

# Strategies and Methods for Tribal Economic Development

*Building Sustainable Prosperity  
in Native American Communities*

W. Gregory Guedel



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## **DEDICATION**

This book is dedicated to my wife, Dr. Christina Wygant, who takes dreams and makes them come true, and to my wonderful family for their constant love and support.



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## PREFACE

Many books on economic development are published each year, discussing theoretical concepts and strategic approaches for increasing business activity and improving the quality of life within a nation, region, or community. Although containing much substantive content, all too often these books leave the reader asking: *“OK, but how do I get the money and technical help to actually do any of these things?”*

With the unacceptably high level of unemployment, poverty, and related social ills within native communities, discussions of tribal economic development strategies must be accompanied by practical methods that tribal governments and businesses can immediately put into practice. This book is intended to provide strategic-level guidance for tribal economic development planning, along with connections to available resources for implementing the selected strategies.

There is significant funding and planning assistance available to native governments, businesses, and individuals for a wide variety of economic and community development activities. From multimillion-dollar allocations of tax-exempt bond financing, to microloans of a few thousand dollars for native-owned small businesses, tribal communities can access capital from public and private sources to create companies, housing, energy, infrastructure—essentially any element of an economic development program. Yet despite the availability of these resources, many of the programs designed to assist native communities are underutilized, and significant sums of money that could be put to work for native people simply sit unused in agency coffers every year.

Part of the reason for this is that information about the available opportunities is not centralized, but is instead scattered across the websites and publications of dozens of federal departments, commercial organizations, and private foundations. To date, it has been difficult to find a one-stop source of information where tribes can look for resources and funding for their various economic development enterprises. This book is designed to help close that gap, by describing a broad spectrum of available programs and providing links to the application forms and other materials needed for participating in the programs.

Each chapter of the book contains footnotes with the website addresses for the agencies and specific programs being discussed, allowing the reader to go directly from the program description to the online link for utilizing the program in one step. Some funding and technical assistance programs can be accessed simply by completing online forms, while others require more detailed submissions that may call for tribes to retain professional consultants. For those more complex programs, tribes and other potential applicants can contact the author and he will be pleased to help make the appropriate connections for creating an effective project team.

The information in this book is intended to assist Native American, Alaska Native, and Native Hawaiian governments, communities, and businesses throughout the United States pursue beneficial policies and programs for economic development. For simplicity, the terms “native,” “tribe,” and “tribal” are used interchangeably in the chapters to collectively refer to indigenous communities without regard to geographic location or specific ethnic heritage.

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# An Introduction to Tribal Economies

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Thousands of years before Europeans first took to the sea in search of the “New World,” the indigenous people of North, Central, and South America had established unique and flourishing civilizations that stretched from the Arctic Circle to Tierra Del Fuego. While the nations of Europe languished in the Dark Ages, the indigenous nations of the Americas were creating scientific, cultural, and architectural achievements that are marvelous to ponder even today. A key element of the success of these societies was their economic activity, which involved trade with other indigenous nations in combination with local endeavors that were harmonious with the natural world and sustainable with available resources.

The general picture of Native American political economy in the twenty-first century is radically different from pre-Columbian times. The political subjugation of indigenous nations by European colonizers, combined with forced geographic dislocation from their ancestral lands and traditional trading partners, essentially destroyed the original paradigm of economic development in the Americas. The result for the economic well-being of native people in the United States can fairly be described as disastrous. Although federally recognized tribes retain the political status of “domestic dependent sovereigns”—nations within a nation—their ability to engage in productive economic activity has long been hampered by a loss of resources, isolation from major population and commercial centers, and a general lack of infrastructure. Those conditions have also proved deleterious to the personal well-being of Native American people, who continue to experience poverty, unemployment, and preventable disease at rates far higher than the national average.

Despite this legacy of impeded development, the economic landscape for tribal nations today presents significant opportunities for positive growth. One of the potentially most powerful—yet often least understood—dynamics within Native American economics is the concept of tribal sovereignty. Federally recognized tribes hold the political status of sovereign nations existing within the boundaries of the United States, hence the legal term “domestic dependent

sovereigns.” Although their sovereignty is not unlimited,<sup>1</sup> tribes engage with the US government on a nation-to-nation basis, and the fundamentals of the relationship are treaty-based. Within the geographic boundaries of their reservations (and in some cases beyond), tribes operate largely as independent nations with the power to create laws and negotiate economic activity and trade. This ability to “set the rules” presents tribes with a very powerful tool for the promotion of economic development.

Throughout this book, the role and importance of sovereignty in tribal economic dealings will be a recurring theme, especially the use of sovereign power as a catalyst for implementing particular development activities. Understanding how the exercise of sovereign power can boost a native community’s economy is a key element of strategic planning for tribes. Yet it must also be recognized that tribal sovereignty carries with it certain elements that can impede economic development, each of which must be managed effectively by the leaders within the political economy to facilitate (and not unintentionally inhibit) opportunities for beneficial economic activities and partnerships.

### **Challenges within Tribal Sovereignty**

Sovereignty manifests itself in numerous ways that are impactful for tribal economies. While many aspects of sovereignty are directly beneficial for economic development, others present some unique challenges. A particular challenge is the inability of tribes to levy property taxes on their own lands. Throughout the United States, much of the basic infrastructure and services people take for granted—roads, public schools, police, and fire departments—are funded through property taxes. Local governments levy taxes on privately owned property within their jurisdiction, and the property owners pay these taxes as part of a monthly mortgage bill or directly to the jurisdiction. Collectively, the amount of property tax revenue dedicated to funding infrastructure and services throughout the country amounts to hundreds of billions of dollars each year, and for most local governments, property tax is a critical source of money to provide for basic community needs.

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<sup>1</sup> U.S. CONST., art. I, § 8 provides Congress with the power “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Congress has utilized this power to craft treaty agreements that circumscribe various aspects of tribal sovereignty.

Given the clear efficacy of using property tax to provide for basic community development, it is startling to realize that Native American tribes are the only governmental jurisdictions in the United States that cannot levy property tax on their land. A unique component of the relationship between the US government and tribal governments is that tribal-owned land is typically held in trust by the federal government, which prevents the land from being sold off or otherwise legally alienated from the tribal community. Although this “trust land” carries the benefit of security against being taken from the tribal community (as much tribal land was from the eighteenth through the early twentieth centuries), it also carries the burden of being exempt from taxation. While most tribes seek to place as much land as possible into trust to exert sovereignty over it and help rectify the destructive legacy of allotment and termination, doing so renders the land exempt from taxation, and thus the land does not provide the steady revenue stream enjoyed by non-tribal jurisdictions. Tribes must therefore seek alternative sources of revenue to fund the creation and maintenance of their community infrastructure and public services—which can be a significant challenge for tribes located far from major metropolitan and commercial centers.

Another challenge is the lack of understanding among non-tribal entities about the nature and power of sovereignty. Common concerns frequently heard from non-tribal business leaders include:

*“I’m not sure about doing business with tribes—I heard they can break contracts any time they want and there is nothing we can do about it.”*

*“What if the leadership of the tribe changes—will they try to change our agreements?”*

*“If something goes wrong, the only place we can sue is in Tribal Court, and we will never get a fair trial there...”*

While these perspectives at least reflect a basic recognition of the existence of tribal sovereignty, they weigh against the willingness of outside entities to engage in business relationships with tribes. This lack of understanding and comfort with the concept of sovereignty presents an important task for tribal leaders: educating potential business partners about the nature and exercise of sovereign power, and accommodating the need for a fair and stable foundation for economic relationships with non-tribal entities.

Although tribal sovereignty is broad, there are certain federal laws and policies that limit the type and scope of business transactions that can occur on reservations. To create successful business relationships with outside partners, tribes must be aware of and transparent in disclosing requirements of the US government when applicable to a given business transaction. One example is the leasing of tribal lands to non-tribal entities, which is a basic part of bringing retail or manufacturing businesses onto tribal property. To attract a business such as Wal-Mart to a reservation, it usually will be necessary to provide a ground lease for an extended period (e.g., thirty years or longer) for the company to justify the capital investment in its physical plant. However, federal law has limited the ability of tribes to enter into long-term leases of tribal land without advance approval from the Bureau of Indian Affairs.<sup>2</sup> Similarly, tribes that seek outside investment for casinos and recreational facilities must have approval from the National Indian Gaming Commission for any agreements that provide outside entities with management rights in the event of a default by the tribe.<sup>3</sup> It is therefore important for tribes to fully understand and disclose the applicable regulations for a given business enterprise, and negotiate terms with outside businesses on a mutually acceptable basis within that context.

The clarity and stability of a tribe's governmental structure is vitally important to the exercise of sovereignty, as well as the promotion of economic development. This is particularly so in the context of a given tribe's relationship with the US government. Like all political groups, tribes experience internal disputes and rivalries between competing factions (often based on family or clan heritage), and political challenges to the existing tribal leadership are common. While this is generally indicative of a healthy democratic process, it can create significant problems if the disputes lead to instability within a tribe's governmental structure. Certain tribes, due to a lack of resources, experience, and/or structural functionality, have seen internal disputes escalate to the point where their government essentially ceases to function. In worst-case scenarios, the Bureau of Indian Affairs has threatened to cut off funding and services to the tribe due to an inability to

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<sup>2</sup> See 25 U.S.C. § 415 (2013); 25 C.F.R. Part 162 (2013).

<sup>3</sup> See Greg Guedel, *Wells Fargo Loses Again in Lac Du Flambeau Tribal Bond Litigation*, NATIVE AMERICAN LEGAL UPDATE, <http://www.nativelegalupdate.com/2010/04/articles/wells-fargo-loses-again-in-lac-du-flambeau-tribal-bond-litigation/>.



identify who is actually the tribe's legitimate government.<sup>4</sup> In any context, political instability impedes the progress of economic development, and instability within a tribe can exacerbate the existing concerns potential non-native partners feel toward working with tribes. It is therefore incumbent upon native communities to create, maintain, and effectively utilize sound governmental structures and political processes that allow for the full expression of the people's will in an orderly, stable manner.

### **Sovereignty and Self-Reliance—The Cobell Lawsuit**

Tribes must also recognize that sovereignty empowers them to do for themselves what the federal government cannot (or will not) do to improve the prospects for their economies. Despite having a fiduciary “trust” relationship with Native Americans,<sup>5</sup> the US government has repeatedly proven to be ill-suited to the management of tribal economic affairs. Examples of this problematic condition are legion, and the recent settlement of the national Cobell trust account litigation is perhaps the most glaring proof of the astonishing mismanagement of the federal government's financial responsibilities to Native Americans. The *Cobell* lawsuit was a class action case involving several hundred thousand Native American plaintiffs, filed by lead plaintiff Elouise P. Cobell of the Blackfeet Nation in 1996. The lawsuit sought compensation for Native Americans for land-related royalties collected by the government from the profits of oil, gas, grazing, timber, and other commodities taken from tribal lands that the United States has managed in trust for tribal members since the nineteenth century.

The lawsuit also sought to rectify and rationalize a bizarre system of fractionated land ownership by Native Americans throughout the country. Following the Civil War, Congress undertook numerous measures to “Americanize” tribal populations and assimilate Native Americans into Western economic and cultural norms. One of the methods used was the seizure and division of historic tribal lands into parcels to be distributed to individual owners. The General Allotment Act of 1887 (known as the Dawes Act) divided communal tribal lands into parcels between forty and

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<sup>4</sup> Lynda Mapes, *Stalemate Puts Snoqualmie Tribe at Risk of Federal Takeover*, SEATTLE TIMES, May 27, 2012, [http://seattletimes.com/html/localnews/2018302591\\_snoq28m.html](http://seattletimes.com/html/localnews/2018302591_snoq28m.html).

<sup>5</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886).

160 acres in size, allotted the parcels to individual Native Americans, and directed all remaining unallocated tribal lands be sold off to outside parties. As the original native allotment holders died, their intestate heirs received an equal, undivided interest in the lands as tenants in common, i.e., a parcel of land that originally had one owner would suddenly have several owners when it passed to the original owner's children. In successive generations, progressively smaller ownership interests descended to the subsequent holders. Today, it is not uncommon to have hundreds of owners for one parcel of land, each owning a miniscule percentage that cannot be separately sold or developed. Such highly fractionated ownership makes it extremely difficult to use the land productively or sell/lease it for financial gain. It is estimated that 4 million acres of land throughout the United States are held in multiple small ownership interests, making that land all but impossible to utilize for economic purposes and provide a benefit to the native owners and tribal community.

While serving as Treasurer of the Blackfeet Nation, Ms. Cobell discovered irregularities in the federal management records of funds held in trust by the United States for the benefit of Native Americans—and in many instances discovered there were no records at all. Working with the Intertribal Monitoring Association, she attempted in the 1980s and 1990s to convince the responsible federal government agencies of the need for procedural reform and an accounting of the trust funds. When the reform effort failed to achieve progress, Ms. Cobell initiated a class-action lawsuit in federal court to force the administrative reform and compel an accounting from the US government of the trust funds belonging to individual Native Americans.

After several federal trials over thirteen years, in 2010 the government agencies with responsibility for managing trust funds for Native Americans effectively admitted they could not produce a reasonable accounting of their actions. It was clear from the evidence that for decades, billions of dollars in revenue collected by the government—money that was gained from the lease of tribal lands that should have gone into trust for native people—had simply disappeared. The exact amount of money that was unaccounted for has never been determined, due primarily to the government's failure to keep even basic records of the business transactions occurring on tribal lands.

Spurred in part by the public shock of the now-exposed mismanagement, in 2010 the Department of Interior reached a settlement with the plaintiffs in the *Cobell* lawsuit. The settlement provided for:

- A \$1.4 billion Accounting/Trust Administration Fund, plus a \$100 million Trust Administration Adjustment Fund, to make payments to individual Native Americans for the mismanagement of their trust funds. The costs of administering and implementing the settlement, as well as other expenses such as attorney fees, were also to be drawn from this account.
- A \$1.9 billion Trust Land Consolidation Fund to purchase fractionated land shares from individual native owners. The land sales are to be voluntary, and the lands purchased with the fund are to be returned to tribal control.
- Up to \$60 million for an Indian Education Scholarship Fund to help Native Americans attend college or vocational school. This money will come out of the \$1.9 billion Trust Land Consolidation Fund and will be based on the participation of landowners in selling their fractionated land interests.

The settlement was subsequently approved by Congress and President Obama in 2010, and the first settlement payment checks were sent to individual Native Americans in December 2012. Implementing the full scope of intended settlement payments and land purchases will take many years.

Despite the billions of dollars in unaccounted-for revenue taken from tribal lands, most of the individual native plaintiffs in the *Cobell* lawsuit were scheduled to receive checks for just \$1,000.

Reaction to the *Cobell* settlement in native communities has been mixed. While few believe the dollar amount allocated by Congress is anywhere near the actual amount of funds that should have been transferred to Native Americans over the generations, many were relieved to receive the payments for the sake of addressing the current financial needs of their families. Dissenters labeled the settlement a “scam” and declared it “on par with the bleakest eras of US Indian policy such as removal, assimilation, and termination.”<sup>6</sup> Regardless of the financial efficacy of the ultimate

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<sup>6</sup> Greg Guedel, *Is the Cobell Settlement Another Bad Idea for Native Americans?*, NATIVE AMERICAN LEGAL UPDATE (May 10, 2010) <http://www.nativelegalupdate.com/2010/05/>

settlement payments, the *Cobell* lawsuit provided clear evidence of the consistent failure of the US government to uphold the letter and spirit of its legal and economic obligations to native nations. While this historical record of failure is beyond lamentable, at this point it should be recognized as an inherent condition within native political economies. As a result, self-reliance must be the driving principle in strategic planning for the economic development of tribal communities.

## **Tribal Development Philosophies**

This book is intended to offer strategies and methods for economic development in native communities, and identify programs and resources available to assist tribal leaders and their partners. Before examining specific approaches, there is a basic yet important initial question to consider: What is economic development? In the narrow sense, it is often seen as means toward the creation of new private-sector business opportunities, and this is certainly a fundamental element. However, the broader and long-term approach to economic development seeks to create positive impacts in many additional elements of the human experience. In the tribal context, economic development should be viewed as encompassing numerous goals, including:

- Eliminating poverty
- Improving health, housing, and safety for community members
- Creating jobs
- Increasing sustainable business activities
- Providing opportunities for education and skills training
- Developing a reputation for fair dealing and consistent relationships with partners
- Producing positive returns on corporate and community investments

A distinctive element of many Native American, Alaska Native, and Native Hawaiian cultures is an emphasis on the collective well-being of families and community members for the long term. In this philosophy, time is viewed over generations, and decisions are taken based on potential impacts far into the future—rather than on the next quarterly report. Although not flashy or likely to produce “hot” business trends, this philosophical outlook

is perfectly suited to the development of a sustainable economic base, from which the leaders of tribal political economies can help provide a solid foundation for the quality of life in their communities.

Another critical element in strategizing economic development approaches is understanding the diversity of conditions within tribal communities throughout North America. Often-heard terms such as “Indian Country” misrepresent the significant differences and unique circumstances among the hundreds of tribes in the United States. The basic reality of tribal geography is perhaps the most obvious example—native communities are located in every region of the United States, and operate within the prevalent conditions and available resources of their respective regions. It must be understood that needs and opportunities will differ between native communities located in the farthest reaches of Alaska, the rainforests of the Northwest, the arid desert Southwest, and the tropical surroundings of Hawaii. The geographic diversity of tribes is matched by their diversity of culture, history, world-view, and goals—even between native communities situated close to each other within the same region. There is no “one-size-fits-all” approach to tribal economic development, and the creation of a community’s development strategy should commence by asking an appropriate variation of three basic questions:

1. “What is the state of our economy today?”
2. “Where do we want our economy to be this year...in five years...in fifty years?”
3. “What tools and resources do we have to get there?”

With nearly 600 federally recognized tribes and native organizations throughout the United States, there will be at least that many different answers to each of these questions across the spectrum of tribal political economies. Starting with that understanding, the following chapters are designed to offer tools that (either individually or in combination) can assist native communities in creating economic development programs suited to their particular conditions and goals.



# **Federal Programs for Tribal Economic Development**

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Despite the damaging legacy and continuing problems in the relations between tribes and the US government, this relationship is and will remain the single most fundamental and important dynamic for the future of tribal economic development. Fortunately, tribes have numerous opportunities to leverage this relationship and produce positive outcomes for their members. Nearly every federal agency has departments and programs dedicated to providing assistance to native communities, and collectively these programs offer hundreds of billions of dollars in annual funding for development projects. The breadth of available programs goes well beyond support for business growth, and combining the resources of numerous programs can facilitate the holistic approach to economic development for tribal communities described earlier. Accessing these programs begins with identifying which are best suited for the needs of a given tribe, followed by connecting with the agency and applying for the desired technical assistance and/or grant allocation. This chapter provides an overview of major programs within primary federal agencies that can provide funding and other beneficial support for tribal economic development.

## **Corporation for National and Community Service**

The Corporation for National and Community Service (CNCS) is an umbrella agency that manages federally funded community development programs through the Senior Corps, AmeriCorps, VISTA, National Civilian Community Corps, and Learn and Serve America. CNCS departments work with tribal governments, schools, and local agencies to support native

communities with needed development programs. Through the various CNCS departments, tribes can access grants, resources, and technical support for elder care, cultural preservation, economic development and job training, health and wellness, youth leadership, education and mentoring, disaster preparedness and response, and traditional lands preservation. CNCS departments help provide connections for tribes to existing local networks, national service resources, and demonstration programs to test effective and culturally appropriate project models. Specific CNCS tribal programs are administered through the following departments:

### *Senior Corps*

The Senior Corps is designed to help connect individuals ages fifty-five and older with resources, volunteers, and organizations that can offer needed services. For tribal communities, Senior Corps programs<sup>7</sup> include:

- Counseling for child victims of abuse and neglect
- Literacy tutoring and bilingual/native language education
- Mentoring for at-risk youth
- Parental skills and child wellness training
- Care for premature infants and children with physical disabilities and severe illnesses
- In-home support for elders
- Immunization and basic preventative health care
- Creating community gardens using traditional methods and plants
- Financial counseling for new business owners
- Disaster relief services
- Organizational planning for tribal community groups

### *AmeriCorps*

Through a large network of local, state, and national programs, AmeriCorps places thousands of individuals each year into community service organizations nationwide. AmeriCorps members earn an educational award

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<sup>7</sup> *Funding Opportunities and Partnerships for Native American Communities*, SENIOR CORPS, [http://www.seniorcorps.gov/for\\_organizations/indian\\_communities/funding\\_partnerships.asp](http://www.seniorcorps.gov/for_organizations/indian_communities/funding_partnerships.asp).



to help pay for college or pay off student loans. By law, at least 1 percent of AmeriCorps funds must be used specifically to support tribal communities, and tribes are also eligible to participate in standard AmeriCorps partnering. Tribal AmeriCorps programs<sup>8</sup> include:

- Assisting tribal elders with residential repairs, fuel assistance, home weatherization, and other support for independent living
- Developing cultural education projects focusing on traditional community engagement
- Tutoring and mentoring youth, and parental/caregiver family management training
- School safety, substance abuse, and gang intervention
- Assisting veterans and their families in accessing services
- Long-term disaster relief
- Environmental improvement and cultural site restoration projects

*AmeriCorps VISTA (Volunteers in Service to America)*

VISTA enables tribes to recruit and place full-time members to create and expand programs designed to eliminate poverty for individuals and the community. Members build organizational and community capacity through economic development activities, fundraising, social entrepreneurship, organizational development, volunteer recruitment, and web design and marketing. The program is designed to ensure the local community retains the capacity to continue the activities after the VISTA member completes service. Tribal VISTA programs<sup>9</sup> include:

- Outreach to remote and underserved native communities to promote youth involvement in community programs
- Program and leadership development for Alaska Native organizations and tribal councils
- Capacity-building for organizations providing assistance to victims of domestic violence/sexual assault

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<sup>8</sup> *New Funding Opportunities*, AMERICORPS, [http://www.americorps.gov/for\\_organizations/funding/index.asp](http://www.americorps.gov/for_organizations/funding/index.asp).

<sup>9</sup> *AmeriCorps VISTA for Organizations*, AMERICORPS, [http://www.americorps.gov/for\\_organizations/apply/vista.asp](http://www.americorps.gov/for_organizations/apply/vista.asp).

- Creating volunteer service opportunities for elders
- Improving coordination of academic, civic, and cultural education
- Developing training curricula, internships, mentoring activities, and certification programs
- Workforce development initiatives for construction trade apprenticeship training on reservations
- Developing educational curricula for urban native youth in the foster care system
- Citizens Corps, CERT programs, and homeland security activities for tribal communities

### *Learn and Serve America*

Learn and Serve America (LSA) supports service-learning—combining traditional education with community service—to address community needs while developing students’ academic skills and citizenship. Within its K-12 school funds, LSA has 3 percent set aside for tribes and US territories. LSA also provides grants to tribal colleges and non-profit community groups. Tribal LSA activities<sup>10</sup> include:

- Elder support, including food distribution and home-visit assistance
- Cultural preservation projects
- Environmental education and recycling program development
- Researching tribal history and publishing oral history records
- Creating museum exhibits on tribal history and folk art/crafts
- Assisting with new construction, home repairs, and renovations
- Addressing chronic health issues including Type-2 diabetes

### **Department of Commerce**

The Department of Commerce is tasked with coordinating economic development programs with tribes and communicating issues with other federal agencies. Three primary agencies within the Department of Commerce that work on tribal initiatives are the Office of Native American Business

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<sup>10</sup> *Programs for Native American Communities*, LEARN AND SERVE AMERICA, [http://www.learnandserve.gov/about/programs/tribes\\_territories.asp](http://www.learnandserve.gov/about/programs/tribes_territories.asp).

Development, the Economic Development Administration, and the Minority Business Development Agency.

### *Office of Native American Business Development*

The Office of Native American Business Development (ONABD)<sup>11</sup> provides direct services to native entrepreneurs and native-owned businesses, promotes intergovernmental and industry collaboration, and funds economic and business development opportunities in Indian Country. ONABD is dedicated to addressing specific challenges in the development of tribal economies, and the office undertakes numerous activities including:

- Coordinating all Department of Commerce economic development initiatives for tribal communities
- Developing and implementing Tribal Consultation Policies within federal agencies
- Serving as the intergovernmental representative with the White House and other agencies on tribal business initiatives and issues
- Facilitating economic development by assisting native organizations in leveraging federal programs, private sector businesses, and financing
- Providing training and contracting opportunities for native-owned 8(a) companies
- Providing technical assistance and resources to entrepreneurs for starting, financing, managing, expanding native-owned business enterprises
- Providing development assistance to promote the growth and competitiveness of native-owned businesses through the Native American Business Enterprise Center.

### *Economic Development Administration*

The mission of the Economic Development Administration (EDA) is to lead the federal economic development agenda by promoting innovation and competitiveness, particularly in regions of the United States that traditionally have not been included in the mainstream economy. The EDA

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<sup>11</sup> *Office of Native American Business Development*, MINORITY BUSINESS DEVELOPMENT AGENCY, <http://www.mbda.gov/main/programs/office-native-american-business-development-onabd>

provides millions of dollars in grants to tribal communities each year, and the Administration's investment policy is designed to establish a foundation for sustainable job growth and the building of durable economies.<sup>12</sup> With a stated policy of providing funding to strengthen diverse communities that have suffered disproportionate economic job losses and/or are rebuilding to become more competitive in the global economy, the EDA is a primary partner in the pursuit of tribal development goals. EDA programs include:

- Assisting tribal governments and development agencies with long-term strategic planning
- Providing grant funding for native businesses, infrastructure, and cultural resource projects
- Connecting tribes with universities and research institutions to assist in development planning
- Integrating native-owned manufacturing businesses into the network of regional Trade Adjustment Assistance centers<sup>13</sup>
- Helping native communities create business incubators, job training facilities, renewable energy sources, and transportation systems

### *Minority Business Development Agency*

The Minority Business Development Agency (MBDA)<sup>14</sup> works to enhance the growth and expansion of minority business enterprises in the United States. The agency does not provide grants or loans for businesses, but it does have programs that provide access to capital and markets for native-owned companies. The MBDA also offers technical assistance to give native business owners the opportunity to contract as first- or second-tier suppliers to the federal government and large corporations. For example:

- The MBDA provides funding for a network of Minority Business Development Centers throughout the United States where tribal businesses can access expert advice for securing capital and identifying partners and markets<sup>15</sup>

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<sup>12</sup> *Investment Priorities*, U.S. ECONOMIC DEVELOPMENT ADMINISTRATION, <http://www.eda.gov/investmentPriorities.htm>.

<sup>13</sup> *Locations*, TRADE ADJUSTMENT ASSISTANCE FOR FIRMS, <http://www.taacenters.org/locations.html>.

<sup>14</sup> MINORITY BUSINESS DEVELOPMENT AGENCY, <http://www.mbda.gov/>.

<sup>15</sup> *MBDA Business Centers*, MINORITY BUSINESS DEVELOPMENT AGENCY, <http://www.mbda.gov/businesscenters>.

- The agency offers direct assistance to native entrepreneurs with writing business plans, marketing, management, and financial planning
- The MBDA can serve as a facilitator for manufacturing businesses to locate production facilities on tribal lands, which provides tax-advantaged status on products for export

## US Army Corps of Engineers

While the Corps is a military organization and branch of the US Army, it also has responsibility for water management, flood control, and infrastructure development within the United States. Rivers, lakes, aquifers, ocean shorelines, and navigable channels are fundamental to the economy and way of life for many native communities, and tribes can improve the quality and sustainability of their water resources through partnering programs with the Corps.<sup>16</sup> Opportunities include:

- Planning and cost sharing for flood and ecosystem projects via the Continuing Authorities Program<sup>17</sup>
- Environmental remediation through the Native American Lands Environmental Mitigation Program<sup>18</sup>
- Funding and technical assistance for comprehensive water resource strategy planning pursuant to the Water Resources Development Act
- Reconnaissance and feasibility studies for tribal water resource projects
- Promotion of historic tribal property for tourism and economic development

## Department of Defense

The Department of Defense (DOD) is one of the largest agencies within the federal government, and each year it offers billions of dollars' worth of contracts to native-owned businesses and provides support for tribal

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<sup>16</sup> HOW TO PLAN A WATER RESOURCES PROJECT WITH THE U.S. ARMY CORPS OF ENGINEERS: A GUIDE FOR TRIBAL GOVERNMENTS, (2d ed. 2012), *available at* <http://www.spa.usace.army.mil/Portals/16/docs/civilworks/tribal/guide.pdf>.

<sup>17</sup> See Water Resources Development Act of 2007, Pub. L. No. 110-114, 121 Stat. 1041, *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-110publ114/pdf/PLAW-110publ114.pdf>.

<sup>18</sup> *Native American Lands Environmental Mitigation Program (NALEMP)*, NATIVE AMERICAN AFFAIRS, <http://www.denix.osd.mil/na/Programs/DoDProgramsUnderSeniorTribalLiaison/NALEMP.cfm>.

communities. Two primary conduits for Department of Defense spending related to tribal programs are the Office of Small Business Programs and the DOD Environment, Safety and Occupational Health Network and Information Exchange (DENIX).

#### *Office of Small Business Programs*

The OSBP coordinates all matters related to small business within the Department of Defense, and has the goal of maximizing the contributions of small business in DOD acquisitions. Native-owned businesses seeking to obtain contracts from the Department and/or work on defense-related projects can obtain assistance through several OSBP programs:

- The Mentor-Protégé Program helps connect small businesses with major corporations to provide training and partnering related to defense contracting.
- The Small Business Innovation Research and Small Business Technology Transfer programs offer research and development funding for small businesses to pursue technology and research that can benefit defense projects.
- A unique program within the OSBP is the Indian Incentive Program (IIP).<sup>19</sup> The IIP is a congressionally sponsored program that provides Department of Defense contractors with a 5 percent rebate on the total amount subcontracted to an Indian-owned economic enterprise or Indian organization. This provides a significant financial incentive to major defense suppliers such as Boeing and General Electric to hire native-owned businesses as subcontractors on defense procurement contracts.

#### *DOD Environment, Safety and Occupational Health Network and Information Exchange*

DENIX contains a Native American Affairs department<sup>20</sup> that is primarily concerned with remediating environmental issues on tribal lands that arise from or are related to ongoing and past military activities. DENIX assists

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<sup>19</sup> *Indian Incentive Program*, OFFICE OF SMALL BUSINESS PROGRAMS, <http://www.acq.osd.mil/osbp/sb/programs/iip/index.shtml>.

<sup>20</sup> NATIVE AMERICAN AFFAIRS, <http://www.denix.osd.mil/na/Index.cfm>.

tribal, Alaska Native, and Native Hawaiian communities in bringing land back to beneficial use by:

- Managing the Native American Lands Environmental Mitigation Program, including providing environmental assessments and program planning for tribal land impacted by DOD programs
- Providing funding for improvement of tribal lands listed in the Native American Management System Environmental Impacts database<sup>21</sup>

## Department of Veterans Affairs

The number of Native Americans who serve in the United States Armed Forces is significant, and there are tens of thousands of Native American veterans who are eligible to access benefits and programs offered by the Department of Veterans Affairs. The VA is best known for providing health care and related services to veterans, but it also coordinates strategic planning initiatives with native communities through the Office of Tribal Government Relations.<sup>22</sup> The cost of health care has a massive economic impact both locally and nationally, and native communities require substantial funding to maintain and improve their basic care systems. Tribes can partner with the VA to obtain funding and technical assistance for their health care programs, and can provide greater access and more affordable care for their veterans. Additionally:

- The VA's mission includes advocating on behalf of tribal governments at the legislative and regulatory levels to help create federal policies that will provide resources for the benefit of native veterans.
- The VA provides reimbursement for expenses connected with direct care services provided by tribal health facilities to veterans and their families through the Tribal Health Programs partnership.<sup>23</sup>

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<sup>21</sup> NATIVE AMERICAN MANAGEMENT SYSTEM FOR ENVIRONMENTAL IMPACTS, <https://www.namsei.com/>.

<sup>22</sup> *Office of Tribal Government Relations*, U.S. DEPARTMENT OF VETERAN AFFAIRS, <http://www.va.gov/TRIBALGOVERNMENT/index.asp>.

<sup>23</sup> DEPARTMENT OF VETERAN AFFAIRS, TRIBAL HEALTH PROGRAMS PROVIDER ORIENTATION, available at [http://www.va.gov/tribalgovernment/docs/VA\\_THP\\_Provider\\_Orientation\\_Nov2012.pdf](http://www.va.gov/tribalgovernment/docs/VA_THP_Provider_Orientation_Nov2012.pdf).

- Tribes can contact the VA to obtain comprehensive information on how to obtain funding for health care programs on reservations and at VA facilities.

## Department of Homeland Security

The Department of Homeland Security oversees numerous agencies involved in law enforcement, disaster preparedness and relief, customs, transportation security, and scientific research. The Department maintains a Tribal Desk<sup>24</sup> that coordinates directly with native governments to coordinate policy issues and provide assistance for tribal programs. Homeland Security programs that relate directly to tribal communities are listed in the Tribal Resource Guide,<sup>25</sup> which provides a wealth of information on opportunities to promote economic development through partnering. Other beneficial programs include:

- The Veterans Employment Program, which promotes preferential hiring of native veterans for federal government positions.
- DHS's Office of Small and Disadvantaged Business Utilization serves as the clearinghouse for contracting opportunities for all DHS component agencies, and provides training for native-owned companies to increase their competitiveness for federal contracts.<sup>26</sup>
- The Tribal Homeland Security Grant Program provides millions of dollars of annual funding directly to tribal governments to help them increase security and emergency response preparedness.<sup>27</sup>

## Department of Housing and Urban Development

Providing safe, livable housing is a fundamental part of economic development planning for every native community. Through its Office of Native American Programs, the Department of Housing and Urban Development (HUD) provides funding and development assistance to tribal governments and community members for housing needs. HUD

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<sup>24</sup> *Tribal Desk*, Homeland Security, <http://www.dhs.gov/tribal-desk>.

<sup>25</sup> DEPARTMENT OF HOMELAND SECURITY, TRIBAL RESOURCE GUIDE, *available at* <http://www.dhs.gov/xlibrary/assets/iga/dhs-tribal-resource-guide.pdf>.

<sup>26</sup> *Do Business with DHS*, HOMELAND SECURITY, <http://www.dhs.gov/do-business-dhs>.

