

Alert | American Indian Law



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Competitive Advantages of Doing Business with Native American Tribes & Tribal Corporations

In an expanding global economy, investors are looking for competitive advantages and more advantageous business environments. Under the U.S. Constitution, Native American Indian tribes are recognized as semi sovereign nations, and a business venture with an Indian tribe can offer many competitive advantages.

While Native American Indian tribal governments follow most federal laws, they also have the authority to establish their own laws and regulations. Most tribes have wholly owned tribal corporate entities that enjoy most of the same legal protections and advantages as the tribe itself. In addition, the federal government has enacted a broad array of financial incentives to encourage investment in economic development projects in economically distressed areas and on tribal lands specifically.

Tribes are Sovereign Governments with Sovereign Corporations

- ***Tribal government owned-corporations.*** Tribal governments can charter their own tribal government-owned corporations under tribal law or federal law (Section 17 of the Indian Reorganization Act of 1934). Tribally chartered enterprises hold the same status as the tribe itself for purposes of federal income tax exemptions and sovereign immunity from suit. Tribal governments can promulgate their own regulations governing economic activity on their lands. Further, tribal governments and their tribal corporations are generally not subject to most state laws.

- ***Tribal corporations create governmental revenue.*** Unlike most governments, due to a variety of legal and practical impediments, Native American tribal governments do not have significant tax-based revenue to run their governments and provide governmental services. (Tribal land is held in “trust” by the federal government and, as such, is not taxable; tribal unemployment rates are very high, so there is no real opportunity for tribal income tax; and, sales taxes are often in dispute with state governments.) As a result, tribal governments create wholly owned tribal corporations in order to participate in the private marketplace, and own a wide variety of businesses (casinos, gas stations, hotels, etc.) in order to generate a revenue stream for their governmental services.

Federal and State Tax Exemptions

- ***No federal income tax (on or off tribal land).*** Like any government-owned entity, tribes and tribal enterprises are exempt from federal income taxes. If a business entity is formed between a tribe and a non-tribal company, the portion owned by the tribe (or the tribal corporation) is in most cases exempt from federal income taxes. This is true regardless of whether the business owned is on or off tribal land. On reservation tribal owned businesses may also be exempt from state income taxes.
- ***No state sales tax.*** Most tribes do not have their own sales taxes. In addition, most states have exemptions from state sales taxes for purchases made by government entities.
- ***No state property tax.*** If the land is located on an Indian reservation, owned by a tribe, and held in “trust” by the federal government, then the land is not subject to state property taxes.
- ***No state property improvements tax.*** Tribal trust lands and tribal-owned improvements on such lands are exempt from state taxation. There are also some circumstances in which this exemption can be extended to non-tribally owned improvements.

Federal Tax Credits

- ***NEW in 2018 - Opportunity Zones.*** Opportunity Zones are economically distressed census tracts designated by governors, a significant percent of those zones are in Indian Country. If capital gains are invested in an “opportunity zone,” taxes on those gains are deferred until 2026 (with some savings due to step-up in basis). In addition, if the investment stays in that zone for 10 years, there are no taxes on the profits made from that investment.
- ***Investment Tax Credit (New Market Tax Credits).*** NMTCs are also available to investors for capital investments in Indian reservations, providing tax credits of up to 39 percent of the entire amount of the investment. The tax credit is spread over seven years – five percent of the investment for the first three years, and six percent of the investment amount can be claimed over the next four years.
- ***Indian wages and insurance tax credits.*** Employers can receive a tax credit of up to 20 percent of wages and health insurance for qualified employees who are working and living on Indian reservations.
- ***Equipment and buildings: accelerated depreciation.*** Businesses can claim depreciation at twice the normal rate for locating equipment and buildings on tribal land.

