



ABA SLGL Spring meeting

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**Advantages of Doing Business  
With Native Americans**

**ABA Section of State and Local  
Government**

**Spring 2016 Meeting**

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The purpose of this paper is to review the advantages to doing business with North American Indians and their businesses.

### **General**

North American Indians are recognized with strong business advantages. These advantages are particularly marked in relation for government and private sector contracting, and there are many savvy planning options available. Native American businesses, tribal member owned enterprises and minority companies are in demand. All government contracts and most private corporations require a percentage (anywhere from 20% to 40%) of their vendor dollars to go to minority enterprises. Native American companies can play a significant role in contracting as a subcontractor, or a prime contractor. Native American owned enterprises have the unique opportunity to offer DOD prime contractors the ability to access the 5% cash contract rebates available under the Native American Incentives Act (U.S.C.1544 FAR Clause 52.226-1). Native American and minority enterprises can utilize SBA socially Disadvantaged Business certification (SDB), HUBZone certification and SBA 8(a) SDB certification to break into government contracting.

### **The Unique Value of Native American Contractors**

Native American and tribally-owned enterprises have unique advantages in minority contracting and can offer prime contractors solutions to minority subcontracting requirements including possible cash rebates. A Native American tribally owned enterprise can meet DOD Indian Incentives Act requirements, provide "super 8(a) status" and meet HUBZone criteria.

#### **A. THE INDIAN INCENTIVE PROGRAM DOD**

Under the Native American Incentive Act (25 U.S.C.A. Sec. 1544), prime contractors utilizing a Native American enterprise as a subcontractor are eligible for a 5% cash rebate of the amount paid the Native American enterprise. This cash rebate is currently available under DOD contracts. The rebate is available to any prime contractor using a Native American enterprise or tribally owned company as a subcontractor at any sub-tier. For more specific information on the Indian Incentive program, see FAR Clause 52-226. -1, and DFARS Clause 252.226-7001.

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## B. NATIVE AMERICAN "SUPER" SBA 8(a) SDB

Tribally owned 8(a) enterprises enjoy unique advantages for minority contracting<sup>1</sup>. It is important that Native American tribes fully explore the advantages and opportunities for economic development available to them through the SBA 8(a) SDB program for tribally-owned<sup>2</sup> enterprises. The purpose of the SBA 8(a) SDB program is to "...assist eligible small disadvantaged business concerns compete in the American economy through business development. Tribally owned "8(a)'s" are exempt from some of the restrictions applicable to other SBA 8(a) SDB's and can achieve what is known as "super 8(a) status" as a result of the regulatory exemptions. (In general, for SBA regulations setting out exceptions for tribal 8(a) enterprises, see 13 CFR 124.109.)

- Tribally owned 8(a) firms are entitled to receive sole source any contracts of any value. The \$3M size standard limitations applied to other 8(a)'s do not apply.<sup>3</sup> The award of a sole source contract cannot be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest (S. 124.517(a).
- Tribes may form and operate multiple 8(a) companies without regard to affiliation if the NAICS codes are unique to each.<sup>4</sup>

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<sup>1</sup> 13 CFR 124.3 defines a "Tribally-owned concern" to mean "any concern at least 51 percent owned by and Indian Tribe as defined in this section."

<sup>2</sup> S. 124.109 © (3) reads: "Ownership. (i) For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest. (ii) A tribe cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary SIC code as the applicant. A tribe may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code. (iii) The restrictions of Sec. 124.105(h) [i.e., ownership restrictions for non-disadvantaged individuals and concerns] do not apply to tribes; they do, however, apply to non disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

<sup>3</sup> See [13CFR124.506\(b\)](#) reads "Exemption from competitive thresholds for Participants owned by Indian tribes. SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement. There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

<sup>4</sup> See [13CFR 124.109\(5\)](#) reads "Individual eligibility limitation. SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of Sec. 124.108(b) [this provision essentially states that a participant can only participate in the 8(a) BD program once]."