<sup>27</sup> *Tribal Homeland Security Grant Program*, FEMA, <http://www.fema.gov/tribal-homeland-security-grant-program>.



offers block grant financing for land acquisition, housing construction, infrastructure development, and commercial/industrial/agricultural projects designed to promote economic development. Important programs for native communities include:

- The Indian Home Loan Guarantee Program, which offers access to private mortgage financing for Native Americans to purchase homes, and provides loan guarantees for lenders<sup>28</sup>
- The Tribal Housing Activities Loan Guarantee Program, which provides loan guarantees for tribal governments and housing agencies to enable them to access financing from private lenders<sup>29</sup>
- Indian Community Development Block Grants, which provide native communities with direct grants for developing housing, infrastructure, and economic opportunities<sup>30</sup>

### Advisory Council on Historic Preservation

Historically significant lands, structures, and artifacts are an important part of the rich heritage of native communities throughout America. They are also important economic resources, as they create opportunities to create and promote tourism and private investment. The Advisory Council on Historic Preservation maintains an Office of Native American Affairs that is dedicated to assisting tribes with historic and cultural preservation activities.<sup>31</sup> The Office is involved in numerous initiatives offering beneficial assistance to native communities, including:

- Coordinating with tribes to ensure the preservation of historic and culturally significant lands that may be impacted by the activities of other federal and state agencies

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<sup>28</sup> *Section 184 Indian Home Loan Guarantee Program*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT,

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/homeownership/184](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184).

<sup>29</sup> *Title VI Tribal Housing Activities Loan Guarantee Program*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/homeownership/titlevi/](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/titlevi/).

<sup>30</sup> *Indian Community Development Block Grant Program*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/grants/icdbg](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/grants/icdbg).

<sup>31</sup> ACHP OFFICE OF NATIVE AMERICAN AFFAIRS, <http://www.achp.gov/nap.html>.

- Preventing encroachment on sacred sites by both governmental activity and private development
- Implementing the Action Plan for Interagency Coordination and Collaboration for Protection of Indian Sacred Sites <sup>32</sup>

## General Services Administration

The General Services Administration (GSA) provides a broad range of services and contracting opportunities for tribes and native-owned businesses.<sup>33</sup> Tribes can access GSA Integrated Acquisition Environment for assistance with market research, procurement of goods and services, and federal contracting matters. The GSA also offers training on how to efficiently receive access to government procurement information and property sales. Working with GSA:

- Tribes can obtain a vast array of federal property, from aircraft to animals, at no cost through the Federal Surplus Personal Property Donation Program.<sup>34</sup>
- Tribes are eligible to take ownership of federal lands and real property administered by the GSA,<sup>35</sup> including undeveloped land, commercial/industrial facilities, military property, and family housing.
- As the vehicle leasing agency for other federal departments, each year GSA auctions more than 30,000 surplus vehicles of all types, and sale prices are often substantially below market rates.<sup>36</sup>

## Internal Revenue Service

Although the IRS is best known as the federal government's tax collection agency, it also manages programs that are of substantial benefit for tribal

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<sup>32</sup> <http://www.achp.gov/docs/SS%20MOU%20Action%20Plan%20%20March%205%202013.pdf>

<sup>33</sup> [http://www.gsa.gov/portal/content/105007?utm\\_source=PBS&utm\\_medium=print-radio&utm\\_term=tribalconsultation&utm\\_campaign=shortcuts](http://www.gsa.gov/portal/content/105007?utm_source=PBS&utm_medium=print-radio&utm_term=tribalconsultation&utm_campaign=shortcuts)

<sup>34</sup> *How to Acquire Surplus Federal Personal Property*, U.S. General Services Administration, <http://www.gsa.gov/portal/content/104591>.

<sup>35</sup> <http://www.gsa.gov/portal/content/105035>

<sup>36</sup> <http://autoauctions.gsa.gov/autoauctions/home.seam>

economic development.<sup>37</sup> Tribal governments are eligible for tax-exempt bond funding for development projects, and can conduct various business activities with an exemption from standard taxation. Understanding and utilizing the tax-exempt status of tribes can provide significant competitive advantages for native communities and native-owned businesses. Tribal leaders involved in tax issues should note:

- New IRS policies contain broad tax exclusions from individual income for certain benefits that tribal governments provide to their members, including assistance with utility bills, tuition payments, or assistance for the elderly.
- Tribes can access capital for development projects through Tribal Economic Development Bonds,<sup>38</sup> which currently offer nearly \$2 billion in funding opportunities under the America Recovery and Reinvestment Act.
- IRS guidance exempts federally recognized Indian tribal governments from much of the standard administrative burden of tax and income reporting, including the Affordable Care Act W-2 reporting requirement.
- Tribes can attract new businesses and jobs to their communities by utilizing IRS programs such as Indian Employment Credit, Work Opportunity Credit, Welfare-to-Work Credit, Empowerment Zone Employment Credit, Special Depreciation Rules, and other targeted tax benefits.<sup>39</sup>

## Small Business Administration

The SBA maintains an Office of Native American Affairs (ONAA),<sup>40</sup> the mission of which is to ensure that native entrepreneurs seeking to create, develop, and expand small businesses have full access to the necessary business

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<sup>37</sup> *Tax Information for Indian Tribal Governments*, IRS, <http://www.irs.gov/Government-Entities/Indian-Tribal-Governments>.

<sup>38</sup> I.R.S. Notice 2012-48 (July 30, 2012), <http://www.irs.gov/pub/irs-drop/n-12-48.pdf>.

<sup>39</sup> *FAQs for Indian Tribal Government regarding Targeted Tax Benefits*, IRS, <http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/FAQs-for-Indian-Tribal-Governments-regarding-Targeted-Tax-Benefits>.

<sup>40</sup> *Office of Native American Affairs*, U.S. SMALL BUSINESS ADMINISTRATION, <http://www.sba.gov/naa/>.

development and expansion tools available through the Agency's entrepreneurial development, lending, and procurement programs. ONAA projects include offering economic and business development resources through tribal colleges, building reservation-based entrepreneurial development, and providing online and direct business training programs such as the Native American Veteran Workshop Series. Tribal business offerings include:

- Native entrepreneurs can obtain information on forming start-up ventures through training programs like the ONAA's Small Business Primer.<sup>41</sup>
- The E200 program provides executives of native-owned companies with the organizational framework and resource network to build sustainable businesses and promote the economic development of reservation communities.<sup>42</sup>
- Tribes can obtain special government contracting opportunities by establishing HUBZone status for business and manufacturing areas within a reservation.<sup>43</sup>
- Through the SBA's 8(a) Business Development Program, native-owned companies can obtain enterprise mentoring, procurement assistance, business counseling, financial assistance, surety bonding, and other management and technical assistance.<sup>44</sup>

## Office of Personnel Management

The Office of Personnel Management (OPM) manages benefit programs for federal employees, and tribal employees are eligible to participate in several programs. OPM maintains a web page dedicated to providing program information for tribes and tribal members.<sup>45</sup> Two important programs to note:

- The Tribal Federal Employee Health Benefits program offers portable and affordable health insurance to workers, access to preferred

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<sup>41</sup> Office of Native American Affairs, The Small Business Primer Presentation, *available at* <http://imedia.sba.gov/vd/media1/training/NABPrimer/player.html>.

<sup>42</sup> *SBA Emerging Leaders Initiative*, SBA.GOV, <http://www.sba.gov/content/sba-emerging-200-initiative>.

<sup>43</sup> *HUBZone Program*, SBA.GOV, <http://www.sba.gov/Hubzone>.

<sup>44</sup> *8(a) Business Development Program*, SBA.GOV, <http://www.sba.gov/content/8a-business-development>.

<sup>45</sup> *Indian Tribes*, OPM.GOV, <http://www.opm.gov/healthcare-insurance/indian-tribes/>.

provider organizations and health maintenance organizations, and individual health savings/reimbursement accounts.<sup>46</sup>

- Eligible tribal members can participate in the Federal Employees Group Life Insurance Program (FEGLI), which provides life insurance and related benefits at very low cost. Unlike many other employer-sponsored life insurance programs, FEGLI coverage can be continued into retirement, and some coverage can be continued by retirees at no cost.<sup>47</sup>

## Department of Energy

Energy is fundamental to economic development, and having affordable and self-controlled sources of energy is crucially important for tribal communities. Tribes that have successfully implemented their own electricity generation projects not only obtain the benefit of low-cost power for their community members and businesses, they also often sell surplus electricity to the local utility for a profit. The Department of Energy (DOE) has numerous funding and technical programs specifically tailored to promote tribal energy sufficiency, as well as to foster economic development and employment on tribal lands through the use of renewable energy and energy efficiency technologies. Examples include:

- The Office of Indian Energy Policy and Programs coordinates federal energy development assistance for native communities, and offers assistance in the development of traditional and renewable energy resources including solar, wind, biofuel, and hydro power.<sup>48</sup>
- Through the START program, early-stage technical assistance is provided for tribal projects to further develop market feasibility, due diligence research, analysis and documentation, prepare site control, verify resources, pre-qualify off-take agreements, and produce a permitting plan.<sup>49</sup>

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<sup>46</sup> *Indian Tribes Health Insurance*, OPM.GOV, <http://www.opm.gov/healthcare-insurance/indian-tribes/health-insurance/>.

<sup>47</sup> *Life Insurance*, OPM.GOV, <http://www.opm.gov/healthcare-insurance/life-insurance/program-information/>.

<sup>48</sup> *Office of Indian Energy Policy and Programs*, ENERGY.GOV, <http://energy.gov/indianenergy/office-indian-energy-policy-and-programs>.

<sup>49</sup> *Start Program*, ENERGY.GOV, <http://energy.gov/indianenergy/resources/start-program>.

- DOE's Tribal Energy Program provides financial and technical assistance that enables tribes to evaluate and develop their renewable energy resources and reduce their energy consumption through efficiency and weatherization.<sup>50</sup>

## Department of Agriculture

Sustainable sources of healthy food are a critical element of every tribal economy, and tribes that have or wish to develop their own food production capacity can partner with the Department of Agriculture (USDA) and obtain technical assistance and financing. The USDA's Office of Tribal Relations serves as the central agency for programs that are beneficial to tribal interests.<sup>51</sup> While not all tribal communities are involved in farming or other agricultural activities, many are located in areas designated as "rural" under federal guidelines. Tribes in rural areas are eligible for numerous USDA funding programs for economic and community development, such as:

- Tribes can utilize the Business and Industry Guaranteed Loan Program to obtain financing for the purchase of land, equipment, and working capital.<sup>52</sup>
- The Intermediary Relending Program offers tribes up to \$2 million in business financing on a thirty-year loan at 1 percent interest.<sup>53</sup>
- The Rural Business Enterprise Grants Program offers tribal enterprises up to \$500,000 in grant financing for land acquisition, construction, equipment upgrades, transportation and parking improvements, pollution control, working capital, technical assistance, and education.<sup>54</sup>

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<sup>50</sup> *Tribal Energy Program*, U.S. Dep't Energy, <http://apps1.eere.energy.gov/tribalenergy/about.cfm>.

<sup>51</sup> *Office of Tribal Relations*, U.S. DEP'T AGRICULTURE (USDA), <http://www.usda.gov/wps/portal/usda/usdahome?navid=OTR>.

<sup>52</sup> *Business & Cooperative Assistance*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/bcp\\_gar.html](http://www.rurdev.usda.gov/bcp_gar.html).

<sup>53</sup> *Intermediary Relending Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_irp.html](http://www.rurdev.usda.gov/BCP_irp.html).

<sup>54</sup> *Rural Business Enterprise Grants Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_rbeg.html](http://www.rurdev.usda.gov/BCP_rbeg.html).

- Low-cost loan guarantees of up to \$25 million are available to assist tribes with energy development projects under the Rural Energy Assistance Program.<sup>55</sup>
- Native-owned farms can obtain low-cost financing for operations through the USDA Farm Service Agency's Direct Loan and Guaranteed Loan programs.<sup>56</sup>
- Tribal water, wastewater, and solid waste management projects can be funded through the Rural Development agency.<sup>57</sup>
- Through Rural Business Opportunity Grants, tribes can undertake community economic development planning and create small business incubators, and native-owned companies can receive training and assistance in developing business technology, trade strategies, and export markets for their products.<sup>58</sup>

## Environmental Protection Agency

A clean and healthy environment is a basic requirement for improving the quality of life in native communities, and living in a sustainable and harmonious way with the natural environment is a priority for tribal nations. Environmental quality has a direct impact on and relationship with economic development, and planning and funding environmental improvement projects should be part of strategic planning for tribal economies. The Environmental Protection Agency's (EPA's) American Indian Environmental Office is tasked with protecting human health and the environment of federally recognized tribes by supporting implementation of federal environmental laws consistent with the federal trust responsibility, the government-to-government relationship, and EPA's 1984 Indian Policy.<sup>59</sup> Opportunities to note:

- Tribes are eligible for EPA grant funding for projects to facilitate clean air and water, remediate toxic chemical and hazardous material sites, and improve solid waste disposal.<sup>60</sup>

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<sup>55</sup> *Rural Development Energy Programs*, USDA RURAL DEVELOPMENT, <http://www.rurdev.usda.gov/Energy.html>.

<sup>56</sup> *Farm Loan Programs*, FARM SERVICE AGENCY, <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=landing>.

<sup>57</sup> *Water Resources*, USDA, [http://www.usda.gov/wps/portal/usda/usdahome?navid=WATER\\_RESOURCES](http://www.usda.gov/wps/portal/usda/usdahome?navid=WATER_RESOURCES).

<sup>58</sup> *Rural Business Opportunity Grants*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_RBOG.html](http://www.rurdev.usda.gov/BCP_RBOG.html).

<sup>59</sup> *American Indian Environmental Office*, EPA, <http://www.epa.gov/indian/aieo/index.html>.

<sup>60</sup> *Grant Topics*, EPA, <http://www.epa.gov/indian/grantsandfunding/topics.htm#envmed>.

- Professors from tribal colleges can receive funding and technical support from the EPA to solve the environmental problems most important to their tribal communities through the Tribal ecoAmbassadors Program.<sup>61</sup>
- Cross-Environmental Media Grants are available to help tribes support conservation, capacity building, compliance programs, environmental education and training, and a wide range of other on-reservation activities for environmental improvement.<sup>62</sup>

## Federal Communications Commission

Improving telecommunications and data transfer are key elements of increasing the competitiveness of native-owned companies and attracting new businesses to tribal communities. The Federal Communications Commission (FCC) created its Office of Native Affairs and Policy in 2010 as part of the federal government's National Broadband Plan,<sup>63</sup> and the ONAP's Tribal Homepage<sup>64</sup> describes the grants and partnering programs available to tribes to promote the deployment and adoption of communications services and technology, including:

- The Enhanced Lifeline for Tribal Lands program provides qualified consumers living on tribal lands with discounts on monthly basic telephone service, and eligible subscribers may receive basic local phone service for as little as \$1 a month.<sup>65</sup>
- Native nations and businesses can obtain access to bandwidth and broadcasting wavelengths through the Secondary Markets Initiative, which reallocates spectrum usage rights.<sup>66</sup>
- Tribes can attract private investment in telecommunications infrastructure through the Tribal Lands Bidding Credits program, which provides financial subsidies to telecommunications companies that build systems in underserved native communities.<sup>67</sup>

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<sup>61</sup> *Tribal ecoAmbassadors*, EPA, <http://www.epa.gov/ecoambassadors/tribal/index.html>.

<sup>62</sup> *Cross Environmental Media Grants*, EPA, <http://www.epa.gov/indian/grantsandfundings/topic-media.htm>.

<sup>63</sup> BROADBAND.GOV, <http://www.broadband.gov/>.

<sup>64</sup> *Tribal Initiatives*, FCC, <http://transition.fcc.gov/indians/>.

<sup>65</sup> *Financial Assistance*, FCC, <http://transition.fcc.gov/indians/financialassistance.html>.

<sup>66</sup> *Secondary Markets Initiative*, FCC, [http://wireless.fcc.gov/licensing/index.htm?job=secondary\\_markets](http://wireless.fcc.gov/licensing/index.htm?job=secondary_markets).

<sup>67</sup> *Tribal Lands Bidding Credits*, FCC, <http://wireless.fcc.gov/auctions/default.htm?>



- The Tribal Homepage provides a comprehensive list of links to federal government communications programs specifically tailored for native communities.<sup>68</sup>

## Department of Transportation

Smooth and efficient transportation is fundamental to business development, and the Department of Transportation (DOT) is a primary partner in creating and improving roadways and other modes of transport for tribes. Working through the Federal Highway Administration's Tribal Transportation programs, native communities can obtain funding and planning/permitting assistance for new roads, bridges, and community transit systems,<sup>69</sup> such as:

- TIGER Discretionary Grants offer millions of dollars for improving roads to boost economic development and make tribal communities more attractive for businesses.<sup>70</sup>
- The Indian Reservation Roads Program addresses transportation needs of tribes by providing funds for planning, design, construction, and maintenance activities.<sup>71</sup>
- The Federal Lands Highway Program provides financial resources and technical assistance for a coordinated program of public roads that service the transportation needs of tribal lands.<sup>72</sup>

## National Parks Service

Preserving and enhancing traditional lands and areas of cultural significance is a priority for native communities, and these areas are often key economic resources related to tourism. Pursuant to the National Historic Preservation Act, the National Parks Service administers the National Tribal Preservation Program, which works to preserve and protect resources and traditions that

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job=tribal\_bidding&page=1.

<sup>68</sup> *Internet Resources for Indian Country*, FCC, <http://transition.fcc.gov/indians/internet/resources/>.

<sup>69</sup> *Tribal Transportation*, DEP'T TRANSPORTATION (DOT), <http://www.fhwa.dot.gov/tribal/index.htm>.

<sup>70</sup> *Tiger Grants*, DOT, <http://www.dot.gov/tiger>.

<sup>71</sup> *Tribal Transportation Program*, FEDERAL LANDS HIGHWAY, <http://flh.fhwa.dot.gov/programs/irr/>.

<sup>72</sup> OFFICE OF FEDERAL LANDS HIGHWAY, <http://flh.fhwa.dot.gov/>.

are of importance to Native Americans by strengthening their capabilities for operating sustainable preservation programs.

- Tribal Heritage Grants provide funding for locating and identifying cultural resources, helping preserve native structures listed on the national register of historic places, undertaking comprehensive preservation planning, documenting oral history and cultural traditions, and education and training for building a tribe's historic preservation program.<sup>73</sup>
- Tribal Historic Preservation Office Grants provide funds to protect and conserve important tribal cultural and historic assets and sites, and assists native communities in executing historic preservation programs and activities pursuant to the National Historic Preservation Act.<sup>74</sup>

## Department of Interior

Tribes and native associations often work most regularly with the Department of Interior's (DOI) Bureau of Indian Affairs, which manages substantial portions of the federal government's trust relationship with native communities. Within the DOI, there are numerous departments that offer beneficial programs for tribal economic development, including:

- The Division of Economic Development assists tribes in creating an environment for economic progress through training, business planning, and expert consultation.<sup>75</sup>
- The Division of Capital Investment manages the Indian Loan Guaranty Program to facilitate access to capital and loan financing for tribes and native-owned businesses.<sup>76</sup>
- The Division of Workforce Development provides a wide array of job placement and training programs to promote employment opportunities for tribal members on and off reservations.<sup>77</sup>

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<sup>73</sup> *Tribal Heritage Grants*, NATIONAL PARK SERVICE, [http://www.nps.gov/history/tribal\\_heritage/](http://www.nps.gov/history/tribal_heritage/).

<sup>74</sup> *Tribal Historic Preservation Office Grants*, NATIONAL PARK SERVICE, <http://www.nps.gov/history/thpo/grants.html>.

<sup>75</sup> *Division of Economic Development*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DED/index.htm>.

<sup>76</sup> *Division of Capital Investment*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm>.

- The Division of Indian Energy Policy Development oversees the development and implementation of regulations governing energy and mineral resource development on tribal land.<sup>78</sup>
- The Division of Energy and Mineral Development helps native communities with the exploration, development, and management of their energy and mineral resources with the ultimate goal of creating jobs and sustainable tribal economies.<sup>79</sup>
- Within the DOI's Bureau of Reclamation, the Native American Affairs Technical Assistance Program (TAP) provides resources and training to help tribes develop, manage, and protect their water and related resources.<sup>80</sup> TAP activities include water needs assessments, improved water management studies, water quality data collection and assessments, and water measurement studies.
- Tribes seeking to protect and/or expand their water rights can obtain monetary, personnel, and technical support through the Indian Water Rights Settlement Program.<sup>81</sup>
- Tribal Wildlife Grants<sup>82</sup> are available through the Native American Liaison<sup>83</sup> of the DOI's Fish and Wildlife Service. Tribes can use the grants for the development and implementation of programs that benefit fish and wildlife resources and their habitat, including planning for wildlife and habitat conservation; fish and wildlife conservation and management actions; fish and wildlife-related laboratory and field research; natural history studies; habitat mapping; field surveys and population monitoring; habitat preservation; conservation easements; and public education.

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<sup>77</sup> *Division of Workforce Development*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DWD/index.htm>.

<sup>78</sup> *Energy and Mineral Development Regulations*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEPD/index.htm>.

<sup>79</sup> *Division of Energy and Mineral Development*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/index.htm>.

<sup>80</sup> *Native American Affairs Technical Assistance Program*, BUREAU OF RECLAMATION, [http://www.usbr.gov/native/programs/techasst\\_activities\\_tap.html](http://www.usbr.gov/native/programs/techasst_activities_tap.html).

<sup>81</sup> *Interior's Indian Water Rights Settlement Program – Reclamation Support for Secretary's Program*, BUREAU OF RECLAMATION, <http://www.usbr.gov/native/waterrights/waterrights.html>.

<sup>82</sup> *Tribal Wildlife Grant Program*, U.S. FISH & WILDLIFE NATIVE AMERICAN LIAISON, <http://www.fws.gov/nativeamerican/grants.html>.

<sup>83</sup> U.S. FISH & WILDLIFE NATIVE AMERICAN LIAISON, <http://www.fws.gov/nativeamerican/>.

### Strategic Use of Federal Programs

The most effective means of leveraging federal government programs for economic development is to use them in combination. For example, a tribe located near a river might wish to develop a new eco-tourism industry to attract outdoor enthusiasts to the reservation. Starting from scratch, the tribe could:

1. Obtain the necessary water rights to control access to and use of the river through the Indian Water Rights Settlement Program;
2. Use a Tribal Wildlife Grant to improve the habitat for fish, birds, and other animals in and around the river;
3. Improve tourist access to the river area from local highways by obtaining funds and planning assistance through the Indian Reservation Roads Program;
4. Utilize AmeriCorps volunteers to build trails, camp sites, and picnic areas around the river;
5. Build cabins and recreational facilities near the river with funding from the Rural Business Enterprise Grants Program;
6. Acquire tools and equipment through the Federal Surplus Personal Property Donation Program to maintain the eco-tourism areas;
7. Create the business plan and marketing strategy for the river area with a project grant from the Native American Business Enterprise Center.

This integrated approach requires advance planning, including development of a project timeline that allows for coordination between multiple government agencies—which in essence means being patient as applications work their way through the bureaucracy. Yet patience and perseverance through red tape can be rewarded significantly with grant funding and technical assistance, enabling native communities to undertake economic development projects that are profitable, sustainable, and culturally appropriate.

## Accessing Capital and Credit

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A consistent problem in tribal economic development has been the difficulty in accessing the necessary capital for starting new businesses, purchasing equipment and facilities, and procuring materials and inventory. Capital investment, lending, and credit providers in the United States have generally not offered the same funding opportunities to tribes and native-owned businesses as they have made available elsewhere, often due to a lack of understanding of tribal sovereignty and a negative economic outlook toward native communities. This long-standing lack of access to capital has hampered the ability of tribes to pursue economic development opportunities and create and sustain successful new business ventures.

Although access to capital in native communities is still below that of comparable communities elsewhere in the country, there is an increasing number of options for tribes and their businesses to obtain equity investment, grants, and loans for business development. Through government finance programs, credit markets, and private lending, significant sources of cash and funding guarantees are available to fund tribal development endeavors.

### **Native-Owned Banks**

In response to decades of disinterest by established lending institutions, a number of tribes have created their own banks to focus on providing cash and credit for projects in native communities. Native-owned banks typically provide both business and personal banking services, are attuned to the unique circumstances and needs of tribal clients, and typically have a greater understanding of the credit conditions that exist for project development on

tribal land. Most also place emphasis on participating as a lender for federal loan guarantee programs established to assist tribal economic development.

Prominent native-owned banks include Native American Bank, NA,<sup>84</sup> People's Bank of Seneca,<sup>85</sup> Bank2,<sup>86</sup> Borrego Springs Bank, NA,<sup>87</sup> and Sovereign Finance.<sup>88</sup> While these banks do not have the broad network of brick-and-mortar branches of other national commercial lenders, they have the ability to finance projects regardless of location and regularly work with tribes far beyond the banks' physical headquarters.

## Commercial Banks

Over time, a number of large commercial banks have realized the importance of providing capital for tribal projects—and have learned there are profits to be made from doing business in native communities. In addition to their traditional loans and services, several large national banks have established departments specifically oriented to supporting projects for tribal clients. Key Bank's Native American Financial Services,<sup>89</sup> Wells Fargo Native American Lending,<sup>90</sup> JP Morgan Chase, US Bank, and Bank of America/Merrill Lynch are a few of the major lenders that have been actively financing projects in native communities. An advantage commercial banks possess is their large capital base—they hold billions of dollars in available funds, and have the ability to finance large-scale economic and infrastructure development projects for tribes. They can also underwrite and market the issuance of bonds by tribes for government and commercial activities.

## Community Development Financial Institutions Fund

The Community Development Financial Institutions Fund is a Department of the Treasury program created for the purpose of promoting economic revitalization and community development through investment in and assistance to Community Development Financial Institutions (CDFIs).

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<sup>84</sup> NATIVE AMERICAN BANK, <http://www.nabna.com/>.

<sup>85</sup> PEOPLE'S BANK OF SENECA, <http://peoplesbankofseneca.com/>.

<sup>86</sup> BANK2, <https://www.bank2online.com/>.

<sup>87</sup> BORREGO SPRINGS BANK, <http://www.borregospringsbank.com/>.

<sup>88</sup> SOVEREIGN FINANCE, <http://www.sovereignfinance.com/new/sovereignfinancellc/>.

<sup>89</sup> *Native American*, KEY, <https://www.key.com/corporate/industry-expertise/native-american-financial-services.jsp>.

<sup>90</sup> *Native American Lending*, WELLS FARGO, <https://www.wfham.com/loans/nativeamerican-lendingbranchsd/index.page>.

CDFIs are privately controlled entities that act like banks (and many are in fact banks or credit unions) and provide funding for economic development within a community.

The CDFI Fund seeks to increase access to capital for native communities in several ways:<sup>91</sup>

1. The Community Development Financial Institutions Program offers direct investments and training for native CDFIs to provide loans, investments, financial services, and technical assistance to underserved populations and communities;
2. The New Markets Tax Credit Program allocates tax credits to community development entities to attract private-sector investment in low-income communities;
3. The Bank Enterprise Award Program offers an incentive to banks to invest in underserved communities and in other CDFIs; and,
4. Through the Native Initiatives program, financing and technical assistance is provided to native CDFIs and other native entities working to create native CDFIs.

Since 1994, the CDFI Fund has awarded more than \$1.4 billion to community development organizations and financial institutions, and has allocated New Markets Tax Credits to facilitate \$33 billion in private-sector community investment. Examples of awards to tribal entities include \$950,000 to the Minnesota Chippewa Tribe Finance Corporation for affordable housing and business loan products, \$855,000 to The Affiliated Tribes of Northwest Indians Revolving Loan Fund for business lending funds, and \$150,000 to the San Carlos Apache Tribe to create a new native CDFI to provide consumer and small business loans.<sup>92</sup>

The CDFI Fund specifically seeks to improve capital access in tribal communities through its Native American CDFI Assistance (NACA) Program.<sup>93</sup> Funding is offered in two forms:

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<sup>91</sup> COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND, [http://www.cdfifund.gov/who\\_we\\_are/about\\_us.asp](http://www.cdfifund.gov/who_we_are/about_us.asp).

<sup>92</sup> A complete list and details of CDFI Fund awards to tribal entities can be obtained through the Fund's award search portal: *Searchable Award Database*, CDFI FUND, <http://www.cdfifund.gov/awardees/db/index.asp>.

<sup>93</sup> *Native American Initiatives Program*, CDFI FUND, [http://www.cdfifund.gov/what\\_](http://www.cdfifund.gov/what_)

- *Financial Assistance Awards*—Certified native CDFIs can obtain up to \$750,000 in loans, grants, deposits, and equity investments to support their community financing activities. These awards require a dollar-for-dollar match with non-federal funds.
- *Technical Assistance Grants*—Certified native CDFIs, emerging native CDFIs, and sponsoring entities can receive grants of up to \$150,000 for training and capacity building for providing financial services to native communities and/or create certified native CDFIs.

To be eligible for NACA funding, the applicant must be a certified native CDFI, emerging native CDFI, or a sponsoring entity.<sup>94</sup> A certified native CDFI is an entity that primarily serves a native community, i.e., at least 50 percent of its activities are directed toward serving Native Americans, Alaska Natives and/or Native Hawaiians. An emerging native CDFI is an entity that primarily serves a native community and can demonstrate that it will achieve full native CDFI certification within a reasonable time. A sponsoring entity is typically a tribe or tribal business entity that proposes to create a new native CDFI.

Numerous tribes and native-owned entities have successfully created CDFIs<sup>95</sup> that work with the Fund to provide financing for businesses, housing, and community development. Tribes interested in forming a CDFI can learn about the legal requirements and application process through detailed webinars offered by the Department of the Treasury.<sup>96</sup>

### IEED Division of Capital Investment

The Department of the Interior's Office of Indian Energy and Economic Development operates a Division of Capital Investment<sup>97</sup> that facilitates access

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we\_do/programs\_id.asp?programID=3.

<sup>94</sup> Information on the history and structure of CDFIs in native communities is available from the First Nations Development Institute: *Community Development Financial Institutions*, FIRST NATIONS DEVELOPMENT INSTITUTE, <http://www.firstnations.org/KnowledgeCenter/FinancialEducation/CDFI>.

<sup>95</sup> Guidelines and application materials can be accessed through the Fund's website. See U.S. DEP'T TREASURY, COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND CDFI PROGRAM & NACA PROGRAM (FY 2013), available at <http://www.cdffund.gov/docs/2013/cdfi/FY%202013%20CDFI%20and%20NACA%20Program%20Guidance%20Final%20and%20Clear%20ed.doc>.

<sup>96</sup> *FY 2013 CDFI Program and NACA Program Update*, CDFI Fund (Jan. 25, 2013), [http://www.cdffund.gov/news\\_events/CDFI-2013-03-FY\\_2013\\_CDFI\\_Program\\_and\\_NACA\\_Program\\_Update.asp](http://www.cdffund.gov/news_events/CDFI-2013-03-FY_2013_CDFI_Program_and_NACA_Program_Update.asp).

<sup>97</sup> *Division of Capital Investment*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.indianaffairs.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm>.



to capital by tribes and individual members through the Indian Loan Guaranty, Insurance, and Interest Subsidy Program. The Indian Loan Guaranty Program<sup>98</sup> provides a government-backed loan guaranty for up to 90 percent of the value of a tribe's economic development project. The IEED itself does not loan the money for projects—the tribe or native-owned business negotiates a loan with an outside lender, and the IEED then guarantees 90 percent of the loan, which is a substantial help in obtaining private financing. To date, IEED has guaranteed more than \$1 billion in loans for tribal economic development projects; the average loan guarantee value for IEED-approved projects in 2011 was \$3 million.

For tribes and tribal-owned ventures to participate in the Indian Loan Guaranty Program, the IEED requires:

- The borrower requesting the loan must be either a federally recognized tribe, an individual member of a federally recognized tribe, or an entity that is at least 51 percent owned by members of federally recognized tribes.
- The borrower must have at least 20 percent equity in the project being financed.
- The project must benefit the economy of a reservation or tribal service area.

Individuals seeking capital for small business activities can obtain up to \$500,000 in loan guarantees through this program, if the same qualifications listed above are met.

### **Tribal Economic Development Bonds**

Federal laws and financial regulations have provided tribes with the authority to issue tax-exempt debt to finance a wide range of activities for job creation and promote economic development. Tax-exempt financing lowers tribes' borrowing costs, and provides attractive tax-free investment returns within private markets, making it easier for tribal communities to access capital for large-scale economic development projects. The primary

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<sup>98</sup> Office of Indian Energy and Economic Development, *Guidance for the Tribe, Tribal Enterprise, or Indian-Owned Business as Borrower*, available at <http://www.indianaffairs.gov/cs/groups/xieed/documents/document/idc-034339.pdf>.

vehicle for tribal governments to issue tax-exempt debt is through Tribal Economic Development Bonds.<sup>99</sup>

Section 1402 of the American Recovery and Reinvestment Act of 2009 altered some previous federal regulations on tax-exempt bonds to give native governments greater flexibility for the issuance of Tribal Economic Development Bonds<sup>100</sup> to finance economic development projects. The range of projects that are eligible to be financed with Tribal Economic Development Bonds is now more closely aligned with the eligibility enjoyed by state and local governments for economic development activities. Examples of tribal projects financed with Tribal Economic Development Bond allocations include:

- The Pit River Tribe obtaining \$3.7 million for construction of a new retail center.
- The Apsaalooke Nation – Crow Tribe of Indians obtaining \$6.4 million to acquire land and construct commercial buildings.
- The Chemehuevi Indian Tribe in California obtaining \$15.8 million for a new tourism facility and marina.
- The Delaware Tribe of Indians obtaining \$22.5 million for the acquisition of businesses and an airpark.
- The Lummi Nation obtaining \$22.5 million for environmental and transportation infrastructure.

There is a total of approximately \$2 billion in bond allocations presently available to tribal governments for economic and infrastructure development projects.

One restriction on the use of Tribal Economic Development Bonds is that the funds from a bond issuance cannot be used to finance any portion of a building in which Class II or Class III gaming is conducted, as defined in Section 4 of the Indian Gaming Regulatory Act.<sup>101</sup> Given that many on-reservation business enterprises seek to locate close to casinos to attract customers who come for

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<sup>99</sup> *Tribal Economic Development Bonds*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.indiancountryworks.org/tribaldevoebonds.cfm>.

