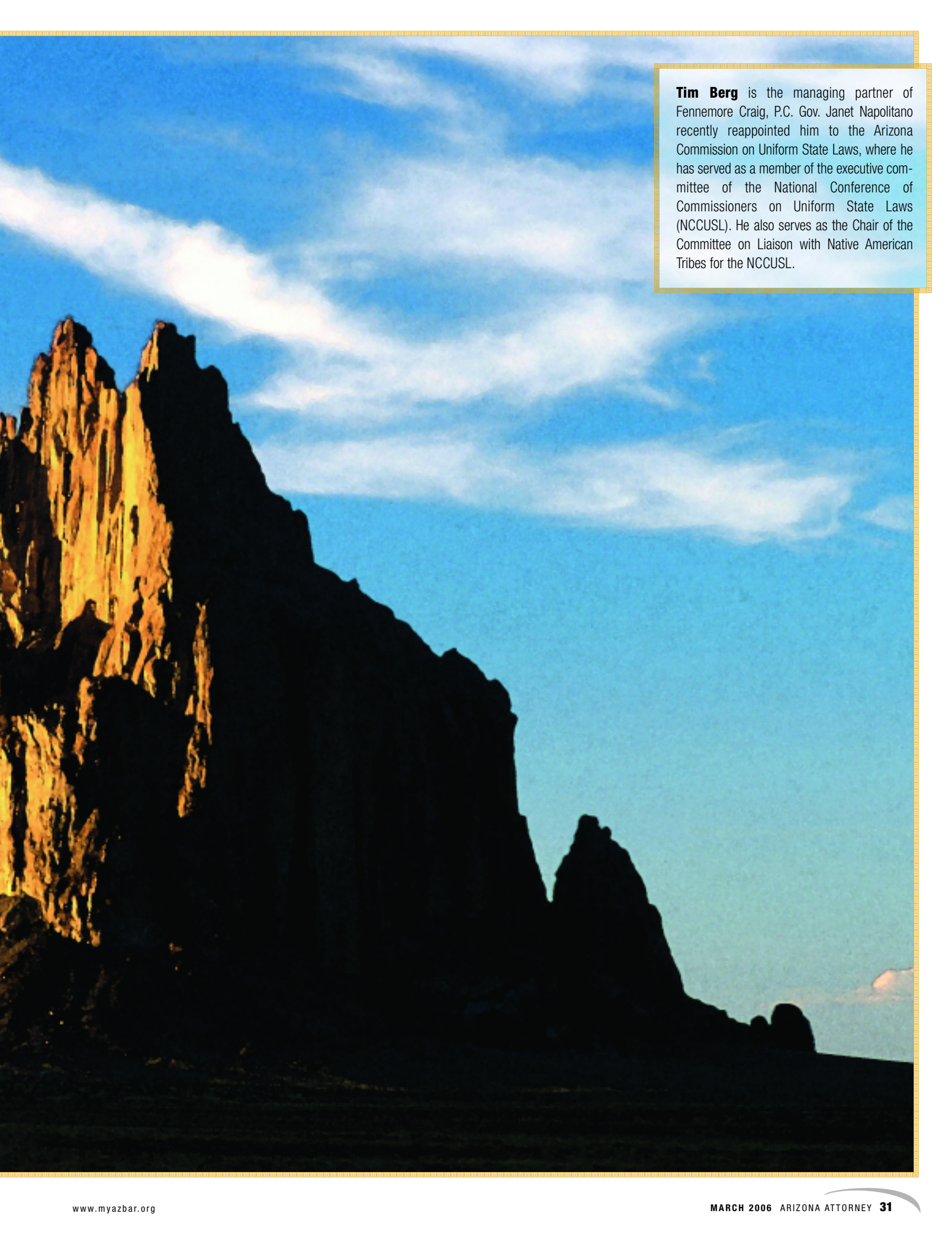


Growing Indian Economies

THE MODEL TRIBAL SECURED TRANSACTIONS ACT

Economic development in Indian Country is on the rise. The U.S. Census Bureau's 2002 Survey of Business Owners indicates that the number of businesses owned by American Indians and Alaskan Natives between 1997 and 2002 increased from 197,300 to 206,125, and approximately 1,000 of that increase occurred in Arizona.