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- The affiliation rules, applicable to size standard determinations by the SBA, do not apply to tribal 8(a) enterprises.<sup>5</sup>
- Any firm owned 51% or more by a tribe is presumed to be socially disadvantaged without formal explanation (per requirement of 124.112(b)(2)).<sup>6</sup> (This avoids having to produce a substantial amount of evidence to prove disadvantaged status). A tribe though must show that it is economically disadvantaged.<sup>7</sup>

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<sup>5</sup> S. 124.109(2)(iii) reads “In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.”

<sup>6</sup> See [13CFR 124.109](#) or 13 CFR 124.103(b). (1) Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement (s. 124.105(a)); (2) In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged (124.105(d)); (3) s. 124. 105 (sets out that for Dividends and distributions. One or more disadvantaged individuals must be entitled to receive:

- (1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;
- (2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and
- (3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation;

(4) s. 124.105 (h) Ownership restrictions for non-disadvantaged individuals and concerns. (1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program.

<sup>7</sup> S. 124.109(b) reads in part that “...In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section.”

S 124.109(b)(2) reads: “Economic disadvantage. In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
  - (ii) The present tribal unemployment rate.
  - (iii) The per capita income of tribal members, excluding judgment awards.
  - (iv) The percentage of the local Indian population below the poverty level.
  - (v) The tribe's access to capital.
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- Tribally owned enterprises do not have to be in business for the two-year (two) minimum usually required by SBA regulation if they can provide an acceptable business plan indicating the firm can meet the combination of performance requirements established by the SBA for 8(a) companies (13CFR 124.109(c)(6)(ii)).<sup>8</sup>
- The United States government may directly outsource non-inherently governmental services or functions to a tribal 8(a) enterprise under OMB circular A76 without study or cost comparison.

Further, any tribally owned enterprise or Native American-owned enterprise located within "Indian country" is automatically deemed eligible for HUBZone certification.

### C. HUBZONE Certification

HUBZone's are "Historically Underutilized Business Zones"<sup>9</sup>. Companies located within a designated HUBZone and meeting SBA requirements ( See SBA regulations at 13 CFR 126. et. seq.) are eligible for Federal contracting preferences. The government has a 3 percent goal

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(vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

<sup>8</sup>S. 124.109(c)(6)(i) stipulates that "A tribally-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, *or* demonstrate potential for success as set forth in paragraph S. 124" S. 124.109(c)(6)(ii) state that "(ii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;

(B) The financial capacity of the concern; and

(C) The concern's record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

The SBA is required to waive the two-year-in-business rule for tribal and ANC-owned firms so long as the SBA finds that the firm has a marketing and development strategy for meeting the competitive mix of requirement of the 8(a) program. See [13CFR 124.123.109\(c\)\(6\)](#) As a result, a tribal or ANC 8(a) firm may be a start-up that is teaming with a more experienced firm in the beginning.

<sup>9</sup>The HUBZone Empowerment Contracting Program stimulates economic development and creates jobs in urban and rural communities by providing Federal contracting preferences to small businesses. These preferences go to small businesses that obtain HUBZone (Historically Underutilized Business Zone) certification in part by employing staff who live in a HUBZone. The company must also maintain a "principal office" in one of these specially designated areas. [*A principal office can be different from a company headquarters, as explained later in this document.*] The program resulted from provisions contained in the Small Business Reauthorization Act of 1997

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for contract set-asides to HUBZone-certified companies. Predominantly in high unemployment, rural or inner cities areas the SBA recently confirmed that all of "Indian Country" qualifies for HUBZone designation. HUBZones are found in over 9,000 urban tracts, 900 rural counties and areas qualifying as "Indian Country". Businesses located within Tribal boundaries or in alliances with tribal people may be eligible for the HUBZone preference. A business that attempts to qualify for the HUBZone Program based upon its location on an Indian reservation does not have to be Indian owned as long as the principal office of the business is located on an Indian reservation and meets all other eligibility criteria, it can earn the HUBZone designation.

To qualify for the federal program, a business must meet the following criteria:

- It must be a small business by SBA size standards;
- Its principal office must be located within a HUBZone, which includes lands on federally recognized Indian reservations;
- It must be owned and controlled by one or more U.S. citizens (N.B.-this means any level of ownership in an applicant small business by another company would result in a decline). Approved ownership can also be by a Community Development Corporation or Indian tribe; and
- At least 35% of its employees must reside in a HUBZone.

