies covering accidental, death and disability and medical treatment. Some of these policies contain limitations, such as caps on dollar amount or temporal extent of coverage that are not consistent with the state law. Many of the entities offering such coverage have not submitted to regulation by state insurance authorities. The absence of regulation makes service of process upon the insurer more difficult and reduces or removes accessibility to a guarantee fund in the event of the insurer's financial failure. Moreover, normal employee notice provisions

¹⁵Santa Clara Pueblo v. Martinez, 436 US 49 (1978)

¹⁶Sac and Fox Nation v. Hanson, supra., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 US 751 (1998)

¹⁷ Wahpepah v. Kickapoo Tribe of Oklahoma, 1997 OK 63, 939 P.2d 1151 (Okla.1997). Compare Little v. Muscogee (Creek) Nation 1997 OK 57, 938 P. 2d 739 (Okla. 1997) which denies a jurisdictional defense to the insurer under similar circumstances.

¹⁸ It is estimated that 75% of the more than 200,00 employees of Indian gaming establishments are non-Indians.

applicable in the states do not apply or are extremely difficult to enforce against employers operating on Indian lands. Consequently, non-Indian employees are often uninformed or misinformed about their rights in the event of injury.

A state faced by the failure of equivalency to state mandated workers' compensation insurance may find itself with its hands tied concerning enforcement of the compact provisions. The Indian sovereigns have invested tremendous resources into their gaming operations, and have generated a very significant cash flow in some instances, which affords them the opportunity to exercise significant political power. If the state chooses to attempt to enforce the contract, the federal courts (perhaps after exhaustion of Tribal court remedies) will have to balance the state interest against the heavily weighted interest in Tribal self-sufficiency and economic development. The economic investment of the Tribes in the enterprises will also be a factor. The application of the "infringement" and "preemption" tests to this circumstance will almost certainly require resolution in the US Supreme Court.

Another circumstance where conflicts between state law and Tribal sovereignty occur with increasing frequency is regulation of joint ventures between Tribal sovereigns and employers otherwise subject to the local workers' compensation act. As noted above, entities that enter into consensual relations with Tribal sovereigns place themselves under the regulatory jurisdiction of the Tribe, Pueblo, or Nation. However, if the non-Tribal partner to the joint venture is also an employer that is otherwise subject to the states' workers' compensation act, issues can become complicated by multiple and inconsistent regulatory schemes. Thus, when a large hotel chain enters into a joint venture with a gaming Tribe to build a resort hotel adjacent to the Tribal casino, the interplay between Tribal and state regulation of the hotel chain employees can become complex.¹⁹

¹⁹ This complexity sometimes expresses itself in an unusual and unexpected ways. In Indian country some joint ventures and non-Sovereign businesses working on Indian land have required their Tribal employees to utilize the Indian Health service as the primary medical provider for Workers' Compensation injuries. The Indian Health Service provides medical services to Tribal member without charge, and in some instances the business entities have resisted Indian Health Service efforts in seeking reimbursement for services that should have been covered under Workers' Compensation pursuant to the applicable state law.

A variety of issues can arise out of this joint venture scenario. If the non-Indian entity is the majority owner of the joint venture, then coverage under the state law for workers' compensation is clearly required, even under the "preemption" test. The state has a compelling interest in workers' compensation coverage in such circumstances.²⁰ In any other scenario, the situation gets more complex. Depending on the circumstances, a worker for such joint venture may be co-employed by the Tribal entity and the non-Tribal business²¹ and resolution of any dispute concerning benefits may have to occur in Tribal court.

