

# Kinship commerce: New developments in inter-tribal trade

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Tribes have engaged in kinship commerce, or inter-tribal trade, since time immemorial. A recent news headline, however, recently helped bring these activities to the forefront: "Economic Consortium of Indian Tribes Launched; The Native American Group to Buy from and Sell to Member Tribes." 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 Seminoles' territory in Florida. The consortium's foremost goal is economic development throughout Indian country.

To assist in its efforts, the consortium in September entered into a Memorandum of Understanding with the Department of the Interior's Office of Indian Energy and Economic Development. IEED will help connect producer tribes and Indian-owned businesses with purchaser tribes, and participating tribes with federal procurement opportunities and commercial markets world-wide. 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, particularly from a tax perspective. 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.

[From a lawyer's perspective, trading tribes' agreements should carefully lay out where and how disputes will be resolved.](#)

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.

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 provided 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.

That part of the Treaty has enormous relevance today. 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. 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.” The *Yakama Nation v. Flores* decision lays out these historical facts.

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 hold a treaty-reserved travel right. Through the hard-fought Flores 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.”

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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 violating these requirements, with monetary penalties for violations. In 2007, the Ninth Circuit in the *Smiskin* case upheld a presumption that the state’s 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.

In 2003, the Tenth Circuit Court of Appeals issued one of the first court decisions to touch upon inter-tribal trade in *Winnebago Tribe of Nebraska v. Stovall*. Both the federal courts and Kansas Supreme Court decided 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. 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 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.

From a lawyer’s perspective, 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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