Notwithstanding such encouraging news, barriers to economic growth and prosperity in Indian Country remain.



Tim Berg is the managing partner of Fennemore Craig, P.C. Gov. Janet Napolitano recently reappointed him to the Arizona Commission on Uniform State Laws, where he has served as a member of the executive committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL). He also serves as the Chair of the Committee on Liaison with Native American Tribes for the NCCUSL.

Consider that a tribal member and entrepreneur can develop a growing construction business, but finds when it comes time to acquire expensive equipment, no reasonably priced financing is available. Another can try to borrow funds to purchase furnishings and inventory for a convenience store on the reservation and finds it impossible to do so. Such are the barriers to creating sustainable economies on tribal lands.

Access to financing and capital is key to economic growth, and such access is hampered in Indian Country by the lack of standard laws governing business and lending transactions. Lenders and other sources of capital want the protection of commercial laws with which they are familiar. When it comes to loans on personal property, everything from tractors to store fixtures and inventory, they are looking for enforceability of their security interest. And when a dispute arises, they seek assurance that they have sufficient recourse to enforce that security interest. Such assurances for lenders are critical if American Indian tribes, tribal entities and tribal members are to grow their economies and their businesses.

This circumstance led the National Conference of Commissioners on Uniform State Laws (NCCUSL) to the conclusion that drafting a comprehensive model tribal secured transaction code could be a helpful tool for American Indian tribes in building their economies. With substantial tribal input and assistance from the Federal Reserve Bank of Minneapolis, the NCCUSL set out to create a model commercial law that would foster access to credit at affordable rates and competitive terms by providing rules needed to govern lender-borrower relationships. This marked the first time the national conference has produced a model act for America's tribes.

Although gaming has accelerated economic development and added a measure of prosperity for certain tribes, such development in Indian Country remains a national challenge. Even the most successful gaming tribes acknowledge that gaming is not the only answer to long-term economic prosperity for their members. These tribes wish to diversify their economic base rather than depend solely on gaming. As the momentum increases for doing business in Indian Country, for tribes entering into joint ventures with each other, and for cultivating Native American-owned businesses, the need for commercial law that adequately addresses the unique aspects of such transactions involving a tribe or tribal member becomes apparent.

The NCCUSL is 113 years old and was established to provide states with nonpartisan, well-conceived and well-drafted legislation on subjects in which uniformity of state law is desirable and practical. Over its history it has drafted more than 250 uniform acts. The best known is the Uniform Commercial Code (UCC), which was first produced in the 1940s and has become the commercial law in all 50 states. The sheer size, complexity and scope of today's UCC make direct adoption by

a tribe cumbersome and impractical.

Until now, tribes have addressed the need for a commercial code with a variety of measures:

- A few have enacted their own statutes or ordinances modeled on some version of Article 9 of the UCC, which covers secured transaction laws and the framework for agreements between parties providing collateral or personal property for loans or other financing arrangements. These secured transactions can include bank loans for start-ups and ongoing businesses, consumer or business revolving lines of credit, auto loans, and installment loan purchases of home appliances, among many others.
- Other tribes have used Article 9 as adopted by the state in which the reservation or tribal community is located.
- Alternatively, some tribes have adopted more narrow codes for a specific transaction as well as collection codes that govern repossession procedures alone.
- Others have modeled their codes after the model tribal code drafted several years ago by the University of Montana Indian Law Clinic, which lacks some of the significant revisions to the UCC since 1999.

Tribes have encountered problems when adopting portions of the UCC by reference. Such adoption by references or state law does not address issues of sovereignty, tribal government infrastructure and tribal customs and traditions important to making secured transaction law truly functional in a tribal context.

In light of the complexity and scope of Article 9 and the task of refining it for practical use by American Indian tribes, the committee took four years for researching, drafting and reviewing portions of the new model act. I chaired the committee, which was inelegantly titled "NCCUSL Committee on Liaison with Native American Tribes." We worked to make the product more straightforward and practical than Revised Article 9. The committee also worked to draft an act that would be adoptable and usable in Indian Country and that would recognize the important political, economic and cultural differences in the transactions inside and outside Indian Country.