Perhaps more daunting from a business perspective is the fact that Tribal courts are not required to recognize the exclusive remedy doctrine of state workers' compensation laws. Accordingly, if a non-Tribal business entity which is part of a joint venture with an Indian Tribe, covers its' employees for workers' compensation injuries and resolves those injuries in state court, the worker is not barred from seeking additional tort remedies against the employer in Tribal court.²² The difficulty of this result is exacerbated by the fact that the Tribal entity does not always

²⁰ If mere minority ownership by a Tribal sovereign entity exempts a company from state workers' compensation laws, then presumably any state regulatory scheme would be avoidable, no matter how limited the Indian Sovereign interest. This would, at its furthest extent, extend sovereign immunity to state regulation to situations where a Tribal entity has publicly traded corporate stock of a non-Indian business in its investment portfolio. Since this result would be absurd, mere minority ownership cannot be enough.

²¹Such a situation parallels that commonly encountered in leasing enterprises where the payer of the wages (the leasing contractor) and the controller of the worksite (the lessee) are considered co employers, with derivative liability falling on the leasing contractor upon the failure of the lessee to pay workers' compensation claims. See, e.g., Lujan v. Payroll Express 114 NM 257, (Court of Appeals 1992) and Johnson v. Aztec Well Servicing, 117 NM 697, (Court of Appeals 1994).

²² Nez v. Peabody Western Coal, SC-CV-28-97 (Navajo Supreme Court, September, 1999) represents exactly that situation. A Navajo worker was injured on the reservation while working for an employer who was not a Navajo Tribal Enterprise. The worker was compensated under Arizona workers' compensation law. Subsequent personal injury claim filed. Navajo District Court held that the personal injury suit in Tribal Court was not barred for lack of jurisdiction, but that it should be dismissed because it caused "unjust enrichment."

The Arizona Industrial Commission's award does not deprive Tribal courts of jurisdiction. 40 U.S.C. 290 extends state workers' compensation law jurisdiction to the reservation, but that does not answer the question. Tribal courts are not obligated to give effect to the state's exclusive remedy provisions, as that is merely a matter of comity. But jurisdiction should be exercised with restraint. The Tribal court should look at whether the workers' award under Arizona Workers' Compensation would be substantially different than what the worker would have been entitled to under Navajo common law.

recognize our traditions of separation of powers between the three branches of government on the same terms or under the same circumstances. Accordingly, a non-Tribal business venture must concern itself not only with the possibility of defense of the Tribal court tort action, but may also be faced with the introduction of legislation before the Tribal council requiring the business entity to pay additional damages to the worker as a condition precedent of continued business dealings.

It is, also, possible to envision conflicts of jurisdiction in such instances. A non-Tribal entity employing Indians in a joint venture with a Tribal sovereign on Indian land may consider itself subject to the state's workers' compensation laws and submit the resolution of any disputes concerning workers' compensation benefits to the state courts. At the same time, the injured Indian worker of the business entity submits a tort claim to Tribal court, alleging that state workers' compensation laws are not applicable. Some mechanism must be developed for determining which court has jurisdiction to decide the initial jurisdictional question of whether state workers' compensation law or Tribal tort law applies. In the absence of some attention to this issue, complex and expensive litigation is a likely result.²³ The situation is complicated by the fact that application of the Full Faith and Credit Clause between the state's workers' compensation courts and Tribal courts is largely uncharted ground. Accordingly, the assumption of jurisdiction by one court system cannot be relied upon to result in a stay of proceedings in the other jurisdiction, and inconsistent findings on the same set of facts are possible.

An additional problem arises where the employer is located on Tribal lands and employs Tribal members, but is not an economic entity of the Tribe. In those cases, 40 U.S.C. 290 appears to give jurisdiction to the state workers' compensation programs, but Public Law 83-280 appears to make the state go to Tribal court to adjudicate contested claims. There do not appear to be any

²³ A recent New Mexico case, *Eldridge v. Circle-K*, 123 NM 145, (Court of Appeals, 1997) is instructive of the kind of analysis that might be undertaken in such an instance. In that case the appellate courts were faced with an intentional tort claim in District Court and workers' compensation claim arising from the same instance in the workers' compensation courts. It was determined that the State District Court had "primary" jurisdiction to decide the jurisdictional issue based on their broader expertise in tort matters. The same analysis has already been urged as grounds for allowing Tribal courts to resolve a claim of an intentional injury to an Indian worker, over the objections of a non-Indian business operating on Indian land.

