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Shane Plumer

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## TURNING GAMING DOLLARS INTO NON-GAMING REVENUE: HEDGING FOR THE SEVENTH GENERATION

By Shane Plumer<sup>†</sup>

### Introduction

When Congress passed the Indian Gaming Regulatory Act (IGRA) there was no way to foresee the vast gap in opportunity that has occurred for tribes depending on the tribe's location.<sup>1</sup>

A handful of tribes located near major metropolitan areas operate highly successful casinos while the majority of tribes barely make enough to fund tribal programs. As Supreme Court Justice Sonia Sotomayor recently wrote, “[o]ne must . . . temper any impression that Tribes across the country have suddenly and uniformly found their treasuries filled with gaming revenue.”<sup>2</sup> Because most tribes do not have sophisticated economic development and investment resources, most of their gaming dollars are sitting in low interest savings accounts.<sup>3</sup> For example, it is reported that the Red Lake Band of Chippewa has almost \$70 million sitting in low yield accounts, and the tribe is reluctant to put that money to work them.<sup>4</sup> At the same time, the Mille Lacs Band of Ojibwe reported an income of over \$50 million from non-gaming investments.<sup>5</sup> Through their Ho-Chunk, Inc. economic development corporation, another tribe, the Winnebago of Nebraska, has mastered the federal Small Disadvantaged

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<sup>†</sup> Shane Plumer, J.D., University of Minnesota Law School, 2016. He is a law clerk for firm of Hogen Adams PLLC, and he is an enrolled member of the Red Lake Band of Chippewa.

1. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as 25 U.S.C. §§ 2701–2721 (2012)).

2. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

3. Alex Davidson, *Native American Investing Comes a Long Way*, WALL STREET J. (Oct. 4, 2015, 10:27 PM), <http://www.wsj.com/articles/nativeamericaninvestingcomesalongway1444012063>.

4. Interview with Charles Dolson, Exec. Dir., Red Lake Band of Chippewa, in Minneapolis, Minn. (Mar. 30, 2016) (on file with author).

5. MILLE LACS CORP. VENTURES, 2014 ANNUAL REPORT (2015) (unpublished) (on file with Mille Lacs Corporate Ventures).

Business 8(a) contracting process.<sup>6</sup> The tribe now has revenues in excess of \$260 million.<sup>7</sup>

This Article is intended for tribal economic development and financial professionals, tribal administrators, tribal investment advisors, and other tribal government employees charged with deploying capital for tribes. In response to Robert J. Miller's charge in his recent book *Reservation Capitalism: Economic Development in Indian Country*,<sup>8</sup> this Article argues that scholars and advocates should turn their attention and efforts to tribal economic development. This article will explain investment banking, private equity funds, and provide a roadmap on how Indian tribes can diversify their business interests, make more profitable investments, and utilize their unique status and sovereign power to create business environments that are attractive to economic development. The explosion of private equity investment in the United States presents a viable opportunity for tribes to pool their capital in order to increase expansion capital, particularly equity capital, and their return on investment (ROI). In addition, because of the IGRA restrictions on uses of gaming revenue, the ability to convert gaming dollars into non-gaming revenue is beneficial to a tribe's investment portfolio.

## I. IGRA & Limitations on Tribal Investments

Contrary to popular belief, IGRA did not grant Indian tribes the right to conduct gaming activities. IGRA is the Congressional response to state challenges to Indian gaming.<sup>9</sup> States took political action to protect non-Indian gaming interests that already existed in many states.<sup>10</sup> Indian gaming has its roots in the late 1970s and 1980s when tribes across the country began bingo and other gaming operations on their reservations, sometimes in garages.<sup>11</sup> The rise of Indian gaming occurred after

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6. See Kurt Mantonya & Milan Wall, *Economic Development in Indian Country: Traits that Lead to Sustainability*, ONLINE J. RURAL RES. & POL'Y, Sept. 1, 2007, at 1–36, <http://newprairiepress.org/cgi/viewcontent.cgi?article=1008&context=ojrrp>.

7. *Ho-Chunk, Inc. Subsidiary Awarded Major U.S. Air Force Contract*, HO-CHUNK (May 4, 2015), <http://www.hochunkinc.com/pressarea/2015/05-04.html>.