<sup>100</sup> Detailed information on the program requirements and application are available from the IRS at: I.R.S. Notice 2012-48 (July 30, 2012), available at <http://www.irs.gov/pub/irs-drop/n-12-48.pdf>.

<sup>101</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-21).

gaming, tribes need to carefully analyze and plan the sites for activities that will be financed with Tribal Economic Development Bonds to ensure compliance with IRS regulations.

Tribes may apply for an allocation of Tribal Economic Development Bonds to finance a single project or multiple simultaneous projects, provided that each project can satisfy the requirements for tax-exempt status. Tribes can also use the bonds to finance joint-venture projects with non-tribal entities, if the joint project will be located entirely on the reservation of the tribal government. Joint ownership of facilities to be financed with Tribal Economic Development Bonds include only those recognized under the private activity bond restrictions on tax-exempt bonds.

Although the program name implies the issuance of actual “bonds,” tribes can in fact apply their Tribal Economic Development Bond allocations to obtain funds through issuing most types of debt. Tribes can use allocations to obtain tax-exempt bank loans from commercial lenders, which has become a common method for financing development projects more efficiently than through the bond issue process. Tribes can also use the program to refinance current taxable debt with cheaper tax-exempt loans, which reduces the expense associated with existing projects. The Oneida Nation of New York, the Southern Ute Indian Tribe, and the Cabazon Band of Mission Indians have each obtained \$22.5 million in allocations for refinancing of taxable debt, and other tribal governments have utilized millions more for this same purpose.<sup>102</sup>

Tribes can receive Tribal Economic Development Bond allocations for projects that are in the final stages of going to the bond market to receive financing. Once a tribe receives an allocation, it has six months to close the bond issue and sell the bonds on the market.<sup>103</sup> The application for allocations of Tribal Economic Development Bonds calls for a fair amount of detail on the physical infrastructure and business plan for the project(s) to be financed, making this form of financing most suitable for large-scale projects that are in the advanced planning stages.

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<sup>102</sup> National Association of Bond Lawyers, *Allocation Schedule of 1st Tranche of Tribal Economic Development Bonds*, available at <http://www.nabl.org/uploads/cms/documents/TribalBondTranches.pdf>.

<sup>103</sup> Aaron Klein, *Promoting Job Creation and Economic Growth in Indian Country*, U.S. DEP'T TREASURY (July 16, 2012), <http://www.treasury.gov/connect/blog/Pages/growth-in-indian-country.aspx>.

## Small Business Administration Programs

The SBA offers several lending programs to help provide capital to tribes and native-owned businesses. These programs typically offer loan guarantees, whereby the tribal business arranges project financing with a private lender and the SBA then provides the lender with a guarantee of repayment for the loan. Current SBA programs available for projects in native communities include 7(a), 504, SBA Express, Patriot Express, Microloans, and Community Advantage.

### *7(a) Loan Guarantee Program*

The 7(a) program can be used by tribal companies to help finance most business activities, including start-up and business purchases, acquiring and improving land and buildings, purchasing fixed assets and inventory, making leasehold improvements, providing working capital, refinancing debts, and securing revolving lines of credit.<sup>104</sup>

The SBA's limit on 7(a) guarantees to any one business is \$3.75 million. One business can have multiple loans guaranteed by SBA but the SBA portion cannot exceed \$3.75 million. Loans up to \$150,000 are guaranteed up to 85 percent. Loans over \$150,000 are guaranteed up to 75 percent. The loan guarantee can be up to 90 percent when the loan proceeds will be used to promote exporting. Applicants for 7(a) guarantees must have a "reasonable" equity stake in the business being financed, though there is no set minimum for collateral.

### *504 Loan Guaranty Program*

The 504 Loan Program offers native-owned businesses long-term, fixed-rate financing to acquire assets for expansion or modernization of their facilities and equipment.<sup>105</sup> 504 program loans are made available through certified development companies<sup>106</sup> working in conjunction with the SBA.

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<sup>104</sup> *General Small Business Loans 7(a)*, SBA.GOV, <http://www.sba.gov/category/navigation-structure/loans-grants/small-business-loans/sba-loan-programs/7a-loan-program>.

<sup>105</sup> *Real Estate and Equipment Loans: CDC/504*, SBA.GOV, <http://www.sba.gov/content/cdc504-loan-program>.

<sup>106</sup> Certified development companies in each state can be found by contacting the local SBA office: *District Office List*, SBA.GOV, <http://www.sba.gov/about-offices-list/2>.

For an economic development project, 504 loans are typically structured with the SBA providing 40 percent of the total project costs, a participating lender covering up to 50 percent of the total project costs, and the borrower contributing 10 percent of the project costs. Under certain circumstances, a borrower may be required to contribute up to 20 percent of the total project costs. The use of proceeds from 504 loans must generally be used for fixed assets, including:

- The purchase of existing buildings;
- The purchase of land and land improvements, such as grading, street improvements, utilities, parking lots, and landscaping;
- The construction of new facilities, or modernizing, renovating, and/or converting existing facilities;
- The purchase of long-term machinery; or
- The refinancing of debt in connection with an expansion of the business through new or renovated facilities or equipment.

504 program funds cannot be used for working capital or inventory, consolidating or repaying debt, or refinancing debt that is not connected with new facilities or equipment.

The project assets being financed are used as collateral for 504 program loans, and personal guarantees from owners of 20 percent or more are also required. There is no maximum project size, though the maximum 504 program loan amount is \$5 million. Interest rates on 504 program loans are set according to the current market rate for five-year and ten-year US Treasury bonds. Loan terms of ten and twenty years are available, and lending fees may be financed with the loan.

### *Community Advantage*

Community Advantage is a pilot program intended to expand availability of capital for small businesses and entrepreneurs in underserved communities, including reservations.<sup>107</sup> The maximum loan is \$250,000, and the SBA provides a guarantee of 85 percent for loans up to \$150,000, and 75 percent for those greater than \$150,000. The Community Advantage program is designed

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<sup>107</sup> *Community Advantage*, SBA.GOV, <http://www.sba.gov/content/community-advantage>.

to be streamlined and easy to access—most Community Advantage loans will be approved within ten days and require only a two-page application.

### *SBA Express*

This is an expedited loan guarantee program for financing small business needs. Native-owned businesses apply for a loan with a commercial lender, and the lender then contacts the SBA to seek the loan guarantee under the SBA Express program. The standards are generally the same as for the 7(a) program, although the SBA's decision time for approving the guarantee is only thirty-six hours.<sup>108</sup> The maximum loan amount is \$350,000, of which the SBA will guarantee 50 percent, and other terms such as interest rate are negotiated between the borrower and the lender.

### *Patriot Express*

Native business owners who are also military veterans are eligible for loan guarantees under the Patriot Express program.<sup>109</sup> The maximum loan amount is \$500,000, and the SBA will guarantee 85 percent of loans up to \$150,000 and 75 percent of loans over \$150,000. This is another expedited program where the SBA promises an approval decision within thirty-six hours of receiving an application. The program can be used for both fixed-amount loans and revolving lines of credit.

### *Microloans*

The SBA's Microloan Program provides small businesses with small short-term loans for working capital or the purchase of inventory, supplies, furniture, fixtures, machinery, and/or equipment.<sup>110</sup> The SBA makes funds available to specially designated intermediary lenders,<sup>111</sup> which are non-profit organizations with experience in lending and technical assistance. These intermediaries then make loans to eligible borrowers in amounts up

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<sup>108</sup> *SBA Express*, SBA.GOV, <http://www.sba.gov/content/sba-express>.

<sup>109</sup> *Patriot Express*, SBA.GOV, <http://www.sba.gov/content/patriot-express>.

<sup>110</sup> SBA, *Microloan Program*, <http://www.sba.gov/sites/default/files/files/Microloan%20Program%20Microborrower%20Fact%20Sheet.pdf>.

<sup>111</sup> The list of microloan intermediaries is found at SBA, *Partner Identification & Management System* (Oct. 31, 2012), <http://www.sba.gov/sites/default/files/Microloan%20Intermediary%20Listing%2020121031.pdf>.

to a maximum of \$50,000. Loans can be set for terms up to seventy-two months. Applications are submitted to the local intermediary and all credit decisions are made on the local level.

### *Small Business Investment Companies*

The Small Business Investment Companies (SBIC) program<sup>112</sup> operates a network of government-backed venture capital companies that will fund small business ventures either with loans and/or in exchange for taking an equity stake in the company. The SBICs are privately owned and managed investment funds, licensed and regulated by the SBA, that use their own capital plus funds borrowed with an SBA guarantee to make equity and debt investments in qualifying small businesses. Businesses seeking funding from SBICs are typically more mature than start-ups and have a track record of revenue, which SBICs need to be able to pay the interest on the funds provided by the SBA. A list of SBICs by state is available on the SBA's SBIC directory page.<sup>113</sup>

### **EDA Revolving Loan Fund**

The Economic Development Administration's Revolving Loan Fund (RLF) Program is designed to promote new lending activity for local economic development initiatives.<sup>114</sup> These funds are allocated to various lending agencies and not-for-profit corporations throughout the country, and the funds are continually re-loaned as initial borrowers repay their debt—hence the “revolving” of the loan funds. RLF projects target small business job creation and development programs, and help provide small businesses and entrepreneurs with the financing needed to start or expand their business. The principal and interest that is repaid by the borrower stays in the local community to help support other business ventures.

The EDA's regional offices provide RLF funds through competitive grants to tribes, and each entity that receives an RLF grant sets its own underwriting

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<sup>112</sup> *SBIC Program: Seeking Financing for Your Small Business*, SBA.GOV, <http://www.sba.gov/content/sbic-program-0>.

<sup>113</sup> *SBIC Directory*, SBA.gov, <http://www.sba.gov/content/all-sbic-licensees-state>.

<sup>114</sup> *Revolving Loan Fund Program*, BUSINESSUSA, <http://business.usa.gov/content/revolving-loan-fund-program#>.

and risk management policies, interest rates, loan terms, and maximum loan amounts in accordance with its own policies. RLF loans can be a maximum of \$1 million, although loans of less than \$175,000 are most common. Native-owned businesses arrange for loans directly with EDA-funded RLF recipients, which can be tribal entities or a local community lender.

## **USDA Programs**

Most tribes and native associations qualify as “rural” communities under the definitions used by the Department of Agriculture. This designation makes native communities eligible to participate in numerous funding programs offered by the Department to support economic development in rural areas. USDA programs offer funding through grants, direct loans, and loan guarantees.

### *Business & Industry Guaranteed Loans*

The B&I Guaranteed Loan Program<sup>115</sup> offers funding to tribes and native-owned businesses for ventures designed to:

1. Provide employment;
2. Improve the economic or environmental climate;
3. Promote the conservation, development, and use of water for aquaculture; or,
4. Reduce reliance on nonrenewable energy resources by encouraging the development and construction of solar energy systems and other renewable energy systems.

The B&I program provides a government guarantee for loans negotiated between the tribe or business and a private lender. The maximum USDA guarantee is 80 percent for loans of \$5 million or less, 70 percent for loans between \$5 and \$10 million, and 60 percent for loans exceeding \$10 million. The total amount of Agency loans to one borrower typically must not exceed \$10 million, but the program administrator may authorize loans of up to \$25 million under certain circumstances. The Secretary of Agriculture may approve loans up to \$40 million for rural cooperative organizations that process value-added agricultural commodities.

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<sup>115</sup> *Business and Industry Guaranteed Loans*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/rbs/busp/b&i\\_gar.htm](http://www.rurdev.usda.gov/rbs/busp/b&i_gar.htm).



The maximum repayment period for B&I loans to purchase real estate is thirty years; for machinery and equipment, repayment must be within fifteen years or within the useful life of the equipment, whichever is less; and repayment of funds for working capital repayment is seven years. The interest rate for the guaranteed loan will be negotiated between the lender and the applicant, and the business normally must provide collateral equal to the loan amount.

### *Intermediary Relending Program*

Similar to the EDA's Revolving Loan Fund program, the Intermediary Relending Program<sup>116</sup> provides funds to local organizations (intermediaries) for the establishment of revolving loan funds. These revolving loan funds are used for financing business and economic development activity to create or retain jobs in disadvantaged and remote communities. Tribes wishing to serve as intermediaries to help finance local businesses can borrow an initial \$2 million to establish the program, and obtain subsequent loans in amounts of \$1 million, up to a total of \$15 million. For native-owned businesses, the maximum loan amount that can be obtained from an intermediary is currently \$250,000. IRP funds have been used to finance a broad range of economic development activities, including:

- The acquisition, construction, and improvement of business facilities
- The purchase or development of land
- The purchase of equipment, leasehold improvements, and supplies
- Start-up costs and working capital
- Transportation services
- Feasibility studies
- Hotels, motels, B&Bs, and convention centers

### *Rural Business Enterprise Grants*

The Rural Business Enterprise Grants (RBEG) program<sup>117</sup> can provide direct grant funding for tribal projects that finance and facilitate development of small and emerging rural businesses. Examples of eligible fund use include:

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<sup>116</sup> *Intermediary Relending Program Lenders*, USDA RURAL DEVELOPMENT, <http://www.rurdev.usda.gov/rbs/busp/irp.htm>.

<sup>117</sup> *Rural Business Enterprise Grants Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_rbeg.html](http://www.rurdev.usda.gov/BCP_rbeg.html).

- Acquisition or development of land;
- Construction and renovation of buildings, equipment, roads, and utilities;
- Capitalization of revolving loan funds, including loans for start-ups and working capital;
- Transportation improvement; and,
- Project planning.

There is no maximum level of grant funding, although smaller projects are given higher priority. Grants generally range from \$10,000 up to \$500,000.

#### *Rural Economic Development Loan & Grant Program*

The Rural Economic Development Loan & Grant (REDLG) program provides funding to rural projects through local utility organizations.<sup>118</sup> Under the program, the USDA provides zero interest loans to local utilities, which then pass through the funds via loans to local businesses for projects that will create and retain employment in rural areas. The businesses receiving the loans repay the lending utility directly. Under the grant program, the USDA provides grant funds to local utilities, which use the funding to establish revolving loan funds similar to the revolving loan programs described above. Loans are made from the revolving loan fund for projects that will create or retain rural jobs.

To receive funding under the REDLG program, a tribe or related entity must:

- Have borrowed and repaid or prepaid an insured, direct, or guaranteed loan received under the Rural Electrification Act; or,
- Be a not-for-profit utility that is eligible to receive assistance from the Rural Development Electric or Telecommunication Program;
- Be a current Rural Development Electric or Telecommunication Programs Borrower.

Examples of eligible tribal projects include:

- Capitalization of revolving loan funds
- Technical assistance in conjunction with projects funded under a zero interest REDLoan

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<sup>118</sup> *Business*, USDA RURAL DEVELOPMENT, <http://www.rurdev.usda.gov/rbs/busp/redlg.htm>.

- Business incubators
- Community Development Assistance to non-profits and public bodies (particularly for job creation)
- Facilities and equipment for education and training for tribal members to facilitate economic development
- Facilities and equipment for medical care for tribal members
- Telecommunications/computer networks for distance learning or long distance medical care

### *Rural Community Development Initiative Grants*

This grant program is designed to: 1) develop the capacity and ability of private, non-profit community-based housing and community development organizations, and 2) assist low-income rural communities to improve housing, community facilities, community and economic development projects.<sup>119</sup> Examples of how tribes can utilize Rural Community Development Initiative grants include:

- Home-ownership education programs for tribal members;
- Native business entrepreneurship training;
- Training on how to effectively prepare a strategic plan;
- Technical assistance for native businesses on how to access funding sources;
- Building organizational capacity through leadership training.

### *Community Facility Grants*

Grant funds under the Community Facility Grants (CFG) program may be used to assist in the development of essential community facilities.<sup>120</sup> The funds can be used to build or improve community facilities for health care, public safety, and public services, including purchasing equipment for a facility's operation. Tribes can receive grants in combination with other USDA financial assistance, such as a direct or guaranteed loan, or loans and grants from other sources.

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<sup>119</sup> *Rural Community Development Initiative Grants*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-RCDI\\_Grants.html](http://www.rurdev.usda.gov/HAD-RCDI_Grants.html).

<sup>120</sup> *Community Facility Grants*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-CF\\_Grants.html](http://www.rurdev.usda.gov/HAD-CF_Grants.html).

The CFG is typically used to fund projects under special initiatives, such as Native American community development efforts. The amount of available grant assistance for a project depends on the median household income and the population in the community where the project is located. Grant assistance may be available for up to 75 percent of project costs. Projects that receive priority for grants typically:

- 1) Serve small communities—with the highest priority going to projects located in a community with a population of 5,000 or less, and/or
- 2) Serve low-income communities—with the highest priority going to projects serving communities with median household incomes below the higher of the poverty line or 60 percent of the state non-metropolitan median household income, and/or
- 3) Provide health care, public safety, or public and community services.

A tribe cannot use grant funds to:

- Pay any annual recurring costs, including purchases or rentals that are generally considered to be operating and maintenance expenses
- Construct or repair electric generating plants, electric transmission lines, or gas distribution lines to provide services for commercial sale
- Pay costs to construct facilities to be used for commercial rental properties where the tribe has no control over tenants and services offered
- Construct facilities primarily for housing state, federal, or quasi-federal agencies
- Finance recreational facilities or community antenna television services or facilities

### *Community Facilities Direct and Guaranteed Loans*

The USDA makes direct loans and loan guarantees of up to 90 percent under this Community Facilities program. There is no maximum dollar amount for a given loan or guarantee, although the program is subject to limits based on available annual funding. Loans and loan guarantees<sup>121</sup>

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<sup>121</sup> *Community Facilities Direct and Guaranteed Loans*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-CF\\_Loans.html](http://www.rurdev.usda.gov/HAD-CF_Loans.html).

under the USDA's Community Facilities program are made for much the same purposes as the Community Facilities Grants described above. Loan funds may be used to construct, enlarge, or improve community facilities for health care, public safety, and public services, and can finance the purchase of land, equipment, and pay professional fees. A tribal entity can also refinance existing debt if the debt is a secondary part of the loan, is associated with the project facility, and if the entity's creditors are unwilling to modify terms to facilitate the new loan.

There are three levels of fixed interest rates charged by USDA for Community Facilities direct loans: poverty, intermediate, and market. Eligibility for the different interest rates is determined by the median household income of the area being served and the type of project. The poverty interest rate is set at 4.5 percent. The market rate is indexed to the eleventh bond buyers' rate as set by the US Treasury. The intermediate rate is set halfway between the market and the poverty rates. For the guaranteed loan program, the interest rate is the lender's customary interest rate for similar projects. The interest rates for guaranteed loans may be fixed or variable and are determined by the lender and borrower. The maximum loan repayment term is the useful life of the facility or forty years.

The application process is a two-stage procedure (pre-application and application). Approximately forty-five days is required to determine applicant eligibility, project priority status, and funding availability. After an application is submitted, the USDA performs an analysis of the scope of the project, environmental review, and legal review.

### **Funding Combinations**

Tribes and native-owned businesses can and should seek capital from as many sources as possible when pursuing funding for development projects. The funding sources listed in this chapter are not mutually exclusive, and more than one source can be utilized to obtain funding for a given project or strategic objective. For example, a tribe wishing to provide a funding base for long-term business development on its reservation could undertake the following actions:

- 1) Create a Community Development Financial Institution with a grant and technical assistance from the Native American CDFI Assistance Program;

- 2) Obtain additional capital for the new CDFI through the EDA and USDA revolving loan fund programs;
- 3) Train local entrepreneurs by establishing a business incubator funded with a Rural Community Development Initiative grant;
- 4) Loan funds from the CDFI to the now-trained entrepreneurs to start or expand their businesses, utilizing the SBA's Community Advantage program to provide an 85 percent loan guarantee to the CDFI.

Individual native-owned businesses can utilize similar combinations of technical assistance, grants, and loan programs to obtain the funding and planning resources needed for the growth of the company, and can work in conjunction with the tribal government to access capital for facility expansion, purchasing equipment and inventory, and job creation.

## Establishing Foreign Trade Zones

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Manufacturing industries provide desirable employment and economic opportunity within communities, and attracting a new manufacturing company is a significant victory for local economic development. Native communities have traditionally had difficulty landing manufacturing businesses on reservations due to factors such as geographic distance from trade centers and a lack of established supporting industries. However, tribes and native associations have the opportunity to create a powerful tool for landing manufacturing businesses and participating in the growth of global trade: the foreign trade zone.

### **What Is a Foreign Trade Zone?**

Foreign trade zones (FTZ) are designated areas within the United States that provide special customs procedures to US manufacturing plants engaged in international trade. Products that are processed in FTZs and then re-exported overseas are duty-free, and duty payment is deferred on imported items to be sold within the United States until they are brought out of the FTZ for sale in the US market. This helps to offset customs advantages available to overseas producers who compete with American on-shore companies. These lower duty rates often provide significant cost savings for manufacturers or assemblers of products in which imported component parts of their products have a higher duty rate than that of the completed product—a situation known as an “inverted tariff.” Many major US manufacturers currently use the inverted tariff rules to achieve significant cost savings by assembling their products in FTZs. FTZs are regulated by the Foreign-Trade Zones Board and the federal government’s International Trade Administration.<sup>122</sup>

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<sup>122</sup> *U.S. Foreign-Trade Zones Board*, IMPORT ADMINISTRATION, <http://ia.ita.doc.gov/ftzpage/>. This chapter reflects currently available information from the Foreign Trade Zones Board;

## How Can Tribes Benefit from Using FTZs?

FTZs are considered to be outside of US Customs Territory for the purpose of customs duty payment. Therefore, goods from overseas that enter FTZs are not subject to customs tariffs until the goods leave the zone and are formally entered into US Customs Territory. Merchandise shipped to foreign countries from FTZs is exempt from duty payments. This provision is especially useful for firms that import components to manufacture finished products for export. In addition, state and local ad valorem taxes cannot be imposed on imported tangible personal property stored or processed on a reservation FTZ, or produced in the United States and then held in the tribe's FTZ for exportation in its original or processed form.

There is no time limit on how long goods can be stored inside the FTZ, and certain foreign and domestic merchandise held in FTZs may be exempt from state and local inventory taxes. This allows firms to minimize their costs while their products are stored prior to being shipped. In addition, federal trade quota restrictions are in some cases waived for items entering the FTZ. A variety of activities can be conducted in a tribal FTZ, including assembling, processing, packaging, destroying, storing, cleaning, exhibiting, repacking, distributing, sorting, grading, testing, labeling, repairing, and/or combining with foreign or domestic content. This broad range of permissible activities creates increased potential for bringing business to the reservation, even when major product or component manufacturing is not an option.

## Advantages of Using the Foreign Trade Zone

- *Cash Flow* – Payment of duty is deferred until goods are actually brought into the US Customs Territory. This results in cash flow savings to manufacturers and exporters.
- *Waste/Scrap/Defect/Damage* – Duties are reduced or eliminated on materials subject to defect, waste, scrap, and damage.
- *Exports* – No US Customs duties are paid on merchandise exported from an FTZ.
- *Inverted US Customs Duty Savings* – In an FTZ, the FTZ user may elect to pay the duty rate applicable to either component material or the

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potential applicants for FTZs should consult the FTZB's website for updated information prior to submitting an application.



finished product manufactured from the component material, whichever is lower. The cost savings from this reduction or elimination of duties is significant.

- *Reduced Cycle Time* – Delays relating to US Customs clearances are eliminated. Special direct delivery procedures expedite the receipt of merchandise in FTZ facilities, reducing inventory cycle time.
- *Production Machinery/Merchandise Consumed* – Machinery for use in a zone may be assembled and installed before duties are owed on parts or finished products. Merchandise used/consumed in an FTZ is generally not subject to duties.
- *No Duties on Labor, Overhead, and Profit* – US Customs duties are not owed on labor, overhead, and profit attributed to production operations in an FTZ. If the same production operation were done overseas, the value of the labor, overhead, and profit would be subject to US Customs duty.
- *Storage* – Goods may be stored within an FTZ indefinitely.
- *Quota* – Most merchandise subject to US quotas may be held in a zone until quotas open.
- *Zone to Zone Transfer* – Transfers between zones are permitted with no entry or duty requirement.
- *Security* – With adequate security measures in place, FTZs typically experience lower insurance costs for facilities and business risk coverage.

### What Are the Types of FTZs?

FTZs are divided into general purpose zones and subzones. The Foreign-Trade Zones Board accepts and reviews applications for both. General purpose zones involve tribal business facilities that can be used by more than one firm, such as industrial parks used by multiple companies for warehousing/distribution and some processing/assembly. Subzones are sponsored by general purpose zones, but typically involve a single firm's site, which is used for more extensive manufacturing/processing or warehousing/distribution that cannot be accomplished easily in a general purpose zone. In addition to creating their own general purpose zones, tribes can partner with other agencies such as ports that already have a general purpose zone and create a tribal subzone that serves a particular company or business activity on tribal land.

### *Creating a Tribal FTZ*

The process of creating an FTZ on tribal land begins with submission of an application to the US Foreign Trade Zones Board.<sup>123</sup> The cover letter submitted with the application materials must be signed by an authorized officer of the tribe and carry the tribe's official seal. The application structure includes an executive summary and five exhibits with detailed information and supporting data.

#### The Executive Summary

This section provides a succinct overview of the tribe's FTZ proposal and should include:

- The tribe's legal authority to make the application;
- The type of zone authority being requested—general purpose zone or subzone;
- The proposed zone site and facilities, and the larger economic development project of which the zone is a part;
- Background information on the tribe's economic development projects for trade;
- A description of the relationship of zone project to the tribe's economic development plans;
- Plans for operating and financing the zone after it is established; and,
- Any additional pertinent information.

#### Exhibit 1 - Legal Authority to Apply

This exhibit must include all of the following:

- A certified copy of the tribe's enabling legislation regarding FTZs; and
- The sections of the tribe's constitution or other charter that are pertinent to FTZs; and,
- A certified copy of a Tribal Council Resolution authorizing the tribe's designated official to sign the application letter. The Resolution should specifically reference the FTZ application.

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<sup>123</sup> See 15 C.F.R. §§ 400, 400.24, 400.25, 400.26 and 400.31 for the basic application requirements, and § 400.29 regarding application filing fees (2013).

Exhibit 2 - Site Description

This Exhibit includes:

- A description of the proposed site(s) for the FTZ, including legal descriptions, and identification of the legal jurisdiction where the site will be located. If multiple sites are proposed, the application should include site labels for easy identification.
- A description of the larger economic development project of which the zone is a part.
- How the proposed site meets the US Customs port of entry adjacency requirement.<sup>124</sup>
- A description of facilities and services for the site.
- A description of existing or proposed site qualifications.
- Identification of current activities taking place at the site.
- A description of transportation services and facilities at the site currently and/or to be developed.
- Possibilities and plans for expansion of the FTZ and business activity within the FTZ.

Exhibit 3 - Operation and Financing

The description of how the FTZ will be operated by the tribe should include:

- Verification of the tribe's site ownership and/or right to use the site. If the tribe does not own the land, it can provide evidence of the owner's willingness to allow the FTZ to be created and run by the tribe.
- The operational plan for the zone.
- A description of the facilities, physical security, and Customs automated systems that the zone will use.
- The tribe's plans for financing capital and operating costs.

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<sup>124</sup> The adjacency requirement can be satisfied if any of the following factors is met:

1. The zone or subzone site is within the limits of a Customs port of entry (19 C.F.R. §101.3 (2013)).
2. The zone or subzone site is within 60 statute miles of the outer limits of a Customs port of entry (19 C.F.R. §101.3).
3. The zone or subzone site is within 90 minutes' driving time from the outer limits of a Customs port of entry (19 C.F.R. §101.3) as verified by the Customs Service Port Director.

- The estimated time schedule for construction and activation of the zone.

#### Exhibit 4 - Economic Justification

To identify the benefits of the proposed FTZ, this exhibit should include:

- The tribe's economic goals and specific growth objectives;
- The tribe's overall economic plan, indicating the role the zone project(s) will play in the plan;
- The economic profile of the tribe, including employment/income, area resources and problems, economic imbalances, unemployment rates, area foreign trade statistics, as well as area port facilities and transportation networks;
- The role, objective, and justification for the tribe's zone project;
- A justification for each specific site being proposed;
- The anticipated economic impact of the FTZ;
- The environmental impact of each site to be developed;
- The status of local zoning and land use permits/issues;
- A statement as to whether the use of FTZ procedures will significantly change the physical aspects of the plant or site, or existing/proposed operations.
- Whether FTZ status or use of FTZ procedures is a requirement or pre-condition for construction or activity at the site(s);
- A statement that the tribe is aware that FTZ status would not exempt any site or party (e.g., operators or users) from any applicable federal, state or local environmental requirements;
- A statement of need for zone services in the area, citing evidence of a general need as well as specific need (which can include letters from businesses expressing interest in zone project); and,
- A description of the proposed manufacturing/processing operations that will occur within the FTZ.

#### Exhibit 5 – Maps

Detailed maps of the proposed FTZ are to be submitted with the application, including:

- A local state map indicating location of zone site(s);
- A map with street-level detail that identifies the location of the site;
- Blueprints of the zone site showing zone boundaries in red with dimensions and metes and bounds; and,
- The original application may contain full-sized maps, and all additional copies must contain legible, letter-sized (8-1/2" x 11") reductions.

Along with the original application, tribes must submit three paper copies and an electronic copy. Adobe PDF is the preferred format for electronic copies, but if a PDF-format copy cannot be created then a MS Word-format copy is acceptable. The electronic copy must include color maps and scans of the signed copies of all letters. Section 8 of the Native American Business Development, Trade Promotion and Tourism Act of 1999 requires the Foreign Trade Zone Board and the Secretary of Treasury to expedite the processing of any applications involving the establishment of an FTZ on tribal lands, thereby providing native communities with an additional advantage toward establishing this beneficial tool for economic development.



## Energy Development on Tribal Land

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Business runs on energy.

This simple fact is fundamental to any economic development program, and the availability of cost-effective energy is part of every company's calculations on whether and where to create, expand, and locate business activity. One of the best things a tribe can do to attract new business to the reservation and give native-owned businesses a competitive edge is to offer abundant energy at favorable prices. Fortunately, native communities have several advantages that can enable the creation of new sustainable energy resources more quickly and affordably than most other jurisdictions. Depending on geographic location, some economically viable forms of energy production available to tribes include oil and gas, solar, wind, and biomass/waste-to-energy projects.

### Oil and Gas Production

The renaissance in American fossil fuel production spurred by technological advances in hydraulic fracturing has brought many once-dormant oil and gas fields back into active production, and inspired broader exploration of potential drilling areas located within tribal lands. As the federal government pursues US energy independence, the search for fossil fuels within native communities will undoubtedly increase, bringing with it the opportunity for significant revenue for tribes through land leases and the sale of extraction concessions.

For decades, leases of tribal land and the sale of oil and gas drilling rights to corporations were handled by the federal government. However, as the

*Cobell* lawsuit graphically illustrated, reliance on the federal government for management of income-producing natural resources has generally not proven to work in the best interest of native communities. Instead, tribes and native associations located in areas with oil and gas deposits should pursue self-management of these resources through the use of Tribal Energy Resource Agreements.<sup>125</sup>

Tribal Energy Resource Agreements (TERA) provide authority to tribes to review, approve, and manage leases, business agreements, and rights-of-way for energy development on tribal lands without the approval of the Secretary of the Interior. With a TERA, a tribal government may enter into leases and agreements for the purpose of energy resource development on tribal land including:

1. Exploration, extraction, and development of the energy mineral resources;
2. Marketing and distribution of tribal energy resources;
3. Construction and operation of an electric generation, transmission, or distribution facility; and,
4. Creating facilities to process or refine energy resources.

Under a TERA, tribes may also grant rights-of-way for energy resource development for construction or operation of a pipeline or electric transmission or distribution line serving:

- a. An electric generation, transmission, or distribution facility located on tribal land, and/or
- b. A facility located on tribal land that processes or refines energy resources developed on tribal land.

To obtain a TERA, tribes submit an application and a proposed agreement for review by the Office of Indian Energy and Economic Development. The requirements for the TERA application and proposed agreement are itemized in 25 CFR 224.53 and 25 CFR 224.63. Tribes must describe the expertise to be used for the development of energy resources, including evaluation of the cultural and environmental effects of proposed leases and other agreements

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<sup>125</sup> *About Tribal Energy Resource Agreements*, TRIBAL ENERGY AND ENVIRONMENTAL INFORMATION, <http://teeic.anl.gov/abouttera/index.cfm>.



under the TERA. The TERA must include an environmental review process for all individual agreements for energy development, and a provision to establish and ensure compliance with the environmental review process. The environmental review process must ensure that the tribe will:

1. Identify and evaluate all significant environmental effects, including effects on cultural resources, arising from expected development agreements;
2. Identify proposed mitigation measures for cultural and environmental impacts;
3. Inform the public and provide opportunity for public comment on the environmental impacts of the proposed development activity;
4. Provide for responses to relevant and substantive public comments before final approval of the development activity by the tribe;
5. Provide for sufficient administrative support and technical capability to carry out the environmental review process; and
6. Develop adequate oversight of energy resource development activities conducted by outside parties to determine whether the activities comply with the TERA and applicable federal and tribal environmental laws.

The TERA must also provide for periodic reviews of its effectiveness, along with a process for regulatory enforcement and appeals by interested parties.<sup>126</sup> Approval decisions on TERAs are typically issued within nine months of the tribe's submission of a completed application to the Office of Indian Energy and Economic Development.

In addition to providing tribes more control over revenue from traditional oil and gas leases, TERA agreements—combined with the sovereign power of tribes to enact more efficient processes for project review and implementation—provide the opportunity to create unique economic development projects related to fossil fuels. Within the lands of the Fort Berthold Reservation in North Dakota, the Three Affiliated Tribes of the Mandan, Hidatsa, and Arikara Nation are presently working to build a new oil refinery—something that has not been accomplished anywhere in the United States for nearly forty years. When completed, the facility will allow

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<sup>126</sup> See 25 C.F.R. § 224 (2013).

oil producers in the Dakotas and Canadian fields to save hundreds of miles of travel and the logistical expense of shipping raw crude to current refineries in Oklahoma and the Gulf Coast area.