One of the first steps was to include in the draft process not only members of the NCCUSL but representatives of tribes from across the country. Participants included tribal attorneys, outside attorneys or officials from the Sac and Fox Nation, Cherokee Nation, Crow Nation, Navajo Nation, Chitamacha Nation, Oneida Nation, Confederated Tribes of Warm Springs, Chicasaw Nation, Little Traverse Bay of Bands of Odawa Indians and several California rancherias. A representative of the Federal Reserve Bank of Minneapolis was also a key contributor to the committee.

After several years' work, the committee produced the Model Tribal Secured Transactions Act in the fall of 2005. Although the model act was based generally on the revised Article 9 of the UCC, it included some provisions from current Articles 1, 2 and 8, because the act was a standalone code and not part of an entire commercial code.

**The Model
Tribal Secured
Transactions Act, as
well as its detailed
implementation guide, may be found on
the Web site of the National Conference
of Commissioners of Uniform
State Laws:
www.nccusl.org**

The act incorporated provisions that were necessary only to deal with particular types of transactions likely to occur in Indian Country. The process of determining what these were required a great deal of discussion and input from the Native American participants. Making the act too comprehensive would lessen its effectiveness with many tribes by making it too complex and unwieldy for adoption and implementation. Making it too narrow in focus would render it useless for the more sophisticated tribes. The committee tried to strike a balance and chose to focus on the following:

- Establish a substantive procedural framework that would provide certainty to all of the parties involved in secured transactions in Indian Country.
- Be sufficiently comprehensive to meet the needs of borrowers and lenders in Indian Country.
- Be straightforward and easy to explain, adopt and use.

In addition, the committee worked to make a revised Article 9 suitable for use in Indian country in consideration of sovereignty, custom, culture and traditions that enter into transactions. For example, Article 9 deals with the issues of security interest in fixtures and the priority of any such security interest over the rights of landowners and mortgage holders. When fixtures are affixed to Indian trust land, issues are raised under federal law that are not found in transactions elsewhere; therefore, the model act does not apply to security interests in fixtures.

Another example involved filing systems. Most states require filing of transactions with the Secretary of State, and the committee concluded that the act would need to provide much greater flexibility in this regard. Consequently, the act provides that the tribe can operate its own filing system, use the respective

state's filing system or use a regional filing system formed by a consortium of tribes.


The issue of sovereignty is significant for tribes, and the model act recognizes the role played by sovereign immunity where a tribe or its enterprise is the borrower. Basically, the act says that unless preempted by federal law, if a transaction involves a tribe and another American Indian tribe or nation, state or country, the parties may agree that the law either of one or the other governs their rights and duties. In the absence of an effective agreement, the act applies to all transactions bearing an appropriate relation to the tribe. The fact that the law of another American Indian tribe or nation, state or country is applicable does not affect the jurisdiction or venue of the tribe, nor does it waive its sovereign immunity.

Like the UCC Article 9, the model act delineates how security interests may be created, perfected and enforced. It specifies who has first rights or "priority" when two or more competing creditors have legally enforceable interests in the collateral.

If the model act can reassure lenders or creditors that their interests are adequately protected, it is also critically important that these same lenders or creditors are confident that they have effective recourse should there be a default or other dispute. The committee is working to secure funding for education and training for tribal judges and staff. Lenders and other potential business partners understandably want assurance that tribal judges are familiar with the complexities of the commercial laws they may adjudicate.

In recognition of the limited resources available to many tribal nations or communities, the committee also produced a detailed implementation guide. The purpose of the guide is to

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explain the differences between the model act and the revised Article 9 so that an enacting tribe can evaluate the impact of those differences; explain certain options that are built into the model act to deal with issues such as filing; and provide a guide for subsequent interpretation of the model act. (Both can be found online at www.nccusl.org.)

The conference recognizes that the model act is only the first step. Approximately 10 tribes are in the process of adopting the model act, but this is only a beginning. The committee and the national conference are committed to helping any tribe considering adoption and implementation of the new act. Committee members are taking the new act “on the road” to meetings of tribes, tribal business entities, bankers and other lenders, Indian law attorneys, and other stakeholders. For those tribes willing to tackle implementation, the new act provides a critically important framework for building economic growth and opportunity by cultivating reasonably priced financing and capital for tribal enterprises, Native American-owned businesses and Native American consumers. 