8. ROBERT J. MILLER, *RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* (2012).

9. See 25 U.S.C. §§ 2701–2721 (2012).

10. Matthew L.M. Fletcher, *Indian Tribal Businesses and the Off-Reservation Market*, 12 LEWIS & CLARK L. REV. 1047, 1061 (2008).

11. Jeff Smith, *Fred Dakota Founded Native American Casinos – In a U.P. Garage*, MYNORTH MEDIA (Feb. 17, 2014), <http://mynorth.com/2014/02/fred-dakota-founded-native-american-casinosin-a-u-p-garage/>.

the Supreme Court held that states generally lack regulatory authority over Indians on reservations.<sup>12</sup> The Indian gaming floodgates opened after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians* that held the state of California could not impose state gambling regulations on a tribal gaming operation.<sup>13</sup> The expansion of Indian gaming created public policy concerns, and states feared that tribal casinos would be overrun by organized crime.<sup>14</sup> As a result, Congress enacted IGRA in 1988 as a regulatory regime that was designed to balance the interests of states, tribes, and the federal government.<sup>15</sup>

IGRA was designed to be an economic development tool for tribes to attain self-sufficiency and strengthen tribal governments, thus promoting the current federal Indian policy of self-determination.<sup>16</sup> IGRA provides a number of mandates to ensure that tribes are not taken advantage of by states, with which they are required to negotiate gaming compacts, or by business entities that want to assist tribes in gaming.<sup>17</sup> Despite these federal protections, tribes should be careful to not use sovereign immunity as a "sword and a shield"<sup>18</sup> when transacting with non-Indian entities.<sup>19</sup>

IGRA also restricts the use of Indian gaming revenues in a number of ways. Under IGRA, tribes may use net gaming revenues for only six purposes: (1) to fund tribal government operations or programs, (2) to provide for the general welfare of the tribe and its members, (3) to promote tribal economic development, (4) to donate to charitable organizations, (5) to help fund operations of local government agencies, and (6) if approved by the U.S. Secretary of the Interior, to make per capita payments

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12. See *Bryan v. Itasca Cty.*, 426 U.S. 373, 384 (1976).

13. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987).

14. See *id.* at 205–07.

15. 25 U.S.C. § 2702 (2012).

16. *Id.*

17. See *id.* § 2710(3)(A) (explaining the process by which an Indian tribe requests the state to enter into negotiations for the purpose of entering into a tribal-state compact governing the conduct of gaming activities).

18. The "sword and shield" metaphor refers to a tribe using inherent sovereignty and/or sovereign immunity as a means to obtain political and economic advantages while simultaneously shielding itself from liability. See, e.g., John Holland, *Tribes' Immunity Draws Closer Look*, ORLANDO SENT. (Mar. 10, 2003), [http://articles.orlandosentinel.com/2003-03-10/news/0303100112\\_1\\_tribal-sovereign-tribes-tribal-leaders](http://articles.orlandosentinel.com/2003-03-10/news/0303100112_1_tribal-sovereign-tribes-tribal-leaders).

19. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

to tribal members.<sup>20</sup> Curiously, the National Indian Gaming Commission considers tribal-state revenue-sharing agreements to fall under “promotion of tribal economic development,” because the tribe gains a valuable economic benefit (typically substantial exclusivity in a certain market) in return for the payments.<sup>21</sup>

There are a few other factors that help explain why tribes have been reluctant to engage in off-reservation investments. American Indians display an understandable resistance toward assimilation and integration, unlike developing countries that are enthusiastic to be a part of the Western global economy.<sup>22</sup> Because many tribes receive a majority of their funding from federal grants, the use of those funds is extremely limited. Money from the federal government cannot be invested in ways that put the principal at risk.<sup>23</sup> In addition, the investment of that money is managed by the federal government, which invests most of it in conservative, passive, and low-yield United States Treasury Securities.<sup>24</sup> Another factor that influences tribal investments is that many tribes are reluctant to make any investments that would require them to disclose revenue data in the public sector.<sup>25</sup> The issue of revenue disclosure raises the specter of states wanting to reopen tribal-state gaming compacts to negotiate controversial revenue-sharing agreements.<sup>26</sup>

Federal Indian Policy is another impediment to business diversification, and recent statements by federal officials imply that Indian gaming and related economic development was intended to remain on the reservation.<sup>27</sup> The Department of the Interior decided that it will only take land into trust and approve off-reservation gaming in extremely narrow circumstances.<sup>28</sup> In

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20. 25 U.S.C. § 2701.