There are four types of HUBZone contract opportunities:

**Competitive:** Contracts can be set-aside for HUBZone competition when the contracting officer has a reasonable expectation that at least two qualified HUBZone small business concerns (SBCs) will submit offers and that the contract will be awarded at a fair market price.

**Sole-source:** HUBZone contracts can be awarded if the contracting officer determines that:

- only one qualified HUBZone SBC is responsible to perform the contract,
- two or more qualified HUBZone SBCs are not likely to submit offers and
- the anticipated award price of the proposed contract, including options, will not exceed:
  - \$5 million for a requirement within the North American Industry Classification System (NAICS) code for manufacturing ;or
  - \$3 million for a requirement within all other NAICS codes

**Full and open** competitive contracts can be awarded with a price evaluation preference. The offer of the HUBZone small business must not be 10 percent higher than the offer of a non-small business.

**Subcontracting:** All subcontracting plans for large business Federal contractors must include a HUBZone subcontracting goal.

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*Other Specialized Assistance –*

- Eligible HUBZone firms can qualify for higher SBA-guaranteed surety bonds on construction and service contract bids.
- Firms in Federal Empowerment Zones and Enterprise Communities (EZ/EC) can also benefit from employer tax credits, tax-free facility bonds, and investment tax deductions.

Some recent changes made include:

- Small businesses applying for HUBZone certification no longer need to be owned and controlled exclusively by U.S. citizens. Now, the level of required ownership by U.S. citizens is 51 percent.
- Others who may apply include agricultural cooperatives that have joined community development corporations and Indian tribes as entities.
- Tribally-owned small businesses also have new options regarding the HUBZone employment requirement, one of four basic eligibility criteria. A tribal business can choose to meet the 35 percent residency at the time of application or wait until the firm actually receives a HUBZone contract. If this latter option is chosen, the business will be required to ensure that 35 percent of those working on the contract reside in a reservation area controlled by the tribe, or an adjoining HUBZone.

**D. PRIVATE SECTOR PREFERENCE CONTRACTING**

On the corporate preference contracting side, a key player is the National Minority Supplier Development Council, Inc. (“NMSDC”)<sup>10</sup> which:

[provides]...a direct link between corporate America and [and] is the primary objective of the National Minority Supplier Development Council, one of the country's leading business membership organizations. It was chartered in 1972 to provide increased procurement and business opportunities for minority businesses of all sizes.

The NMSDC Network includes a National Office in New York and 39 regional councils across the country. There are 3,500 corporate members throughout the network, including most of America's largest publicly-owned, privately-owned and foreign-owned companies, as well as universities, hospitals and other buying

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<sup>10</sup> See: [http://www.nmsdcus.org/who\\_we\\_are/purpose.html](http://www.nmsdcus.org/who_we_are/purpose.html)



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institutions. The [regional councils](#) certify and match more than 15,000 minority owned businesses (Asian, Black, Hispanic and Native American) with member corporations which want to purchase goods and services.

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In 2002, member [corporations' purchases](#) from minority businesses **exceeded \$72 billion** [this has grown from an estimated \$86 million in 1972 and rose to \$83 billion in 2003]. This was accomplished not by lowering corporate purchasing standards — in fact, these standards have gotten much tougher in recent years — but by sourcing qualified minority firms and giving them business on a competitive basis. <sup>11</sup> [emphasis added]

There are several national members of NMSDC whom represent more than 400 of America's largest publicly-owned, privately-owned and foreign-owned companies, and their purchasing activity is national and international in scope. Currently, minorities represent 26% of the United States population, but minority businesses represent only 11% of total businesses, 6% of gross receipts and 3-4% of total corporate purchases. The NMSDC has a Corporate Plus membership program for the highest calibre minority business enterprises which have the proven capacity to handle national contracts for major corporations.