reported cases addressing this situation, indicating that state workers' compensation programs have been understandably reluctant to enforce their jurisdiction under those circumstances.²⁴

This scenario is exacerbated when the basic compliance with the mandatory insurance requirement present in most jurisdictions is involved. Commonly, an Indian-owned insurance company that is not a Tribal enterprise (i.e. privately owned, rather than owned by the Tribal sovereign) writes a policy of insurance to cover on-the-job injury, and sells it to Indian employers conducting business on Tribal lands. The policy may, or may not, call itself "workers' compensation". The insurer usually has not submitted to state Insurance Department requirements for writing such policies. Normally, the purchase of such a policy would not satisfy the mandatory insurance requirement, and administrative enforcement proceedings would take place against the employer for failure to have valid workers' compensation insurance in place. However, if the business operates exclusively on Tribal lands and is owned by an enrolled member of the Tribe, then jurisdiction to hear the state administrative enforcement action probably lies exclusively in Tribal court. At the present time, there are no reported cases deciding the jurisdictional question in this context²⁵, but such cases will likely arise in the future.

POLICY ALTERNATIVES RESPONSIVE TO THE ISSUES RAISED

Do nothing. This alternative is an obvious choice for those jurisdictions where there are no Tribal sovereigns or where those Tribal sovereigns in residence have no enterprises where non-Indians are employed. In those instances, the probability of an uncompensated injury is sufficiently low that no preventative response may be necessary.

²⁴ A current controversy exists on this set of facts in New Mexico. The "Indian Nations Insurance Company", an insurance carrier that is not admitted to write workers' compensation policies in New Mexico, is writing "Sovereign Nation Employee Protection" policies for Indian-owned enterprises operating on lands within the Navajo Nation. There is no applicable precedent for clearly determining whether the mandatory insurance requirement applies and legal staff is not admitted to the Navajo Bar for purposes of invoking a ruling from the Tribal court system.

²⁵ An informal survey of the states currently active in the IAIABC Tribal Sovereignty Task Force indicates that none have attempted to enforce mandatory insurance requirements on such employers unless their operations include work off reservation lands and/or employment of non-Tribal members.

Internal education. In jurisdictions where the probability of sovereignty issues arising exists, but is sufficiently small, it may be sufficient to educate appropriate members of the state workers' compensation system staff concerning the impact of sovereignty issues upon their function. Candidates for such education efforts would include persons working in the General Counsel function, the employer compliance function, the ombudsman/claimant assistance function and the adjudication function. Issues of sovereignty will arise in inappropriate claims of sovereign immunity in employer compliance cases and in determinations of jurisdiction in the adjudication process, and having staff deal with them appropriately in the first instances is a good first step in developing a cooperative relationship, based upon mutual respect, with neighboring Tribal sovereigns.

Educational outreach. Education of the public combats the "surprise" factor arising from variance with the normal presumption of worker coverage by the state workers' compensation law. Workers' who are informed that they are not covered by workers' compensation can make the choice to accept the risk of uncompensated injury or can choose to obtain private disability and medical coverage that will fill in the gaps in the coverage provided by the sovereign employer. Most non-Tribal workers employed by Tribal sovereigns are not aware that they are not covered by state law, and make no informed decisions concerning their risks.

Information can be provided to workers by the Tribal entity, the state or both. Tribal entities may have a greater interest in providing employees with education about what benefits their employees have upon injury than in creation of recruiting issues by highlighting the fact that workers' compensation is not available. The state may have issues with provision of correct information to the public. This issue arises because Tribal entities sometimes switch status between voluntary participants in the state system and sovereign entities. Provision of public information concerning Tribal sovereignty issues by the state may also be viewed as straining state-Tribal relationships and may not be viewed as the highest priority issue for expenditure of limited public education resources.