### **Solar Power**

The sun is an abundant energy source, and current technologies in solar energy systems can generate electricity even in the cloudiest areas of the country. Typical systems are either “concentrating” or “photovoltaic.” Concentrating solar power technologies convert solar energy into electricity by using mirrors to focus concentrated sunlight onto a receiver, which then transfers the heat to a converter that produces electricity. Concentrating systems can be used to generate electricity for a variety of applications, ranging from remote power systems as small as a few kilowatts up to grid-connected power plants producing hundreds of megawatts. The cost of installing concentrating plants dictates that systems of tens of megawatts in size must be constructed to obtain competitive energy pricing, making them viable only for large-scale community power projects. Photovoltaic systems are the “solar panel” technology, which is typically used for smaller applications like home power generation or operating individual electric-powered devices. The cost of electricity from photovoltaic systems has dropped significantly over time, and grid-connected systems currently sell for about \$5 to \$10 per peak watt (twenty to fifty cents/kWh), including support structures. They are highly reliable and last twenty years or longer.

Solar power is in broad use in tribal communities, particularly in the Southwest where sunshine is abundant but connectivity to power grids is not. The Navajo Tribal Utility Authority has installed dozens of solar power systems in remote homes throughout the Navajo Nation, providing power throughout the 25,000-square-mile Navajo reservation, which includes thousands of homes that lack a traditional electrical power connection.<sup>127</sup> The increasing availability of affordable systems, along with grant and low-cost loan funding programs, makes solar energy an attractive power source for tribes.

To determine the viability of solar technology for energy generation, tribes can utilize the Hybrid Optimization Model for Electric Renewables (HOMER)

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<sup>127</sup> *Navajo Utility Installs 63 Solar and Wind Power Systems*, EERE (June 9, 2004), [http://apps1.eere.energy.gov/news/news\\_detail.cfm/news\\_id=6926](http://apps1.eere.energy.gov/news/news_detail.cfm/news_id=6926).

system.<sup>128</sup> The system is a free web-based computer model that assists in evaluating design options for both off-grid and grid-connected power systems for remote, stand-alone, and distributed generation applications. The system's algorithms allow tribes to evaluate the economic and technical feasibility of a large number of technology options and account for variations in technology costs and energy resource availability.

## Wind Energy

Depending on the regularity and strength of typical wind activities in their location, wind power can be a viable option for native communities. Capturing energy from wind has many advantages: wind is free, clean, often powerfully abundant depending on the location, and wind turbines do not produce harmful emissions. It also has disadvantages relative to other power generating systems: wind output is not steady, windmills are often large and unsightly on the landscape, and the expense involved in purchasing turbine equipment is significant. Tribes must therefore perform significant due diligence to determine whether wind power can offer a sustainable and cost-effective source of energy.

Wind energy can offer native communities a measure of independence from local utilities. "Hybrid" wind energy systems supply off-grid power for homes, offices, and other applications in areas that are far from the nearest utility lines.<sup>129</sup> An off-grid hybrid system may be beneficial for tribes when:

- Located in an area with an average annual wind speed of at least nine mph (four m/s).
- Where an electrical grid connection is not available or can only be made through an expensive extension. The cost of running a power line to a remote site to connect with the utility grid can be prohibitive, ranging from \$10,000 to \$50,000 per mile.

The Wind Energy Payback Period Workbook<sup>130</sup> is a spreadsheet tool tribes can use to analyze the economics of a wind power generation system and decide

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<sup>128</sup> *Optimizing Clean Power Everywhere*, HOMER ENERGY, <https://analysis.nrel.gov/homer/>.

<sup>129</sup> *Can I Go "Off-Grid"?*, OPEN ENERGY INFO, [http://en.openei.org/wiki/Small\\_Wind\\_Guidebook/Can\\_I\\_Go\\_Off-Grid](http://en.openei.org/wiki/Small_Wind_Guidebook/Can_I_Go_Off-Grid).

<sup>130</sup> NREL, WIND ENERGY PAYBACK PERIOD WORK, available at <http://www.nrel.gov/wind/>

whether wind energy will work for the desired application. The spreadsheet inputs include data on financing the system, the characteristics of the proposed site, and the properties of the system. The program then provides a payback estimation measured in years: if the number of years required to regain the capital investment in the wind equipment is greater than the life of the system, wind energy is not economically practical for that scenario.

Information and resources to assist tribes in assessing the viability of wind power systems for meeting their energy needs are available through the DOE's Tribal Energy Program.<sup>131</sup>

### **Biomass and Waste-To-Energy**

Biomass refers to raw organic material used to generate a number of energy resources, including heat, liquid or gaseous fuels, and electricity. Energy stored in biomass can be converted directly to: 1) heat through burning, 2) liquid or gaseous fuels, and 3) generate electricity. Biomass energy applications can be implemented on a small scale, such as within individual buildings, or on a large scale to generate ethanol, biodiesel, biogas, or electricity for an entire community. Waste-to-energy systems employ similar technologies and utilize processed refuse materials as the feedstock for energy production. Biomass and waste-to-energy systems are probably the most universally available form of community power generation for tribes, as they are not limited to specific geographic areas or climate conditions and can be set up inside buildings.

Funding opportunities for the creation of biomass energy systems<sup>132</sup> are available through the DOE's Biomass Program,<sup>133</sup> which also offers technical assistance and project analysis for tribal communities interested in pursuing biomass projects. Utilizing federal funding and development assistance, tribes can successfully implement biomass and waste-to-energy projects that are specifically designed for their local conditions. In Washington State, the Tulalip Tribes have installed an anaerobic digester system that utilizes the waste

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docs/spread\_sheet\_Final.xls.

<sup>131</sup> *Wind Turbines*, TRIBAL ENERGY PROGRAM, [http://www1.eere.energy.gov/tribalenergy/guide/wind\\_turbines.html](http://www1.eere.energy.gov/tribalenergy/guide/wind_turbines.html).

<sup>132</sup> *Financial Opportunities*, BIOENERGY TECHNOLOGIES OFFICE, [http://www1.eere.energy.gov/biomass/financial\\_opportunities.html](http://www1.eere.energy.gov/biomass/financial_opportunities.html).

<sup>133</sup> BIOENERGY TECHNOLOGIES OFFICE, <http://www1.eere.energy.gov/biomass/>.

produced by cows on local dairy farms. The tribe obtained a \$500,000 grant from the USDA for the feasibility study and business plan, a \$3 million low-interest renewable energy loan for construction and equipment costs, and sited the digester on land obtained through donation of a state-owned dairy farm.<sup>134</sup> The tribes' system now powers a 450KW generator (with the potential to increase to 1.2MW) that produces enough electricity for hundreds of homes, and generates revenue for the tribes' power company through the sale of surplus electricity to local utilities, the sale of solidified waste by-products such as fertilizer, and the sale of carbon credits.<sup>135</sup>

### Selling Electrical Power to Local Utilities

Beyond the direct benefit of providing free or low-cost energy to tribal members and businesses, tribes that generate their own electricity can obtain an additional stream of revenue by selling surplus power to the local public utility. The Public Utility Regulatory Policies Act of 1978 and the Federal Energy Regulatory Commission's Order 888 require utilities to purchase power supplied by independent power producers. Tribes whose generation facilities produce excess electricity can enter into a Power Sales Agreement (PSA)<sup>136</sup> with the utility that controls the local electrical grid. The price the utility will pay for the tribe's electricity is negotiable and subject to various factors including the amount of power available, the reliability of transmission, and whether the utility can exercise "first rights" to the energy produced. PSAs are generally long-term agreements of twenty-plus years, with options for extensions.

Tribes can enter into a PSA with the local utility for the power output from a tribal energy project before the project is completed. This approach is advantageous both for the long-term economic viability of the project, and to obtain the initial capital financing to build the project. Lenders typically request proof that an electricity generation project will have a stable revenue stream upon completion before they will provide funding for project construction. An executed PSA to sell energy to the local utility can fulfill this requirement.

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<sup>134</sup> QUALCO ENERGY, <http://qualco-energy.org/about-qualco/>.

<sup>135</sup> Bryan Sims, *Qualco Energy Biogas Project is Paying Off*, BIOMASS MAGAZINE (Jan. 10, 2011), <http://biomassmagazine.com/articles/5217/qualco-energy-biogas-project-is-paying-off>.

<sup>136</sup> Hawaiian Electric Company, *Model Power Purchase Agreement for Renewable Energy Projects* (June 2008), available at <http://www.heco.com/vcmcontent/GenerationBid/HECO/FinalRenewableModelPPA.pdf> (model PSA).

## Forming a Tribal Utility

Tribes whose energy projects will supply community-wide power and/or produce surplus electricity for sale may benefit from creating and operating their own utility.<sup>137</sup> Pursuant to The Energy Policy Act of 1992, tribes are authorized to form utilities to manage their energy resources and participate in the market for electricity. Throughout the United States, there are now numerous tribes that operate their own utilities and provide affordable power to their members and businesses. Creating a utility can provide significant benefits for native communities, including new revenue streams, tribal employment, enhanced conservation and energy efficiency, resource development, as well as improved power infrastructure and service.

As with any business venture, tribes must have a clear vision, specific goals, and the means to measure outcomes before developing their own utility. Basic questions to consider include:<sup>138</sup>

- What will the utility do: provide power to community members, subsidize business energy needs, and/or sell power for revenue?
- What form of utility will work best: non-profit, for-profit, or tribal government agency?
- Which method(s) of power generation will be most cost-effective, and what systems are needed?
- What business partnerships and government-to-government agreements are needed for operations?
- How much financing is available for start-up and capital infrastructure costs?

Tribal utilities offer the potential for direct control of the community's energy resources, as well as significant new revenue streams to support economic development. Native-owned utilities throughout the United States are currently grossing millions of dollars from their energy management activities,

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<sup>137</sup> Current guidance on the operation of Tribal utilities can be found in the IEED's handbook *Establishing a Tribal Utility Authority* by Leonard S. Gold: <http://www.utility-strategies.com/downloads/Web-TUA%20Formation%20Handbook.pdf>

<sup>138</sup> A detailed examination of tribal utility formation and case studies can be found in Christopher Clark Deschene, *Tribal Utility Overview*, [http://apps1.eere.energy.gov/tribalenergy/pdfs/tribal\\_business/tribal\\_utility\\_overview\\_0811.pdf](http://apps1.eere.energy.gov/tribalenergy/pdfs/tribal_business/tribal_utility_overview_0811.pdf).

and are developing innovative approaches beyond the traditional sale of electricity. The Navajo Tribal Utility Authority sells Renewable Energy Certificates in the commodities market;<sup>139</sup> the Tulalip Tribes' Qualco Energy venture sells the aforementioned carbon credits and biomass by-products; and the Fort Mojave Tribe's Aha Macav Power Service has created a Geographic Information Systems Service Center<sup>140</sup> that can provide detailed utility infrastructure data for the surrounding region.

One of the most beneficial activities a tribal utility can undertake for economic development is to serve as the central coordinator for energy efficiency improvements in the community. Working with agencies like DOE and HUD, tribal utilities can obtain funding and equipment<sup>141</sup> to upgrade the electrical systems and weatherization<sup>142</sup> of homes and businesses, thereby lowering their members' monthly electric bills and making more power available to sell to the local utility. Tribal utilities can access grants and technical assistance for energy efficiency improvements through the Weatherization Assistance Program.<sup>143</sup>

The formation of a tribal utility requires the creation of sections in the tribe's legal code to authorize and govern the operations of the utility.<sup>144</sup> The code sections should include the utility's purpose, powers and obligations, corporate structure, leadership structure, and accounting responsibilities. The code provisions should be consistent with and facilitate the business and service goals of the utility, and can be created in conjunction with the strategic visioning process described above.

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<sup>139</sup> *Navajo Tribal Utility Authority Sells Renewable Energy Certificates*, NATIVE NEWS NETWORK (June 14, 2012, 7:30 AM), <http://www.nativenewsnetwork.com/navajo-tribal-utility-authority-sells-renewable-energy-certificates-to-salt-river-project.html>.

<sup>140</sup> *AMPS Utility Management*, TRIBAL ENERGY PROGRAM, [http://www1.eere.energy.gov/tribalenergy/guide/cs\\_amps\\_amps\\_utility.html](http://www1.eere.energy.gov/tribalenergy/guide/cs_amps_amps_utility.html).

<sup>141</sup> *Tribes*, U.S. DEP'T HOUSING & URBAN DEVELOPMENT, <http://www.hud.gov/energystar/tribes.cfm>.

<sup>142</sup> NATIONAL RENEWABLE ENERGY LABORATORY (NREL), HOME ENERGY UPGRADES PROJECT UPDATE, [http://apps1.eere.energy.gov/tribalenergy/pdfs/tribal\\_community/home\\_energy\\_upgrades\\_nrel.pdf](http://apps1.eere.energy.gov/tribalenergy/pdfs/tribal_community/home_energy_upgrades_nrel.pdf).

<sup>143</sup> *Weatherization & Intergovernmental Program*, EERE, <http://www1.eere.energy.gov/wip/wap.html>.

<sup>144</sup> Cow Creek Band of Umpqua Tribe of Indians Tribal Legal Code, tit. 30, *available at* [http://www1.eere.energy.gov/tribalenergy/guide/pdfs/uiuc\\_tribal\\_legal\\_code.pdf](http://www1.eere.energy.gov/tribalenergy/guide/pdfs/uiuc_tribal_legal_code.pdf) (sample legal code provisions governing the Umpqua Indian Utility Cooperative).

## Funding for Tribal Energy Development

Each year, the Division of Energy and Mineral Development within the IEED offers grant opportunities through the Energy and Mineral Development Program (EMDP).<sup>145</sup> This program provides financial assistance to tribes and native allottees in evaluating the energy (conventional and renewable) and mineral resource potential on their lands. In turn, this provides tribes and allottees with the information they need to promote economic development, negotiate favorable agreements with partners or investors, and bring energy resources to their communities.

The IEED solicits proposals from tribes and using a competitive review system selects qualified projects for funding. The EMDP projects may include such activities as performing initial exploration and defining potential targets for development; performing market analyses to establish production/demand for a given commodity; providing outreach and education to tribes concerning energy or mineral development issues; performing economic evaluation and analyses of the resource; and promoting completed projects at industry conferences and to prospective partners or investors.

The Rural Energy for America Program's Renewable Energy System Grant and Loan Guarantee program<sup>146</sup> provides financial assistance to tribes for the specific purpose of purchasing, installing, and constructing renewable energy systems. Tribes can obtain loan guarantees and grants to finance biomass, anaerobic digesters, geothermal, hydroelectric (thirty megawatts or less), hydrogen, small and large wind, small and large solar, ocean (including tidal, wave, current, and thermal), and energy efficiency projects.

For tribes interested in creating commercial-scale biofuel operations, the Biorefinery Assistance Program<sup>147</sup> can provide loan guarantees of up to 90 percent of the project cost. To be eligible for financing under the Biorefinery Assistance Program, a project must utilize a technology that is viable for

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<sup>145</sup> *Tribal Grant Program for Evaluating Energy and Mineral Potential of Indian Lands*, U.S. DEPT OF INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DEMD/TT/TF/index.htm>.

<sup>146</sup> *Rural Energy for America Program - Renewable Energy System and Energy Efficiency Improvement Guaranteed Loan and Grant Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_ReapResEei.html](http://www.rurdev.usda.gov/BCP_ReapResEei.html).

<sup>147</sup> *Biorefinery Assistance Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_Biorefinery.html](http://www.rurdev.usda.gov/BCP_Biorefinery.html).



commercial-scale operation or has demonstrated technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel. Advanced biofuels are fuels derived from renewable biomass, other than corn kernel starch, and include:

- Biofuel derived from cellulose, hemicellulose, or lignin
- Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch)
- Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste
- Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat
- Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass
- Other fuel derived from cellulosic biomass

The USDA's Energy Audit and Renewable Energy Development Assistance Grant<sup>148</sup> program provides up to \$100,000 to assist tribal agriculture producers and small businesses with conducting energy audits and providing information on renewable energy development.

Feasibility studies for tribal energy programs can be funded through grants from the USDA's Feasibility Study Grant Program.<sup>149</sup> To help facilitate the development of wind energy in native communities, tribes can participate in the Native American Anemometer Loan Program,<sup>150</sup> which provides tribes with wind-resource measuring equipment at no cost. The anemometers help determine the viability of wind power within the tribe's lands and the best locations for building turbine generators.

Technical assistance for tribal energy projects is available and easy to access through the DOE's technical assistance request web page.<sup>151</sup> This simple

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<sup>148</sup> *Rural Energy for America Program - Energy Audit and Renewable Energy Development Assistance Grant Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_ReapEaReda.html](http://www.rurdev.usda.gov/BCP_ReapEaReda.html).

<sup>149</sup> *Rural Energy for American Program – Feasibility Studies Grant Program*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/BCP\\_Reap\\_FeasibilityStudies.html](http://www.rurdev.usda.gov/BCP_Reap_FeasibilityStudies.html).

<sup>150</sup> *Native American Anemometer Loan Program*, EERE, [http://www.windpoweringamerica.gov/nativeamericans/anemometer\\_loan.asp](http://www.windpoweringamerica.gov/nativeamericans/anemometer_loan.asp).

<sup>151</sup> *Apply for Technical Assistance*, Tribal Energy Program, <http://apps1.eere.energy>.

online form allows tribes to connect with DOE energy experts and the research facilities of the National Energy Laboratories.

In addition to government funding programs, tribal energy projects can offer attractive prospects to private investors. If a project involves the purchase and use of depreciable equipment and improvements—which almost all energy projects do—the tribe can create a depreciation pass-through entity that provides tax-shield benefits for private non-tribal partners. Energy projects are often authorized to issue industrial revenue bonds, which enjoy tax-free municipal status for institutions and investors in the bond market. Tribes can also partner with private developers and venture capital firms on a lease-buyback ownership structure for land and equipment that provides an agreed return to the investors and an exit strategy timeline.<sup>152</sup>

### Strategic Energy Planning

Energy development is a specialized activity that requires the identification and use of locally available resources. Not every form of energy development will be viable in a particular native community, but most tribes have the potential to implement some form of on-reservation energy production. For example, Northwest coastal tribes do not have access to oil and gas deposits like some Alaska Native communities or certain tribes in the Southwest, but weather conditions and local waterways may make wind or hydroelectric power generation feasible. Forms of power generation available to most tribes include waste-to-energy and biomass projects, which can utilize refuse or organic material produced on the reservation and in surrounding communities to provide electricity. There is broad availability of funding and technical assistance for tribal energy projects designed to produce sustainable or “green” power,<sup>153</sup> and the benefit of such projects for tribal economic development is compelling. Simply put, every native community should work to implement some form of energy production for its members and businesses, and take full advantage of government subsidies, available technical assistance, and private partnerships.

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[gov.tribalenergy/request\\_assistance.cfm](http://gov.tribalenergy/request_assistance.cfm).

<sup>152</sup> Marvin J. Hoekema, *Quil Ceda Power Business Planning Considerations*, March 3, 2004.

<sup>153</sup> *Guide to Tribal Clean Energy Development*, EERE, <http://www1.eere.energy.gov/tribalenergy/guide/index.html>.

## Funding for Tribal Housing Development

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Housing is a critical component of every tribal economy. Ensuring tribal members have safe, comfortable, and affordable housing for their families is a fundamental policy objective, and should be a top priority within every native government's economic development strategy. The physical creation and improvement of housing is itself an engine of economic growth, as it provides construction jobs and sends a signal of economic health to potential investors. Businesses want to be located in places where their employees can live in close proximity to the workplace, and native communities that offer a solid base of quality housing have a distinct advantage in attracting new employers.

A consistent challenge in the development of new housing in native communities is the unique legal status of tribal trust land. Most housing development in the United States is financed through construction or mortgage loans provided by private lenders like banks. In exchange for the cash to build or purchase the home, the lender typically places a lien against the property as security for the loan, usually in the form of a deed of trust. If the borrower fails to repay the loan, the lender can then foreclose on the lien and take ownership of the property. This system provides a security incentive to banks to lend money for housing construction and purchases, making credit broadly available for those wishing to build or buy a home.

The problem for tribal housing development is that the standard lien-and-foreclosure system does not work on tribal trust land. By law, land that is held in trust for a tribe by the federal government cannot be liened or foreclosed upon by outside parties. As discussed earlier, this reflects one of

the sovereign powers tribes possess: the ability to prevent the alienation of their lands to outside parties. However, it also eliminates the primary security that banks and other private lenders rely on when providing construction financing and home loans, and lenders therefore must assume greater risk when providing traditional loan financing for housing projects on tribal trust land. The result has been sadly predictable—bank lending for tribal housing development and mortgages has been far less frequent than for the rest of the United States, resulting in many tribal members living in substandard housing on their reservations.

Recognition of this problem has led to the creation of numerous programs specifically designed to help finance housing development within native communities where the housing is located on tribal trust land. There are now several federally-backed capital investment, direct loan, and loan guarantee options to assist tribal housing entities in obtaining funds for new home construction, as well as help families and individual buyers obtain the necessary credit to purchase a new home.

### **Low Income Housing Tax Credits**

In the absence of lien security against tribal land, another financial incentive exists to attract private capital to invest in constructing housing in native communities: tax credits. The Low Income Housing Tax Credits Program (LIHTC)<sup>154</sup> was created to provide private investors with a direct financial benefit for putting their money into the creation of affordable housing, in the form of a dollar-for-dollar credit against their federal tax liability. Pursuant to Section 42 of the Internal Revenue Code, federal housing tax credits are awarded to developers of qualified projects, which can include tribal housing authorities and similar agencies. The tribe then sells these credits to outside investors to raise money to build the projects, which reduces the debt burden the tribe would otherwise have to carry to finance the construction.

If the property continues to remain in use for low-income tribal housing and is in compliance with other program requirements, the investors who financed the project receive a dollar-for-dollar credit against their federal tax liability each year for ten years. The amount of the annual credit is based on

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<sup>154</sup> *HOME and Low Income Housing Tax Credits*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/training/web/lihtc](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc).

the amount invested in the affordable housing. Tax *credits* generally provide a significantly greater financial benefit to investors than tax *deductions*, as the tax credits are applied against the actual amount of tax owed rather than merely adjusting the investor's pre-tax income.

Projects developed using tax credit financing can either be new construction or the improvement of existing housing. To qualify under the LIHTC Program,<sup>155</sup> a project must:

- Be a residential rental property.
- Meet low-income occupancy threshold requirements.
- Limit rents, including utility charges, in low-income units.
- Maintain the rent and income restrictions for thirty years or longer.

The low-income occupancy requirements can be met one of two ways:

- At least 20 percent of the units must be rent-restricted and occupied by households with incomes at or below 50 percent of the area median income; or,
- At least 40 percent of the units must be rent-restricted and occupied by households with incomes at or below 60 percent of the area median income.

Tax credits are only available for the cost of the affordable units within a project, which provides an incentive for as many of the units to be affordable housing as possible. To qualify as “affordable,” the monthly rent for each unit (including a utility allowance) cannot exceed LIHTC rent limits, which are set county by county throughout the United States.<sup>156</sup> The rent limitation only applies to the portion of the rent paid by the tenant, not the total rent. Certain rental assistance programs such as project-based Section 8 contracts can be used to raise the total rent above the LIHTC rent limit. The LIHTC program requires a minimum affordability period of thirty years, and tenant incomes are recertified annually for continued eligibility.

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<sup>155</sup> Details on project eligibility and income limits are available at *Eligibility*, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/training/web/lihtc/basics/eligibility](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/eligibility).

<sup>156</sup> The national rent limit database can be accessed at *LIHTC Maximum Rents and Incomes – Non-New England*, DANTER COMPANY, <http://www.danter.com/TAXCREDIT/getrents.HTML>.

To obtain the private capital to finance a new housing project, tribes can sell the tax credits either directly to an interested investor or to a “syndicate” of investors who act through a representative. The investor(s) must become a part of the entity that owns the property, which is typically accomplished by creating either a limited partnership or limited liability company in which the tribe or Tribal Housing Authority is the managing partner or member. The investor then becomes a “silent” partner in the entity, providing capital while leaving the management of the project and property to the tribe.

### HUD Section 184 Loan Guarantee

Also known as the Indian Home Loan Guarantee Program,<sup>157</sup> Section 184 provides a mortgage loan guarantee to help Native Americans and Alaska Natives obtain private bank financing to purchase or build a home. Since private lenders cannot place a deed of trust against tribal trust land, HUD provides a 100 percent guarantee on the loan, eliminating the possibility of the private lender losing money in the event of a borrower default. This guarantee makes mortgage loans to Native Americans using the program the safest in the country for lenders, and as of 2010 there were more than 12,000 home loans worth a combined \$2 billion under the Section 184 program.

In addition to the 100 percent loan guarantee, other advantages of the Section 184 program include:<sup>158</sup>

- A down payment of only 2.25 percent on loans over \$50,000
- Low interest rates that are not based on a person’s credit scores
- More flexible risk analysis based on the unique issues involving tribal land
- No monthly mortgage insurance
- Protection from unreasonable fees and risky loan structures

To assist its members in obtaining Section 184 loan guarantees, a tribe or Native Association must have certain provisions in its governing codes, including:

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<sup>157</sup> *Section 184 Indian Home Loan Guarantee Program*, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/homeownership/184](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184).

<sup>158</sup> *Tribe and TDHE Section 184 Resources*, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/tribes](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/homeownership/184/tribes).

- Tribal Court jurisdiction over residential property
- A specified area for Section 184 program housing
- Foreclosure, eviction, and leasing procedures
- Tribal Trust and/or Allotted Trust land lease provisions
- Section granting HUD 184 Guaranteed Loans first lien priority
- Authorization for HUD and/or private lenders access to service guaranteed properties
- Acknowledgement that HUD will cease new loan guarantees if the tribe does not enforce its own eviction/foreclosure procedures

Tribes must send copies of the applicable code provisions to HUD's National Office of Native American Programs.

### HUD Section 184A Loan Guarantee

Also known as the Native Hawaiian Housing Loan Guarantee Program,<sup>159</sup> this program mirrors the Section 184 program described above but is directed toward financing housing for Native Hawaiians.

### HUD Title VI Loan Guarantee

This program is designed to assist tribes in creating new housing for members through private financing. Tribes that receive Indian Housing Block Grants (IHBG)<sup>160</sup> are eligible for Title VI loan guarantees. The program has been used to finance new housing developments ranging from the ten-home project constructed by the Native Village of Unalakleet in Alaska to the \$50 million, fourteen-county development undertaken by the Cherokee Housing Authority in Oklahoma.<sup>161</sup>

The tribe uses its IHBG funds as security for repayment of the guarantee obligation. A private lender or investor provides the financing for the tribal housing project, and HUD guarantees the loan. The tribe must repay the

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<sup>159</sup> *Loan Guarantees for Native Hawaiian Housing (Section 184A)*, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/co detalk/onap/program184a](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/co detalk/onap/program184a).

<sup>160</sup> *Indian Housing Block Grant Program*, HUD, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/grants/ihbg](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/grants/ihbg).

<sup>161</sup> *Title VI-Success Stories*, HUD, <http://www.hud.gov/offices/pih/ih/homeownership/titlevi/success.cfm>.

loan directly, and if it fails to do so HUD will repay the lender and deduct the funds from the tribe's future IHBG funds.

To be eligible for a Title VI guarantee, a project must be part of the tribe's Indian Housing Plan that is filed with HUD.<sup>162</sup> An approved Indian Housing Plan qualifies a tribe to receive the Indian Housing Block Grant funding required to be pledged to secure the Title VI guarantee. The guarantee can then be utilized by the tribe to obtain funding for housing development, services, management, safety and crime prevention, and other approved activities. In applying for a Title VI guarantee, the tribe must provide HUD with:

- A detailed project description
- Demonstrated need for the project
- A construction cost estimate
- An operating cost estimate for the completed project
- A description of the sources of funds to be used to repay the loan
- A description of the tribe's administrative capability
- Estimates of the full cost of the project and amount of HUD's loan guarantee.

### **USDA Section 515 Loans**

This Department of Agriculture program<sup>163</sup> provides direct mortgage loans for affordable multifamily rental housing for people in the very low, low, and moderate-income brackets; for the elderly; and for persons with disabilities. Very low income is defined as below 50 percent of the area median income (AMI); low income is between 50 and 80 percent of AMI; moderate income is capped at \$5,500 above the low-income limit. Section 515 funds may also be used to buy and improve land and to provide sanitary facilities such as water and waste disposal systems. Tribes and tribal members are eligible for Section 515 funding to finance housing needs. Tribal projects are more likely to receive Section 515 funding if they incorporate energy conservation systems, and if they are partially financed

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<sup>162</sup> U.S. Dep't Housing and Urban Development, *Indian Housing Plan and Annual Performance Report Form Guidance*, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=ihp-apr-guide.pdf> (Information and application guidance for creation of an Indian Housing Plan).

<sup>163</sup> *Direct Rural Rental Housing Loans*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-Direct\\_Rental\\_Loans.html](http://www.rurdev.usda.gov/HAD-Direct_Rental_Loans.html).



with Low Income Housing Tax Credits or Native American Housing and Self Determination Act funds.<sup>164</sup>

### USDA Section 538 Loan Guarantee

This program provides a 90 percent loan guarantee for private financing of affordable housing. Section 538 guarantees<sup>165</sup> can be used by tribes for construction of new rental housing, land acquisition and improvements, office/maintenance buildings, community and recreation facilities, parking, landscaping, fencing, and the purchase and installation of appliances. The program allows for the purchase and rehabilitation of existing affordable housing when there is at least \$6,500/unit of upgrade work required. Funds guaranteed under the program can be applied to loan fees and costs, professional services, market studies, other project-related fees, and debt refinancing that is necessary to facilitate the project.

Housing created with a Section 538 guarantee must have an affordable rent cap, which must be maintained for the life of the original loan even if the loan is repaid early. Tenancy in Section 538 housing is limited to people whose income is equal to or less than 115 percent of the local adjusted median income. Once a tenant is accepted, there is no further income restriction or any requirement for tenant income verifications or certifications. The project's average monthly rent (including a utility allowance) must be less than or equal to 30 percent of the applicable adjusted median income, and the maximum monthly rent (with utility allowance) must be less than or equal to 30 percent of 115 percent of the adjusted median income. These affordability requirements must be recorded in a deed restriction for the property.

### USDA Section 502 Direct Loans

Section 502 loans<sup>166</sup> help low-income families obtain home ownership by providing direct financing to purchase homes; build, repair, renovate or relocate

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<sup>164</sup> USDA RURAL DEVELOPMENT, *Fiscal Year 2011 Pre-application for Section 515 Rural Rental Housing Program*, available at

[http://www.rurdev.usda.gov/supportdocuments/515\\_%20RRH\\_Preapplication\\_FY2011.pdf](http://www.rurdev.usda.gov/supportdocuments/515_%20RRH_Preapplication_FY2011.pdf).

<sup>165</sup> “538” Program Overview, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/ca/pdf%20files%20and%20documents/538\\_Overview.pdf](http://www.rurdev.usda.gov/ca/pdf%20files%20and%20documents/538_Overview.pdf).

<sup>166</sup> *Direct Housing Loans*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-Direct\\_Housing\\_Loans.html](http://www.rurdev.usda.gov/HAD-Direct_Housing_Loans.html).

a home; or to purchase and prepare a site for a home, including installing water and sewage systems. These loans are available to people with very low or low incomes—very low income being defined as below 50 percent of the area median income, and low income being between 50 and 80 percent of the area median income. Under the Section 502 program, housing must be “modest” in size, design, and cost, cannot have a market value in excess of the applicable area loan limit, and certain features are prohibited. Houses must meet the applicable state building codes and USDA standards.

To qualify for a Section 502 loan, a family must be without adequate housing at the time of their loan application,<sup>167</sup> yet still be able to afford the mortgage payments for the home they wish to finance. The USDA’s current standard for a typical mortgage payment is 24 percent of an applicant’s income. Applicants may be eligible for a mortgage payment subsidy from the USDA to help them meet this standard. People receiving Section 502 loans need to show they have been denied affordable financing from other lenders, as well as have a “reasonable credit history”.

The terms of Section 502 Loans are for up to thirty-three years (or thirty-eight years for those with incomes below 60 percent of the area median income and who cannot afford thirty-three-year terms). For manufactured homes, the maximum loan term is thirty years. The interest rate for the loan is set by the USDA based on the federal borrowing rate, though it can be altered by the available payment assistance subsidy.

### **USDA Section 502 Guaranteed Loans**

This is a companion program to the Section 502 Direct Loan program, and provides a loan guarantee to a private lender instead of providing a direct mortgage loan.<sup>168</sup> The homebuyer arranges financing with a bank or other mortgage lender, and the USDA guarantees the loan will be repaid by the government in the event of default. This program is geared toward families with higher incomes than those eligible for Direct Loans, and applicants for

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<sup>167</sup> Form RD 410-4, Application for Rural Assistance (Nonfarm Tract), Uniform Residential Loan Application, <http://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD410-4.PDF> (application forms for Section 502 loans).

<sup>168</sup> *Guaranteed Housing Loans*, USDA RURAL DEVELOPMENT, [http://www.rurdev.usda.gov/HAD-Guaranteed\\_Housing\\_Loans.html](http://www.rurdev.usda.gov/HAD-Guaranteed_Housing_Loans.html).

Guaranteed Loans may have an income of up to 115 percent of the median income for the area. Loan terms are a maximum thirty years, the interest rates are negotiated between the borrower and lender, and no down payment is needed. The same Section 502 house construction and design standards apply.

### VA Native American Direct Loan Program

Native veterans have access to several home ownership financing programs sponsored by the Veterans Administration. In addition to the standard VA home purchase and refinancing programs,<sup>169</sup> the Native American Direct Loan Program was created specifically to assist native veterans and their families obtain a home loan for properties located on tribal trust land.<sup>170</sup> VA home loans under this program allow eligible veterans to borrow up to \$417,000 for the purchase or improvement of a home. Two important aspects of this program are:

- Native American Direct Loans are only available for veterans of a given tribe if a memorandum of understanding exists between the tribal government or housing agency and the VA.<sup>171</sup> Tribes should proactively contact the VA to enter into the required MOU to enable this program to benefit the tribe's veterans.
- Veterans who are not Native American, but who are married to Native American non-veterans, may be eligible for a mortgage under this program if both people reside on tribal trust land.

VA mortgage loans require no down payment, no private mortgage insurance, have low closing costs, and generally lower interest rates than conventional mortgages. Veterans who receive a pension or other financial benefits from the VA can elect to have their monthly mortgage payments deducted automatically from their VA payments.

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<sup>169</sup> *Purchase and Cash-Out Refinance Home Loans*, U.S. DEP'T VETERANS AFFAIRS, <http://www.benefits.va.gov/HOMELOANS/purchasecashout.asp?expandable=0&subexpandable=0>.

