

## *Insights*

# Commercial Lending in Indian Country: Potential Opportunities in a Growing Market

### **Abstract**

This edition of *Insights* explores the commercial lending environment in Indian Country, including the relationship between the commercial lending business and Native American governmental, legal, and institutional structures. The report reviews the factors that make lending in Indian Country attractive for banks, including regulatory considerations such as those related to community reinvestment. The report also examines the unique challenges for banks interested in commercial lending on Indian reservations. In reviewing ways to overcome these challenges, the report discusses successful marketing and risk mitigation strategies that banks can adopt. These strategies include several federal programs that help lenders manage risks associated with financing business developments on Indian reservations.

The information in this report was obtained from various sources, including bankers active in commercial lending in Indian Country, as well as representatives from tribal advocacy groups and economic development entities. The appendix contains success stories of tribes engaged in economic and community development. The resource directory contains sources of additional information on commercial lending in Indian Country.

### **I. What Is Commercial Lending in Indian Country?**

Commercial lending in general is lending to businesses. It can take several forms, including account receivable loans, letters of credit, construction loans, equipment and vehicle loans and leases, and real estate loans. Commercial lenders include commercial banks, mutual companies, credit unions, community development loan funds, private lending institutions, and other financial groups. This report focuses on commercial lending by national banks and federal savings associations (collectively, banks).

“Indian Country” is a legal definition of land found in many federal laws and regulations. It is also a colloquial term that refers to areas where Native Americans live and work. These include reservations, or land “reserved,” i.e., held in trust by the U.S. government for federally recognized tribes. This term also includes all federally dependent Indian communities and all Indian allotments still in trust, whether or not they are located on reservations.<sup>1</sup> The term is also more generally used to refer to the people who are

<sup>1</sup> 18 USC 1151.

members of federally recognized tribes in the contiguous United States, along with their governments, economies, land areas, communities, and cultures.

In the United States, “Native American” refers to a person belonging to one of three primary groups: Native Hawaiians, Alaska Natives, and American Indians (residents of the contiguous United States, living on or off reservations).<sup>2</sup> Also, because all reservations but one are located in the contiguous United States (the other is in Alaska), this report is most relevant to banks that are interested in lending to American Indians living on reservations. These definitions are especially important when discussing federal programs, some of which are targeted to specific groups and may not be applicable in all cases.

Commercial lending in Indian Country may require special arrangements, largely because of the sovereign status of tribes and the unique status of Indian lands.<sup>3</sup> The sovereign status of tribes means that tribes are responsible for defining the rules for commercial activities on reservations as well as organizing the tribal legal infrastructure, including tribal court systems. When it comes to land ownership, the relationship between the U.S. government, on one hand, and tribal governments and individual Indians, on the other, is referred to as a “trust responsibility” for Indian assets. The trust responsibility extends to lands, natural resources, money, and other assets held by the federal government on behalf of tribes and members of tribes. Tribes and members of tribes hold beneficial ownership interests in those assets. Tribal trust lands generally may not be sold, taxed, or encumbered, making it a challenge to perfect a bank’s mortgage lien(s) on real property.

Some banks are uncertain about lending to businesses and individuals in Indian Country. Commercial lenders, after all, offer loans backed by hard collateral, in many cases real estate. This report reviews the unique issues banks face when extending commercial loans in Indian Country and focuses on successful strategies adopted by some banks to work around these issues.

## **II. Why Is Commercial Lending in Indian Country of Interest to Banks?**

### **Favorable Market Conditions**

There is a consensus among field experts that Indian Country has experienced significantly higher economic growth rates since the onset of the self-determination era in the mid-1970s,<sup>4</sup> compared with preceding decades. Although there is great disparity in economic growth performance among tribes, the growth rate in Indian Country as a whole has outpaced that of the rest of the United States during this time. Gains have been made in real per capita income, median household income, employment, infrastructure, and education.<sup>5</sup> As a result, demand for business development in local markets and loans to support such development continues to rise in large parts of Indian Country. Moreover, through self-determination, tribal governments and entities have gained experience in building and managing businesses, producing a cadre of American Indian professionals and government employees with valuable managerial and governance skills. These

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<sup>2</sup> [Frequently Asked Questions](#), part IV, “Our Nation’s American Indian and Alaska Native Citizens,” Indian Affairs, U.S. Department of the Interior.

<sup>3</sup> In addition to federal reservations, Indian lands encompass allotted lands, restricted status lands, and state reservations. For more information, see the “[Frequently Asked Questions](#)” page of the U.S. Department of the Interior’s Indian Affairs Web site.

<sup>4</sup> The [Indian Self-Determination and Education Assistance Act of 1975](#), among its other provisions, allowed tribes to assume administrative responsibility for federally funded programs designed for their benefit.