Cooperative arrangements between state administration and Tribal officials. In states with resident Tribal sovereign entities, the development of personal and institutional relationships between the state workers' compensation system and appropriate Tribal officials may provide a degree of cooperation that will reduce or eliminate issues. Cooperative relationships provide channels for verification of the status of particular businesses as Tribal economic entities or as Indian owned enterprises subject to state jurisdiction. Cooperative arrangements may facilitate public educational outreach efforts and both Tribal and state workers' compensation administrators will benefit from the cultural cross-fertilization that accompanies any joint educational functions.

One difficulty in development of such relationships is that ongoing institutional relationships usually require formalization that may be difficult to obtain. Tribal sovereigns may have issues with the level of government with which it is appropriate to negotiate such agreements. If successfully negotiated, the process of obtaining Tribal approval may reflect different cultural values and involve processes not familiar to non-Tribal participants.

Offering cooperative assistance in development of local Tribal Codes. Many Gaming Compacts have been approved with a requirement that the Tribal entity to provide a system for provision of workers' compensation that is equivalent to the benefits provided by the state in which they reside. Especially when there has already been some trust building through personal or institutional cooperative arrangements between state and Tribal officials, opportunities may exist for state officials to provide cooperative assistance in the development of Tribal workers' compensation codes.

The benefits of participation for both sides are substantial. The state gets an assurance of Compact compliance, and more importantly receives the benefits of having on staff personnel who are very familiar with the Tribal Code provisions and the cultural values reflected by the choices made in development of the Code. The Tribal entity gets the benefit of years of experience with the issues that are likely to arise under a workers' compensation system, and

assistance in modifying any model that they may choose to use as a basis for their system without incurring the expense of a private consultant.

The key to successful cooperative assistance is listening. State consultants must hear and respect the cultural values of the Tribal entity and resist the urge to impose assumptions based upon their experience upon the developing system. Respect for Tribal choices concerning the issues addressed is imperative, and it is often more fruitful to respectfully ask questions than to make declarative statements. The consultants will, in return, open themselves to experience Workers' Compensation through a fresh assumption set, resulting in a broadened and deepened perspective concerning the basic structure of the enterprise.²⁶

“Bootstrapping.” One vehicle for such achieving the benefits of a state workers' compensation system without a waiver of Tribal sovereignty that has been discussed recently involves certain components that have collectively been referred to as “bootstrapping.”²⁷ By an act of the Tribal Council, the Tribal entity adopts as Tribal law the state workers' compensation law, including decisional law and the embedded benefit structure. The Council may also agree to cross-designate state workers' compensation dispute resolution personnel, such as judges and mediators, as Tribal Court dispute resolution personnel. Finally, the Tribal Council may adopt the state workers' compensation procedural rules regarding dispute resolution to complete the joint coverage of the two systems.

The benefit to the Tribal sovereign is obvious. Tribal sovereignty has not been waived and is thus preserved. At the same time, the Tribal entity does not undertake the infrastructure expense attendant to creation of workers' compensation system for its limited number of claims. Predictability for joint ventures and non-Indian businesses doing business on Tribal land is enhanced, promoting economic development. The insurance expense to the Tribe is reduced due

²⁶ The Navajo Nation used such assistance in the development of their current Tribal Workers' Compensation Code. The consultant involved still receives occasional requests from Tribal self-insurance program adjusters to assist in the application of the Tribal Code to unique circumstances.