21. MODEL GAMING ORDINANCE §105(a)(3) (Nat'l Indian Gaming Comm'n 2005).

22. *See Assimilation, Relocation, Genocide*, PBS (Sept. 2006), <http://www.pbs.org/indiancountry/history/assimilation.html> (exploring the history of American Indian assimilation).

23. *See* Davidson, *supra* note 3.

24. *Id.*

25. *Id.*

26. *See, e.g.*, In re Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003); Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010).

27. *See* Memorandum from Carl Artman, Assistant Sec'y, Bureau of Indian Affairs, to Regional Dirs., Bureau of Indian Affairs (Jan. 3, 2008), <http://turtletalk.files.wordpress.com/2008/01/artman0103081.pdf> [hereinafter Artman Memorandum].

28. *Id.*

his article, Matthew L.M. Fletcher theorizes that rising tribal economic development has “caused a backlash” and federal Indian policy “favoring assimilation and dependence threatens to frustrate emerging tribal participation in the broader economy.”<sup>29</sup> Fletcher explains how Indian tribes enjoyed a long history of participation in large regional trading markets (“openness”) with other tribes, European nations, and other people who existed throughout the land that eventually became the United States.<sup>30</sup> As the treaty and reservation policies began to dictate the relationships between Indians and non-Indians, “economic and political discrimination all but destroyed Indian participation in regional markets.”<sup>31</sup> The term “measured separatism” was coined by Charles Wilkinson to describe the federal policies designed to grant Indians their desire to be left alone and to avoid conflicts between Indians and non-Indians.<sup>32</sup>

As federal Indian policy changed to assimilation and now self-determination, tribes are deciding for themselves whether to pursue modern measured separatism or openness.<sup>33</sup> Modern measured separatism enables tribes to “maintain their own private communities while they engage in sophisticated commercial and political activities involving non-Indians.”<sup>34</sup> However, as Fletcher explains, some tribes that do not have strong gaming markets have “taken significant steps into the global economy . . .”<sup>35</sup> They have encountered “backlash” that Fletcher contends has occurred because “American commentators . . . want tribal businesses to stay home.”<sup>36</sup> In the context of off-reservation gaming, the Department of the Interior (DOI), “has made a unilateral decision that it will not approve applications for off-reservation Indian gaming except in extremely narrow circumstances.”<sup>37</sup> One of the contradictory rationales for this decision is the DOI’s conclusion that, “Indian gaming operations will not assist Indian communities unless they help to reduce the

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29. Fletcher, *supra* note 10, at 1047.

30. *Id.*

31. *Id.* at 1048.

32. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14–19 (1987).

33. Fletcher, *supra* note 10, at 1056.

34. *Id.*

35. *Id.* at 1050 (citing Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103 (2008)).

36. *Id.*

37. *Id.*

on-reservation unemployment rate.”<sup>38</sup> As Fletcher contends, “[t]his rationale for denying tribal access to the off-reservation market is little more than a resurrection of the worst aspects of both measured separatism *and* assimilation.”<sup>39</sup>

Fletcher makes an astute observation that many Indian law practitioners do not want to concede, that federal Indian law has its basis in measured separatism and is not designed to “encourage the importation of outside capital.”<sup>40</sup> Fletcher further theorizes that many successful Indian businesses do not look to “the advantages and contours of federal Indian law” to develop their business models.<sup>41</sup> Successful tribal businesses “look to the market first” and “go where the better markets are located; that is, off-reservation.”<sup>42</sup> In continuation of Fletcher’s proposal, this Article provides a roadmap for tribes to bring in outside capital and to go where the capital is located.<sup>43</sup>