<sup>170</sup> *Native American Direct Loan*, U.S. DEP'T VETERANS AFFAIRS <http://www.benefits.va.gov/HOMELOANS/nadl.asp?expandable=0>.

<sup>171</sup> A sample form for the memorandum of understanding is available here: Sample Memorandum of Understanding, <http://www.benefits.va.gov/HOMELOANS/documents/docs/mou.pdf>.

## VA Disability-Adapted Housing Grants

For veterans who have suffered disabilities due to service-connected injuries or conditions, the VA provides grants to adapt their homes (or build a custom-adapted home) to accommodate the disability.<sup>172</sup> The confusingly similar Specially Adapted Housing (SAH) Grant and Special Housing Adaptation (SHA) Grant programs provide annual funding for the cost of constructing new features in a residence to allow veterans full access and use of the home. SHA and SAH grants provide different levels of funding based on the disability condition, and veterans can access grants up to three times within the maximum funding allocation.

To create broad-based housing solutions and produce the greatest positive impact for the community, tribes should serve as a centralized housing development and information center for their members. Many tribes have formed Tribal Housing Authorities or similar entities to obtain funding and coordinate the construction of new community-owned housing, and to assist members in qualifying and applying for the loan and loan-guarantee programs described above. Native home purchase programs are substantially underutilized each year, and an unfortunately large number of Native Americans continue to live in substandard housing despite being eligible for home ownership and improvement financing. A proactive approach by the tribal government to provide information on home financing programs can do much to help families obtain the funding needed to secure stable housing.

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<sup>172</sup> *Housing Grants for Disabled Veterans*, U.S. DEP'T VETERANS AFFAIRS, <http://www.benefits.va.gov/HOMELOANS//adaptedhousing.asp?expandable=0>.

## Secured Transactions in Native Communities

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Secured transactions are an integral part of the modern credit economy, and millions of secured transactions between buyers/sellers and borrowers/lenders occur every day. The premise of the secured transaction is that a seller/lender provides financing to a buyer/borrower to purchase or otherwise take possession of a good, and the seller/lender retains a legal ownership interest in the good until the buyer/borrower pays for it in full. Common secured transactions include car loans, where the vehicle is in the possession and use of the person who buys it but the bank keeps its name on the title certificate until the loan is repaid. The car itself is considered the “security” for the loan, as legal ownership of the car has not yet been transferred to the buyer. If the loan is not repaid, there is typically a right of repossession by the bank, thereby making the loan “secured” by the vehicle. In most jurisdictions of the United States, the laws regarding how secured transactions are made and enforced are incorporated into a state version of Article 9 of the Uniform Commercial Code.<sup>173</sup> These laws provide a detailed set of rules that help give commercial sellers/lenders the confidence to offer credit to purchasers for business development activities, knowing that there is a legal recourse in the event of a buyer/borrower default.

The ability to conduct secured transactions is crucial for businesses, as it allows them to obtain materials and equipment on credit instead of having to pay for everything up front in cash. Unfortunately for native-owned businesses, far fewer secured transactions take place in tribal communities

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<sup>173</sup> U.C.C. art. 9 (2010, available at <http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20>).

than the rest of the United States, which is a significant obstacle for tribes in growing their business enterprises. A primary reason for the lack of secured transactions is essentially the same as for the lack of home mortgages—the laws that apply on reservations are different from those in the rest of the country, and lenders fear they will not be able to repossess property or otherwise collect on a tribal debt if there is a default. As a result, when an on-reservation business seeks to obtain goods or equipment on credit from a commercial supplier, the answer too frequently is “No.”

To overcome this obstacle, tribes and native associations can and should implement their own secured transactions laws. Having a secured transactions code—along with a well-established body of case law for interpreting it—can help give lenders the confidence to extend credit to businesses and other customers within the reservation just as they do for those outside. As a starting point for implementing these crucial laws, the National Conference of Commissioners on Uniform State Laws has created a template specifically for tribes: The Model Tribal Secured Transactions Act (MTSTA).<sup>174</sup>

### **The Model Tribal Secured Transactions Act**

The MTSTA is the result of a multi-year effort by attorneys, legal scholars, and tribes to create a set of codes that would allow for secured transactions to occur within the legal conditions of native communities. The work was undertaken in 2001 by a drafting committee in cooperation with representatives of numerous tribal nations including the Navajo, Cherokee, Crow, Oneida, Chickasaw, Odawa, Sac and Fox, Chitimacha, Warm Springs, and several Rancherias in California. The goal was to create a set of model laws that were similar enough to standard UCC Article 9 provisions that commercial lenders would be comfortable, and to have those laws tailored to the needs and circumstances of tribal communities.<sup>175</sup> The result is a comprehensive model secured transactions code that tribes can customize and adopt as part of their body of laws.

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<sup>174</sup> Commentary and guidance on how tribal communities can implement the MTSTA can be found at NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT (2005), available at [http://www.uniformlaws.org/shared/docs/mtsta/mtsta\\_implement\\_guide\\_jun05.pdf](http://www.uniformlaws.org/shared/docs/mtsta/mtsta_implement_guide_jun05.pdf).

<sup>175</sup> *Id.* at 14.

The sections of the MTSTA closely resemble the typical UCC Article 9 provisions and organizational structure, again for consistency with the rules commonly in use for commercial transactions. The sections of the MTSTA include:

- Part 1: General Provisions and Definitions
- Part 2: Effectiveness, Attachment, and Rights of Parties
- Part 3: Perfection and Priority
- Part 4: Rights of Third Parties
- Part 5: Filing
- Part 6: Default
- Part 7: Miscellaneous Provisions

Each part of the MTSTA has numerous subsections that provide the rules and process for the specified elements of secured transactions covered within that part. The drafters of the MTSTA also included sample forms for financing statements and filings.

### **Adopting the MTSTA**

A secured transactions code is a law, and it becomes part of a tribe's overall body of law. A native government adopts its version of the MTSTA with the same process and authority used to adopt any other standing law that will apply within the community. As a "model" code, the MTSTA is not intended to be adopted as-is by any native government. Instead, it provides a base set of provisions that can and should be customized to work within a tribe's own legal, business, and cultural framework. The MTSTA is the starting point for creating a secured transactions code, and the tribal government should review its provisions with its political leaders, legal advisors, and business owners to determine which terms need to be amended and supplemented to work effectively within the tribe's desired paradigm. If the tribe already has codes that pertain to business transactions, those codes should be reviewed in conjunction with the MTSTA to ensure consistency and eliminate a conflict between different laws. Existing laws that touch on loans and security interests can be incorporated into or superseded by the tribe's new secured transactions code.

In addition to crafting appropriate legal provisions, an important practical consideration for tribes in adopting a secured transactions code is where to

file all of the paperwork. As anyone who has ever taken out a car loan can attest, secured transactions produce a great deal of paper to describe the secured property and the financing agreement. After a secured transaction like a car loan has been agreed to between the buyer and seller, the seller needs to publicly record the transaction to “perfect” its secured position, i.e., to tell the world that it has a legal claim against the car until the loan has been paid in full. If the buyer of the car then tries to borrow more money from some other lender and use the same car as security, the other lender can check the secured transactions records first to see if the original lender still has a claim. It is therefore necessary to have an efficient and publicly accessible record-keeping system for secured transactions filings. Tribes that implement a secured transactions code can manage their own filing system if they choose, but many instead allow the use of the local state’s system to eliminate the administrative burden on the tribal government. Given that most commercial lenders will already be familiar and comfortable with the state filing system, this can be helpful in encouraging the lenders to participate in a tribal secured transaction system.

Since a primary purpose of adopting a secured transactions code is to help native businesses access more credit with commercial lenders, once the code is adopted it is critical to proactively advertise that fact to the business community. Business managers within the tribe should be educated directly and thoroughly regarding what the code provides and how it will operate—and indeed it is best if those business leaders are involved and kept informed throughout the process of adopting the code. After the code is adopted, it is equally important to make it easily available to commercial lenders and other credit-extending firms so they can study and understand its provisions. Again, it may be advantageous to bring these outside businesses into the tribe’s adoption process at appropriate points, so the lenders can gain a comfort level that will encourage them to work with native-owned businesses within the tribe’s secured transaction regime. Once the code is adopted, it should be made readily accessible by posting it on the tribe’s public website in a printable format.

### **Key Provisions**

The MTSTA contains numerous provisions that are of specific interest and applicability to native communities, and are designed to facilitate secured



transactions within the unique legal circumstances of tribal jurisdictions. Some key provisions include:

- *Sovereign Immunity*: The MTSTA explicitly identifies and protects the sovereignty of the native government and its agencies, and precludes any unintended waiver of sovereign immunity by participation in secured transactions with outside commercial entities.
- *Property Exemptions*: The model code identifies tribal property and assets that are specifically exempt from any foreclosure or seizure action in the event of a default; e.g., a home located on tribal trust land.
- *Choice of Law*: As discussed further below, the tribal government has the option of defining which case law will be used to interpret its code in the event of disputes.
- *Priority*: In cases where multiple parties have made loans that are secured by the same item(s) of property, the tribe can define which party has first priority for repayment or repossession of the property.
- *Enforcement*: If a secured loan is not repaid, the code provides the rights, methods, and limitations under which the property can be repossessed by the lender.

## Case Law Interpretation

Adopting a customized version of the MTSTA is half of the legal process for encouraging the use of secured transactions in a tribal community—the other half is identifying the body of case law that will be used to interpret the new code. As with any law, disputes will eventually arise regarding the meanings of terms within a tribal secured transactions code, and at some point those disputes will end up in the Tribal Court or other specified venue. When they do, there should be a clear set of case precedents the parties and the judge can look to for interpretations of the facts and issues in the dispute. When a commercial lender is considering whether to participate in a secured transaction with a tribal entity or native-owned business within a reservation, one of the primary questions the lender will ask is “What law applies if we have a dispute?” Having a well-documented secured transactions code will provide the answer for the statutory framework; then the lender will seek to know which body of case law will be used to provide specific guidance for issues within that framework.

While some tribes have long-established court systems that track case decisions in the same manner as state and federal court precedence, many do not. Even tribes that have a significant body of case precedent already published from their Tribal Court decisions likely do not have an extensive record of secured transactions decisions. To remedy the absence of Tribal Court decisions, and to increase the confidence of lenders in the legitimacy and predictability of the tribe's secured transactions regime, a tribal government can simply adopt the case decisions of another jurisdiction and declare them applicable for the interpretation of the tribe's secured transactions code. For example, the state of Delaware has perhaps the most extensive body of corporate-related case law in the United States, and a tribe could incorporate a term in its secured transactions code that provides: "The terms and procedures within this Code shall be interpreted in accordance with the case law decisions issued by the Judiciary of the State of Delaware." This does not mean that disputes arising from a secured transaction will be dealt with in Delaware, but rather the parties can look to Delaware cases for interpretations of disputed issues, and the judges in the Tribal Court (or other specified venue) will use those published case decisions to guide its own judgments. It may be more convenient for the tribe to adopt the case law of the state in which it is located, particularly if the tribe's secured transactions code specifies that the state's filing system will be used for recording security interests. Adopting the local state law does not surrender the tribe's jurisdiction or sovereignty regarding disputes, and that point should be made clear in the appropriate code section.

## 8(a) Companies and Section 17 Corporations

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Thousands of new businesses are started by people throughout the United States each year—and a large percentage do not make it to their second anniversary. Every small business faces significant challenges in becoming organized, finding customers and revenue-generating work, and managing its affairs well enough to grow and become a long-term enterprise. Given that small businesses provide significant services and jobs in native communities, tribal governments have a direct interest in seeing native-owned businesses succeed, and should actively facilitate that success by providing information on opportunities and helping the companies qualify for contracts and technical assistance. Two particular corporate structures offer significant opportunities for tribal business growth and enterprise management: 8(a) companies and Section 17 corporations.

### 8(a) Companies

One of the primary programs designed to assist native-owned businesses grow successfully is the federal 8(a) Business Development Program, which is managed by the Small Business Administration. Federal policy mandates that the US government allocate a significant percentage of its annual procurement dollars to contracts with small businesses, and in 2010, US government agencies issued more than \$18 billion in contracts to 8(a)-qualified companies.<sup>176</sup> The 8(a) program is designed to provide technical

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<sup>176</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO12-84, FEDERAL CONTRACTING: MONITORING AND OVERSIGHT OF TRIBAL 8(A) FIRMS NEED ATTENTION 1 (Jan. 2012), available at <http://gao.gov/assets/590/588101.pdf>.

assistance and federal contracting opportunities to small businesses that are owned by “socially and economically disadvantaged individuals.”<sup>177</sup> Under SBA regulations, Native American, Alaska Native, and Native Hawaiian entrepreneurs are usually automatically qualified for the 8(a) program within this definition. In addition, business enterprises that are owned by tribes, Alaska Native corporations, and Native Hawaiian organizations are also qualified for the 8(a) if they are within the size definition of “small business.” In 2010, the total value of federal contracts issued to native 8(a) companies exceeded \$5.5 billion.<sup>178</sup>

The 8(a) Business Development Program provides technical assistance and contracting opportunities to companies that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals. The goal of the program is to help disadvantaged small business owners build the capacity to participate in government contracting. Participants can receive sole-source federal contracts, and there is no dollar limit for these contracts for native 8(a) companies. 8(a) companies can also partner or joint venture with established companies to compete for larger contracts and/or work that is beyond the company’s current experience capability.

Participation in the program is divided into two phases: a four-year developmental stage and a five-year transition stage. In the developmental stage, 8(a) companies can obtain business development assistance provided by the district offices of the SBA located around the country. SBA technical experts can offer guidance on organizational structuring, technical performance issues, financial management, and procurement assistance. There is also a Mentor-Protégé program that pairs new 8(a) companies with established firms that can provide real-world lessons for improving competitiveness.<sup>179</sup> In the transition stage, the company is expected to begin growing its business using its own know-how, and over time have an increasing portion of its work come from private sources rather than the federal government. After the nine-year period of the two stages is finished, the company “graduates” from the 8(a) Program, and is no longer able to access the program’s technical and contracting assistance.

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<sup>177</sup> *8(a) Business Development Program*, SBA.GOV, <http://www.sba.gov/content/about-8a-business-development-program>.

<sup>178</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-84, *supra* note 176.

<sup>179</sup> *Mentor-Protégé Program*, SBA.GOV, <http://www.sba.gov/content/mentor-protege-program>.

8(a) companies are responsible for maintaining their ownership eligibility and for marketing their products and services to the federal government and the private sector. In addition to demonstrating that it is owned by a tribe or qualified native persons, the company must:

- Be a “small business” as defined by the SBA’s size standards;<sup>180</sup>
- “Demonstrate a potential for success,” which is typically judged by already being in business for at least two years.

The SBA recommends that companies interested in participating in the 8(a) Program first complete an online training and self-evaluation course.<sup>181</sup> The course explains the 8(a) Program in detail, and gives companies a set of yes/no questions to help evaluate whether they are eligible to participate in the program. If some of the eligibility criteria are not met, the course site can provide alternative resources within the SBA to assist with obtaining eligibility.

The application for the 8(a) program is usually submitted electronically,<sup>182</sup> although a paper application can be submitted through the SBA district offices. Assistance with the application can be obtained via e-mail by contacting [BDMIS@sba.gov](mailto:BDMIS@sba.gov), and general information on program requirements can be obtained by contacting [8aBD@sba.gov](mailto:8aBD@sba.gov).

Unlike most 8(a) corporations that are owned by individuals, Native American tribes, Alaska Native corporations, and Native Hawaiian organizations can also own and operate 8(a) businesses. This can provide a powerful tool for economic and community development, as the profits from the company can be allocated to benefit an entire native community rather than just a few owners. 8(a) companies that are owned by tribal governments can issue dividend payments to all tribal members, or dedicate funds to particular needs or projects within the community. In Alaska, ANC-owned 8(a) companies have distributed millions of dollars in profits

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<sup>180</sup> *Small Business Size Standards*, SBA.GOV, <http://www.sba.gov/category/navigation-structure/contracting/contracting-officials/eligibility-size-standards>.

<sup>181</sup> SBA, *8(a) Business Development Program Sustainability Tool*, available at <http://imedia.sba.gov/vd/media1/training/sbdtool/player.html>.

<sup>182</sup> *8(a) Business Development Program Certification*, SBA.GOV, <https://sba8a.symplcity.com/applicants/guide>.

to individual Alaska Natives throughout the state, and they pay hundreds of millions of dollars in wages to local employees.<sup>183</sup>

Developing a close relationship with the local SBA office is a key strategic approach for tribal governments for promoting the long-term growth of small business enterprises within their communities. Tribal governments and business enterprises should seek out small native-owned businesses within their communities, and provide information on the 8(a) program to companies that may qualify for and benefit from the technical assistance and contracting opportunities. Tribes can also advertise partnering opportunities to non-native firms that may be interested in joint-venture endeavors with current or potential tribal 8(a) companies. This approach can help tribal companies gain the necessary experience and resources to compete for federal contracts, and it is attractive to non-native businesses that would not otherwise qualify for 8(a) or other sole-source contracting opportunities.

## Section 17 Corporations

Just as tribes can own and operate 8(a) companies for federal contracting work, they can also operate what are known as “Section 17 corporations” to conduct a wide range of business activities in the private sector. This corporate designation takes its name from Section 17 of the Indian Reorganization Act of 1934,<sup>184</sup> which provided tribes with the ability to incorporate a wholly owned business entity and obtain a federal corporate charter from the Secretary of the Interior.<sup>185</sup> Under a Section 17 corporate umbrella, the tribe is the owner of the corporation, but the corporation operates as a separate legal entity from the tribal government. The purpose of the Section 17 corporation is to provide tribal governments with a means of pursuing economic development without sacrificing sovereign immunity or tax-exempt status. As a result, Section 17 corporations have several features that distinguish them from traditional corporations, such as:

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<sup>183</sup> Taylor, *Native American Contracting Under Section 8(a) of the Small Business Act: Economic, Social and Cultural Impacts*, Taylor Policy Group/NACA (2007).

<sup>184</sup> See 25 U.S.C. 477 (2013).

<sup>185</sup> Mark D. Ohre, *When the Location is Tribal a New Law Affects Real Estate Deals in Indian Country*, 10 BUSINESS LAW TODAY (March/April 2001), available at <http://apps.americanbar.org/buslaw/blt/bltmar01ohre.html>.

- Section 17 corporations are exempt from federal taxation.
- They can raise capital through tax-exempt bonds, taxable bonds, tax credit programs, and government-backed loan guarantees.
- They enjoy sovereign immunity except to the extent specifically waived.

Section 17 corporations must be wholly owned by the tribal government, and act as a business arm of the tribe. Once organized, Section 17 corporations can undertake most any form of business activity including buying and selling property, purchasing trust land, leasing tribal lands without approval by the Secretary of the Interior, entering contracts, and any further activities needed to conduct the tribe's business. Section 17 charters can permit the corporation to establish and manage subsidiary corporations, and tribes have operated construction, manufacturing, gaming, and government contracting companies through Section 17 corporations.<sup>186</sup> Unlike 8(a) companies, tribal Section 17 corporations do not need to be "small businesses" and can grow to any desired size and level of revenue.

Section 17 corporations are designed to shield the tribe from liability and the loss of community assets from business activity—and to shield the corporation and its business counterparts from undue interference from the tribal government. The corporation is established by drafting a corporate charter that is submitted for approval to the Bureau of Indian Affairs. The BIA has drafted a model Section 17 corporate charter<sup>187</sup> that tribes can use as a starting point for organizing their own Section 17 corporations. The charter provides for a board of directors that will manage the business activities of the corporation, and the procedures the board will use for doing so. Generally, the official tribal government is not involved in the management of a Section 17 corporation, although there is no legal prohibition against government officers serving on the corporate board of directors.

Managing liability and protecting tribal assets are key elements of the Section 17 corporate structure. The assets held and controlled by the Section 17 corporation are kept separate from the general assets of the tribe, including the

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<sup>186</sup> ATKINSON & NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK, Office of Indian Energy & Economic Development (2008).

<sup>187</sup> BIA's Model Charter, <http://www.bia.gov/cs/groups/public/documents/text/idc-001806.pdf>.

corporation's land, cash, and financial accounts. With this separation, the tribe's assets are not at risk of loss from the activities of the corporation. Similarly, if the Section 17 corporation is sued as a result of its business activities, the tribe itself cannot be held liable for the actions of the corporation and the tribal government maintains its immunity from suit. This is an important legal separation, as Section 17 corporations will often waive at least some of their inherent sovereign immunity to attract non-tribal entities to do business with them. The tribe is also insulated from liability related to the corporation's fundraising, e.g., if the Section 17 corporation issues bonds to raise capital for a business enterprise, the tribe itself is not liable for the repayment of the bond debt in the event the corporation cannot make the payments.

Section 17 corporations offer a useful "umbrella organization" through which a tribe can conduct economic activity. A tribal government can establish more than one Section 17 corporation to undertake different business purposes—and to shield the assets of one corporation from lawsuits or liability related to another. Some tribes have set up single-purpose Section 17 corporations strictly to manage one particular piece of real estate,<sup>188</sup> while others use their corporation to oversee multiple business enterprises including gaming, communications, and native art sales.<sup>189</sup> With their ability to maintain tax-exempt status while insulating the tribe from liability related to business activity, Section 17 corporations should be a primary tool for tribes in implementing their economic development strategies.

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<sup>188</sup> Michael Taylor, The Practical Issues of Business Development - Some Things to Consider: When to Waive Sovereign Immunity (or Not), Building and Sustaining Tribal Enterprises Seminar, University of Arizona (Mar. 29, 2007).

<sup>189</sup> E.g., *Blackfoot Nation's Siyeh Corporation*, <http://www.siyehdevelopment.com/>.



## Tribal Employment Rights Ordinances

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Unemployment remains a chronic problem in native communities. The rate of unemployment among Native Americans living throughout the United States is significantly higher than the national average,<sup>190</sup> with on-reservation unemployment rates often many times higher yet again.<sup>191</sup> Unemployment is a direct factor contributing to numerous negative social conditions within native communities, including poverty, crime, preventable disease, and mental illness. Creating opportunities for meaningful and sustainable work for community members should be a basic goal within every tribe's strategic economic development plan.

A useful tool for tribes in promoting employment is the Tribal Employment Rights Ordinance, typically known as a TERO ordinance.<sup>192</sup> A TERO ordinance establishes legal requirements for the hiring of native people for work performed within a tribal government's jurisdiction, which includes the reservation and sometimes the surrounding local area. Tribes can utilize the TERO ordinance to ensure that native people receive first consideration in hiring by companies wishing to do business on the reservation. Sometimes referred to as "Indian preference" laws, a TERO is

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<sup>190</sup> In 2011, the Bureau of Labor Statistics reported the overall unemployment rate in the United States as 8.9 percent. The unemployment rate for Native Americans and Alaska Natives was 14.6 percent, and 10.4 percent for Native Hawaiians. *Racial and Ethnic Characteristics of the U.S. Labor Force, 2011*, BUREAU OF LABOR STATISTICS (Sept. 5, 2012), [http://www.bls.gov/opub/ted/2012/ted\\_20120905.htm](http://www.bls.gov/opub/ted/2012/ted_20120905.htm).

<sup>191</sup> Chris McGreal, *Obama's Indian Problem*, GUARDIAN (Jan. 10, 2010), <http://www.guardian.co.uk/global/2010/jan/11/native-americans-reservations-poverty-obama>.

<sup>192</sup> A sample TERO ordinance may be reviewed at <http://www.hoopa-nsn.gov/services/tribal-employment-rights-office>

an implementation by a tribal government of its sovereign power to control commerce activity within its lands, and TERO policies have a solid foundation in federal statutes and case law. Tribes are exempt from certain employment discrimination laws such as Title VII of the Civil Rights Act, and under federal law, a native hiring preference policy has been deemed a legally acceptable political preference, rather than an illegal racial preference.

Title VII of the Civil Rights Act of 1964 generally prohibits discriminatory practices in employment based on race, color, religion, sex, or national origin.<sup>193</sup> However, 42 U.S.C. 2000e-2(i) (“Businesses or enterprises extending preferential treatment to Indians”) provides a specific exemption:

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

The Indian Self-Determination and Education Assistance Act<sup>194</sup> provides that all federal contracts or subcontracts with (or federal grants or subgrants to) native organizations, or for the benefit of native people, shall require to the greatest extent feasible: (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to native people, and (2) preference in the award of such contracts or grants shall be given to tribal organizations and to native-owned economic enterprises.<sup>195</sup> 25 C.F.R. section 271.44 provides the federal regulations implementing these requirements of the Indian Self-Determination Act, and directs that preference be given to native people in employment and training and to tribal organizations and native-owned economic enterprises in the award of contracts and subcontracts.

Native hiring preferences are further authorized under the regulations of the Office of Federal Contract Compliance Programs, specifically 41 C.F.R. 60-1.5(a)(7):

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<sup>193</sup> Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 (codified as amended at 42 U.S.C. § 2000e).

<sup>194</sup> 25 U.S.C. § 14, Subchapter II (2013).

<sup>195</sup> 25 U.S.C. § 450e(b) (2013).

Work On or Near Indian Reservations. It shall not be a violation of the equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the work “near” would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor or subcontractor from complying with the other requirements contained in this chapter.

TERO ordinances are instruments of the individual native governments, and can be customized to suit the particular needs and goals of a given community. General provisions found in most TERO ordinances include:

- A requirement that contractors subject to TERO submit a written plan detailing how they will comply with the tribe’s ordinance. The compliance plans are often formatted to be consistent with the affirmative action plans required by the Office of Federal Contract Compliance Programs.<sup>196</sup>
- Working with the TERO office for employee hiring prior to interviewing or hiring non-natives.
- An agreement to hire a minimum number of native workers in specified job classifications, and coordinating with tribal apprenticeship programs to hire a certain number of trainees.
- Using US Equal Employment Opportunity Commission guidelines,<sup>197</sup> employers must eliminate all extraneous job qualification criteria that may act as barriers to native employment.

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<sup>196</sup> U.S. Dep’t Labor, *Sample Affirmative Action Program*, available at <http://www.dol.gov/ofccp/regs/compliance/pdf/sampleaap.pdf>.

<sup>197</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/>.

- Employers who have collective bargaining agreements with one or more unions must secure a written agreement from the unions indicating they will comply with the TERO.
- Employers agree to acknowledge and respect tribal religious beliefs and culture, and to cooperate with TERO to provide reasonable accommodations for native workers.
- Restrictions on layoffs of native workers.
- A process for disputes/appeals of TERO office decisions.
- All companies claiming rights to a contracting preference must register with the TERO for certification as a native-owned business.<sup>198</sup>

TERO ordinances often contain specific and detailed requirements for commercial companies seeking to do business on reservations. For example, the TERO of the Tulalip Tribes has a section related to construction projects that obligates non-tribal construction companies to:

- Negotiate a TERO compliance plan prior to commencing any construction work;
- Give native-owned businesses the opportunity to bid for subcontracts;
- Hire qualified native workers to fill construction trade jobs; and
- Pay the tribes a 1.75 percent TERO fee on all construction projects over \$10,000.<sup>199</sup>

A well-planned and reasonable TERO can provide a boost to tribal employment without pushing away commercial businesses with excessive costs, as evidenced by the large retail stores constructed by Wal-Mart, Home Depot, and Cabela's within the Tulalip reservation.

A TERO ordinance is a law, and is created by an action of the tribal council or governing body of the native community. When creating a TERO ordinance, tribes typically also create a TERO office to administer the law, or place the responsibility for doing so with another employment-related

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<sup>198</sup> *T.E.R.O. Frequently Asked Questions*, COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS, <http://ctertero.org/faq.html>.

<sup>199</sup> TULALIP TRIBAL EMPLOYMENT RIGHTS OFFICE, <http://www.tulaliptero.com/>; Tulalip TERO Ordinance, available at <http://www.codepublishing.com/wa/Tulalip/>.

tribal office. To facilitate the employment of tribal members, a tribe's TERO office should proactively serve as a central resource for both workers and the businesses who would hire them. The TERO office should maintain an up-to-date database of tribal members who are qualified to perform work in different disciplines, so when hiring opportunities arise the right workers can be matched with the right jobs. In industries such as construction where many jobs require complex skills, the TERO office can work with commercial companies to establish an apprenticeship program to help tribal members obtain on-the-job training that will qualify them for future positions. If no tribal workers are qualified to assist with a given business enterprise, the TERO fees collected by the tribe should be dedicated to worker training programs to enhance the base of skills within the tribal employment pool.



## Utilizing Tribal Land for Economic Development

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Land is fundamental to the spiritual and cultural life of every native community, and land is also a fundamental resource upon which to build the community's economic stability. As noted in previous chapters, utilizing tribal land for economic development comes with a unique set of challenges based on the special legal status of land within tribal jurisdictions. Additionally, each reservation or other native community has its own mixed-set of land classifications that have evolved from the days of federal land allotment and termination attempts, resulting in a tremendously complex legal picture for tribal real property ownership throughout the United States.

The first task for tribes to undertake in preparing for land-based economic development is to inventory and understand the legal status of the land within their jurisdictions. Most reservations contain a combination of tribal trust land, native-owned fee simple land, and fee simple land owned by non-natives. This variety of legal designations for land within reservations is often referred to as a “checkerboard” for the way different parcels of land are identified by their legal status on real property maps. Each type of land carries its own requirements and opportunities for economic use, and each tribe's strategic plan for land use should be based on a thorough understanding of its particular mix of land ownership. For tribes whose property ownership records may be incomplete, the Bureau of Indian Affairs operates the Division of Land Titles and Records to assist with tracking land parcel ownership, creating land title status maps, and updating and recording property records.<sup>200</sup>

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<sup>200</sup> *Division of Land Titles and Records*, U.S. DEP'T INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/BIA/OTS/DLTR/index.htm>.

## Leasing Tribal Trust Land

As discussed in previous chapters, tribal trust lands possess a legal status that is designed to keep them in the perpetual ownership of the tribal government and prevent them from being sold off or otherwise alienated from the tribal community. This status was created in response to the results of disastrous federal land allotment policies dating back to the General Allotment Act of 1887, which left many native communities on the verge of disintegration. While trust land carries the security of inalienable tribal ownership, it also carries a development challenge: it cannot be sold to private parties, which limits its attractiveness to business investors. However, trust land can be leased for use by private businesses (whether native-owned or not), and tribes presently can engage in commercial leasing activities with more freedom and flexibility than in the past.

Since tribal trust land is held “in trust” by the federal government for the benefit of tribes, Congress regulates the authority of tribes to lease the property to non-tribal business interests. Until 2012, most tribal land leases were limited to twenty-five years unless special permission was obtained from the Secretary of the Interior. This limited the ability of tribes to attract large commercial manufacturing and retail businesses to reservations, as most companies want to be assured of long-term land security before investing millions of dollars in capital facilities on that land.

On July 30, 2012, President Obama signed the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012.<sup>201</sup> Although the law was primarily intended to help streamline federal housing assistance for at-risk families, it also contained provisions amending the Indian Long Term Leasing Act, 25 U.S.C. § 415. The HEARTH Act authorizes tribes to lease tribal trust land for business and other purposes for up to seventy-five years without review and approval by the Secretary of the Interior. The new leases are to be structured with a twenty-five-year base term and two renewal terms of twenty-five years each. The HEARTH Act is designed to reduce the delays and costs of federal bureaucracy in tribal land leasing, including the complicated environmental and administrative reviews that previously added months to the leasing process.

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<sup>201</sup> <http://www.gpo.gov/fdsys/pkg/BILLS-112hr205enr/pdf/BILLS-112hr205enr.pdf>.



To utilize the extended lease terms authorized by the HEARTH Act, tribal governments must adopt leasing regulations and have them approved by the Bureau of Indian Affairs. The tribe's regulations must be consistent with the federal regulations for tribal land leases found at 25 C.F.R. Part 162.<sup>202</sup> Tribal regulations must include:

- An environmental review process providing for identification and evaluation of “any significant environmental effects of the proposed action on the environment.”
- A process to ensure the public is informed of and has a reasonable opportunity to comment on any significant environmental impacts of the proposed action.
- A requirement that the tribal government will formally respond to relevant and substantive public comments before approving a lease.
- Federal safeguards specified in the HEARTH Act to ensure tribal compliance with leasing regulations and lessee compliance with lease terms.

Under the HEARTH Act, the BIA must take action on tribal lease regulations within 120 days of submittal by a tribe.<sup>203</sup> Once the tribe's leasing code is approved, the tribe no longer needs to submit business leases to the BIA for approval, which allows tribes to negotiate and implement commercial leases faster and with less cost and risk. The availability of seventy-five-year terms for commercial leases is a significant boost for tribes' ability to successfully attract major businesses to their communities, as that long-term land security helps justify capital investment in a company's physical plant. Combined with other business-friendly regulations and employment conditions, tribes can now be more competitive with other communities in bringing “big box” operations to tribal lands.

The HEARTH Act applies to surface leases for business, agricultural, recreational, educational, religious, or residential purposes. Mineral resource exploration, development, or extraction leases are not covered by HEARTH, and operate under the TERA provisions discussed in Chapter 4. Projects on tribal land remain subject to applicable federal environmental regulatory

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<sup>202</sup> See 25 C.F.R. pt. 162 (2013).

<sup>203</sup> This time may be extended by the BIA “after consultation with the Indian tribe.” *Id.*

requirements, including Clean Water Act and Clean Air Act permits and federal reviews triggered by federal agency action.

### **The Cobell Land Buy-Back Program**

One of the legacies of the allotment era is the “fractioning” of land owned by native people throughout the United States. When tribal lands were divided by the federal government into parcels and allotted to individual tribal members, little thought or assistance was provided to help people pass the ownership of those parcels efficiently from generation to generation. For example, a parcel of land that had been owned 100 percent by one person with two children became owned 50/50 by the two children when the original owner passed away. If those two people each had two children, the next generation would have ownership of that same parcel divided between four people with 25 percent shares. Today, there are many thousands of parcels of former tribal land that have dozens—even hundreds—of owners, each holding just a small fraction of ownership in the overall parcel.<sup>204</sup> With so many owners, it is nearly impossible to put the land into beneficial economic use, simply from the inherent difficulty in getting them all to agree on how it should be used. As a result, large areas of useful land within and around reservations lay undeveloped, providing little to no benefit to the community.