<sup>5</sup> See Akee, Randall K.Q., and Jonathan B. Taylor, *Social and Economic Change on American Indian Reservations: A Databook of the U.S. Censuses and the American Community Survey 1990-2010*, May 15, 2014.

professionals are leading the way in laying the foundation for commercial and economic growth in Indian Country.<sup>6</sup>

Beyond improvement due to the self-determination era, other developments have boosted the growth momentum in Indian Country, including

- the Indian Gaming Regulatory Act (IGRA) of 1988, which enabled tribes to invest in gambling enterprises and use the profits to invest in infrastructure, education, and social projects.<sup>7</sup>
- advances in oil and gas extraction technology. These advances have made many areas on or near reservations viable for energy investment, leading to significant economic gains and thousands of new jobs.<sup>8</sup>
- the faster growth of the Native American population compared with the country as a whole. This growth has produced a larger labor force participation rate compared with the country as a whole, which is a contributing factor for future economic and commercial growth.<sup>9</sup>

### Commercial Credit Needs

Despite the improvement in the overall economic condition of Indian Country, large gaps remain between Indian Country and the rest of the United States, according to practically every economic and welfare indicator.<sup>10</sup> Although sources providing hard data for commercial activity in Indian Country are scarce, there is plenty of anecdotal evidence pointing to severe shortages in commercial credit. For example, in 2010 and 2011, the federal banking agencies, including the OCC, organized a series of workshops around the country to assess the state of economic development in Indian Country. The Federal Reserve Board of Governors published a report in 2012 summarizing the workshops' findings.<sup>11</sup> The report listed access to capital as the challenge to economic development most frequently cited by workshop participants. The participants provided several reasons for the limited access to capital for tribal businesses and independent Indian-owned businesses, including

- limited access to brick-and-mortar offices of regulated financial institutions.
- the perception by tribal business enterprises, even those with adequate collateral and good credit histories, that commercial bank financing is difficult to secure.
- a lack of diversity in funding sources.
- a lack of equity resources, collateral, and credit history, resulting in commercial credit denials for Indian small business owners.

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<sup>6</sup> *Securing Our Futures*, National Congress of American Indians, 2013.

<sup>7</sup> See Spilde, Katherine A., and Jonathan B. Taylor, "Economic Evidence on the Effects of the Indian Gaming Regulatory Act on Indians and Non-Indians," *UNLV Gaming Research and Review Journal*, volume 17, issue 1, University of Nevada at Las Vegas, 2013. Tribes recognize, however, that with the advent of state-sanctioned gambling, the industry has become significantly more competitive.

<sup>8</sup> *The Department of the Interior's Economic Contributions* report, June 21, 2011.

<sup>9</sup> The U.S. Census Bureau does not produce population figures for the three Native American groups separately. Rather, it identifies native populations by two groups: American Indian and Alaska Native, and Native Hawaiian and Other Pacific Islander. See *The American Indian and Alaska Native Population: 2010*, 2010 Census Briefs, U.S. Census Bureau, U.S. Department of Commerce, January 2012.

<sup>10</sup> See, for example, American Indian employment and poverty rates in the *2013 American Indian Population and Labor Force Report*, Office of the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, January 16, 2014.

<sup>11</sup> *Growing Economies in Indian Country: Taking Stock of Progress and Partnerships*, Board of Governors of the Federal Reserve System, April 2012.

While these factors highlight the obstacles facing commercial loan borrowers in Indian Country, they also highlight opportunities for banks interested in exploring Indian Country as a new market segment.

### **Favorable Regulatory Environment**

Several federal laws and programs promote business lending in underserved areas in general and in Indian Country in particular. For example, the Indian Financing Act of 1974 was designed to provide businesses on reservations with access to investment capital equal to that available to businesses in nonreservation areas. One important program created under this act is the U.S. Department of the Interior's Loan Guaranty, Insurance, and Interest Subsidy Program.<sup>12</sup> The purpose of the program is to encourage conventional lender financing of Indian business borrowers who are otherwise unable to obtain financing by reducing the lenders' risk.<sup>13</sup>

Another law is the Riegle Community Development and Regulatory Improvement Act of 1994, which created the Community Development Financial Institution Fund. The fund supervises community development financial institutions (CDFI), which provide business loans, technical assistance, and other financial services to underserved areas and populations, including those in Indian Country. In many cases, CDFIs, especially Native CDFIs,<sup>14</sup> can be natural partners for banks interested in exploring commercial lending in Indian Country.<sup>15</sup>

In addition, there are federal programs that directly or indirectly make it easier for banks to lend to businesses in Indian Country. They include programs administered by the U.S. Department of Agriculture (USDA), the Small Business Administration (SBA), and the U.S. Department of Energy (DOE). These programs are designed to help various types of businesses, including small, rural, and sector-specific businesses. Section IV of this report discusses some of these programs in more detail.

### **Community Reinvestment Act**

Commercial lending in Indian Country presents community reinvestment opportunities. Community Reinvestment Act (CRA) regulations describe the types of activities that qualify for consideration by bank examiners, including those activities that meet the definition of community development (CD), such as lending, investment, and services that benefit low- to moderate-income (LMI) individuals or geographies or distressed or underserved nonmetropolitan middle-income geographies.<sup>16</sup> There are several categories of CD activities, and most of them apply to large parts of Indian Country. The following questions can help determine whether a banking activity qualifies for consideration under the CRA:

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<sup>12</sup> [25 CFR 103](#).

<sup>13</sup> For more information, see the program's page on the Web site of the Division of Capital Investment, Office of Indian Energy and Economic Development, U.S. Department of the Interior.

<sup>14</sup> A Native CDFI is a CDFI with at least 50 percent of its activities serving Native Americans. As of November 30, 2015, there were 968 CDFIs, 70 of which were Native. For an up-to-date list of all CDFIs, including Native CDFIs, see the [CDFI Certification page](#) on the CDFI Fund Web site.

<sup>15</sup> See "[Community Development Loan Funds: Partnership Opportunities for Banks](#)," *Community Developments Insights*, Office of the Comptroller of the Currency (OCC) Community Affairs, October 2014.

<sup>16</sup> For more information on CRA data and lists of distressed and underserved tracts, see the [Federal Financial Institutions Examination Council Web site](#).