²⁷ The term refers to the adoption by the Tribe of state law and dispute resolution infrastructure by a single act of the Tribal council. The Tribal sovereign thus “bootstraps” itself into a fully developed workers' compensation system.

to the fact the actuarial cost of underwriting a separate policy for the Indian enterprise is minimized by the predictability of claims expense afforded by the applicability of the larger state database. Relations with the state are normalized and jurisdictional disputes and Full Faith and Credit issues can be resolved.²⁸ Workers employed by Indian enterprises or joint ventures with Indian sovereigns are provided with coverage, predictability of benefits and predictability of claims resolution procedures. Underwriters, state workers' compensation systems and business entities doing business on Indian land are all provided with a reduction of uncertainty and the costs associated with it.

The demands of such an approach are significant. Negotiation of the arrangement must be conducted at the government-to-government level. This requires cooperation, participation and advocacy, probably at the gubernatorial level. Since there is virtually no model for the resolution of complex and unforeseen problems, a negotiated agreement for a "bootstrapping" plan should attempt to resolve all relevant issues during the initial negotiations and contain a specific procedure for resolution of unanticipated issues. Accordingly, jurisdictional conflicts, exclusivity doctrine issues, access to the courts, Indian Health Service reimbursement issues, variations from state law and variations from state procedural matters and benefit levels must be addressed. Challenges to such an approach include the difficulty of obtaining the attention and approval of authorities at the gubernatorial and Tribal level and the requirement for state laws to be enacted to allow joint powers or other cooperative executive agreements to be executed between state agencies and Indian Tribal sovereigns. A great deal of cultural sensitivity must be exercised in the negotiation of the "bootstrapping" agreement. Such negotiations must be approached as an agreement among equals. Moreover, such negotiations must recognize and account for differences in worldview that subtly alter some basic assumptions about workers' compensation coverages and benefits.²⁹ Provisions for enforceability of the "bootstrap" system and for sharing of infrastructure costs associated with Tribal use must also be negotiated.

²⁸ If state workers' compensation decisional law is adopted, the doctrine of law of the case and decisional law concerning "choice of law" questions may automatically come with it.

²⁹ The new Navajo Tribal Code concerning workers' compensation is an interesting example. Although state workers' compensation officials were available as consultants to the Tribal task force tasked with the writing of the Navajo Tribal Code, the document that emerged was uniquely Navajo. The Tribal Code reflects choices concerning

Self-Insurance. Individual Tribal entities, or groups of Tribal entities may wish to self-insure within the provisions of state law, where self – insurance is permitted. The benefits to the Tribal entity of such an approach is that the infrastructure of the state’s workers’ compensation system is utilized and benefit predictability and exclusivity join to encourage cooperative economic ventures with non-Tribal businesses, make excess insurance more readily available and make workers’ compensation loss costs more predictable through the utilization of a larger actuarial database. The obvious cost is the Tribal entity’s waiver of sovereignty by voluntary participation in the state system. Cooperation among individual Tribal entities attempting to band together to pool their risks through a group self-insurance program may run afoul of traditions and historical conflicts.

State administrators should be prepared to exercise discretion within whatever range they have available to tailor the requirements of the self-insurance program to the particular circumstances of the application for self- insurance. Views of traditional self-insurance requirements, such as tangible net worth, third party administration of claims and security deposits may have to be balanced against the perceived benefits of having the Tribal entity voluntarily participate in the state system.

Enforcement of Gaming Compact provisions concerning workers’ compensation, where applicable. As noted above, most Gaming Compacts have a provision requiring that the Tribal entity provide coverage for workers’ compensation equivalent to that provided under the resident state’s law. If the political will exists, it is possible to seek enforcement of such provisions, presumably in a court action brought by the state Attorney General in Federal Court. The issue of what constitutes an “equivalent” system or benefits is uncharted legal ground, the remedies are potentially draconian and the venue in which such litigation must occur is generally unfamiliar with state workers’ compensation issues, with such litigation most likely eventually being heard by the United States Supreme Court.

medical care, benefits structure, dependency, the going and coming rule and alcohol and drug abuse that are different from those reflected by the laws of the surrounding states