The Cobell Settlement, which provides a measure of restitution to Native Americans for decades of mismanagement of trust assets by the federal government, contains a provision designed to help put fractionated land into use by tribal communities. The settlement funds authorized by Congress include a \$1.9 billion Trust Land Consolidation Fund. The Department of the Interior has been tasked with using the Fund in a Land Buy-Back Program for Tribal Nations<sup>205</sup> to acquire fractionated trust land interests from individual people who are willing to sell, and to spend all the money within the Fund on fractional land share purchases within ten years.<sup>206</sup> It is presently estimated that 219,000 Native Americans collectively

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<sup>204</sup> U.S. DEP’T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN LAND BUY-BACK PROGRAM at Appendix B (Dec. 18, 2012), *available at* <http://www.doi.gov/buybackprogram/upload/Initial-Implementation-Plan-508.pdf> (tribe-by-tribe table of the Department of Interior’s estimates of fractionated land shares throughout the United States).

<sup>205</sup> Details and official documents for the Program are available from the DOI at: *Land Buy-Back Program for Tribal Nations*, U.S. DEP’T INTERIOR, <http://www.doi.gov/buybackprogram/index.cfm>.

<sup>206</sup> The ten-year period commenced on November 24, 2012 with the final court approval of the Cobell Settlement.

own 2.9 million fractional interests that are eligible to be purchased by the Fund.<sup>207</sup> After all the fractional interests in a given parcel of land have been purchased and consolidated, the government will turn over the parcel to the local tribal government to add to its tribal trust lands.

The Secretary of the Interior has specified several goals for the Buy-Back Program:

First and foremost, the Buy-Back Program will seek to reduce the number of fractional interests in trust or restricted lands, using reasonable efforts to prioritize the consolidation of the most highly fractioned tracts of land as required by the Settlement. The Buy-Back Program will structure acquisitions to maximize the number of tracts in which the tribe gains a controlling ownership interest in order to unlock the land for beneficial use or conservation by tribal nations. Reducing fractionation will increase the number of acres in tribal land bases, thereby promoting tribal sovereignty and self-determination. In order to best achieve this goal, the Buy-Back Program will target fractionated tracts that are amenable to cost-efficient, mass valuation techniques. The Program also includes the corollary benefit of providing educational scholarship funds to Native American students with each land transaction.<sup>208</sup>

Active involvement by tribal governments is a key element of the Buy-Back program, and tribes need to be closely involved throughout all phases of the process. The Department of the Interior envisions a four-stage process<sup>209</sup> for purchasing the fractionated land shares:

1. *Outreach.* In cooperation with the tribe, DOI will inform individual shareowners that the Buy-Back Program will be valuing land parcels and purchasing fractional interests from those who wish to sell their shares. The Department will

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<sup>207</sup> U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN LAND BUY-BACK PROGRAM, *supra* note 204.

<sup>208</sup> U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN LAND BUY-BACK PROGRAM, *supra* note 204 at 2.

<sup>209</sup> *Id.* at 22.

consult directly with the tribe to ascertain the tribe's priorities for acquisition of land, but the Buy-Back Program cannot force anyone to sell their shares even for tracts identified as tribal priorities. Direct tribal involvement is needed to inform the landowners of the program and generate interest in selling ownership shares for the lands that are tribal priorities.

2. *Land Research.* While outreach is ongoing, the BIA and other departmental agencies will gather data to determine the fair market values of the fractionated tracts within the reservation. To remain efficient and cost effective, the Buy-Back Program may choose not to appraise shares that would require excessive time or cost to complete a valuation. The Department will coordinate with the tribe to ensure tribal priorities are included in the valuation work.

3. *Valuation.* The OST Office of Appraisal Services (OAS) will undertake the valuation of the selected parcels within the reservation, primarily using mass-valuation techniques to establish the fair market value of the properties.

4. *Acquisition.* After the fair market value is established for the parcels, the DOI will send purchase application packets to the people who own interests in those parcels. The application packets will have a specific response deadline date, likely thirty to sixty days after they are mailed. If too few individuals sell their interests at a given reservation, the excess purchase amount will be used at other locations where individuals are willing to sell. If the Buy-Back Program receives too many applications, it will approve applications until the location's purchase ceiling is exhausted, and any remaining applications will be held and processed only if more funds become available.

For each land acquisition effort, the DOI envisions this four-stage process occurring over a period of eighteen months: outreach will continue for the entire period, land research will take one to three months, valuation will take three to twelve months, and acquisition will take three to six months.

The Buy-Back Program will be managed through three DOI acquisition centers located in Aberdeen, South Dakota; Billings, Montana; and Albuquerque, New Mexico.

The Buy-Back Program offers a unique opportunity for tribes to acquire new useful land within their reservations at the expense of the federal government. Once acquired, the land can be put to use in furtherance of any tribal development priority, be it housing, business operations, or community infrastructure. It is critical to recognize that the success of the program will be driven by the proactive involvement of tribal governments. To obtain the full potential benefit of the land purchase funds, tribes themselves need to take the lead in identifying priority properties within their jurisdictions, educating the current owners about the individual and community benefits of the buy-back opportunity, and moving to secure the necessary paperwork from the owners willing to sell their fractional interests.

### **Playing on “The Checkerboard”**

As noted above, many native reservations have extensive parcels of land within their boundaries that are not protected trust land, but are instead standard fee simple lots that can be bought and sold between willing parties. Although this land does not carry the sovereign protection against alienation of trust land, it can actually be economically useful in attracting businesses or other enterprises that require actual land ownership for their operations or are otherwise not interested in a lease arrangement on trust lands.

Tribal governments and their business entities can purchase and hold ownership in fee simple land just like any other party, and tribes can use the funding resources described in this book (as well as their own funds) to acquire property with economic potential within the reservation. After acquiring ownership, it may be in the best interest of the tribe not to apply for trust status for the land, particularly if the characteristics of the acquired parcel(s) make them more economically viable or attractive to outside investors if they continue in fee simple status. Tribes can also act as intermediaries between current fee simple owners and potential purchasers to facilitate the development of the land for a productive business enterprise.

For example, a tribe may have a multi-acre parcel within its reservation that is a promising site for a shopping area, but it is held in private hands and has fee simple ownership status. The tribe has identified outside investors interested in creating a retail center on the site, but who will only do so if they can own the land and buildings in fee simple to enable them to claim federal tax offsets and depreciation deductions. To facilitate the development, the tribe can purchase the fee simple land directly (using its own cash and/or the funding resources identified in this and the previous chapters) and then sell/convey to the investors, or serve as an intermediary for a direct sales transaction between the present owner and the investors. During construction of the shopping center, the tribe's TERO ordinance will help provide trade jobs and training for tribal members. Once the center is built, the tribe can help native entrepreneurs access the grants and technical assistance described in Chapter 2 so they can open their own retail shops in the center. Depending on the tribe's compact agreements with the local state government, the tribe may also obtain sales-tax-equivalent payments from certain retail businesses operating within the center.<sup>210</sup> Even without the land being in full ownership by the tribal government, native communities can therefore obtain numerous and long-term economic benefits from the development of fee simple land within their reservations.

A key legal element of effectively utilizing fee simple land within a reservation is the existence of a well-defined and enforced tribal land use code.<sup>211</sup> With fee simple land not carrying the same sovereign control as trust land, civil jurisdictions (e.g., the government of the county in which a reservation is located) sometimes attempt to assert regulatory control over non-tribally owned parcels within a tribe's reservation. If a tribal government has no land use code or its code does not provide sufficient regulations to govern current property development scenarios, a local civil government may feel obligated (or at least empowered) to insist that any development activity on that land be conducted in accordance with its own codes. If the tribal government does have a comprehensive land use code, the likelihood of outside interference and legal conflicts is significantly

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<sup>210</sup> See JUDY ZELIO, NATIONAL CONFERENCE OF STATE LEGISLATURES, *PIECING TOGETHER THE STATE-TRIBAL TAX PUZZLE* (June 2005) (overview of tribal-state tax agreement issues).

<sup>211</sup> The Tribal Law and Policy Institute offers guidance and resource links for the development of Tribal Codes for land use and many other critical governmental functions. [http://www.tribal-institute.org/codes/part\\_four.htm](http://www.tribal-institute.org/codes/part_four.htm)

diminished, and a well-crafted land use code can itself be a significant factor in attracting private capital investment for property development.<sup>212</sup>

### Creating a Federally Chartered City

Prior to the implementation of the HEARTH Act, most tribes were limited to issuing commercial leases of tribal land for only twenty-five years, and then only after the lengthy process of obtaining approval from the Department of the Interior. This limitation was a substantial hindrance on land-based economic development. Even the newly extended and streamlined leasing authority of the HEARTH Act does not provide complete control to tribal governments over the full economic potential of commercially viable tribal lands.

In an effort to unlock the true economic value of tribal land—and maintain full and direct tribal control—the Tulalip Tribes undertook a unique effort in the late 1990s to form a new legal entity for the pursuit of broad-based economic development within their reservation. The tribal government created an entirely new municipality known as The Consolidated Borough of Quil Ceda Village,<sup>213</sup> a first-of-its-kind federally chartered city located within the boundaries of the Tulalip reservation that possesses extensive powers for enhancing the tribes' economy.

In accordance with treaties and federal law, tribes have the power to create political subdivisions for the benefit of tribal members and to carry out governmental functions. This power is typically exercised through the establishment of sub-agencies such as Tribal Housing Authorities, which operate as an arm of the tribal government. Reviewing these legal powers, the Tulalip Tribes saw a broader opportunity for the establishment of a new “city-within-a-nation” that would have far more powers and be directed specifically

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<sup>212</sup> Examples of Tribes with current land use codes and planning resources that offer beneficial models include the Confederated Salish & Kootenai Tribes. *Land Use and Development Planning*, CONFEDERATED SALISH & KOOTENAI TRIBES, [http://www.cskt.org/tld/tld\\_land\\_use.htm](http://www.cskt.org/tld/tld_land_use.htm); *Ordinance No. 56*, CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION, <http://www.nplnews.com/toolbox/tribal/1.html>; *Agua Caliente Band of Cahuilla Indians Land Use Ordinance*, AGUA CALIENTE BAND OF CAHUILLA INDIANS, <http://www.aguacaliente.org/downloads/TribalLandUseCode.pdf>.

<sup>213</sup> *About Quil Ceda Village*, QUIL CEDA VILLAGE, [http://www.quilcedavillage.com/info\\_about.asp](http://www.quilcedavillage.com/info_about.asp).

toward advanced economic development. In 2001, the BIA approved Quil Ceda Village's status as a municipality and the IRS approved its status as a political subdivision of the Tulalip tribal government under the Indian Tribal Governmental Tax Status Act of 1982<sup>214</sup>, making it the first tribal political subdivision under this Act in the United States. The only other comparable federally chartered city at present is Washington, DC. Article I, Section 3 of the Quil Ceda Village Charter<sup>215</sup> outlines the powers granted the municipality:

The Village shall have all general and specific powers granted to municipal and quasi municipal corporations by the various states of the United States and the laws of the Tulalip Tribes of Washington and by its Charter, including but not limited to the taxing and police powers, the powers of annexation and eminent domain, the power to protect the public safety, health and welfare of all persons within the Village, and the power to contract together with all the implied powers necessary to carry into execution all the powers herein granted. In addition, the Village shall have all the powers and privileges of a political subdivision of an Indian tribal government.

Quil Ceda Village is organized and functions as a separate political entity within the Tulalip reservation. It is governed by a Village Council that enacts local ordinances and legislation, develops and approves the Village budget, and sets policies. The Village provides businesses within its jurisdiction with services and infrastructure including the construction and maintenance of roads, water and sewer systems, high-speed fiber optic broadband access, parks and recreation areas, planning and permitting services, and emergency response services. The municipality's Council implemented streamlined permitting, zoning, and planning processes to allow commercial businesses to efficiently obtain lease rights and commence operations.<sup>216</sup> The municipality's \$4 million annual operating

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<sup>214</sup> Pub. L. No. 97-473, 96 Stat. 2605 Title II, § 202(a) (1983); see Yule Kim, *The Indian Tribal Governmental Tax Status Act: An Overview*, available at <http://congressionalresearch.com/RL34290/document.php>.

<sup>215</sup> *Article I Chapter of the Consolidated Borough of Quil Ceda Village*, QUIL CEDA VILLAGE, <http://www.quilcedavillage.org/article1.asp>.

<sup>216</sup> *Quil Ceda Village*, HARVARD KENNEDY SCHOOL, <http://www.innovations.harvard.edu/awards.html?id=6171>.



budget is funded from a combination of lease revenue, water and sewer fees, tribal taxes, and subsidies from the Tulalip tribal government.

The economic impact of Quil Ceda Village has been tremendously significant for the Tulalip Tribes, and for the surrounding region. The basic numbers illustrate the dramatic growth since the Village was established:<sup>217</sup>

- Approximate number of stores, shops, and restaurants: 150
- Estimated annual gross receipts (not including casino): \$720 million
- People employed directly by Tulalip Tribes: 3,500 (up from 350 in 1990)
- Full-time employees of Quil Ceda Village municipality: 175

The Tulalip Casino is located within Quil Ceda Village, and construction of the gaming facility allocated \$18 million in contracts to thirty-eight native-owned construction firms, and 47 percent of the construction trade workers on the project were Native American.<sup>218</sup> In addition to the tribes' casino and resort complex, the Village now contains a Wal-Mart Supercenter, Home Depot, Cabela's, a 2,600-seat amphitheater, and a premium outlet mall. Given that only approximately 500 acres of Quil Ceda Village's 2,000-acre total area are presently in full commercial use, the municipality possesses substantial future growth potential.

### Capital and Resources for Land Acquisition

In addition to the funds of the Cobell Land Buy-Back Program, there are other private sources of grants and capital funding assistance available to tribal governments for acquiring land for economic and community development.

#### *Indian Land Tenure Foundation*

The Indian Land Tenure Foundation (ILTF)<sup>219</sup> is a non-profit 501(c)(3) based in Little Canada, Minnesota that works with tribes to regain lands lost

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<sup>217</sup> Bill Sheets, *John McCoy, Quil Ceda Village Helped Tulalips to Prosperity*, HERALD NET (Dec. 5, 2010, 12:01 AM), <http://heraldnet.com/article/20101205/NEWS01/712059909/-1/news01?page=single#singlePage>.

<sup>218</sup> Mark Baughman, *Tribal Firms Hit the Jackpot*, DAILY J. COMMERCE (June 12, 2003), <http://www.djc.com/news/co/11145908.html>.

<sup>219</sup> INDIAN LAND TENURE FOUNDATION, <http://www.iltf.org>.

through allotment. Founded in 2001 with a \$20 million grant from the Northwest Area Foundation, ILTF's mission is to help restore land to tribal ownership within reservations and areas of traditional significance. ILTF offers grants and coordinates financial assistance via numerous community and land recovery funds.<sup>220</sup> Typical land recovery grant amounts range from \$10,000 to \$100,000. Tribal governments and non-profit organizations are eligible for funding and can submit proposals to the ILTF's grant office.<sup>221</sup>

### *Indian Land Capital Company*

The Montana-based Indian Land Capital Company (ILCC)<sup>222</sup> was formed in 2005 by ILTF and the Native American Community Development Corporation. The ILCC offers term loans, bridge loans, and lines of credit up to \$3 million to native governments seeking financing to acquire tribal lands. The ILCC does not require land to be used as collateral for the loan, but instead relies on the full faith and credit of the tribal nation, and does not require appraisals or environmental assessments of the land for determining funding eligibility.<sup>223</sup>

### *The Trust for Public Land*

The Trust for Public Land works with native governments and cultural groups to protect tribal homelands and culturally significant places such as ancestral burial grounds, fishing sites, and lands that supply traditional foods and medicines. The TPL has worked with more than seventy tribes to protect more than 200,000 acres of historic lands.<sup>224</sup>

In addition to direct funding, the TPL provides technical and planning assistance<sup>225</sup> to tribal agencies to further land reclamation and conservation strategies, including:

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<sup>220</sup> *Community Funds*, INDIAN LAND TENURE FOUNDATION, <https://www.iltf.org/get-involved/community-funds>.

<sup>221</sup> *How to Apply*, INDIAN LAND TENURE FOUNDATION, <https://www.iltf.org/grants/how-to-apply>.

<sup>222</sup> INDIAN LAND CAPITAL COMPANY, <http://www.ilcc.net/>.

<sup>223</sup> *Loans and Land Acquisitions Plans*, INDIAN LAND CAPITAL COMPANY, <http://www.ilcc.net/products-and-services/>.

<sup>224</sup> *Tribal and Native Lands Program*, TRUST FOR PUBLIC LAND, <http://www.tpl.org/what-we-do/initiatives/heritage-lands/tribal-and-native-lands.html>.

<sup>225</sup> *Services*, TRUST FOR PUBLIC LAND, <http://www.tpl.org/what-we-do/services/>.

- *Conservation Finance*: Helping tribes identify and raise funds for land programs from federal, state, local, and philanthropic sources.
- *Conservation Transactions*: Structuring, negotiating, and closing land transactions to create parks and protected natural areas.
- *Conservation Vision and GIS*: Supporting park and green space creation through innovative research, planning, and spatial analysis (GIS).
- *Park Design and Development*: Working with tribes to create parks and playgrounds on new or existing sites, using a community-based design process.

As is the case with most development resources, the programs and funding sources described above will likely have the most impact if used in combination to further a tribe's land use goals. A multi-faceted approach could include: 1) working with the TPL to obtain a GIS survey of the land within a tribe's reservation; 2) using an ILTF grant to study which parcels offer the most commerce-ready potential; 3) verifying the title status of the parcels through the Division of Land Titles and Records; then, 4) purchasing the land with an ILCC loan if the property is held in fee simple title, or with funds from the Cobell Buy-Back Program if the property is in fractionated ownership.



## Risk Management for Tribal Enterprises

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Given the amount of time, effort, and money invested in economic development activities—whether one is building a company or “building a building”—it is critical that tribal governments and native-owned businesses take a comprehensive and methodical approach to identifying and managing the risks that accompany this work. As is the case with economic development itself, risk management is a broad and multi-faceted activity. The Casualty Actuarial Society defines risk management as:

The discipline by which an organization assesses, controls, exploits, finances, and monitors risks from all sources for the purpose of increasing the organization’s short and long term value to its stakeholders.<sup>226</sup>

For tribal organizations, stakeholders will include both the direct participants in an economic activity and the members of the community whom the project is intended to benefit. With such a broad base of stakeholders to whom tribal governments and business enterprises are responsible, effective risk management strategies are a crucial component of economic development planning. Key elements of risk management for tribes include performing risk assessments, undertaking due diligence in selecting partners, obtaining and reviewing insurance coverage, bonding for security during complex projects, addressing sovereign immunity issues, and considering risk management codes.

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<sup>226</sup> Edward G. Kocott, CPCU, Risk Management & Construction, Brown & Brown Seminar Presentation, Seattle, Washington, (Feb. 27, 2013).

## Assessing Risk

The first step in effective risk management is to identify and understand what risks exist. Having the most complete understanding possible of the potential threats of loss for a business enterprise provides the foundation for the subsequent steps to mitigate those threats. Tribal enterprises confront numerous types of risk, including but not limited to:

<i>Hazard Risks:</i>	Property damage, natural disasters, legal liability;
<i>Financial Risks:</i>	Price fluctuations, loss of funding, market volatility;
<i>Operational Risks:</i>	Facility or systems failures, departure of key personnel, workplace issues, employee misconduct;
<i>Strategic Risks:</i>	Increased competition, legal/regulatory changes, shifting market trends, internal/external political developments. <sup>227</sup>

Risk assessment begins with an overall analysis of the new venture that is being planned, and by asking some very basic questions:

- *What is it we want to do?* Start a business...build a recreation center...create a wind farm...invest in foreign bonds? Understanding the nature of the economic enterprise is fundamental to assessing the risks that will be faced, and most projects will involve more than one type of activity risk.
- *What do we need to protect?* A building under construction...an existing facility...financial assets...the tribe's reputation? Taking inventory of everything that is "at stake" in a development project provides the starting point for creating the risk management strategy.
- *What could go wrong in this project?* A fire...theft...market crash...legal battle...tornado? While it is difficult to identify every potential risk to an enterprise, it is essential to list the likely scenarios that could affect the development project, and then go beyond the obvious to account for events that could seriously impair the work being undertaken.

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<sup>227</sup> *Id.*

- *What can we do to mitigate the risks?* Buy insurance...put up a fence...hire a legal team...lobby at Congress? There is some means for lowering the likelihood or impact of nearly every risk, and Tribes must take a comprehensive approach to mitigating the apparent risks from the beginning of each development venture.

Underlying this analytical process is the need for high-quality information, and the need for the tribe's enterprise managers to have a thorough knowledge of their organization and the external environment in which the enterprise will operate. It will always be important to conduct research and obtain historical information about the risk profile for a venture, and to review the risks experienced by other organizations that have previously undertaken similar enterprises.

It is equally important to be systematic and meticulous in gathering and analyzing risk data, to help ensure the information leads to prudent management decisions. Methods and tools used to identify and analyze risks<sup>228</sup> include checklists, judgments based on experience and records, flow charts, scenario analysis, and systems engineering techniques. As an initial step, team-based brainstorming workshops can help identify general risks for the enterprise and create a collective awareness of the need to understand and mitigate the project's risk profile. From there, structured techniques such as flow charting, system design review, hazard analysis, and operational modelling can be used to provide specific data for addressing risk factors.

### Establishing Responsibility Criteria

One of the biggest risks native enterprises will face in their economic development activities comes from working with other people. Whether it is hiring an investment company to manage a tribe's sovereign wealth fund or hiring a plumber to improve the restrooms in a community center, most significant economic development projects will require hiring or partnering with other people, companies, or entities to obtain the necessary goods,

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<sup>228</sup> The European Network and Information Security Agency (ENISA) has produced a comprehensive and easy-to-follow template for undertaking risk analysis, including activity charts and recommended protocols. *Risk Assessment*, EUROPEAN NETWORK AND INFORMATION SECURITY Agency (ENISA), <http://www.enisa.europa.eu/activities/risk-management/current-risk/risk-management-inventory/rm-process/risk-assessment>.

services, or technical assistance. Given that none of us is perfect, dealing with human beings is an inherently risky undertaking, and selecting the most qualified and most reliable partners for the project at hand is a critical component of risk management.

One method tribes can use for improving the chances of picking a good business partner is to develop responsibility criteria and apply them in the selection process. Responsibility criteria are a set of questions that are asked of potential partners to obtain information on their qualifications for the work to be performed, and to help review their track record of success on similar projects in the past. In essence, responsibility criteria are the means through which a tribe asks an outside entity: “Are you qualified to do this project, how many times have you done this before, and what were the results?”

Responsibility criteria are commonly used in the construction industry, where owners of complex building projects need to have confidence that their contractors are experienced in the specific type of construction needed for the job. Yet the same approach can be taken to investigating the history of potential partners in any area of a native community’s economic development. Just as it is important to confirm that the contractor hired to build a tribe’s new health clinic is experienced in constructing medical care facilities, it is equally important to confirm that potential joint-venture partners, investors, consultants, and other service providers have the requisite skills and resources to deliver effective results.

Each project a tribe undertakes that will involve outside partners calls for a specific set of responsibility criteria directed toward the needs of that project. Each set should contain a section covering the basic qualifications for performing the work, including:

- Business License
- Federal Employer Identification Number
- State Registration Certificate (as appropriate, e.g., contractor’s registration)
- Industrial Insurance/Workers’ Compensation Registration

Beyond these basic items, responsibility criteria should then go into detail regarding the particular requirements for the project at hand. For example,



a tribe intending to hire a construction company to build a water pipeline across the reservation may create some highly detailed criteria:

Company Experience: The Bidder or Subcontractor must have successfully and satisfactorily completed at least two (2) ductile-iron pipe projects within the last five (5) years with a minimum diameter of 24 inches and a minimum length of at least 1,500 linear feet of buried ductile-iron pipe each with similar ground water and subsurface conditions and used for the pressurized conveyance of water at a working pressure of at least 150 psi.

Tribes should require potential partners to provide specific and confirmable details on the past projects they list in their qualifications, including:

- Name of project and contact information for owner(s)
- Location of work
- Dates of overall work effort
- Contract (or subcontract) amount
- Description of work performed and significant relevant features

As a standard due diligence practice, managers of tribal enterprises should check references thoroughly to ensure the accuracy of the experience history provided by potential contractors/partners. Inquiries to the reference sources should include asking questions about the company's:

1. Quality control;
2. Safety record;
3. Timeliness of performance;
4. Use of skilled personnel;
5. Management of subcontractors and suppliers;
6. Availability and use of appropriate resources;
7. Compliance with contract documents;
8. Management of administrative process, changes, warranties, and close out; and
9. Any other critical performance elements required in the tribe's upcoming work.

In addition to the information regarding corporate/agency experience, tribes should also request information about the specific people who will actually be working on the project. An organization is only as good as the people who work within it, and having the right people on the job is always a crucial element of success. It is important to remember that people move from organization to organization frequently, and corporate qualifications are based on the qualifications of the people who do the work. A company that says: “We’ve done ten of these projects in the last two years” may seem well-qualified—but if the project manager who ran all ten of those projects just left the company, she may have taken all of the company’s experience with her. Responsibility criteria should therefore include people-focused inquiries, such as:

Personal Experience: The Bidder/Contractor shall name the key personnel proposed for this project and shall provide evidence of their qualifications in accordance with the following: The Project Manager shall have directly supervised the successful performance and completion of two (2) substantially similar projects in the last five (5) years. The Bidder/Contractor shall submit the name, resume, and experience summary of at least two experienced project field superintendents who will be available for this assignment. One of the proposed project field superintendents must be assigned to the project and may not be substituted unless approved in advance by the Owner. Substitute personnel must meet the experience requirements of this section.

Responsibility criteria should also include inquiries designed to reveal potential warning signs regarding an entity’s past performance. Potential partners should be asked to:

- State whether you have ever been debarred or otherwise prohibited from contracting with any tribal, federal, state, or local government agency.
- State whether you have ever been charged with a public bidding crime or tax crime.

- State whether you have ever had a contract terminated for cause by the other contracting party.
- List any claims you have made against project owners or contracting partners in the past ten years.
- List all claims and liens filed against you by any tribal, federal, or state government agency in the past ten years.
- List all lawsuits and arbitrations in which you have been a party in the past ten years, including the names of the parties, venue, and general nature of the dispute.
- List all administrative legal actions in which you have been a party in the past ten years, including the names of the parties, venue, and general nature of the dispute.
- List all lost-time safety incidents for your employees and agents on projects in the past five years.

There is no limit to the level of specificity that can be used in responsibility criteria, but tribes should incorporate some flexibility into their approach to avoid disqualifying potential partners who are in fact capable of delivering good results. This is especially true for projects that are the “first of its kind,” where it may be that nobody has actually done a project precisely of this type. In such cases, rather than developing a detailed set of responsibility criteria, a tribe may wish to issue a request for qualifications (RFQ) to see what entities in the marketplace may have the right capabilities. Rather than detailing every capability requirement a potential partner must meet, an RFQ provides a more general description of the project to be undertaken, and asks interested parties to submit descriptions of their qualifications related to the required work. The tribe then reviews the qualifications it receives to determine which potential partner is the most capable, and can follow up with more specific questions if needed. RFQs can also contain responsibility criteria the tribe knows in advance to be necessary, e.g., “All responding companies must have at least ten years of experience in renewable energy development and be legally eligible for federal contracting.”

## Insurance

The most common method people and organizations use for risk management is buying insurance—if something goes wrong, it is always good to have some money to help fix the problem. However, simply “having

insurance” is not sufficient for effective risk management. It is critical to understand which of the myriad types of available insurance policies are appropriate and necessary for the specific risk profile of an enterprise, and to understand what a particular policy *actually covers* in terms of loss events. Many have thought to themselves: “Do not worry, we have insurance,” only later to discover to their dismay that the insurance they had was not enough to make them whole for their loss—and may not have even covered that loss at all.

There are multiple genres of insurance policies that are designed for different purposes and provide different types of coverage. Which policies are appropriate for a given economic activity depends on the nature of that activity and the risks involved. For tribal economic development projects, common policy types include:

*Commercial General Liability (GGL).* These policies are held by most business and governmental entities, and are typically designed to do three things: 1) Pay lawyers to defend claims against the insured, 2) pay to settle claims against the insured; and 3) pay judgments against the insured.<sup>229</sup> CGL policies can be found with a broad range of covered events—and many exclusions—and a similarly broad range of coverage amounts and deductibles. Tribal enterprises should regularly review their CGL policies (and those of their partners/contractors) to ensure the covered risks are adequate for the tribe’s current and intended development activities.

*Umbrella Policies.* These policies are similar to CGL policies in what they cover (e.g., claims/lawsuits against the owner), but provide additional monetary coverage over and above the CGL policy limits. Given the cost of lawsuits—even those where claims are invalid—it has become a best practice for businesses and building/vehicle owners to obtain a significant dollar amount of umbrella coverage to pay for potential claims for injuries or other damages.

*Builder’s Risk.* These construction-related policies cover new buildings and facilities while they are being built. They are designed to protect the owner from property losses that might occur during construction, like an accidental fire that burns down the building halfway through the project.

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<sup>229</sup> Jack Zahner, Insurance For Public Works, Foster Pepper PLLC Seminar Presentation, Seattle, Washington (Oct. 31, 2012).

Tribal entities that are undertaking construction projects should generally obtain a builder's risk policy to compensate them in the event of a loss that damages the work. This policy is separate from and in addition to the contractor's liability policies, as it covers different risks within the construction context, and tribes should obtain their own appropriate coverage regardless of their contractors' policies. A question sometimes arises as to whether the owner or the contractor should obtain the builder's risk policy for a construction project. Given that the policy is designed to compensate the owner for losses to the owner's project—and that a contractor who buys the policy will almost certainly pass on the premium cost to the owner through general overhead charges—it is recommended that the owner purchase the policy and have it structured to meet the particular risks of the project program.

*Professional Liability.* Also known as “E&O” policies (for “errors and omissions”), professional liability policies provide coverage for problems associated with the design of a building or system. Architects and engineers typically carry professional liability policies to cover their work in creating designs for new facilities and structural/mechanical/utility infrastructure. If a tribal entity is undertaking design work with its own personnel, or if it wants to ensure its hired experts will be adequately covered in the case of a design defect, the tribal entity can also obtain its own policy. Two items tribal managers should review in professional liability policies are the deductibles and any additional-insured exclusions. The deductible is the amount the design company has to pay out of its own pocket before the insurance company will pay out from the policy coverage. Sometimes insurance companies require very high deductibles for these policies, which the architect/engineer may not actually be able to pay. Tribal managers should therefore confirm that the deductible levels for these policies are reasonable before accepting them. The additional-insured exclusion prevents one party that is covered under the policy from making a claim against another party insured on the same policy. If this exclusion exists, the tribe will want to avoid being named as an additional insured on the policy, so that in the event of a design problem the tribe can make a claim against the policy coverage.

*Wrap Policies.* In the construction context, particularly for tribal housing projects, wrap policies are often obtained to provide insurance for the building

for events that may occur after its completion. The policies usually cover the work of all on-site parties that participated in construction and is designed to cover most potential problems with the work that are discovered later—thereby “wrapping” up all the parties and issues into one policy coverage. However, it is important to review the policy exclusions before purchasing wrap coverage to ensure it will actually cover the necessary risk areas.

Tribal enterprise managers have several key tasks when obtaining insurance:

- *Determine the Correct Type and Amount of Coverage.* “Do we have insurance for that?” A manager needs to ask this question before engaging in an economic development activity, and then make sure the answer is “Yes.” Working closely with a reputable insurance broker, tribal managers should review all of the risk elements for the intended activity and determine which types of policies are needed and the appropriate coverage amounts. Bear in mind that different policies may provide *some* coverage for the same activity, but it may require multiple policies to effectively cover all risks for that activity. Using a construction project as an example: a tribe’s general liability policy may provide coverage if an employee accidentally causes a fire inside the building, but the policy does not cover damage from windstorms—the tribe would therefore also want a builder’s risk policy that includes coverage for weather damage.
- *Read the Policy Documents.* Most people never bother to read the actual insurance coverage documents before (or after) buying the policy. Given that insurance policies are usually written in language only a lawyer could love, it is perhaps understandable that these documents typically go unread, yet the critical information about what the policy covers is described in those documents. The policy documents are a contract that tells the tribe exactly what the insurance company agrees to do in exchange for the money the tribe is paying. The manager responsible for obtaining the policy must thoroughly understand how it works to use it effectively to mitigate risk. *It is also critical for tribes to obtain and read the insurance policy documents of their partners/contractors.* If the construction company a tribe hires does not have an insurance policy that adequately covers the work being performed, the tribe could be left on its own to pay for a catastrophic loss.

- *Look for Exclusions.* One of the most important reasons to read the coverage documents before buying the policy is to identify the exclusions—the things the policy does not cover. Every insurance policy will contain a list of potential risks for which coverage is excluded, meaning: “This policy does not cover that.” If a policy excludes coverage for an event or risk, then you do not have insurance for that event or risk under the policy. A policy may contain exclusions for the very risks a tribe needs insurance for in the first place, e.g., a Tribal Housing Authority in the rainy Pacific Northwest may want property insurance for an apartment building, but the policy being offered contains an exclusion for water damage or mold. Before paying for insurance, managers must be sure the policy will actually cover the risks that need to be insured, which requires the manager to have a thorough understanding of the policy exclusions.
- *Understand the Claim Requirements.* The whole point of having insurance is to be able to access the policy money in the event of a loss. Policy documents will contain specific and detailed procedures that must be followed to make a claim, including deadlines for when the insurance company must be notified of the loss. Failing to follow the claims and notice requirements set forth in the policy potentially can relieve the insurance company’s obligation to pay for a claim, which would naturally have terrible consequences for the tribal entity. It is imperative for managers to understand when and how claims on an insurance policy must be made, and to fulfill those requirements promptly and completely in the event of a loss. It is often helpful to create a simple activity flowchart for major insurance policies, listing what information needs to be sent where/when in the event of a claim, and then attach the flowchart to the policy document for easy reference.

## Performance and Payment Bonds

Another risk management tool similar to an insurance policy is a performance and/or payment bond. Rather than a policy that covers a potential loss, a performance bond provides a financial guarantee that a party will perform a certain contractual obligation (e.g., that a construction company will properly complete a building project), and a payment bond

provides a financial guarantee that a party will provide proper payment to its employees, subcontractors, and suppliers who are involved in the project. Performance and payment bonds are issued by private surety companies, which charge a premium based on the amount of the bond and the perceived risk of default by the bonded party.