- Does the activity serve LMI individuals?
- Does the activity serve an economic development purpose as defined under the CRA Interagency Questions and Answers (Q&A)?<sup>17</sup>
- Does the activity serve distressed or underserved nonmetropolitan middle-income areas as defined under the CRA Interagency Q&A?<sup>18</sup>
- Does the activity create, retain, or improve jobs in areas targeted for redevelopment by federal, state, local, or tribal government entity?
- Could the activity involve flexible lending practices?
- If the activity involves investment, is it routinely provided by private investors?
- Is the activity responsive to credit or CD needs in the area?
- Are the beneficiaries of the activity located in the bank’s assessment area?<sup>19</sup>
- Does the activity serve the assessment area, or the broader statewide or regional area that includes the bank’s assessment area?

To answer these questions, banks need to understand what is involved in a CRA evaluation.<sup>20</sup> For example, banks are subject to different performance criteria depending on their asset size: small, intermediate small, or large.<sup>21</sup> CRA evaluations cover three types of activities: lending, investment, and service. Small banks generally are evaluated on their lending activities only; intermediate small banks and large banks are evaluated on their retail and CD lending, investment, and services.

Banks of all sizes can receive consideration under the CRA for making loans guaranteed under a federal (or other) program designed to help meet the credit needs of LMI individuals, small businesses, or small farms in Indian Country. Large banks may also receive consideration for innovative or flexible lending practices by participating in these programs.

For all banks, home mortgage and small business loans generally must be located in a bank’s assessment area(s) to receive CRA consideration. CD loans, CD services, and qualified investments must serve a bank’s assessment area(s) or the broader statewide or regional area that includes the bank’s assessment area(s).<sup>22</sup>

Figure 1 illustrates how financial institutions evaluated under the lending, investment, and service tests may benefit from engaging in CD activities in Indian Country.<sup>23</sup>

<sup>17</sup> Q&A § \_\_.12(g)(3) – 1.

<sup>18</sup> Q&A § \_\_.12(g)(4)(iii) – 3.

<sup>19</sup> A bank’s assessment area is generally based on the location of its deposit-taking facilities. The assessment area is the geographic area within which bank examiners evaluate a bank’s record of helping to meet community credit needs. The area typically follows the boundaries of a metropolitan area or political subdivision and must not reflect illegal discrimination or arbitrarily exclude LMI areas.

<sup>20</sup> For a discussion of the CRA and Indian Country, see Askari, Ammar, and Vonda Eanes, “Community Reinvestment in Indian Country,” *Community Developments Investments*, OCC Community Affairs, August 2013.

<sup>21</sup> Banking agencies adjust banks’ asset size thresholds annually. See the [CRA page](#) at the Federal Financial Institutions Examination Council Web site for the current asset thresholds.

<sup>22</sup> Federal banking regulators respond to specific questions regarding the CRA in notices called “Community Reinvestment Act; Questions and Answers Regarding Community Reinvestment.” The most recent notice is [75 Fed. Reg. 47](#) (March 11, 2010). A few questions in that notice were updated in [78 Fed. Reg. 224](#) (November 20, 2013).

<sup>23</sup> Under the CRA regulations, intermediate small banks are evaluated under a streamlined lending test and a CD test and are not required to collect and report data regarding small business loans. Institutions evaluated under the lending, investment, and service tests, however, must collect and report these data.

**Figure 1: Activities That May Receive CRA Consideration**

<b>Lending Test</b>	<ul style="list-style-type: none"> <li>• Providing a CD loan to a nonprofit organization serving LMI residents in a tribal community.</li> <li>• Making a CD loan to construct a facility on a reservation that provides jobs for LMI persons.</li> </ul>
<b>Investment Test</b>	<ul style="list-style-type: none"> <li>• Contributing funds to support the operations of a CDFI that promotes economic development by financing small businesses or small farms on a reservation.</li> <li>• Investing in an equity fund that makes loans to businesses that serve a reservation and provide jobs for LMI persons, or in LMI areas, or in areas targeted for redevelopment by the tribal government.<sup>a</sup></li> </ul>
<b>Service Test</b>	<ul style="list-style-type: none"> <li>• Having a bank officer serve on the board of directors of an organization that promotes credit availability on reservation-based communities.</li> <li>• Providing technical assistance on financial matters (such as developing business or commercial loan underwriting standards) to a Native CDFI that addresses economic revitalization needs.</li> <li>• Offering financial literacy training to LMI individuals through a tribal community organization.</li> </ul>

<sup>a</sup> For national banks, these investments may require a filing under the OCC’s public welfare investment regulation, [12 CFR 24](#) (Part 24). Under Part 24, national banks may make investments in community and economic development entities and projects that are designed primarily to promote the public welfare.

### III. Commercial Lending in Indian Country

A major constraint impeding the growth of commercial lending in Indian Country is that many lenders are unfamiliar with this market. As with any niche market, lending in Indian Country requires a specific understanding of how to approach and manage business risks, and both Indian and non-Indian parties must address a complex interrelationship of legal, regulatory, cultural, governmental, and operational issues. In this section, we describe some of the issues that have proved challenging to bank lending in Indian Country and how some banks have addressed them. Section IV covers strategies successfully used by banks and tribes to overcome these challenges in more depth.