When reviewing the attendees at many NMSDC events, it was surprising that there are very few Aboriginal companies of any size to take advantage of such enormous opportunities (with some of the largest businesses in the world), there simply were very few Aboriginal companies. Represented at the event were enterprises such as GMC, Ford Motor Company, Fiat Chrysler, Coca Cola Company, American Express, General Mills, UPS, Walt Disney World Company, ITT Industries, to name a few. Officials from these major corporations indicated that they have separate minority procurement divisions established with targeted dollar figures (representing a percentage of their entire corporate supply purchasing). The Big-3 automakers, it turns out, have established targets of 20% of their entire purchasing from minority suppliers and were having difficulty in meeting such targets. Another noteworthy development was the announcement by Ford of the largest contract ever awarded to a minority supply company for USD \$.5B.

<sup>11</sup> See: [http://www.nmsdcus.org/who\\_we\\_are/procurement.html](http://www.nmsdcus.org/who_we_are/procurement.html)

<sup>12</sup> To qualify as a tier I minority owned business the corporation has to be physically within the U.S, be at least 51% minority owned, and the management or daily operations have to be controlled by the minority owned group members. <sup>12</sup> A minority business may also be certified as a tier II minority "controlled" enterprise if the minority owners **own at least 30% of the economic equity** of the firm, the minority management/owners control the day-to-day operations of the firm, the minority management/owners retain a majority (no less than 51% of the firm's voting equity and the minority owner's operationally control the board of directors (i.e., must appoint a majority of the board of directors) **7**



Many representatives from huge corporations remain extremely interested in sourcing business with Aboriginal companies (even in preference to other minority companies —since Aboriginal companies are something of a rarity). They were, however, unable to find any that could provide the products or services that they needed or were too small to provide much of a sizeable contract. In other words, concluding supply contracts with small companies would not make much of a dent in their corporate minority purchasing financial targets. A variant of a phrase that was heard often from such representatives was that “it takes our procurement department just as much work to execute a \$10,000 contract as it does to do a \$100M one”. Trading Gateways has had contacts from many large American corporations and advised to incorporate a US company and become NMSDC certified as quickly as possible—some are specifically targeting and promoting opportunities with Aboriginal companies, especially those that are professional and can deliver on large contracts.

Basically put, there are incentives given to corporations in the U.S. who do business with qualified minority-owned businesses (“MBEs”). The NMSDC program gives an advantage to MBEs, though their products or services still must adhere to quality, pricing and service standards as required by the purchaser. The participating corporations believe that it is in their best interest to support minority businesses - first, as good corporate citizens and, second, in hopes that they will be consumers of their products or services. In particular, automakers see a strong business case for more minority buying with expanding minority populations. For example, companies such as General Motors, Honda, Toyota and others provide good case studies that illustrate this trend.<sup>13</sup> Most Fortune 500 corporations now have or are developing minority procurement programs.

The NMSDC program is partially administered through the Native American Business Alliance (see: <http://www.native-american-bus.org/>)

## **E. FOREIGN TRADE ZONES**

Perhaps one of the most interesting advantages is that Indian tribes are eligible to apply for status as a Foreign-Trade Zone (“FTZ”). One of the chief advantages is the ability to defer the payment of duties on imported merchandise until the imported merchandise leaves the foreign trade zone and enters the commerce of the United States. These lower duty rates could entail significant cost savings for manufacturers or assemblers of products in which the component part has a higher duty rate than that of the completed product (i.e., inverted

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<sup>13</sup> Excerpted from presentation by Tom Quinn, Canadian Consulate General, Detroit, titled “Technology Export Opportunities to the U.S. & Minority Procurement Programs” given at the Nexus Tech 2003 conference and Trade Show in Vancouver on April 16, 2003.



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tariffs). It should be noted that all of the major U.S. automobile manufacturers currently use the inverted tariff rules to achieve significant cost savings by assembling many of their automobiles in foreign trade zones (Wyatt, 1993). FTZs could also be utilized to avoid quota restrictions on goods imported from outside the United States.

Businesses involved in international trade that locate on a reservation designated as a FTZ could defer, reduce or, in some instances, eliminate U.S. Customs duties on products imported or exported through the reservation. Such is the case no matter how long the products were in the FTZ.