Federal Government Contracting Preferences

- **Preferences for tribal companies (8(a) Preferences).** The Small Business Administration’s “8(a) Business Development program” authorizes preferences for minority-owned small businesses in bidding for federal contracts. However, if the company is owned by a tribal government, it receives additional benefits, such as not being subjected to the lower contract amount caps, and sole-source bidding.
- **Preferences for Indian reservation-based businesses (HUBZone Preferences).** If a small business is located on Indian lands, and 35 percent of its employees reside on the reservation, the company is eligible for HUBZone (Historically Under-Utilized Business Zone) preferences in the awarding of federal contracts. Benefits include competitive and sole-source contracting and a 10 percent price evaluation preference in full and open contract competitions.
- **Preferences on Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) contracts (Buy Indian Act).** Because of the unique treaty responsibilities of the United States, BIA and IHS have the authority to give preferences to Indian and tribally owned companies in procurement contracts.

Subsidized Financing

- **NEW in 2018 – Department of Energy (DOE) loan guarantees for tribal energy projects.** \$2 billion in loan guarantees have recently become available, to guarantee up to 90 percent guarantee of a private loan. Indian tribes or Alaska Native corporations are eligible, and “energy development” is broadly defined. Applications are submitted in rounds every few months.
- **BIA loan guarantees for Indian reservation projects.** Tribes can obtain a loan guarantee from the Bureau of Indian Affairs for up to 90 percent of a private loan. The business must be located on or near an Indian reservation and must contribute to the economy of the reservation. The tribe must have at least 20 percent equity in the business. The loans may be used for a variety of purposes including operating capital, equipment purchases, business refinance, building construction, and lines of credit.
- **United States Department of Agriculture (USDA) loan guarantee for rural businesses. (Business & Industry).** The USDA provides loan guarantees ranging from 60-80 percent of a privately financed loan. The business must be located in a rural area (less than 50,000 inhabitants); many Indian reservations meet this requirement. The loan guarantee can be used for: business conversion, land, rights-of-way, buildings, equipment, inventory, and debt refinancing and business acquisitions when it saves or creates jobs.
- **USDA low-interest loans for community facilities.** The USDA provides low-interest loans directly, and some grants, for tribal governments to build essential community facilities in rural areas (where many Indian reservations are located). Eligible facilities include: hospitals, clinics, airport hangars, child care centers, fire departments, police stations, prisons, schools, and local food systems.
- **Incentives for foreign investors (Immigrant Investor/EB-5 Visas).** With this U.S. government program, foreign investors receive American visas in return for investments that create 10 new jobs. Generally, the investment required is \$1 million. However, in rural areas and areas of high unemployment, which includes many Native American reservations, the investment required is only \$500,000.

- **Tax exempt bonds (Tribal Economic Development/TED Bonds).** There are annual IRS allocations available for tribes to issue governmental bonds that are tax exempt for investors. Bond proceeds used for projects must be located on tribal lands, provide essential governmental functions, and not involve gaming.

Flexible Regulatory Environments

- **Zoning.** Tribes are generally exempt from local, county, and state zoning and land-use restrictions and state permitting requirements.
- **Environmental regulations.** Tribes can issue environmental licenses and permits in conformance with tribal and federal environmental requirements.

Social Impact Investing

- **Socially responsible investing.** Unlike a privately held company, all profits of a tribal government-owned corporation go back into the tribal corporation and the tribal government's budget, for government expenditures such as education, infrastructure, winter heating assistance, etc. Therefore, investments in tribal government-owned corporations go toward the economic empowerment of historically disadvantaged people.
- **Cultural cachet.** While perhaps not a direct financial advantage, many individuals and many countries (such as Germany and Turkey) have a significant interest in Native American tribes and culture. Therefore, the idea of investing in or partnering with Native American tribal government-owned corporation has additional marketing cachet.

Conclusion

Each Native American Indian tribe and tribal corporation has its own unique culture, values, and goals for doing business. There are many competitive advantages available to investors and businesses partnering with Indian tribes and tribally owned corporations. Businesses that appreciate the uniqueness of working with tribes can thrive doing business in Indian Country, and do good while doing well.

Author

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