#### Sovereign Immunity

As described in section I, tribes, like states and the federal government, possess sovereign immunity from suits. Tribal sovereign immunity can be waived only by the tribe or by Congress, and the waiver must be express and unequivocal. The sovereign status of tribes has substantial implications for jurisdiction, collateral, and dispute resolution that can affect a bank’s readiness to lend in Indian Country. Indian tribes and reservation-based communities exist and operate within a unique legal and governmental framework that can make the enforcement of traditional bank agreements less predictable. The tribes’ sovereign status requires that banks and tribes work together to ensure that lenders can enforce contracts and resolve contract disputes through litigation, arbitration, or other methods of adjudication.

It is important to note that sovereign immunity is an issue for banks to consider primarily when lending to a tribe or tribal enterprises only. Sovereign immunity is not an issue for banks when lending to private Native-owned businesses.

Many tribes have successfully instituted business frameworks that minimize risk to non-Indian lenders. For example, in their transactions with tribal governments and tribal corporations, some banks have negotiated limited waivers of sovereign immunity that are restricted to a specific transaction, with assets expressly pledged or made available to satisfy any claims that may arise from the transaction. Alternatively, the transaction may be carried out through a legally distinct tribal business entity with either no sovereign immunity or limited immunity vested by the tribe. Tribes understand the need to provide such limited waivers of immunity in their commercial transactions with lenders and other non-Indian parties, with judicial recourse available either in tribal or state court. The “Working With Tribal Businesses” subsection of this report provides some examples of transactions through distinct tribal business entities.

### **Collateral Considerations**

As mentioned in section I, the U.S. government has a “trust responsibility” for Indian assets, including land. Indian trust affairs are managed by the Bureau of Indian Affairs (BIA) and the Office of the Special Trustee for American Indians, both of which are part of the U.S. Department of the Interior. Tribal trust lands generally may not be sold, taxed, or encumbered, requiring a different process to secure and perfect a bank’s mortgage liens on real property.<sup>24</sup>

The Indian Long-Term Leasing Act of 1955 tried to address this challenge by allowing tribes to lease trust lands to a tribal entity, tribal members, or a nontribal party with the approval of the BIA.<sup>25</sup> The lessee then may grant a leasehold mortgage interest that, in the event of a default, gives the lender control over the pledged land for the balance of the term of the lease.<sup>26</sup> Thus, leasehold interests, with BIA approval and tribal consent, can be encumbered, assigned, and used as collateral for the financing of the transaction. The lease approval process, however, was slow and inefficient.

In an attempt to expedite the lease approval process and promote homeownership on reservations, Congress in 2012 passed the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act).<sup>27</sup> The HEARTH Act creates a voluntary, alternative land leasing process available to tribes. Under HEARTH, after a tribe’s governing leasing regulations have been submitted to, and approved by, the Secretary of the Interior, the tribe is authorized to negotiate and enter into leases without further approvals by the Secretary.

Some bankers have successfully negotiated leases with tribal entities and taken leasehold mortgage interests as collateral. Bankers also have worked around the issue of securing loans on trust lands by using collateralized deposits from sources such as tribal reserve funds and certificates of deposit. When tribes with limited resources were not able to pledge reserve funds, some bankers instead have used as collateral the equipment of a commercial enterprise for which the loan is made.<sup>28</sup>

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<sup>24</sup> [25 USC 177](#).

<sup>25</sup> [25 USC 415](#). Under federal regulations, such leases are generally limited to a term of 25 years with a renewal option of an additional 25 years; on certain reservations, however, leases may have terms up to 99 years.

<sup>26</sup> [25 CFR 162, subpart D](#).

<sup>27</sup> For more information, see the text of the act [here](#).

<sup>28</sup> See, for example, Briggs, Larry, “[Lending in Indian Country: Opportunities in Partnerships](#),” *Community Developments Investments*, OCC Community Affairs, August 2013.

## Secured Transaction Laws

In the United States, rules governing secured transactions generally fall within the jurisdiction of the states, not the federal government, and are encompassed in Article 9 of the Uniform Commercial Code (UCC), as adopted by all 50 states and several U.S. territories.<sup>29</sup> One of the most frequently mentioned impediments to perfecting liens against personal property in reservation-based communities is insufficient or nonexistent written tribal commercial laws and regulations, and particularly secured transaction laws. In many instances, there are inconsistencies among tribal laws and regulations regarding secured transactions, resulting from a lack of formalized commercial practices and standardized documentation. Consequently, there often is lender uncertainty about the perfection and enforceability of security interests in personal property collateral.

A growing number of tribes are adopting secured transaction codes that mirror the UCC. It is difficult, however, to assess accurately the extent of adoption of secured transaction laws by tribes because there is no comprehensive, up-to-date repository of tribal laws. Among the secured transaction codes that have been adopted by some tribes, there is little uniformity or consistency. A number of tribes have modeled their codes on the official text of Article 9 of the model UCC,<sup>30</sup> while others have used as their template Article 9 as adopted by the state in which the tribe's reservation or community is located. Some tribes have adopted verbatim the laws of the states in which they are located, while others have incorporated the state law by reference into tribal law, in some cases carving out provisions or making the state law subject to specified tribal laws.<sup>31</sup>

## Independent Tribal Judicial System

Researchers have observed that an essential element in attracting private sector investment in reservation-based business development is an independent tribal judicial system willing to uphold contracts, enforce effective business codes, resolve disputes, and, in the case of lending to tribal enterprises, separate tribal business matters from governmental decision making by tribes.<sup>32</sup> Generally, a tribal court has jurisdiction over non-Indian parties that enter into commercial relationships with tribes or tribal entities through contracts, leases, or similar business arrangements.