Tribal entities that are undertaking construction projects should generally require a performance and payment bond from the prime contractor hired to perform the work. In the event the contractor goes bankrupt or otherwise defaults on the contract, the tribe can make a claim to the surety against the performance bond to access the money necessary to hire a replacement contractor or fix defective work. Given that compensatory purpose, it is advisable for the owner to require the dollar amount of the bond to be at least the full dollar amount of the contract. The payment bond is separate from the performance bond, and in the event the contractor fails to pay its workers or subcontractors the tribe can make a claim against that bond or assist the unpaid workers to do so. It is advisable for the payment bond to be in the same dollar amount as the contract value, particularly for labor-intensive projects. The premium cost for surety bonds is typically 1 percent to 3 percent of the total project contract price; for very large-dollar projects, the bond cost can be less than 1 percent.<sup>230</sup>

Although performance and payment bonds are perhaps most commonly used in the construction industry, tribes can require them for many kinds of contract-based work with outside companies. For example, a company that is hired to upgrade the Tribal Court's computer systems and network could be required to post a performance bond, so the tribe will not have to pay twice to get the technology upgraded in the event the company defaults.

Performance and payment bonds should be obtained before the work on a project starts, so that they are in effect and provide protection for the entire course of the project. The same due diligence for tribal owners applies to these bonds as to insurance policies: read the bond documents, confirm the proper amount and type of coverage, note the claims requirements, and identify the notice deadlines. Surety companies will often put into the bond documents a requirement that any lawsuit against the surety must be filed

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<sup>230</sup> Scott Strickland, CPCU, ARM, CPA, Risk Management & Construction, Brown & Brown Seminar Presentation, Seattle, Washington (Feb. 27, 2013).



much earlier than the normal statute of limitations—for example within two years of an event rather than six years—so it is critical to be aware of the applicable claims timelines for the bonds. If a contractor provides a bond that does not sufficiently cover the obligations needed for the project, the owner can demand the contractor obtain a new bond with more appropriate terms.

In addition to providing protection to tribal project owners, payment and performance bonds provide a means for a tribe to assist the development of companies owned by its members. The ability to obtain performance and payment bonds is critical for native-owned companies, especially in the construction industry. Companies that cannot meet minimum bonding requirements are often prohibited from being awarded government contracts, and private owners similarly avoid doing business with a company that cannot get bonded. A company's ability to get bonding from a surety is usually based on the company's financial position, and it is challenging for a small start-up company to obtain a multi-million dollar bond for a large project. However, if the tribe is willing to sign on as a guarantor of the bond, surety companies will be much more willing to provide bonds to the company. Presuming the company is capable of performing the work, this is an inexpensive and low-risk way for a tribal government to give a significant boost to the business opportunities of its members' businesses.

## **Sovereign Immunity**

A tribal government's sovereignty is perhaps the best protection against one type of risk: legal liability. Sovereign immunity generally provides a blanket protection for tribes and their agencies against being sued and having judgments taken/collected against them. However, this protection carries with it another risk that threatens a tribe's economic development: the risk that nobody will do business with the tribe for fear of having no legal recourse if something goes wrong. Therefore, tribal governments must often consider offering limited waivers of sovereign immunity to entice outside parties to become partners in development projects.

Waivers of sovereign immunity need to be carefully limited to avoid exposing the native community to general liability. The scope of a waiver should be

minimized to provide liability only for a specific project and specific time period, and be limited as to what tribal assets are at risk. For example, this limited waiver language was included in the contract for a tribal construction project that was built with funds from the federal Indian Health Service:

Article 1: *Sovereign Immunity*

1.1 It is understood that Owner is a federally recognized Indian Tribe that possesses sovereign immunity from suit. Nothing in the Contract Documents shall be construed to be a waiver of sovereign immunity by Owner except to the limited extent necessary to permit Contractor to pursue the specific dispute resolution mechanism permitted under the Contract Documents or to seek judicial review to enforce any binding decision or award issued in accordance with the dispute resolution mechanism. Sovereign immunity is not waived as to any employee of Owner, Board member of Owner, Tribal Council member of Owner, or agent of Owner and Owner hereby specifically reserves and retains its sovereign immunity, and all rights and privileges pertaining thereto.

1.2 A judgment or award against Owner made in accordance with the dispute resolution provisions of this Contract may, pursuant to this limited waiver of immunity, be satisfied only from Owner's then-available IHS Title V Construction Project Agreement funds. Nothing in this limited waiver of immunity shall be construed as a waiver or consent to the levy of any judgment, lien, attachment or encumbrance upon any other funds, assets, or income or any real property or interest in any real property of Owner, whether held in trust for the benefit of Owner by the United States, as restricted fee land or in fee simple.

1.3 This waiver of sovereign immunity specifically does not allow for recovery of attorneys' fees or post-judgment interest and does not extend to actions for declaratory judgment or injunctive relief.

1.4 The parties hereby acknowledge and agree that these limitations shall also apply to any other agreements entered into by the parties during the respective terms of such agreements, and shall, whenever any application of this Contract continues beyond the termination of this Contract, continue to apply thereto, notwithstanding any prior termination of this Contract.

In the event a dispute arises from the contract activity, the waiver should also specify the dispute resolution process and venue. If the tribe has a well-established Tribal Court and business codes, the contract may specify that tribal law applies and the venue for dispute resolution is the Tribal Court. For tribes that do not have their own court systems, it may be necessary to utilize another forum for dispute resolution within the restrictions of the limited waiver of sovereign immunity. For example, an Alaska Native association that does not have its own court or business-related laws might include language in its contracts such as:

To the extent jurisdiction obtains, this limited waiver of sovereign immunity shall be deemed a consent to the jurisdiction only of the United States District Court for the District of Alaska. The law to be applied in any process to resolve any dispute arising under or in relation to this Contract shall be: first, federal law, including federal statutory and common law; and second, in the absence of applicable federal law, the law of the state of Alaska, provided, however, that references to the laws of the State of Alaska shall not be construed as an admission or concession by Owner that the State of Alaska or any subdivision or agency thereof has jurisdiction or authority to promulgate laws applicable to Owner, any constituent Tribe, or to the Project.

A potential challenge in attracting non-native companies to become engaged in development projects being funded by a tribal government was noted in Chapter 1: the fear that if the tribe for some reason refuses to pay what is owed, the company will have no ability to make a claim against any tribal asset. Few companies are willing to take the risk that they will be “out of luck” and have no recourse in the event of a project owner’s breach of contract, so it is incumbent on the tribe to find a method of alleviating this concern without

providing an excessive waiver of sovereign protections. One method is to utilize an escrow account for the project funds, held by a private lending institution or other third party that does not have sovereign immunity.<sup>231</sup>

A tribal government can deposit the money to fund the project into escrow, with specific instructions providing for how it is to be disbursed (e.g., only in payment amounts pre-approved in writing by the tribe). In the event of a dispute, the money would remain in escrow until the parties negotiated a settlement or the matter was adjudicated through the dispute resolution clause in the contract. At that point, the escrow company would disburse the money per the agreement or judgment. This provides a balanced approach to managing the financial risk of the project—the tribe cannot pull out the money and leave the contractor with no asset to pursue for payment, but the contractor cannot pursue any tribal asset except the escrow funds.

### **Risk Management Codes and Plans**

The scope and complexity of risks native communities confront mandates the creation of some standard procedures for handling major events. Beyond planning for the financial risks related to business activities, tribes should develop contingency plans for dealing with emergencies and disasters that can affect the community as a whole.

Tribes throughout the country have created various plans and legal codes that provide guidance for dealing with specific risks they confront based on their geography, climate hazards, and activity-based issues. Examples include:

- The Dry Creek Rancheria Band of Pomo Indians' Risk Management Code;<sup>232</sup>
- The Nooksack Indian Tribe's tribal Hazard Mitigation Plan;<sup>233</sup>
- The Tulalip Tribes' Emergency Plans.<sup>234</sup>

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<sup>231</sup> Sample Escrow Agreement between the Crow Tribe and the State of Montana, *available at* [http://crowlaws.org/yahoo\\_site\\_admin/assets/docs/Crow\\_Tribe-Montana\\_Water\\_Compact\\_Escrow\\_Agreement.190142319.pdf](http://crowlaws.org/yahoo_site_admin/assets/docs/Crow_Tribe-Montana_Water_Compact_Escrow_Agreement.190142319.pdf) (for the funds to be transferred through a water revenue compact).

<sup>232</sup> Dry Creek Rancheria Band of Pomo Indians, Government Code Title 8, *available at* <http://www.drycreekrancheria.com/Documents/8%20Risk%20Management%20Code%20FINAL.pdf>.

<sup>233</sup> NOOKSACK INDIAN TRIBE, TRIBAL HAZARD MITIGATION PLAN SUMMARY, *available at* <http://nooksackindiantribe.org/wp-content/uploads/2012/01/Tribal-Hazard-Mitigation-Plan-Summary2.pdf>.

Native governments and businesses need to make risk management a fundamental part of their operations and strategic planning, and creating a venture-specific risk management plan should be part of every economic development activity. The specific risks and potential loss scenarios for the intended activity need to be reviewed in detail in the early planning stages, and revisited regularly as the endeavor moves forward and the true risk profile becomes more apparent. Appropriate risk management consultants should be included in the project team, and guidance on best practices should be sought at all critical intervals during the project program: initial planning, funding decisions, contract negotiations, design selections, and any other events that create a new risk or potential source of loss for the tribal enterprise.

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<sup>234</sup> *Emergency Plans*, TULALIP TRIBES, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/OfficeofEmergencyManagement/Plans.aspx>.



## Managing Retirement and Per Capita Programs

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People work hard for their money—and native governments and businesses work hard to provide economic opportunity for their members and employees. After the hard work of earning money, the next task is getting the highest possible value from that money and making it last for the long term. Two primary methods tribal officials employ for assisting individual members with their personal finances are retirement savings programs and per capita payments. Both have the potential to provide substantial and lasting financial benefits to community members—if the programs are well-conceived and properly managed.

### Retirement Savings Programs

Native governments and native-owned businesses create a significant economic impact in their communities through the jobs they provide. For most employees, the wages and benefits they receive are not merely their means for paying day-to-day living expenses for their families—their jobs provide their primary source of funds for their future retirement. Few people can feel secure that Social Security benefits alone will be sufficient to cover their financial needs when they become elders. It is therefore extremely important that tribal members have good financial planning information while they are working, and solid investment vehicles in which to accumulate retirement savings.

Tribes and tribal businesses should view the retirement services programs they provide for their employees as having two primary functions. First and foremost, the programs are the basis for workers to save the money necessary for a secure and comfortable retirement. Second, the programs themselves can

be a means for the tribal employer to attract high-capability workers in a competitive employment environment, as most prospective workers now view a good retirement plan as a fundamental need. Both of these functions call for tribes to offer the best possible programs for the benefit of their workers. Unfortunately, retirement savings programs are another area where tribal communities have been underserved by commercial institutions, and many tribes have long been working with substandard plans and in some cases, with no plan at all.

A positive development has been the national realization that the federal government cannot provide for most people's desired standard of living in retirement, resulting in a tremendous increase in the availability of 401(k)/403(b) plans and similar savings programs. With many reputable savings programs now available at low or no cost to employers, there is no longer any reason for a tribal government or business not to offer this important benefit to its employees.<sup>235</sup> The real task for tribal employers is to determine which program is most appropriate for the particular organization, and how to manage it most effectively for the good of the workers who participate. Basic questions<sup>236</sup> tribal employers should ask as they research options to create or enhance retirement savings plans for their workers include:

- What programs and benefits do our current/prospective employees want?
- What programs do our business competitors offer their employees?
- What programs and benefits can we afford to offer our workers?

An important initial analysis for tribal employers in creating or updating retirement plans for employees is to determine whether the work they do is a "governmental" activity or a "commercial" activity. Federal laws such as the Employee Retirement Income Security Act (ERISA)<sup>237</sup> govern the structure

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<sup>235</sup> Employers can compare 401(k) program information from major investment institutions such as FIDELITY, <http://workplace.fidelity.com/> and CHARLES SCHWAB, [http://www.schwab.com/public/schwab/investing/accounts\\_products/accounts/small\\_business\\_retirement/business\\_401k\\_plan](http://www.schwab.com/public/schwab/investing/accounts_products/accounts/small_business_retirement/business_401k_plan).

<sup>236</sup> Leilani Wilson Walkush, Improving Tribal Pension & Employee Benefit Plans, Blue Stone Strategy Group Seminar Presentation, Seattle, Washington (Feb. 27, 2013).

<sup>237</sup> Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461). For more information, see *Employee Retirement Income Security Act* (ERISA), U.S. DEP'T LABOR, <http://www.dol.gov/compliance/laws/comp-erisa.htm>.



and function of employee retirement programs, and there are different federal regulations for employer-sponsored retirement savings programs depending on whether the employee is considered to work for a government entity or a business entity. This distinction is often difficult to make in the tribal context, as almost all tribal governments are involved in some form of business activity in addition to their governmental functions. Nevertheless, tribes must properly assign their employees into the governmental or commercial category to avoid federal compliance problems and entanglements with the IRS. The analysis of whether an employment activity is governmental starts with a “Facts and Circumstances” test:<sup>238</sup>

- *Does the activity provide a public benefit to tribal members, and is it non-profit oriented?* Examples include historical museums and native cultural centers.
- *Is there an absence of commercial activity typically performed by private businesses, of the kind where most customers are non-tribal?* Enterprises like banks and factories that make goods for non-members are not usually considered governmental.
- *In the activity located on tribal land?* Although activity taking place outside a reservation can conceivably be governmental, it will more likely meet the governmental standard if it occurs within the tribe’s territory.

Examples of governmental activities include:

- Building public infrastructure such as roads and utility systems
- Police, fire, and emergency services
- Civil services like schools, tribal housing, health care, libraries, and Tribal Courts
- Activities involving treaty or trust land ownership and use

Any activity that does not meet the “Facts and Circumstances” test for governmental activities will be considered a commercial activity. Tribal casinos, hotels, retail shops, and for-profit recreation centers are commercial activities, even though the revenue generated by these activities is often put to use for

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<sup>238</sup> J. Scott Galloway, Improving Tribal Pension & Employee Benefit Plans”, Foster Pepper PLLC Seminar Presentation, Seattle, Washington (Feb. 27, 2013).

governmental purposes.<sup>239</sup> Employees involved in these tribal endeavors need to be provided with a retirement program that is legally authorized for workers in commercial activities.

Retirement savings programs for tribal members are subject to additional layers of complexity not found in the non-tribal employment realm. Some restrictions that are unique to tribal 401(k) plans include:

- Tribal council members can only contribute to a 401(k) with their council pay if they are considered *employees* of the tribe in that capacity, as opposed to being strictly elected officials.<sup>240</sup> Unless council members receive a W-2 form for their council income, the IRS likely will not consider them to be employees and will disallow any 401(k) contributions from council pay.
- Income tribal members receive from their treaty fishing rights as defined under Section 7873 of the federal tax code *cannot* be used to contribute to a member's 401(k) plan.<sup>241</sup>

Specialized restrictions and conditions such as these require tribal governments and their economic departments to have detailed knowledge of the requirements for deferred-income retirement savings plans—particularly since the applicable regulations are frequently subject to change. It is advisable for tribes to connect with knowledgeable consultants<sup>242</sup> who focus on plans and legal issues specific to native organizations, and undertake a regular review of the tribe's employment activities to ensure federal compliance and that workers have the appropriate program for their retirement savings. Depending on the size and complexity of a tribe's employment profile, it may be prudent to work

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<sup>239</sup> *Id.*

<sup>240</sup> *ITG FAQ #7 Answer-Are Tribal Council members eligible to participate in a 401(k) Plan sponsored by the Tribe?*, IRS, [http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/ITG-FAQ-%237-Answer-Are-Tribal-Council-members-eligible-to-participate-in-a-401\(k\)-Plan-sponsored-by-the-Tribe%3F](http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/ITG-FAQ-%237-Answer-Are-Tribal-Council-members-eligible-to-participate-in-a-401(k)-Plan-sponsored-by-the-Tribe%3F).

<sup>241</sup> *ITG FAQ #9 Answer-Can an Indian tribal government set up a 401(k) plan with contributions based on section 7873 income?*, IRS, [http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/ITG-FAQ-%239-Answer-Can-an-Indian-tribal-government-set-up-a-401\(k\)-plan-with-contributions-based-on-section-7873-income%3F](http://www.irs.gov/Government-Entities/Indian-Tribal-Governments/ITG-FAQ-%239-Answer-Can-an-Indian-tribal-government-set-up-a-401(k)-plan-with-contributions-based-on-section-7873-income%3F).

<sup>242</sup> A recommended contact for tribal retirement plan structuring is Leilani Wilson Walkush (Tlingit/Haida) of Blue Stone Strategy Group. *Leilani Wilson Walkush*, BLUE STONE STRATEGY GROUP, <http://www.bluestonestrategy.com/about-us/blue-stone-team/leilani-wilson-walkush>.

with a third-party administrator to manage the retirement savings program(s), thereby relieving the tribal managers of some of the administrative work and compliance burden.

### Per Capita Payments

Numerous tribal governments whose revenue levels exceed their expenditures for governmental functions choose to distribute the surplus dollars in payments to their tribal members. Known as “per capita” payments, the surplus distribution is often in the form of a check or account deposit given to every enrolled member, similar to the dividends issued by corporations to shareholders. Tribes are not required to issue per capita payments, and the amounts and frequency of payments vary widely between tribes, making per capita distributions a highly individualized economic input for native communities.

The decision whether a given tribe *can* issue per capita payments is a very simple one to make: either the tribe’s government has surplus money or it does not. The decision whether the tribe *should* issue per capita payments is much more complex, and needs to be made based on the community’s cultural values and the potential benefit that could be realized from investing the surplus funds in other economic activities. When the tribe has reached the decision that it will distribute surplus funds to members via per capita payments, tribal leaders should ask a fundamental question:

*“What do We Want This Money to Accomplish for Our People?”*

There will undoubtedly be numerous answers. For tribes burdened by high unemployment and a lack of economic opportunity, there may be an urgency to provide cash to members so they can fulfill basic family needs. Beyond subsistence aid, per capita payments also offer a means for members to strengthen the fabric of their community. Per capita payments can help members pay for higher education, home and neighborhood improvements, and personal savings. It is therefore in the interest of tribal governments to view per capita payments as a method for improving the long-term economic health of the people they represent, and to structure the payment program in furtherance of this goal.

In addition to mailing out the monthly/quarterly checks, tribal governments should actively assist their members in obtaining the financial education necessary to get the most from their money. Tribes can work with CDFIs, banks, educational institutions, and governmental agencies to provide free classes and workshops to members. Budgeting, tracking spending, and elementary saving/investing plans are not difficult concepts to learn, yet too few people receive even a basic education on these subjects in school. Some tribes are considering making completion of a sponsored financial education course mandatory for members before they can receive per capita payments—but every tribe with the funds to issue the payments should provide its members with the information needed to manage the money effectively.

A particularly complex facet of per capita programs is minor trust programs, which hold children's per capita payments until they reach a designated age. A too-common phenomenon in tribal communities is a young person with little or no financial education suddenly receiving a significant sum of money on her or his eighteenth birthday...and having no idea how to handle it. Cars, clothes, electronics—the money that arrived so suddenly can disappear the same way. Many tribes that have witnessed this scenario repeatedly are now taking steps to help ensure that trust account payments are being received by young members who are also equipped with a sense of responsibility:

- The Ho-Chunk Nation issues payments to youth at age eighteen only if the member has received a high school diploma—otherwise the money is held until age twenty-five.
- The Mille Lacs Band of Ojibwe places trust funds into investment accounts until the member's schooling is complete.
- The United Auburn Indian Community requires that all tribal members attend eighteen hours of financial education classes at American River College to receive per capita payments.
- The Seminole Nation issues payments when its youth complete high school and pass a drug test; a \$35,000 payment is offered to minors who complete an approved financial education program; and additional payments are offered to members enrolled in college or serving in the armed forces.

An excellent partner to help tribal governments create financial education programs for their members is the First Nations Development Institute,<sup>243</sup> a non-profit organization dedicated to improving economic conditions for Native Americans. FNDI offers a tremendous range of financial information and resources specifically designed for native communities, most of which is available at no cost and can be easily downloaded. Useful financial planning tools available from FNDI include:

- Financial education programs<sup>244</sup> for individuals and groups on family budget management and investing.<sup>245</sup>
- Free publications designed to assist tribal governments with visioning and implementation of per capita programs, such as “Developing Innovations in Tribal Per Capita Distribution Payment Programs”<sup>246</sup> and “Big Money – Structuring Minor’s Trust Programs for Native Communities.”<sup>247</sup>
- A financial advice column called “Ask Dr. Per Cap,” which provides practical guidance to help families take control of their finances.<sup>248</sup>

Connecting per capita payments to financial education, particularly with incentives for successful program completion, is a direct method for tribal governments to improve the overall economic prospects for their communities. Along with that “carrot,” tribes can also build a “stick” into their per capita systems. To help deter inappropriate behavior within the community, tribes can take actions such as reducing or suspending payments to members who commit crimes or violate tribal codes, or garnishing per capita payments for overdue child support or other delinquent obligations. Money is a powerful motivator, and beneficial outcomes can be achieved with strategic planning of how per capita payments are distributed within the community.

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<sup>243</sup> FIRST NATIONS DEVELOPMENT INSTITUTE, <http://www.firstnations.org/>.

<sup>244</sup> BNC: *Financial Education Curriculum*, FIRST NATIONS DEVELOPMENT INSTITUTE, <http://www.firstnations.org/KnowledgeCenter/FinancialEducation/BuildingNativeCommunities#FSF>.

<sup>245</sup> <http://www.firstnations.org/sites/default/files/BNC-InvestingforFuture1.31.12.pdf>

<sup>246</sup> [http://www.firstnations.org/sites/default/files/Developing\\_Innovations.pdf](http://www.firstnations.org/sites/default/files/Developing_Innovations.pdf)

<sup>247</sup> <http://www.firstnations.org/sites/default/files/BigMoney.pdf>

<sup>248</sup> *Ask Dr. Per Cap*, FIRST NATIONS DEVELOPMENT INSTITUTE, <http://www.firstnations.org/AskDrPerCap>.



## Protecting and Marketing Native Arts and Crafts

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*As I was waiting for my flight in Sitka, Alaska, I stopped in the airport gift shop. I noticed a shelf displaying numerous totem pole figurines for sale. I thought: "What a good way to promote the hand-crafted art of local Native stone and wood carvers." When I picked one up, I realized it was actually made of plaster. When I turned it over, the label on the bottom read: "Made in China."*

—Millie Kennedy (Tsimshian), Native American Unit Attorney,  
Northwest Justice Project

The sale of native art in the United States is an industry that generates hundreds of millions of dollars in revenue each year. For native artisans, this offers a significant opportunity to make a living while promoting broader awareness and appreciation of the history and culture of their people. Unfortunately, this opportunity is being undercut by the mass production of “faux-native” art in places like China—and by outright fraudulent products that are knowingly mislabeled as authentic native works.

This cultural misappropriation takes money out of the pockets of individual artists and their families, and collectively deprives tribal economies of millions of dollars of much-needed revenue each year. Few native artists have the resources to enforce copyrights and other intellectual property protections for their work, making it difficult for them to prevent what is essentially a theft of both their work and their heritage. It is therefore incumbent upon tribal governments and their advocates to take action on behalf of their artists to protect their intellectual property, and to help

expand the market for their creations. Maximizing the effectiveness of this approach requires a combination of actions involving the Indian Arts and Crafts Act, the Indian Arts and Crafts Board, state laws on fraud and consumer protection, and establishing an independent certification of authenticity for native artwork.

### **The Indian Arts and Crafts Act**

Federal laws for the protection of native art have been in effect for many years, and have been periodically updated to try to deal with the continuing problems of fraud and misrepresentation. The Indian Arts and Crafts Act (IACA) of 1935 made it a misdemeanor offense for a person to:

willfully offer for sale any goods, with or without Government trade mark, as Indian products or Indian products of a particular Indian tribe or group...when such person knows such goods are not Indian products or are not Indian products of the particular tribe or group...

The 1935 IACA also created the Indian Arts and Crafts Board, which was tasked with implementing the provisions of the Act.

The IACA was updated by Congress with the enactment of The Indian Arts and Crafts Act of 1990.<sup>249</sup> The 1990 Act included numerous changes to the definitions, scope, and penalties of the 1935 law in an attempt to put more force behind the effort to stop counterfeiting of native art. The new prohibition on misrepresentations increased the criminal sentences for convictions to:

- For a first violation, a fine of not more than \$250,000 or imprisonment for not more than five years, or both. If the “person” is not an individual (e.g., a corporation) the fine can be \$1 million;
- For subsequent violations, individuals can be fined not more than \$1million or imprisoned not more than fifteen years, or both; and non-individuals can be fined not more than \$5 million.<sup>250</sup>

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<sup>249</sup> Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662.

<sup>250</sup> *Id.* § 104.



The definitions within the Act were expanded to include more than just federally recognized tribes within the scope of protection. The 1990 Act encompasses:

- Any Indian tribe, band, nation, Alaska Native village, or other organized group or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;
- Any individual who is a member of any of the communities described above;
- Anyone who is certified as an Indian artisan by an Indian tribe;
- Any group that has been formally recognized as an Indian tribe by a state legislature or by a state commission or similar organization legislatively vested with state tribal recognition authority;
- Indian arts and crafts organizations, which are defined as any legally established arts and crafts marketing organization composed of members of Indian tribes.<sup>251</sup>

The 1990 Act also provides a right of action for any person or organization listed above to initiate a private lawsuit to stop violations of the IACA. If a native plaintiff can successfully prove that a person or company has violated the IACA, the plaintiff may be awarded:

- Injunctive or other equitable relief; and
- The greater of treble damages or not less than \$1,000 for each day on which the illegal display or sale of bogus art continues;
- Punitive damages; and
- Legal costs and reasonable attorney's fees.<sup>252</sup>

Ten years after the 1990 Act, the IACA was again amended by Congress through the Indian Arts and Crafts Enforcement Act of 2000.<sup>253</sup> The primary change in this short bill was to expand the range of recoverable damages in a civil suit under the IACA to include “all gross profits accrued by the defendant” from the sale of fraudulent art.

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* § 105.

<sup>253</sup> Indian Arts and Crafts Enforcement Act of 2000, Pub. L. No. 106-479, 114 Stat. 2219.

Unfortunately, despite the good intentions behind the IACA, the blunt truth is that the law is not very effective in protecting native artists. In the twenty years from 1990 to 2010, only five people were prosecuted in federal court for the fraudulent sale of native art.<sup>254</sup> With so little federal enforcement, tribes must look to other means for protecting the legal rights and promoting the economic opportunities of their artists. As a practical matter, the most potent element within the IACA is the private right of civil action, through which tribes and individuals can bring lawsuits to stop infringement of their intellectual property rights and artistic creations. A prime example is the recent federal lawsuit brought by the Navajo Nation against clothing retailer Urban Outfitters, which marketed products such as the “Navajo Flask” and “Navajo Hipster Panty” that were decorated with artistic elements inspired by traditional native designs.<sup>255</sup> The legal action is continuing to determine the Nation’s entitlement to monetary damages for trademark infringement, but Urban Outfitters has since removed the line of “Navajo” products from its retail offerings.

### The Indian Arts and Crafts Board

The Indian Arts and Crafts Board (IACB) was created through a mandate within the Indian Arts and Crafts Act, with the goal of helping implement the policies within that federal law.<sup>256</sup> The original IACA provides a clear statement of purpose for the IACB:

It shall be the function and the duty of the Board to promote the economic welfare of Indian tribes and the Indian wards of the Government through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.<sup>257</sup>

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<sup>254</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN, Appendix II (Apr. 2011), available at <http://www.gao.gov/new.items/d11432.pdf>.

<sup>255</sup> Jenna Sauer, *Navajo Nation Sues Urban Outfitters Over the Navajo Hipster Panty*, Jezebel.com (March 1, 2012, 2:20 PM), <http://jezebel.com/5889702/navajo-nation-sues-urban-outfitters-over-the-navajo-hipster-panty>.

<sup>256</sup> *Indian Arts and Crafts Board Mission*, Indian Arts and Crafts Board, <http://www.iacb.doi.gov/mission.html>.

<sup>257</sup> Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662, § 2.

The IACB is intended to be the primary enforcement agency for the IACA laws, and the Board coordinates with federal and state law enforcement authorities to investigate complaints. The IACB's website includes a page titled REPORT A VIOLATION,<sup>258</sup> which serves as a portal for anyone to submit a complaint regarding activity that appears to violate the provisions of federal laws relating to native art.

In addition to law enforcement, the IACB is involved in numerous activities designed to protect the integrity and enhance the marketability of native art. Regular IACB programs include:

- Hosting museum exhibitions of native Art at the Sioux Indian Museum, Museum of the Plains Indian, Southern Plains Indian Museum, and other venues<sup>259</sup>
- Maintaining the Source Directory of American Indian and Alaska Native Owned and Operated Arts and Crafts Businesses,<sup>260</sup> which includes hundreds of native art-related businesses, arts and crafts cooperatives, shops and galleries, and non-profit arts organizations dedicated to promoting the market for legitimate native works
- Attending and providing information at major cultural events such as powwows, festivals, and native arts fairs<sup>261</sup>
- Publishing informative materials for tribal and general consumer use, including "Sources for Authentic Native American Art" and "Buying Genuine American Indian Arts and Crafts"<sup>262</sup>

Continuing the pattern set with the IACA, the effectiveness of the IACB has been limited by the lack of federal funding allocated to support its mission. Most of the people who serve on the Board are volunteers and do the best they can with the available resources. To obtain beneficial assistance from the IACB,

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<sup>258</sup> *Violations of the Indian Arts and Crafts Act*, INDIAN ARTS AND CRAFTS BOARD, <http://www.iacb.doi.gov/file.html>.

<sup>259</sup> *Museum Exhibitions*, INDIAN ARTS AND CRAFTS BOARD, [http://www.iacb.doi.gov/museums/museum\\_exh.html](http://www.iacb.doi.gov/museums/museum_exh.html).

<sup>260</sup> *Source Directory of Arts and Craft Businesses*, INDIAN ARTS AND CRAFTS BOARD, [http://www.iacb.doi.gov/order/source\\_info.html](http://www.iacb.doi.gov/order/source_info.html)

<sup>261</sup> *Upcoming Events*, INDIAN ARTS AND CRAFTS BOARD, [http://www.iacb.doi.gov/upcoming\\_events.html](http://www.iacb.doi.gov/upcoming_events.html).

<sup>262</sup> *Publications*, INDIAN ARTS AND CRAFTS BOARD, <http://www.iacb.doi.gov/publications.html>.

tribes need to proactively and persistently request the Board to take action on issues affecting their artists. The IACB can be contacted as follows:

Indian Arts and Crafts Board  
U.S. Department of the Interior  
1849 C Street, NW MS-2528-MIB  
Washington, DC 20240

E-mail: [iacb@ios.doi.gov](mailto:iacb@ios.doi.gov)  
Telephone: (202) 208-3773  
Toll Free: (888) ART-FAKE  
Fax: (202) 208-5196

### **State Fraud and Consumer Protection Laws**

Twelve states have enacted laws specifically prohibiting misrepresentations related to native arts and crafts: Alaska, Arizona, California, Colorado, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, and Texas.<sup>263</sup> Tribes and native organizations located in those states should become familiar with the laws and the procedures for initiating complaints. The website for the state attorney general's office will usually provide a portal for filing complaints online, although calling and speaking directly with an attorney in the office often results in a faster response and action.

All fifty states have civil (and often criminal) laws that prohibit fraud in business transactions, and many states have consumer protection laws that are designed to prevent and punish deceptive behavior in commerce. Fraudulent acts that violate the IACA will typically also qualify for prosecution and/or civil action under state fraud laws, and state attorney general offices generally have more staff and resources than the IACB to pursue fraud cases. State consumer protection laws often contain stiff financial penalties for fraudulent acts in trade, and tribes that successfully pursue claims can be entitled to punitive awards such as multiplied damages and attorney fees.<sup>264</sup>

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<sup>263</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-432 at 3.

<sup>264</sup> Examples include Washington State's Consumer Protection Act, which provides treble damages and attorney fees (WASH. REV. CODE § 19.86.090, *available at*

The National Association of Attorneys General maintains a web page with contact information for every attorney general in the United States and the overseas territories.<sup>265</sup> When a misappropriation of native art or other fraudulent activity occurs, tribal governments should send information on the violation with an official written request for action to the attorney general for the state in which they are located (and the state where the violation occurred, if elsewhere). Given the typical volume of consumer complaints submitted to attorney general offices each year, the “squeaky wheel” approach of persistent follow-up is again advisable, combined with the tribe expressing its willingness to actively participate in and provide its own resources to support the investigation and prosecution of the fraud. From a diplomatic perspective, the tribal government should work cooperatively with the attorney general’s office in the spirit of pursuing a “win-win” outcome—a successful legal action that accomplishes the tribe’s goal of protecting its artists and cultural heritage, and provides a public relations victory for the attorney general’s office to highlight their commitment to supporting native communities.

### Independent Certification of Authenticity

Experience has demonstrated that the IACA and IACB cannot themselves provide adequate protection for native artists, and in any event they do not actively market the works of artists from a given native community. To improve the economic opportunities for native artists and help them reach a larger commercial market, tribal governments and like-minded agencies need to help provide a means of distinguishing true native art from the fakes and replicas, and help connect local artisans with customers wishing to purchase legitimate native artwork. One method is to establish an independent certification of authenticity for the works of their artists.

In Alaska, the Silver Hand Program is an undertaking of the state government to help Alaska Native artists promote their work and enable consumers to identify authentic Alaska Native art.<sup>266</sup> The program provides

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<http://apps.leg.wa.gov/rcw/default.aspx?cite=19.86.090>), and The Regulation of Business Practices for Consumers in Massachusetts, which authorizes double or triple damages. MASS. GEN. LAWS ch. 93A, § 9 (2013).

<sup>265</sup> *Attorneys General*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, <http://www.naag.org/current-attorneys-general.php>.

<sup>266</sup> ALASKA STATE COUNCIL ON THE ARTS, <http://www.eed.state.ak.us/aksca/native.htm>.

a distinctive logo for attaching to artwork that states the work is “Authentic Alaska Native Art From Alaska.” To have artwork certified under the program, an artist must be a full-time resident of Alaska, be at least eighteen years old, and provide documentation of membership in a federally recognized Alaska Native tribe. The Silver Hand seal is only authorized for artwork that is actually produced within the state of Alaska.