In addition, as a matter of federal law, state and local ad valorem taxes cannot be imposed upon imported tangible personal property stored or processed on the reservation FTZ, or produced in the U.S. and held in the FTZ for exportation in its original or processed form.

FTZ businesses could also save tens of thousands of dollars by avoiding per-shipment customs processing fees ranging from \$25 to \$485, in favor of a \$485 "weekly entry" fee that is imposed irrespective of the number of shipments.

In 1986, the Lummi Nation successfully petitioned the Foreign-Trade Zones Board in Washington, D.C. to have the Lummi Reservation designated an FTZ. Other tribes in close proximity to the Canadian or Mexican borders, or deep-water ports and/or access, might consider doing the same as a means to attract international trade.

Section 8 of S. 401, Native American Business Development, Trade Promotion and Tourism Act of 1999 requires the Free Trade Zone Board and the Secretary of Treasury to expedite the processing of any applications involving the establishment of a foreign-trade zone (FTZ) and port of entry on Indian lands, respectively.

Many Indian tribes have set up FTZs, so that goods destined for their reservations can be sold duty free. And, of course, all the tribes claim immunity from income tax, corporation taxes and virtually all the other taxes required of businesses and government entities. They've essentially set up little off-shore tax havens that happen to be on-shore.

### **F. NEW MARKETS TAX CREDITS<sup>14</sup>**

The New Markets Tax Credit (NMTC) program permits investors to receive a federal income tax credit for making qualified equity investments in designated Community Development

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<sup>14</sup> Much of the discussion that follows is from article by attorneys Juarez and Galanda, "Attracting private investment in Indian country", Indian Country Today, May 05, 2005. Online Source. Page <<http://www.indiancountry.com/content.cfm?id=1096410898>>.



Entities (CDEs), which in turn provide investments in low-income communities, including Indian reservations. Off-reservation tribal fee or trust land, particularly in rural areas, may also be designated as low-income areas for NMTC purposes.

Qualified investments in tribal economic development ventures, made through CDEs, allow the investor(s) tax credits equal to 39 percent of the investment allocated over a seven-year period. If tapped, the NMTC program could spur millions of dollars in private capital investment in tribal communities.

### **G. EMPLOYMENT TAX CREDITS**

The Indian employment credit<sup>15</sup> provides non-Indian businesses with an incentive to hire Indians who live on or near the reservation. A \$20,000 tax credit is available to such businesses each tax year for every "qualified employee" that is paid "qualified wages."

A qualified employee must: 1) be an enrolled member of an Indian tribe or the spouse of a tribal member, 2) perform substantially all of his or her services for the business on the reservation, and 3) reside on or near the reservation. Qualified wages are any wages the business pays or incurs for services performed by a qualified employee, including health insurance costs. Thus, a non-tribal company that situates a business facility on the reservation could be eligible for sizeable employment tax savings annually.

### **H. ACCELERATED DEPRECIATION**

Non-Indian manufacturers with facilities in Indian country can use shorter recovery periods when calculating depreciation deductions for its production equipment.<sup>16</sup> "Qualified Indian reservation property" must be used predominately in the active conduct of a trade or business on a reservation, and must be a 3-, 5-, 7-, 10-, 15- or 20-year property or non-residential real property.

"Qualified infrastructure property" that is located off-reservation but is connected to qualified infrastructure within the reservation, is also eligible for shorter recovery periods. Power lines, water systems and telecommunication facilities are examples of qualified infrastructure

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<sup>15</sup> Pub. L. 103-66 added section 45A to the Internal Revenue Code, providing a tax credit for increases in reservation employment since 1993.

<sup>16</sup> Pub. L. 103-66 also added a new subsection to I.R.C. § 168 providing for shorter depreciation periods for property used to conduct a trade or business within an Indian reservation.



property.

Because the shorter recovery periods for qualified Indian and infrastructure property are in addition to the normal expense deduction of up to \$100,000 for such assets, the depreciation tax savings to non-Indian manufacturers could also be significant.

## **I. TAX-EXEMPT FINANCING**

Tribes can issue tax-exempt debt, like state and local governments, so long as the proceeds will be used in the "exercise of an essential governmental function." Accordingly, interest on tax-exempt tribal bonds can be excluded from income, which results in significantly decreased borrowing costs for the nation as compared to conventional interest rates.

