Leveraging Tribal Sovereign Economic Advantages to Attract Private Investment in Indian Country

By Debora Juarez & Gabriel S. Galanda

As a result of the Indian gaming phenomenon, many tribes have experienced tremendous economic growth and opportunity. However, gaming revenue is more than just money. It is the source that helps us examine how we turn our cultural understanding and communities’ wealth – people, land, time, ideas, culture – into governmental practices that sustains healthy tribal economies.

Tribal leadership has recently expressed some concern regarding the future of gaming and its governmental benefits. “Indian gaming will one day cease to exist,” Anthony Pico, Chairman of the Viejas Band of the Kumeyaay Indians from California was quoted as saying in a Reuters article aptly titled, “U.S. Indian tribes need to look beyond casinos.” Chairman Pico goes on to explain that the threatened expansion of non-Indian gaming, the over-saturation of the national gaming market, and public policy concerns about gambling addiction, are all factors that will sooner or later contribute to the demise of the $18.5 billion Indian gaming industry.

Chairman Pico’s wise foresight, from the perspective of California tribes who have operated governmental gaming operations since the 1970s, should be heeded by gaming tribes through the country. There were 15 gambling measures on the ballot in six states last November, which embody exactly the type of threat of expanded non-Indian gaming and market over-saturation that Chairman Pico speaks of. Fifteen states have conducted statewide prevalence studies on “problem gambling” and several states are considering legislation to combat gambling addiction, just as Chairman Pico eludes. As such, it is imperative that tribes expand their revenue sources beyond gaming and avoid placing all of their economic eggs in one basket.

Although some tribes have begun to devise ways to attract private investment and industry to the reservation, it has become more important than ever for Indian Country to create new economic opportunities that will withstand the volatile gaming market. Some tribes are major players in the local and regional economy. They are investing heavily in infrastructure and building major centers for trade and commerce, and as a result have acquired some wealth to benefit their communities. In short, tribes are ready to explore investment opportunities, invite industry and participate in the mainstream commercial market.

Economic sovereignty requires commercial diversification and strategic capital plans that attract investors to Indian Country. Aggressive business plans that favor economic development and job creation are tried-and-true methods of generating income and creating a thriving private sector (which, like the Tulalip Tribes’ Quil Ceda Village, could bolster tribal taxation); all of which is not dependent on Indian gaming. To those ends, consider the following advantages and savings an entrepreneur could enjoy if lured to invest in tribal commercial ventures or locate business facilities on tribal lands.
New Market Tax Credits. 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 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% 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.

Employment Tax Credits. The Indian employment credit 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 situated a business facility on the reservation could be eligible for sizeable employment tax savings annually.

Accelerated Depreciation. Non-Indian manufacturers with facilities in Indian Country can use shorter recovery periods when calculating depreciation deductions for its production equipment. “Qualified Indian reservation property” must be used predominately in the active conduct of a trade or business on the Reservation and, must be 3-, 5-, 7-, 10-, 15-, or 20-year property or non-residential real property. “Qualified infrastructure property” that is located off-reservation, but 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 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.

Tax-Exempt Financing. Tribes can issue tax-exempt debt, like state and local government, 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 IRS 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 business who develop or lease
commercial land in Indian Country.

**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

**Federal Contracting Preferences.** Initiated in 1997, the Historically Underutilized Business Zone (HUBZone), program, gives qualified participants preference in competing for federal contracts and creates jobs in historically distressed areas. A HUBZone is defined as a non-metropolitan county, area on an Indian reservation or qualified census tract. Also, Non-Indian business can obtain federal contracting priority based on the designation of tribal trust lands as a HUBZone. The HUBZone Empowerment Contracting Program is designed to stimulate economic development and create jobs in, e.g., tribal communities by providing federal contracting preferences to small business that locate in and hire employees from HUBZones. To receive preferential treatment by federal departments and agencies, a non-Indian business situated in a HUBZone must: (1) be owned by U.S. citizens; (2) ensure 35% of its workers reside in the HUBZone; (3) maintain its principal office in the HUBZone; and, (4) qualify as “small” under the Small Business Administration’s (SBA) regulations. According to the North American Industry Classification System followed by SBA, a “small” company could employ as many as 500 to 1,000 people and thus qualify for HUBZone preferences.

**Customs Duty Deferral, Elimination or Reduction.** Businesses involved in international trade, which locate on a reservation designated as a Foreign-Trade Zone (“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 was successful in petitioning the Foreign-Trade Zones Board in Washington, DC, 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.

**State/County Land Use Exemption.** 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*, 304 F.3d 909 (9th Cir. 2002), cert. denied, 538 U.S. 908 (2003) (Tulalip Tribes, not Snohomish County, possesses 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 permitting requirements.

Many tribes have become well-armed and extremely savvy in the political arena and thus have withstood attack from non-Indian gaming interests. Notwithstanding, tribes cannot afford to focus the bulk of their governmental attention towards 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 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 mission is to so 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.

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