While tribal courts generally have exclusive jurisdiction over lawsuits involving American Indians in Indian Country, such courts are not necessarily the only venue for adjudicating transactions arising within the boundaries of a tribe's reservation or other jurisdiction. Parties to an agreement can expressly agree to specific dispute resolution provisions to permit adjudication in another forum (choice-of-venue or choice-of-forum provisions) or in accordance with a particular state or federal law (choice-of-law provisions). Alternatively, tribes and non-Indian parties may agree to resolve contractual disputes through binding or nonbinding arbitration, bypassing the court system completely, except for the enforcement of an arbitration award. This approach may be especially useful if non-Indian parties insist that tribes agree to adjudicate disputes in

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<sup>29</sup> For more information on Article 9, see the Uniform Law Commission [Web site](#).

<sup>30</sup> The model Tribal Secured Transactions Act was drafted by a committee of the National Conference of Commissioners on Uniform State Laws based on UCC Article 9 to assist tribes in bringing some degree of consistency to tribal secured transaction laws, as well as familiarity for lenders, while addressing issues unique to tribal jurisdictions. For more information, see the [Model Tribal Secured Transactions Act](#), Uniform Law Commission, August 2005.

<sup>31</sup> For a more in-depth analysis, see "Q&A—Secured Transactions Codes: A Stepping-Stone to Economic Development in Indian Country," *Community Developments Investments*, OCC Community Affairs, August 2013.

<sup>32</sup> See, for example, *On Improving Tribal-Corporate Relations in the Mining Sector: A White Paper on Strategies for Both Sides of the Table*, Harvard Project on American Indian Economic Development, April 2014.

nontribal courts. Choice-of-forum and choice-of-law matters are significant issues that should be settled at the outset of a commercial transaction.<sup>33</sup>

### **Tribal Governance**

Bankers and tribal representatives both stress the importance of a stable tribal government. Political uncertainty can be a significant impediment to implementing viable economic development activities. Bankers consulted in the development of this report emphasized that all parties to a tribal commercial transaction must understand the governmental organization of the tribe in question. Stable tribal governments enhance the tribe and banks' ability to engage in commercial transactions. Research suggests, for example, that stable Indian governments share certain attributes, including basic checks and balances, staggered council terms, clear and predictable rules, an independent dispute resolution mechanism, and civil service professionalism.<sup>34</sup>

## **IV. Successful Commercial Lending Strategies in Indian Country**

There are 567 federally recognized tribes in the United States.<sup>35</sup> They vary greatly in membership, land base, resources, infrastructure, and state of economic development. Some tribes have the well-developed legal and business infrastructures necessary to attract non-Indian businesses; others do not. Therefore, there is no single approach for a bank to follow when it comes to doing business with a tribe or Indian business in Indian Country. Banks that have successfully engaged in commercial lending in Indian Country have followed different approaches. Regardless of which approach a bank follows, however, its success inevitably involves a deeper understanding of Indian culture and history, dedication of resources to this market segment, and partnerships with tribes and other business development actors.

In this section, we discuss strategies that tribes and banks can follow to enhance commercial lending opportunities in Indian Country.

### **Working With Tribal Businesses**

As discussed earlier, tribal sovereign immunity has implications for the corporate or business structures that tribal governments create to undertake development ventures. Depending on their organizational structure, some business entities formed by a tribe may not possess this immunity. Moreover, tribes have addressed immunity issues by establishing various methods by which tribal economic activities are separated from governmental functions.<sup>36</sup> The following are three such methods:

- **Establishing a Section 17 corporation.** Pursuant to Section 17 of the Indian Reorganization Act of 1934, a tribe may establish a Section 17 corporation to carry out its tribal business activities and responsibilities.<sup>37</sup> A Section 17 corporation provides a framework by which a tribe can segregate tribal business assets and liabilities from those of the tribal government. It also preserves the integrity of the decision-making

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<sup>33</sup> Ibid.

<sup>34</sup> Grant, Kenneth, and Jonathan Taylor, "Managing the Boundary Between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises," Jorgensen, M.R., ed., *Rebuilding Native Nations: Strategies for Governance and Development*, University of Arizona Press, 2007.

<sup>35</sup> There were 566 tribes listed in the *Federal Register* in January 2015. On July 2, 2015, the BIA acknowledged the [Pamunkey Indian Tribe](#) as an Indian tribe within the meaning of federal law.

<sup>36</sup> For a review of the different forms of tribal business structure, see Atkinson, Karen J., and Kathleen M. Nilles, "Tribal Business Structure Handbook," Office of Indian Energy and Economic Development, U.S. Department of the Interior, 2008.

<sup>37</sup> 25 USC 477.

process of tribal governmental officials. A Section 17 corporation, however, shares the tribe's immunity from suit. Thus, contracts and business agreements must include appropriate immunity and waiver provisions.

- **Establishing a state-chartered corporation.** Some tribes have organized state-chartered corporations or limited liability companies (LLC), whose assets are not immune from suit, since they are incorporated pursuant to state, not tribal, laws. Assets of the corporation or LLC, however, may be tribal or reservation-based assets, so contracts and business agreements must include appropriate recourse provisions.
- **Using tribal council appointments.** Rather than having the council act as a decision maker for tribal enterprises, tribes more typically permit their councils to appoint directors to the boards of these enterprises. Under this scenario, tribal corporate officers report to the tribal council about the activities of the enterprise, and the council is generally relieved from involvement in the entity's management.<sup>38</sup>

### Strategies for Banks

When looking for business partners in Indian Country, banks should look for tribes that have the legal, governance, and business infrastructure necessary for the banks' safe and sound business practices. Bankers note that as they gained knowledge about, and experience with, commercial and industrial projects in Indian Country, they became more comfortable dealing with the issues described in section III.