Tribes can issue non-taxable bonds when exercising such essential governmental functions as constructing government buildings, health clinics and hospitals, parks, schools and libraries, roads, parking lots, and water and sewer systems. In recent years, however, the Internal Revenue Service has cast doubt on whether tribal "commercial" ventures like golf courses and hotel-resorts can be financed tax-exempt. Notwithstanding, tribal infrastructural developments achieved through tax-exempt savings can be passed on to non-Indian businesses that develop or lease commercial land in Indian country.

## **J. DISCOUNTED LEASING RATES**

Tribal trust lands and improvements on such lands are exempt from state taxation. As such, typical pass-through lease costs such as real property taxes can be significantly minimized, if not eliminated, to the benefit of non-Indian commercial lessees. A non-Indian company's leasehold interest in trust lands may also be exempt from state excise taxation.

In October 2004, The Wall Street Journal reported how the Salt River Pima-Maricopa Indian Community attracted a private developer to lease land from tribal members and construct two office parks on those lands for leasing purposes.

Although purchasing off-reservation land in Phoenix would cost \$10 per square foot, lands within the Pima-Maricopa community were leasing for \$1.50 per square foot annually, resulting in tremendous savings for both the developer and lessees. Tribes could also lure developers and lessees to their reservations by offering below-market lease rates.



## I. STATE/COUNTY LAND USE EXEMPTION<sup>17</sup>

If a non-Indian company sought to build a facility on trust lands, the development would be exempt from local, county and state zoning and land-use restrictions: see *Gobin v. Snohomish County* (Tulalip Tribes, not Snohomish County, possess land-use jurisdiction over land within the exterior boundaries of the Tulalip Reservation). As such, the business could save a tremendous amount of time - and time is money - by avoiding, among other things, state permit requirements.

Many tribes have become well-armed and extremely savvy in the political arena, and thus have withstood attacks from non-Indian gaming interests. Notwithstanding, tribes cannot afford to focus the bulk of their governmental attention toward gaming as the gateway to obtaining wealth and prosperity for future tribal generations. Tribes are at a turning point in their professional and business growth and should make governmental decisions to avoid being held hostage to a single industry - Indian gaming.

In doing so, tribes need to attract worthy outside investors (including other tribal enterprises via intra-tribal trade and commerce), major franchises, government and the technology industry as commercial partners. Our unified mission must be to assist tribes and Native communities to create and harness tribal sovereign advantages and to leverage such advantages into vibrant and dynamic economic opportunities that will benefit Indian people.

## K. TAX PLANNING OPPORTUNITIES

Another possible advantage in engaging in business with American Indians stems from the fact that Indian tribes are treated as sovereign states and are, therefore, exempt from many taxes and eligible for certain loan programs. There are no tribal corporate income taxes, nor is an inventory tax assessed on goods held for resale. There may be a sales tax exemption for machinery and equipment used directly in the manufacturing process and reduced real estate assessment taxes on real estate leasehold interests. In fact, one respected law firm has identified 8-12 tax relative incentives that can be applied to manufacturing facilities on tribal lands that may possibly be channeled to non-Native American business partners/investors to reduce investment costs in facilities on tribal lands. Plus, certain property held in trust by the United States is generally exempt from state ad valorem taxes. In some respects, with careful

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<sup>17</sup> The Internal Revenue Code (§ 164) allows a deduction for various taxes paid to state and local governments. These include: (a) real property taxes, (b) personal property taxes, (c) state, foreign and local income, war profits, and excess profit taxes, and (d) the environmental tax imposed by I.R.C. § 59A, and the GST (i.e., generation skipping transfer tax) on income distributions. *See* I.R.C. § 164(a). The Code also allows a business expense deduction for various state and local taxes which are paid in carrying on a trade or a business. Such taxes paid to Indian tribes are now tax deductible by virtue of the Tax Status Act. 26 U.S.C. § 7871(a)(3).



planning a tribe can essentially set up what in many respects might be characterized as offshore tax havens—an incredible possibility considering America is the largest single market in the world.

