



Creating the Proper Legal Infrastructure for Economic Development

by Derril Jordan

Modern-day tribal governments should place a premium on promoting economic development within their respective communities. Many long term problems such as a general lack of access to financial capital, lower educational or vocational training levels within the community, and isolation from population centers and major transportation networks, make economic development in Indian Country a challenge. The involvement of the tribal government is usually necessary to jump start the process. To compound the challenge, many tribes also lack the adequate legal infrastructure necessary to create a stable business environment.

The development of the necessary legal infrastructure is one of the first concerns a tribe must address when embarking on a purposeful economic development campaign. The term “legal infrastructure” refers to the creation and expansion of tribal laws, as well as the tribal institutions necessary to encourage and manage investment and development. While the creation and growth of these laws and institutions must be part of the process from the beginning, it is not necessary that a tribe place the full array of laws and institutions in place at the outset.

Laws such as a commercial code (addressing basic contract law, sales, and secured transactions) and a business organization code (governing the creation of corporations, limited liability companies, partnerships and joint ventures), alongside laws or regulations related to land use, planning and zoning, encourage outside investment in tribal communities and help to create the legal environment in which investors feel secure. The development and implementation of the requisite laws and regulations can be quite costly, and a tribe may not be able to afford to put in place a fully developed code system at the outset of its economic development journey. However, many of the laws and regulations can be drafted and enacted on an as-needed basis, particularly when a tribe is presented with an investment opportunity in a specific area. An independent court system in which disputes can be resolved, which also has accessible rules of procedure and judicial decisions, will also go a long way in helping to promote investment in tribal economies.

In addition to establishing the traditional set of laws and regulations to attract investment, a tribe must also create a mechanism through which it will promote itself to outside investors and scrutinize opportunities. Many tribes do this, at least initially, through their tribal council or business committee, which is often adequate in the early stages of

economic development. However, as a tribe ramps up its economic development and begins to operate more, and increasingly sophisticated governmental programs, the tribal council or business committee may become over-burdened. Thus, the delegation of responsibility for economic development to another tribal institution wholly dedicated to that task may be to the tribe’s advantage. A model tribal economic development commission can be created by tribal law, and charged with both the responsibility of attracting investors and potential business partners, and vetting the associated business opportunities so that the tribe has a greater chance of success in its ventures and tribal resources are not wasted. The laws related to the economic development commission should address factors such as the selection and removal processes for, and the required qualifications of, persons who will serve on the commission, whether members of the tribal council can serve on the commission, and whether the commission (or some other tribal entity, such as the tribal council) has the authority to decide whether to make an investment or enter into a business relationship once it has been properly investigated. The laws should also establish the inspection criteria to ensure that each venture is given a “hard look,” and that the tribe is not investing in ill-conceived opportunities or passing over those that have a real chance for success.

A tribe must also decide how it will own and manage its economic development ventures. Most investors will want to use a business structure with which they are familiar and comfortable, which usually means they favor the use of a corporation or limited liability company. Non-Indian investors often recommend the organization of such entities under state law, but the organization of tribal businesses under the laws of a state can have serious negative legal consequences. For example, establishing a venture under state law can expose it to state and local regulation and taxation, affect the contours of its immunity to suit, and even result in federal taxation. Other potential partners may suggest the use of a federal corporation organized pursuant to section 17 of the Indian Reorganization Act (25 U.S.C. § 477), referred to as a “Section 17 corporation.” The use of a Section 17 corporation has the advantages of providing the potential investor with a familiar corporate entity through which to conduct business, while also preserving the privileges and immunities of a tribally-owned business. However, it is not without its own shortcomings. For example, a Section 17 charter must be approved by the Bureau of Indian Affairs

(BIA), which can slow down the economic development process, and it also inserts the BIA into the economic development process, which many tribes prefer to avoid.

A tribe can also use its sovereign authority to charter its own governmental corporations through which it can own and manage its economic development ventures. Such organizations are referred to as tribally-chartered corporations. Although this authority is part of the tribe's inherent sovereignty, meaning that it exists without regard to whether it is specifically referred to in the tribe's constitution or in a code, it is advantageous to address this power in positive tribal law. For example, it can be set forth in the code a tribe adopts to create the economic development commission if it is not otherwise addressed in tribal laws. The tribally-chartered corporation option includes the advantages of a Section 17 corporation, because it is a form of business organization with which non-Indian investors are familiar, but it eliminates the need for BIA approval, thereby streamlining the creation process and preserving a greater measure of tribal autonomy. Tribally-chartered corporations are usually governed by an independent board of directors that have full authority to manage the enterprise within broad parameters established by the tribal council in the corporate charter.

An important goal in business organization is the separation of tribal politics from business considerations, which can be achieved in a number of ways. First, a tribe can create independent business structures within the tribe to own and manage the tribe's businesses, either through the use of Section 17 or tribally-chartered corporations. Second, the board of directors for the tribal company should not consist solely of members of the tribal council. While it may be wise to include one or two tribal council members on the board of a tribal enterprise, the non-tribal council members should be in the majority. This arrangement fosters communication and cooperation between the tribal council and the board of directors, while also helping to ensure that board decisions are guided by legitimate business concerns and not political considerations. Lastly, a charter should provide for the removal of board members only on the basis of good cause, which also helps to protect the enterprises from political decisions that undermine the stability and predictability that successful businesses need.

A final, and perhaps most important, piece of advice is that a tribe should make careful and informed decisions about matters related to economic development, doing what appears best for it based on the balance of its own opportunities and

limitations. It is understandable that a tribe may want to try to replicate the success of a neighboring tribe by doing things the same way that the other tribe does them. However, what works for one tribe may not work for another, and the methodologies of a tribe that has developed significant entrepreneurial experience may not be practical for a tribe that is in the process of starting its first-ever business enterprise. There is much wisdom in the adage that one must learn to walk before one tries to run. ♣

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