For banks unfamiliar with Indian Country, particularly smaller banks looking to enter this market, experts recommend investing the time and resources it takes to become acquainted with the tribes in the bank's area. Banks should get to know the tribal leaders (in office and out of office) and should learn how the tribal judicial and financial systems work, how accountable they are, and how those institutions manage change in tribal administrations. Banks should learn about the tribe's

- constitution, commercial laws, and other relevant laws and regulations.
- position on waivers of sovereign immunity.
- tribal court structure and decisions.
- relationship with state and federal governments.

Lenders with experience in Indian Country recommend that banks interested in this market get to know the program directors at the BIA, USDA, DOE, and SBA as part of the banks' credit risk strategies. These lenders noted that use of these agencies' loan guarantee programs was critical for them to move forward with Indian Country transactions.

Bankers may also benefit from the work of nonprofit entities, including many CDFIs and Community Development Corporations (CDC),<sup>39</sup> that provide training and technical assistance to many tribes. These groups are seeking partnerships and alliances with other nonprofit groups and financial intermediaries, as well as with lenders in the private sector.

In addition to gaining knowledge, forming partnerships, and using outside resources, bank strategies in Indian Country can be divided into market segment strategies and risk mitigation strategies. Market segment strategies require the bank to allocate specialized resources, help build tribal capacity, and design an outreach strategy specific to Indian

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<sup>38</sup> Grant, Kenneth, and Jonathan Taylor (see footnote 34).

<sup>39</sup> CDCs are nonprofit organizations incorporated to provide programs, offer services, and engage in other activities that promote and support CD. CDCs usually serve a geographic location such as a neighborhood, town, or reservation.

Country. Risk mitigation strategies supplement the market segment strategy with federal and other programs designed to mitigate the risk of doing business in Indian Country.

### Market Segment Strategies

All lending assumes a certain amount of risk, and banks lending to tribes should manage this risk as they manage the risk of a project in any other market segment. Banks should conduct a comprehensive due diligence evaluation that includes

- a review of the legal structure of the tribe and the tribal enterprise.
- an assessment of tribal management, including enterprise management.
- a financial analysis of the project and the collateral pledged by the tribe.
- the overall creditworthiness of the tribe.

The credit risk profiles that the bank establishes for the tribe, the tribal corporation, and the transaction should determine the loan rates and terms offered.

In addition to the due diligence the bank would exercise with other market segments in its portfolio, there are specific costs involved in this type of lending. These might include costs associated with the dedication of specialized resources, building tribal capacities, and segment-specific outreach campaigns.

- **Specialized legal resources:** Many bankers conduct a legal risk assessment before undertaking a project in Indian Country. Having in-house or outside counsel with tribal commercial law and tribal court experience is important to the success of a bank's transactions. In some instances, banks have developed standardized loan documentation packages that reflect the major legal considerations discussed previously and include transaction-specific terms and negotiated conditions. These documentation packages and other products can serve as models for future business negotiations with different tribes involving other commercial activities.
- **Building tribal capacities:** Tribal advocates emphasize the importance of creating partnerships such as mentoring arrangements, which have been particularly valuable in the construction industry. Several bankers have developed customized training for tribes, members of tribes, and tribal entities, noting that even more experienced tribes often benefit from ongoing financial management assistance. In some cases, banks have carried out these training and technical assistance programs in partnership with entities such as tribal nonprofit agencies and local Native CDFIs. Native CDFIs work with tribes to develop commercial strategies, including tribal codes, and to improve financial literacy and entrepreneurial skills.<sup>40</sup>

Developing and implementing these programs entails the commitment of human and financial resources by Indian and non-Indian parties. Bankers and tribal representatives noted, however, that investments by lenders in these types of programs would enhance the long-term viability of the projects financed.

- **Marketing and outreach campaigns:** Typically, bankers expend substantial marketing, promotion, and outreach efforts in developing business in specific market segments. The same is true for Indian Country. Banks may want to look for business prospects at conferences and conventions with a Native American focus, such as the annual Reservation Economic Summit and American Indian Business Trade Fair, sponsored by the National Center for American Enterprise Development, and the annual Tribal Economies Conference, sponsored by the Native American Finance Officers Association. Banks can hold one-on-one consulting sessions at such events with tribes in their area.

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<sup>40</sup> See, for example, Fiddler, Tanya, "Working Together: Effective Partnerships Between Native CDFIs and Banks Bridge the Financing Gap in Indian Country," *Community Developments Investments*, OCC Community Affairs, August 2013.

Bankers also recognize the need for patience in communicating with tribal councils and tribal corporations or other tribal business entities. This commitment of effort not only enables bankers to understand tribal laws and traditions more fully, but also helps inform the tribal parties about the bank's legal and business requirements. While the time spent in building trust and cultivating business relationships is essential, it may extend the timetables for completion and increase the costs associated in financing these ventures.