In addition to tax savings, the business-person doing business with Indian tribes may be able to take advantage of certain loan programs such as the industrial-access loan programs through both the Bureau of Indian Affairs and the state department of transportation.

The concept of sovereignty also enables the Indian tribe to establish their own rules and regulations. The tribe is free to establish their own EPA laws in compliance with federal EPA regulations, to establish their own product liability caps for manufacturers, and to self insure. The ability of the tribe to self insure allows the tribe to offer business persons the advantages of avoiding participation in state unemployment insurance and worker's compensation programs.

To summarize, American Indians and their properly structured business enterprises are not subject to federal income tax and qualify for certain other benefits under federal tax laws, providing significant planning opportunities. These significant tax benefits available to tribes might be shared with non-tribal investors/business partners. These benefits can be used to reduce the overall cost associated with the investment. Tribes and their members also have broad immunities from state taxes for business done on reservations, but face controversies regarding state authority to collect taxes on non-members within Indian country and the scope of any tribal responsibility to assist states.

#### L. RESERVATIONS AS UNION FREE ZONES<sup>18</sup>

Many industries today are outsourcing their maintenance and manufacturing processes to countries outside of the U.S. due to lower labor cost. By doing this, American corporations are still able to compete in the global market place by largely becoming systems integrators. The sad alternate reality of this scenario is that whole industries requiring highly-trained personnel, and provide very high paying employment are being lost completely from the economy. As an example, apparently the aerospace manufacturing industry employed over 1.5 million Americans in 2000. Now there are less than 500,000 people employed in the U.S. in this industry.

The skill and economic drain to the American economy is unfortunate and can be avoided by looking more carefully at the opportunities that exist on tribal lands. As mentioned

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<sup>18</sup>This discussion has been largely excerpted from an article written by Gabriel S. Galanda. “**Getting commercial in Indian Country: That can be big business, and lawyers should be ready**”, Business Law Today, Volume 12, Number 6 - July/August 2003. Online Source. Page. <http://www.abanet.org/buslaw/blt/2003-07-08/galanda.html>



throughout this discussion, tribes are sovereign in law. In terms of the labor laws that apply to America at large, many or all may not apply on tribal lands in certain circumstances. In a recent legal paper, Gabe Galanda comments that:

*Labor and employment* — Labor and employment matters affect the possibility and practicability of every tribal contract. Both Title VII, 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, expressly exclude Indian tribes. Likewise, state discrimination laws usually do not apply to tribal employers. For example, Arizona Revised Statute § 41-1464 expressly exempts tribes from the state's discrimination laws. Tribal officials are also immune from suit arising from alleged discriminatory behavior, so long as they acted within the scope of the tribe's authority.

The circuits, however, are split regarding whether federal regulatory employment laws apply to reservation employers. The Tenth and Eight circuits have refused to apply to tribes such laws as the Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA), Fair Labor Standards Act (FLSA), and National Labor Relations Act (NLRA), because doing so would encroach on well-established principles of tribal sovereignty and tribal self-governance. Conversely, the Ninth, Seventh and Second circuits have applied OSHA, ERISA and NLRA to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws. Nevertheless, state labor laws and workers' compensation statutes generally remain inapplicable to tribal businesses.

Given that U.S. tribes now employ nearly half a million Americans, it will not be long before the Supreme Court is asked to resolve the conflicting circuit court decisions. Until then, a business lawyer should evaluate pertinent federal precedent at the outset of any tribal negotiation and determine to what extent labor and employment issues will affect the deal.

In addition to this discussion relating to the applicability of general labor laws to tribal lands, there is specific legislation or treaties for some tribes that definitively prevent labor laws applying to tribal lands.

Once again, with careful planning and structuring, industries that were one time areas of American leadership (and are currently being lost to other countries) may be repatriated to American tribal lands. Once these industries are returned to America, appropriate quality monitoring and the stable investment environment of tribal lands are factors that should ensure they endure. Innovative management-employee relations contracts based on employee productivity can also be instituted. These agreement can actually lead to higher compensation



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for productive employees than the existing union labor agreements that are driving industries out of America..

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