In the Pacific Northwest, an effort is underway to develop a private model and organizational structure that can be utilized nationally for protecting and marketing native artwork. The American Friends Service Committee<sup>267</sup> and the Northwest Justice Project<sup>268</sup> have teamed to form the Indian Arts and Crafts Committee (IACC). The IACC brings together a consortium of tribes, native advocates, and private entities dedicated to providing tangible assistance for native artists. The mission of the IACC includes:

- Educating native artists regarding intellectual property rights and the IACA;
- Educating consumers on the importance of “Buying Native”;
- Identifying authentic native artwork;
- Certifying legitimate native artists;
- Creating a branding logo for identifying native art to consumers; and
- Taking legal action and recovering damages under the IACA and state laws.

The IACC is organized as a non-profit 501(c)3 entity, which provides a tax-exempt status and allows donors to claim a tax deduction for contributions. A primary activity is to serve as a clearinghouse to certify artists as being of legitimate native ancestry or who otherwise have an authentic connection to native culture. Certified artists will receive a license to use a trademarked branding logo that identifies their work as authentic native art. The IACC will actively promote the logo in education campaigns with the goal of enhancing consumer consciousness and making it a sought-after branding similar to certified organic food and cruelty-free products.

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<sup>267</sup> *Seattle Indian Program*, AMERICAN FRIENDS SERVICE COMMITTEE, <https://afsc.org/program/seattle-indian-program>.

<sup>268</sup> NORTHWEST JUSTICE PROJECT, <http://nwjustice.org/>.

One of the benefits of the IACC model is that it provides greater flexibility for accommodating the realities of life and work for native artists. IACC certification is not limited to artists from a given tribe or location, and art does not need to be created in a specific state to retain its authenticity. Once artists are certified, the certification and logo license travels with them and can be applied to their art regardless of the physical location where it is created or sold.

The IACC is actively recruiting partners for its program, and will provide information on the protection and promotion of native artists to all interested parties. To connect with the IACC, contact:

Millie Kennedy  
Northwest Justice Project | Native American Unit  
401 Second Ave S, Ste 407  
Seattle, WA 98104  
Phone 206-464-1519  
Fax 206-464-1533  
[milliek@nwjustice.org](mailto:milliek@nwjustice.org)

Independent certification programs can and should coordinate with the Indian Arts and Crafts Board to be listed in the national Source Directory, as well as enlist the IACB's support for law enforcement, education, and marketing efforts. Certification bodies should be aware of Section 107 of the 1990 IACA, which states that "an Indian tribe may not impose a fee in certifying an individual as an Indian artisan," and the IACB will likely request confirmation that the certification body does not require artists to pay a fee to be a certified member of the organization.





## **Non-Profit and Public Service Organizations**

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As discussed in the Introduction, strategic visioning for tribal economic development involves the holistic assessment of the community's needs and goals, and seeks to produce the greatest possible improvement for the overall quality of life for its people. In addition to the business-driven and government-driven aspects of economic development, much beneficial work can be undertaken by non-profit entities that are designed to meet specific needs within the community.

### **Advantages of Non-Profit Entities**

Non-profits can target high-need issues within a community and focus exclusively on improving quality of life for tribal members. Being free of the obligation to produce business profits, non-profit organizations can devote their funding and other resources to addressing baseline development issues such as public health, housing, and education. Non-profits also can be the conduit for specific economic development work such as technology training, business education, and entrepreneurial networking. Through non-profit entities, tribal communities can attract private capital by providing donors with tax deductions applicable to their income tax, gift tax, and estate taxes.

The creation of non-profit entities by tribes can significantly boost the self-sufficiency of native communities, and help close a glaring gap in charitable funding. Between 1989 to 2002, the 900 largest charitable foundations in the United States donated less than 0.4 percent of their funds and resources

to Native American communities.<sup>269</sup> With so little money being invested by established non-native charities to address the needs of native people, tribes themselves need to take an active role in organizing and promoting non-profit activity for the betterment of their communities.

### **Structures for Tribal Non-Profit Entities**

The three primary corporate structures for non-profit entities operating within native communities are 501(c)(3) corporations, Section 7871 corporations, and tribally chartered non-profit corporations.

#### *501(c)(3) Corporations*

The most common non-profit structure for charitable/public service purposes is the 501(c)(3) corporation, which is named for the section in the Internal Revenue Code that authorizes its creation. The primary advantage enjoyed by 501(c)(3) organizations is tax-exempt status—the organizations do not pay federal income tax like a for-profit corporation, and people who make donations to a 501(c)(3) are often eligible for a corresponding tax deduction.

To obtain tax-exempt status, a 501(c)(3) must be organized and operated exclusively for “exempt purposes” set forth in IRC Section 501(c)(3), and none of its earnings may be used to benefit any private shareholder or individual. The “exempt purposes” which a 501(c)(3) can undertake include:

Charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term *charitable* is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating

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<sup>269</sup> HICKS & JORGENSON, LARGE FOUNDATIONS’ GRANTMAKING TO NATIVE AMERICA, Harvard Project on American Indian Economic Development, Harvard University and the Kathryn M. Buder Center for American Indian Studies: Washington University (2005).

prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.<sup>270</sup>

To be organized exclusively for a charitable purpose, the IRS requires the organization to be a corporation (or unincorporated association), community chest, fund, foundation, or charitable trust.<sup>271</sup> An individual person cannot qualify as a 501(c)(3). The organizing documents for a 501(c)(3) must limit the entity's purposes to exempt purposes as described above, and must not empower it to engage in activities that are not in furtherance of one or more of those purposes. This requirement can be met if the purposes section in the organizing documents includes a statement such as: "The corporation's purposes are limited to those authorized under IRC Section 501(c)(3)."<sup>272</sup>

In addition to these operational requirements, a 501(c)(3)'s assets must be permanently dedicated to an exempt purpose.<sup>273</sup> This means that if an organization dissolves, its assets must be distributed for an exempt purpose, or to the federal or a state or local government for a public purpose. To establish that an organization's assets will be permanently dedicated to an exempt purpose, its organizing documents should contain a provision ensuring their distribution for an exempt purpose in the event of dissolution. If a specific organization is designated to receive the organization's assets upon dissolution, the organizing document must state that the named organization must be a Section 501(c)(3) organization when the assets are distributed. Although reliance may in some cases be placed on state law to establish permanent dedication of assets for exempt purposes, an organization's application can be processed by the IRS more rapidly if its organizing documents include a provision ensuring permanent dedication of assets for exempt purposes.

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<sup>270</sup> *Exempt Purposes – Internal Revenue Code Section 501(c)(3)*, IRS, [http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Purposes-Internal-Revenue-Code-Section-501\(c\)\(3\)](http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Purposes-Internal-Revenue-Code-Section-501(c)(3)).

<sup>271</sup> *Filing Requirements and Required Disclosures*, IRS, <http://www.irs.gov/publications/p557/ch02.html> (details on the IRS operational and paperwork requirements for non-profits).

<sup>272</sup> Sample organizational documents that meet the IRS requirements for 501(c)(3) corporations can be downloaded from *Sample Organizing Documents*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Sample-Organizing-Documents-Public-Charity>.

<sup>273</sup> *Organizational Test – Internal Revenue Code Section 501(c)(3)*, IRS, [http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Organizational-Test-Internal-Revenue-Code-Section-501\(c\)\(3\)](http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Organizational-Test-Internal-Revenue-Code-Section-501(c)(3)).

A 501(c)(3) corporation cannot be what the IRS labels “action organizations”—lobbying groups that attempt to influence legislation or participate in campaign activity for or against political candidates. The organization must not operate for the financial benefit of private interests, which means it cannot be used as a cover for taking profits. If a 501(c)(3) is found to have provided an “excess benefit” to a person having substantial influence over the organization, an excise tax may be imposed on the person and any organization managers agreeing to the transaction.<sup>274</sup> It is therefore critical that 501(c)(3)s have clear mission statements that explicitly describe their charitable focus, and have a leadership structure that is free from undue influence by people not connected with the management of charitable operations.

### *Section 7871 Corporations*

Internal Revenue Code Section 7871 was implemented in 1982 to give tribal governments the same status as state governments with regard to certain tax laws.<sup>275</sup> Most importantly for developing non-profit activities, it allows tribal governments and any entity or fund that is an integral part of the tribal government to receive tax-deductible donations. This puts Section 7871 entities in the same category as 501(c)(3)s in their ability to offer a tax benefit to donors who support the mission of the tribal non-profit.

The primary difference between a Section 7871 organization and a 501(c)(3) is that a Section 7871 organization is actually an arm of the tribal government, and the government exerts direct control over the entity’s operations. Only federally recognized tribes can establish a 7871 organization, the entity must exist strictly to serve public purposes, and the entity must have either 1) taxing authority, 2) policy powers, or 3) the power of eminent domain.

Section 7871 organizations have several advantages over 501(c)(3)s within the tribal context, including:

- Section 7871s that are incorporated under tribal law are not subject to the same state law jurisdiction and requirements as 501(c)(3)s,

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<sup>274</sup> *Intermediate Sanctions – Excess Benefit Transactions*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Intermediate-Sanctions-Excess-Benefit-Transactions>.

<sup>275</sup> I.R.C. § 7871 (2013), available at <http://www.irs.gov/pub/irs-tege/irc7871.pdf>.

which are typically incorporated under state law. This provides greater independence and sovereignty protection for Section 7871s.

- Section 7871s are not subject to the same administrative and financial reporting requirements as 501(c)(3)s, resulting in less mandatory paperwork and public disclosures.
- 501(c)(3)s are generally prohibited from engaging in lobbying and other forms of political advocacy, but those restrictions do not apply to Section 7871s.
- Gaming revenues that are distributed to tribal members through the charitable activities of Section 7871 organizations are not subject to taxation as they would be if distributed directly through per capita payments.

### *Tribally Chartered Non-Profit Corporations*

Tribes have the ability to create non-profit organizations that are organized and chartered in accordance with tribal law, as opposed to state and federal laws. This necessitates a tribe having a non-profit ordinance or similar enabling law within its tribal code.<sup>276</sup> The non-profit ordinance needs to be comprehensive and detailed in its treatment of non-profit organizations, including:

- Specifications for organizational structure;
- Board governance procedures;
- Meeting requirements;
- Contents for the corporate charter, bylaws, and articles of incorporation;
- Management and distribution of assets;
- Reporting and record-keeping requirements;
- Dissolution procedures.

It is important to note that while tribally chartered corporations can be created and organized in accordance with a tribe's legal code, to enjoy the same tax-advantaged status of a 501(c)(3) or Section 7871 the entity will need to operate in compliance with the same IRS regulations that govern those non-profit forms.

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<sup>276</sup> The Tulalip Tribes' Non-profit Corporations Ordinance provides an excellent model for tribal code sections to regulate tribally chartered non-profits: *Tulalip Tribes of Washington Codes and Regulations*, NATIONAL INDIAN LAW LIBRARY, <http://www.narf.org/nill/Codes/tulalipcode/tulalip107nonprofits.htm>.

## Utilizing Non-Profits for Community Development

The range of beneficial activities that non-profit organizations can undertake in native communities is essentially limitless, and tribes can focus and encourage non-profit development toward servicing the major needs of tribal members. Examples of non-profit programs for the benefit of native communities include:<sup>277</sup>

*Community Health:* Preventive health maintenance, mental health programs, prescription drug cost subsidies, substance abuse treatment programs, marital counseling, fitness and diet training.

*Housing:* Provide financial and other assistance to members to obtain affordable housing, help pay utility bills, make rent/mortgage payments, perform maintenance, and make improvements to homes.

*Child Care:* Day care, child wellness, nutrition, pre-natal, and parenting classes.

*Elder Care:* Recreation and physical fitness programs, health education and services, benefits assistance, mobility/accessibility upgrades for housing, assisted living facilities.

*Food/Clothing Banks:* Coordination and distribution of emergency aid for families in need.

*Education/Scholarships:* College/technical education funding, tutoring, youth programs, job skills training, continuing education programs.

Numerous tribal nations have created Section 7871 organizations specifically for the purpose of economic development, such as:

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<sup>277</sup> An excellent guide to tribal-controlled non-profit activity is FIRST NATIONS DEVELOPMENT INSTITUTE, CHARITABLE AND SOVEREIGN: UNDERSTANDING TRIBAL 7871 ORGANIZATIONS (2009), <http://www.firstnations.org/sites/default/files/Charitable%20and%20Sovereign%207871%20Report.pdf>

- The Salt River Pima Maricopa Indian Community in Arizona established the Salt River Financial Services Institution as a CDFI to provide loans, home ownership assistance, and financial education to community members.<sup>278</sup>
- The Citizen Potawatomi Nation's Community Development Corporation is a tribally chartered non-profit corporation designed to provide capital and technical assistance for economic development projects, help tribal entrepreneurs with business planning, and help tribal members develop financial skills and obtain credit counseling.<sup>279</sup>
- The Ho-Chunk Community Development Corporation is a 501(c)(3) that was created by the Winnebago Tribe of Nebraska to provide tribal members assistance with commercial development, business and technology training, housing, and youth development.<sup>280</sup>

Leveraging the power of non-profits can pay substantial dividends for tribal economies. Well-managed non-profits can undertake significant community development work and produce broad social benefits for the tribe's members. Every dollar that non-profits invest in these social services gives greater flexibility to the tribal government in the expenditure of its own funds, allowing for the initiation or expansion of other economic activities. The positive public relations impact from the good works of non-profits is attractive to potential donors, who also obtain the financial benefit of tax deductions for their contributions to these organizations. Including support for non-profit organizations in a strategic economic plan opens up new avenues for attracting capital to native communities, and facilitates the grass-roots distribution of that capital to help achieve real improvement in the quality of life for tribal members.

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<sup>278</sup> SALT RIVER FINANCIAL SERVICES INSTITUTION, <http://www.srfsi.com/index.aspx>.

<sup>279</sup> CITIZEN POTAWATOMI NATION, [http://www.potawatomi.org/index.php?view=category&id=105%3Acpcdc&option=com\\_content&Itemid=18](http://www.potawatomi.org/index.php?view=category&id=105%3Acpcdc&option=com_content&Itemid=18).

<sup>280</sup> HO-CHUNK COMMUNITY DEVELOPMENT CORPORATION, <http://www.hochunkcdc.org/>.





## **Tribal Business Codes and Dispute Resolution**

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When the leaders of a native community undertake an assessment of the state of their economy, one of the many important questions to ask is:

### **Are We “Open for Business”?**

Just as a retail shop needs to make it easy and attractive for potential customers to walk through the door, tribes need to establish a favorable environment for doing business in and with their communities, while demonstrating that they can help their partners realize a positive return on their economic investments. Many different factors will help an individual tribe build a reputation that attracts new business opportunities. Two factors that are universal for all native communities are: 1) good tribal codes for business, and 2) fair dispute resolution procedures.

### **Tribal Business Codes**

The tribal code is the law of the land within the tribal community, and it provides the legal backdrop for the business transactions involving the tribe and its partners. It can also provide a powerful mission statement that publicly announces the tribe’s intent to pursue beneficial economic development. The Hoopa Valley Tribe’s Comprehensive Business Policy Code contains an excellent example:

The Tribe recognizes that a strong Reservation economy must include both tribal and private sector development. It

is the policy of the tribal Council to promote both tribal and private sector development within the exterior boundaries of the Reservation and elsewhere within the jurisdiction of the Tribe. It shall be the policy of the Tribe to interpret laws, policies, regulations, procedures, etc., in a manner that facilitates the development and promotion of businesses on the Reservation to the greatest commercial potential possible.<sup>281</sup>

Tribes can facilitate the development of private enterprise within their communities by creating business-oriented tribal code provisions that assist the creation and expansion of companies. Before creating a new tribal business code (or adopting a version of another tribe's existing code), tribal leaders should think strategically about how the new code can best assist the community's business development goals. At their most fundamental level, tribal business codes should be crafted to fulfill three primary purposes:

- 1) Give native entrepreneurs a simple and affordable means of incorporating their businesses and non-profit enterprises within a familiar system designed for their protection;
- 2) Provide clear and efficient business regulations that serve the tribe's economic interests and cultural priorities;
- 3) Improve on state/local business regulations and administrative processes, to give the tribe a competitive advantage in attracting new businesses to the community.

Beyond these basic tenets, tribal codes should be customized to address the particular business circumstances of each individual community. For example, a tribe that has or wants a biomass energy facility may wish to include specific provisions on the transport and handling of waste material. Having a tribal business code that allows for the creation of companies under the auspices of tribal law is also a method for preserving tribal sovereignty. Businesses incorporated under tribal law are not subject to the state corporate registration requirements, although they may be required to obtain licensing to conduct business off-reservation, e.g., native-owned

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<sup>281</sup> Hoopa Valley Tribal Code tit. 50, § 50.104, *available at* <http://www.narf.org/nill/Codes/hoopacode/t50cbpc.htm>.

construction companies may need a state contractor's license to work on projects outside the tribe's jurisdiction.

*Applicable Law and Jurisdiction:* The laws that govern corporate conduct on tribal land and by companies registered under the tribe's corporate code should be specified. The tribe's own laws as codified within the tribal code should apply, and may be supplemented with reference to the laws of another jurisdiction (such as federal or Delaware) if the tribe's business codes are not felt to be sufficient to cover all necessary scenarios. If the tribe has its own Tribal Court, that will be the preferred jurisdiction and venue for the resolution of disputes involving the business code. If the tribe does not maintain its own court system, it can specify jurisdiction within another court such as an InterCourt or federal courts.

*Requirements for Articles of Incorporation:* For any company created within the boundaries of the tribe's territory, its articles of incorporation should be required to conform to the tribe's constitution, code, and other applicable laws and regulations.

*Registered Office and Agent:* Every corporate entity needs to provide the tribal government with a physical location (not just a PO box) where official correspondence can be sent, as well as a registered agent upon whom service of process for legal matters can be made. Since the managers within a corporation are subject to change, many businesses are utilizing professional registered agent companies to receive service of process, and the tribal corporate code should allow for this.

*Corporate Powers:* The powers afforded to companies to conduct their business should generally be quite broad to allow for corporate growth and diversification. However, tribes can restrict business activities that are deemed to be culturally inappropriate or deleterious to community health, such as pornography or selling alcohol.

*No Waiver of Sovereign Immunity:* The code should specify that the tribe and its government do not waive any sovereign immunity toward a business by allowing it to incorporate under the tribe's business laws, and that no special relationship or entitlement is created between the business and the tribe unless by separate written agreement.

*Liability of Corporate Officers:* One of the primary reasons people create corporations to conduct business is to shield themselves from personal liability in the event of problems arising from their business activities. The tribal business code should provide liability protection that is at least equivalent to that of common corporate jurisdictions such as Delaware and Nevada.

*Procedures for Corporate Dissolution:* When a business is dissolving, going bankrupt, or otherwise not continuing to operate, the code should require the company to provide notice and other information to the tribe so the tribe can maintain current records of the status of corporations within its jurisdiction.

Tribal business codes should accommodate different structures, including traditional shareholder corporations and LLCs. Codes for different corporate forms should address key operational issues specific to those forms, e.g., the code for corporations should provide terms for the rights and meetings of shareholders, and an LLC code should include requirements for transfer/expansion of membership. As a starting point for tribes that wish to create new business codes and corporate documents, the Michigan Economic Development Corporation's Tribal Business Development Unit has created a model set of tribal business codes that include a model Tribal Business Corporation Code, Articles of Incorporation, Tribal Limited Liability Company Code, and Articles of Organization for a Tribally chartered LLC.<sup>282</sup>

## Dispute Resolution

As noted in the Introduction, many non-tribal businesses are reluctant to do business with tribes due to a fear that if a dispute arises, they will not be able to obtain a fair resolution—or even a fair hearing. Many companies simply will not engage with tribes if the only recourse for disputes is to go to Tribal Court, or if the tribe will not provide a waiver of sovereign immunity. Being “open for business” therefore requires tribal governments and their enterprises to take a strategic approach to dispute resolution that

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<sup>282</sup> MICHIGAN ECONOMIC DEVELOPMENT CORPORATION, TRIBAL BUSINESS STRUCTURES GUIDEBOOK ON DIFFERENT STRUCTURES FOR TRIBAL BUSINESS ENTITIES (Sept. 14, 2011), available at [http://www.michiganadvantage.org/cm/Files/Tribal\\_Business\\_Development/Tribal%20Business%20Structures%20Guidebook.pdf](http://www.michiganadvantage.org/cm/Files/Tribal_Business_Development/Tribal%20Business%20Structures%20Guidebook.pdf).

balances the need to protect sovereignty with the need to provide non-tribal partners with confidence that any problems will be fairly resolved.

When approaching how business dispute resolution will be undertaken, as either a general policy or specific to a particular relationship or transaction, tribes should consider four basic concepts:

1. *Choice of Law.* Business agreements and obligations, and the disputes that arise from them, are interpreted according to a particular set of laws that can be specified in the agreement between the parties. If the tribal code for a given nation covers business issues and is supplemented by an extensive history of court case decisions, companies that are already familiar with the tribe and comfortable with business in the tribal realm may agree to the applicability of tribal law. However, many companies will want to use another set of laws for the interpretation of agreements, either due to a lack of familiarity with tribal codes or in cases where the tribe does not have codified case law. Federal law is often a compromise choice for tribal business agreements, as it is usually comprehensive enough for most business transactions. Tribes can also agree to use state *law* for interpreting business agreements without agreeing to the jurisdiction of state *courts*, or any other aspect of state government, to resolve potential disputes.

2. *Forum for Disputes.* The fear of Tribal Courts—or at least the fear of not getting a fair decision in them—is a typical challenge to overcome in making business deals with non-native companies. Although this fear is usually based on ignorance and/or inexperience, tribes should recognize the reluctance of potential partners to have disputes resolved in Tribal Court, and be prepared to use an alternative forum. As an initial step in dispute resolution, non-binding mediation is often highly effective, and the parties mutually agree on the third-party neutral who will facilitate their negotiations. If mediation/negotiation does not get the issue resolved, many tribes are agreeing to a private arbitration as a binding method of reaching an ultimate outcome. Arbitration presents fewer sovereignty issues for tribes than appearing in federal court, and is almost always more acceptable to tribal governments than appearing in a state court. Like mediation, the parties themselves can select the arbitrator, which helps ensure the matter is decided by an experienced professional who will understand the factual and legal issues in the dispute.

3. *Limited Waiver of Sovereignty.* For any dispute resolution to be legally binding, the tribe must provide a waiver of sovereign immunity, otherwise any judgment from an outside authority against the tribe will likely only be worth the paper on which it is printed. Most companies interested in doing business with tribes will understand this, and insist the tribe waive at least some of its sovereign immunity as a condition of agreeing to do business. These waivers should be limited to the narrowest scope necessary to deal with potential business disputes, and in no case should provide any open-ended waiver. As noted in Chapter 11, it is possible to limit both the scope of the waiver and the potential tribal assets at risk, thereby explicitly detailing the tribe's maximum risk in the transaction.

4. *Enforceability of Resolutions.* In conjunction with the limited waiver of sovereign immunity, it may be necessary for the tribe to demonstrate that in the event a dispute is resolved in the other party's favor, there will actually be some financial asset of the tribe that can be accessed to provide compensation. Again, the scope of the tribe's asset risk should be kept to the minimum level necessary to make the other party willing to engage in the business transaction. For deals where the tribe is paying money to the other party in exchange for providing goods or services (such as through construction contracts), the tribe could place some or all of the funds to be paid under the agreement into an escrow account with a bank or other third party. The escrow agreement would provide specific instructions on when and how funds can be distributed, including in the event of a judgment or arbitration award following a dispute.

Perhaps the most fundamental method for initiating economic development is to understand how potential business partners think and what they need to invest in a business enterprise, and then creating conditions that satisfy those needs. By creating tribal business codes that encourage entrepreneurship, and demonstrating good faith in agreeing to reasonable dispute resolution procedures, tribes can establish their reservations as favorable places to do business and build a reputation for reliability in business dealings—a key element for sustainable economic growth over the long term.

# Conclusion: Strategic Planning and Diversification

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## **“You’re an Indian Tribe? Well, Why Don’t You Just Open a Casino and Start Making Money?”**

In the midst of the endemic and systemic problems that native communities confront when planning for economic development, there are also problems of perception. Casino gaming is easily the most high-profile business activity in which certain tribes engage, and for most people outside native communities it is likely the first thing that comes to mind when thinking about tribal economies. Typically, less thought is given to the purpose behind gaming, which serves as a source of replacement revenue to compensate for a tribe’s lack of property taxing authority, and must fill the gap to help finance roads, emergency services, and other basic community needs. The myth of the “rich casino tribes” is belied by the reality of native communities continuing to struggle to reach the average national income level after centuries of abandonment and neglect, and the fact that the average annual personal income of Native Americans still remains only half the level of the rest of America.<sup>283</sup>

Even within tribes, the glittering allure of potential casino dollars has lost a fair amount of its initial shine. The financial crisis that commenced in 2007 proved that gaming is not recession-proof, and several of the largest tribal casinos could not meet the payments on their development loans and went into default.<sup>284</sup> Casinos are not a viable option for hundreds of tribes and native communities throughout the United States, due to their geographic isolation

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<sup>283</sup> *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, <http://www.narf.org/pubs/misc/gaming.html>.

<sup>284</sup> Foxwoods Casino: Greg Guedel, *Mashantucket Pequot Reaches Deal to Extend Foxwoods Casino Debt Forbearance*, NATIVE AMERICAN LEGAL UPDATE (Jan. 26, 2010), <http://www.nativelegalupdate.com/2010/01/articles/mashantucket-pequot-reaches-deal-to-extend-foxwoods-casino-debt-forbearance/>;

Lake of the Torches: Greg Guedel, *Wells Fargo Takes Another Run at Lac du Flambeau Tribal Bond Lawsuit*, NATIVE AMERICAN LEGAL UPDATE (Feb. 17, 2010), <http://www.nativelegalupdate.com/2010/02/articles/wells-fargo-takes-another-run-at-lac-du-flambeau-tribal-bond-lawsuit/>.

from the concentrated population centers that are necessary to provide a sustainable customer base, and less than half of the federally recognized tribes are involved in gaming. Of the tribes that do have casinos, the top 4 percent (twenty casinos) account for more than 55 percent of all tribal gaming revenue; the remaining 45 percent of total revenue is split between the other 96 percent of the gaming tribes.<sup>285</sup> Tribal leaders have learned through hard experience that casinos are no “sure bet” on which to base strategic economic planning. With several decades of data on gaming revenues and community impacts now in hand, the lesson has become clear: diversification is critical to the long-term growth and success of tribal economies.

Diversification is simply the business version of the timeless adage: “Don’t put all your eggs in one basket.” Having multiple streams of revenue from different sources is a sound method for creating long-term economic stability within native communities. Strategic planning for diversified economic development begins with recognizing certain basic principles:

- Economic development is broad-based, and should address the broadest possible spectrum of community needs.
- The specific needs and resources of each unique native community should guide its development planning.
- Effective planning requires a realistic assessment of the available development tools, and setting goals that are measurable and achievable.

Identifying key resources is fundamental to the process of developing new economic ventures, and strategic planning assessments should highlight the resources that are currently available in the community and those that could become available with near-term development work.

The most important resource in any native community is its people. The members of a native community will provide the creativity, energy, and dedication to carry forward the strategic plans of the tribal leadership, and will do so while remaining conscious of the heritage, traditions, and values

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<sup>285</sup> POTLATCH FUND OPPORTUNITIES AND CHALLENGES IN RELATION TO THE FUNDING OF NORTHWEST NATIVE COMMUNITIES (Feb. 2007) [http://www.potlatchfund.org/documents/pdf/Philanthropy\\_in\\_Indian\\_Country.pdf](http://www.potlatchfund.org/documents/pdf/Philanthropy_in_Indian_Country.pdf); *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, <http://www.narf.org/pubs/misc/gaming.html>.



of their nation. It is critical for tribal leaders to connect and communicate effectively with the members of the community, and create opportunities for them to participate in and support economic development work. Broad membership involvement in the planning and information process can be obtained in numerous ways, including:<sup>286</sup>

- Community surveys
- General council presentations
- Shareholder meetings and webinars
- Public budget and development proposal hearings
- Annual reports of tribal business activity
- Newsletters

A well-informed tribal membership will be more supportive of new economic initiatives, particularly for innovative ideas that may be unfamiliar to most people, and often will bring in their own helpful suggestions for implementing the concepts. Successful development projects that were commenced with community outreach and member participation will impart significant social goodwill along with their economic gains, and the leaders of the projects will earn enhanced credibility with the membership for future endeavors.

Beyond obtaining cultural support within the community, assessing the tribe's human resources is a critical element of strategic planning for economic development. The size, location, and capabilities of the tribal membership will affect the viability of a given business enterprise, and likely determine the required level of partnering with outside entities. For each new business venture being considered, key questions include:

- Do we have people with the experience/expertise to manage and work in the enterprise?
- How many potential managers/employees do we have, and how many will be needed?
- What training/education do our people need to be qualified to work in this enterprise?

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<sup>286</sup> Robert Whitener, Strategic Planning in Indian Country, The Whitener Group seminar presentation, Seattle, Washington (Feb. 27, 2013).

- Who are the best partners to help develop our members' skills and knowledge base?

The answers to these questions will provide important guidance for taking the next steps in developing plans for both the specific enterprise and the approach for members' education and workforce training. Aside from finding qualified workers who can immediately help launch the enterprise, part of the strategic plan should be focused on ensuring there will be growth in the number of tribal members who have the necessary education and skills to provide a sustainable workforce.

After the tribe's available human resources have been identified, the next crucial question is: "What is the best way to organize our people to accomplish this work?" The baseline issue is management structure—determining what form of organization and method of operation is best suited for success. As the previous chapters have detailed, there are many options: council-controlled entities, tribally chartered corporations, joint ventures, non-profits, and others. Each has its strengths when used in appropriate applications, and each has its weaknesses for managing work not suited to the characteristics of the form. For example, an enterprise that is wholly owned and directly controlled by the tribal government has the benefit of sovereign immunity and political cohesion with the tribal council—which may make it well-suited to provide for on-reservation community development like a tribal utility or housing authority. On the other hand, these entities are also subject to political interference and inconsistency when elections change the composition and priorities of the council—which may make them a poor choice for a business that will engage in partnership with outside companies to pursue contracting opportunities. The nature of the economic activity should be a primary driver in determining the appropriate corporate structure for the enterprise, and tribal leaders should resist the simplicity of having existing entities take on new projects that they cannot efficiently manage.

For every development activity conducted by any form of corporate entity, tribes seeking to create economic diversification should weave five core principles into the strategic planning process:

1. *Efficiency*: Sovereignty is one of the great competitive advantages tribes enjoy in pursuing economic development, and tribes should use the

power of their sovereignty to create highly efficient processes and environments for doing business. Tribal governments can eliminate the unnecessary regulations and red tape that businesses and investors confront in other jurisdictions, and help entrepreneurs realize positive gains much faster than is possible elsewhere. Licensing requirements, permit paperwork, staff review/approval turnaround—all should be streamlined to create maximum efficiency and minimize delays in the process for creating new economic ventures in the community. It is a realistic goal for tribes to endeavor to be “The Best Place To Do Business In The State,” and using sovereign powers to help businesses produce positive results quickly is the best first step.

2. *Transparency*: The “mystery” that surrounds tribes and how to do business with them is a significant hindrance on economic growth in native communities. Tribes are understandably protective of their heritage and culture, and the tragic history of broken promises by the federal government certainly justifies caution in how information about a community is shared. However, any competent outside partner will conduct thorough due diligence before embarking on a business venture with a tribe, and will expect to have access to financial and other information that is relevant to the intended operation. Tribal leaders should understand in advance what data disclosure is necessary or warranted for starting an economic development project, and be prepared to share that information under an appropriate regime of non-disclosure agreements and other legal protections.

3. *Consistency*: Probably the single biggest fear that non-native entities have toward doing business with tribes is the notion that after they make a deal, the tribal leadership will change its mind (or change altogether) and then use sovereignty to alter or break the agreement. This fear is not unfounded—tribes do have the legal power to do exactly that, however deleterious it may be to their own economy and those of their fellow tribes. The only way to alleviate this fear and attract beneficial partnerships is for the tribe to demonstrate consistency in its business dealings, and establish a track record for carrying through on agreements. Two methods that assist in this regard are: 1) giving tribal business managers independence from political interference by the tribal council, and 2) having tribal codes and business regulations that are clear and applied logically and predictably.

4. *Responsiveness*: A frustrating cliché regarding native communities is that they tend to operate on “Indian time,” a euphemism for tardiness and slow activity.<sup>287</sup> Such generalizations are harmful for economic development, as major investors will not likely put cash into partnerships with people who will not promptly return their phone calls. Regardless of the ignorance behind this stereotype, tribal leaders in government and business need to create a culture of responsiveness within their enterprises, and educate their staff on the importance of timely communication. Depending on the level of staff experience, it may be necessary to implement formal operational policies such as “All phone messages are to be returned within twenty-four hours.” The speed of information transfer is constantly increasing, and tribes need to keep pace to maximize development opportunities.

5. *Publicize Success*: For many native communities, trumpeting about one’s own success is inconsistent with traditional culture and values. Yet economic success breeds new opportunities for partnering and diversification, and effectively communicating the tribe’s ability to produce results is a key factor in the creation of these opportunities. Whether discussing the success of small projects with the local chamber of commerce, or giving interviews to Bloomberg or The Economist regarding major new developments, tribes should actively and regularly utilize appropriate media and other communication outlets to help promote their reputation as reliable business partners with strong economic environments.

Just as tribal cultures are multi-faceted and reflect the unique values and experiences of each tribe’s heritage, so too should each tribe’s economic activity be geared toward creating opportunities across multiple industries. A robust economy is part of the tribe’s legacy to future generations, just like its art and history and traditions, and economic growth and diversification should be cultivated with care and dedication for the long-term benefit of the community.

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<sup>287</sup> For a discussion on the origins and relevance of this concept, see Tim Giago, *Is there still a place for Indian Time in this busy world?*, HUFFINGTON POST (Dec. 6, 2009, 1:36 PM), [http://www.huffingtonpost.com/tim-giago/is-there-still-a-place-fo\\_b\\_381809.html](http://www.huffingtonpost.com/tim-giago/is-there-still-a-place-fo_b_381809.html).

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ASPATORE