### **Risk Mitigation Strategies Using Government Programs**

Several federal government programs are available to banks interested in exploring commercial lending opportunities in underserved markets, including Indian Country. These programs are designed to mitigate some of the business risks involved by providing loan guarantees. The use of loan guarantees as secondary support for debt repayment may be particularly appropriate for highly leveraged or start-up projects, which are typical of commercial developments in Indian Country. In this section, we review three of these programs:

#### ***Indian Loan Guaranty, Insurance, and Interest Subsidy Program***

The Indian Loan Guaranty Program,<sup>41</sup> run by the Department of the Interior's Office of Indian Energy and Economic Development (IEED), helps lenders reduce risks on the loans they make to eligible Native-owned businesses, primarily by providing a guarantee of up to 90 percent of the unpaid principal and interest. The program is open to federally recognized tribes or villages, individually enrolled members of such tribes or villages, or a business organization with no less than 51 percent ownership by American Indians or Alaska Natives. The borrower's project must be located on or near a federally recognized Indian reservation or recognized service area, and the project must contribute to the economy of the reservation or service area. Nearly any type or size of business can benefit from this program, and its authority allows great flexibility to provide loan guarantees in varied amounts and to any business structure. A typical program transaction involves the establishment or expansion of a small business on a reservation.<sup>42</sup>

- **IEED loan insurance:** This feature of the program allows approved lenders to make insured loans of up to \$250,000 to Indian businesses without prior review or approval by the IEED. The premium is 1 percent of the insured portion of the loan, and insurance covers 90 percent of outstanding loan principal and accrued interest up to a maximum of 15 percent of the lender's total outstanding insured loan portfolio. Loan insurance is a fast and relatively inexpensive way to support borrowers with smaller loan needs.
- **IEED interest subsidy:** This feature of the program is available to some borrowers able to demonstrate that their projected or historical earnings before interest and taxes, after adjustment for extraordinary items, are less than the industry norm. Approved borrowers receive a rebate of a portion of the interest they pay on their loan, equal to the difference between the interest rate their lender charges and the (typically lower) interest rate charged by the U.S. Treasury. Interest subsidy payments are issued for the term of the loan, up to three years. The subsidy can be extended for up to two one-year periods, if justified. Five years is the maximum period for receiving interest subsidy payments.

<sup>41</sup> See "[Loan Guaranty, Insurance, and Interest Subsidy Program](#)," Indian Affairs, U.S. Department of the Interior.

<sup>42</sup> For examples of how one bank used this program successfully, see Page, Jay, "[Prospering Together on Top of the World: How First National Bank Alaska Became a Leading Financial Partner of Alaska Native Corporations](#)," *Community Developments Investments*, OCC Community Affairs, August 2013.

### ***USDA Business and Industry (B&I) Loan Guarantee Program***

USDA Rural Development manages the B&I program, whose primary purpose is to improve the economic and environmental climate in rural areas by developing or financing business, industry, and employment. The program covers any area that is not a city or town with a population greater than 50,000 or the urbanized area contiguous and adjacent to such a city or town. National banks and federal savings associations are among eligible lenders that may apply for this program.

Eligible borrowers include Indian tribes on federal or state reservations or other federally recognized tribal groups or individuals. A borrower must be engaged in or proposing to engage in a business. Businesses may include manufacturing, wholesaling, retailing, providing services, or other activities that will (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.<sup>43</sup>

The maximum percentage of guarantee is 80 percent for loans of \$5 million or less, 70 percent for loans larger than \$5 million but no more than \$10 million, and 60 percent for loans exceeding \$10 million. In addition, the maximum loan term on real estate is 30 years; the maximum term on machinery and equipment is useful life or 15 years, whichever is less; and the maximum term on working capital may not exceed seven years. Balloon payments are not permitted, but reduced payments may be scheduled in the first three years. Interest rates are negotiated between the lender and borrower and subject to agency review. Rates may be fixed or variable, but variable rates may not be adjusted more often than quarterly. Collateral is required and must have documented value sufficient to protect the interest of the lender and the agency.

Renewal fees are paid annually, usually by the borrower, and are required to maintain the enforceability of the lender's guarantee. The amount of the annual renewal fee is established by USDA Rural Development. The annual renewal fee in effect at the time the loan is obligated remains the same for the life of the loan. Lenders interested in participating in this program should contact the USDA Rural Development Business Programs Director in the state where the project is located.<sup>44</sup>

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

The 7(a) program was designed to expand access to capital for small businesses by helping creditworthy small businesses acquire financing when they cannot otherwise obtain credit at reasonable terms. The program covers business borrowing requests in which the business has sufficient cash flow to repay the loan but may not have the necessary collateral or history required by a bank's lending policy. The SBA does not provide funds to the borrower. Instead, the SBA guarantees a portion of the lender's loan, which is conditional on the lender following certain requirements established by the SBA. If the borrower defaults, the SBA pays off the guaranteed portion of the remaining loan balance. This conditional guarantee covers a portion of the risk of borrower repayment default.

The program is a flexible tool that can be used to finance a variety of business purposes. The proceeds of a 7(a) guaranteed loan may be used to purchase machinery, fixtures, and

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<sup>43</sup> 7 CFR 4279.

<sup>44</sup> For more information, see the USDA's "[Business & Industry Loan Guarantee](#)" fact sheet, Rural Development, Rural-Business Cooperative Service, January 2015.

supplies; make improvements to land and buildings; finance receivables and augment working capital; acquire and start businesses; and refinance existing debt under certain conditions. The regular 7(a) program's maximum loan amount is \$5 million. There is no minimum loan amount. The regular 7(a) loan program provides an 85 percent guarantee for loans of \$150,000 or less and a 75 percent guarantee for larger loans. Other, more specialized 7(a) programs have different terms and guarantee amounts.<sup>45</sup>

With higher-than-average growth rates and other growth-enhancing characteristics (such as large deposits of unexplored mineral resources), Indian Country can provide a large source of business opportunities for banks. But as this section has shown, bankers should expend time and effort in developing good relations with tribes and potential Indian customers. Experienced lenders emphasized that this approach will pay off over the long term.

## **V. Conclusion**

Commercial lending in Indian Country requires navigating complex legal and business issues, but the market has evolved and bankers and tribes have responded positively to these issues. Many banks and tribes now use business and legal mechanisms tailored to addressing some of the long-standing challenges to lending in Indian Country. Government guarantee programs also accommodate these legal nuances and provide assistance when banks decide to enter this market.

Market opportunities do exist, illustrated by the relatively high growth rates in Indian Country in the past two decades. There is a growing appetite for business and commercial lending on tribal trust lands. As this report describes, some banks have aggressively pursued these opportunities by implementing a variety of business strategies to meet the needs of this expanding market.

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<sup>45</sup> For more information, see the "[General Small Business Loans: 7\(a\)](#)" page on the SBA's Web site.

## Appendix A

### Success Stories in Tribal Economic Development

Asset-based development involves building wealth through natural resources, such as oil, minerals, agriculture, and wildlife and forests, as well as tribal cultural and intellectual property, such as customs, practices, and traditions. Tribes use their natural and cultural resources to support culture-based commercial and industrial development. The following success stories<sup>46</sup> document progress in tribal economic development:

- [The Mississippi Band of Choctaw Indians](#) (MBCI) manages a portfolio comprising manufacturing, service, retail, and tourism enterprises. The MBCI provides almost 6,000 permanent, full-time jobs for tribal members and nontribal employees. The tribe is one of the 10 largest employers in Mississippi, with an annual payroll of more than \$100 million, and has reinvested more than \$500 million in economic development projects in the state.
- [The Gila River Indian Community](#) in Arizona has successfully built a diversified economy based on proper resource management and principles of self-sufficiency. In addition to gambling ventures, the community has been successful in creating and sustaining business enterprises in areas including hospitality, services, utilities, telecommunications, and construction.
- [The Citizen Potawatomi Nation](#) of Oklahoma has several tribal enterprises that provide services to its citizens and create a substantial economic impact in its communities. With more than 2,000 employees, the Citizen Potawatomi Nation operates a variety of tribal enterprises, including First National Bank, Grand Casino Resort, FireLake Discount Foods, and the Citizen Potawatomi Community Development Corporation.

Other examples include the [Navajo Nation](#), which has national monuments and other scenic attractions on its reservation, and the [Three Affiliated Tribes](#), which are developing tourism-related activities, including a cultural interpretation center. In addition, Alaska Native Corporations have a dominant presence in the construction and manufacturing sectors in Alaska, effectively using their status under the SBA 8(a) program in construction, telecommunications, and energy-related projects.<sup>47</sup>

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<sup>46</sup> Information provided in this appendix is courtesy of the respective tribes' Web pages.

<sup>47</sup> The [8\(a\) Business Development Program](#) is a business assistance program for small disadvantaged businesses. The 8(a) program offers a broad scope of assistance to businesses that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals.

## Appendix B

### Resource Directory

#### Federal Government Resources

Center for Indian Country Development, Federal Reserve Bank of Minneapolis  
[www.minneapolisfed.org/indiancountry](http://www.minneapolisfed.org/indiancountry)

Community Development Financial Institution Fund  
<https://www.cdfifund.gov/Pages/default.aspx>

General Small Business Loans: 7(a), U.S. Small Business Administration  
[www.sba.gov/loans-grants/see-what-sba-offers/sba-loan-programs/7a-loan-program](http://www.sba.gov/loans-grants/see-what-sba-offers/sba-loan-programs/7a-loan-program)

Indian Loan Guaranty Program, Indian Affairs, Department of the Interior  
[www.indianaffairs.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm](http://www.indianaffairs.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm)

OCC Community Affairs Publications  
<http://www.occ.gov/publications/publications-by-topic/community-affairs/index-ca-publications.html>

OCC Native American Banking Resource Directory  
[www.occ.gov/topics/community-affairs/resource-directories/native-american/index-native-american.html](http://www.occ.gov/topics/community-affairs/resource-directories/native-american/index-native-american.html)

Business and Industry Program, U.S. Department of Agriculture  
[www.rd.usda.gov/programs-services/business-industry-loan-guarantees](http://www.rd.usda.gov/programs-services/business-industry-loan-guarantees)

#### Industry Resources

The National Congress of American Indians  
[www.ncai.org/](http://www.ncai.org/)

Harvard Project on American Indian Economic Development  
[www.hpaied.org/](http://www.hpaied.org/)

National Center for American Indian Enterprise Development  
<http://ncaied.org/>

Native American Finance Officers Association  
[www.nafoa.org/](http://www.nafoa.org/)

The National Tribal Justice Resource Center  
[www.naicja.org/](http://www.naicja.org/)

Minority Business Development Agency/Native American Business Development Centers  
[www.mbda.gov/main/programs/office-native-american-business-development-onabd](http://www.mbda.gov/main/programs/office-native-american-business-development-onabd)

This report is an update of a 2006 report written primarily by Stephanie Caputo. Ammar Askari is the primary author of this updated report. Also contributing was Barry Wides. *Community Developments Insights* reports differ from OCC bulletins and regulations in that they do not reflect OCC policy and should not be considered as definitive regulatory or supervisory guidance. Some of the information used in the preparation of this paper was obtained from publicly available sources that are considered reliable and were believed current as of January 31, 2016. The use of this information, however, does not constitute an endorsement of its accuracy by the OCC.