## II. Roadmap to More Profitable Tribal Investments

Tribes can turn gaming dollars into non-gaming revenue by increasing market awareness and diversifying tribal business enterprises. Tribes have utilized the “promoting tribal economic development” purpose of IGRA to deploy gaming revenue in order to create non-gaming sources of revenue.<sup>44</sup> Generally, tribes have pursued four levels of diversification: “non-gaming amenities within or adjacent to gaming facilities, tourist-reliant non-gaming businesses, on-reservation businesses that export products off the reservation, and off-reservation businesses.”<sup>45</sup> By creating separate business entities such as corporations and LLC’s that are capitalized with non-gaming revenue, a tribe can engage in more sophisticated investment strategies like private equity and investment banking opportunities. Furthermore, diversification can also be an important part of tribal debt restructuring because it can provide cash flow for bondholders.<sup>46</sup>

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38. *Id.* (citing Artman Memorandum, *supra* note 27).

39. *Id.*

40. *Id.* at 1063.

41. *Id.*

42. *Id.*

43. *Cf. id.*

44. *See* 25 U.S.C. § 2702(1) (2012).

45. Alan P. Meister et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 395 (2009).

46. Lisa Allen, *For Buyers, Tribal Casino Debt Remains the Wild West*, THE DEAL (Jan. 31, 2014), <http://tfacp.com/wp-content/uploads/2015/07/For-Buyers-Tribal-Casino-Debt-Remains-the-Wild-West.pdf>.

Currently, the most common form of diversification for gaming tribes is the creation of non-gaming amenities such as hotels, convention centers, restaurants, spas, and other forms of entertainment that supplement the gaming activities and are located within or adjacent to gaming facilities.<sup>47</sup> Some tribes, such as the Mille Lacs Band of Ojibwe, also create venues for concerts and other live productions that often generate significant revenue for the tribe.<sup>48</sup> However, even given the crowds that these amenities draw to the gaming facility, they are still dependent on the gaming operation itself, are entwined with the tribe, and are subject to National Indian Gaming Commission regulations.<sup>49</sup> As a result, the creation of non-gaming amenities is considered the lowest level, level one, of economic diversification.<sup>50</sup>

Tribes commonly create small businesses such as convenient stores, gas stations, water parks, RV parks, museums, and other entities that are located on the reservation. These small businesses serve the dual purpose of providing social and economic infrastructure for the tribe and for tourists visiting the gaming facility.<sup>51</sup> Some other innovative examples of this type of diversification include a ski resort owned by the White Mountain Apache Tribe in Arizona, a hotel that caters to fishing enthusiasts on Mille Lacs lake owned by the Mille Lacs Band of Ojibwe, and golf courses located on many reservations including the Shakopee Mdewakanton Sioux Community. Although these level-two businesses are less dependent on gaming than level-one non-gaming amenities, their revenue is still dependent on the surrounding market conditions.<sup>52</sup>

The third level of diversification involves creating enterprises that are located on the reservation and utilize the natural and human resources of the tribe to produce products that are exported off the reservation.<sup>53</sup> These businesses are usually independent of the gaming operations but sometimes rely on funding from the tribe when the business cannot sustain itself

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47. Meister et al., *supra* note 45, at 395.

48. BARRY RYAN, MINN. INDIAN GAMING ASS'N, THE ECONOMIC CONTRIBUTIONS OF MINNESOTA TRIBAL GOVERNMENTS IN 2007, at 6 (2009), [http://www.mnindiagamingassoc.com/MIGA\\_RYAN\\_REPORT\\_ON\\_EC\\_IMPACT\\_2009.pdf](http://www.mnindiagamingassoc.com/MIGA_RYAN_REPORT_ON_EC_IMPACT_2009.pdf).

49. 25 U.S.C. § 2704 (2012).

50. Meister et al., *supra* note 45, at 396.

51. *Id.*

52. *Id.*

53. *Id.*

with its own revenue.<sup>54</sup> Examples of level-three diversification include forestry, mining, energy production, agriculture, fisheries, and other similar entities.<sup>55</sup> Another example of diversification at this level includes tribal cigarette and tobacco distribution. Tribes have the ability to leverage tribal sovereignty to create a tribal tax system that creates a competitive advantage in this industry. The Mille Lacs Band of Ojibwe has been particularly adept at acquiring businesses located on and off the reservation that support the gaming operations. For example, the tribe acquired a commercial laundry service that cleans all of the linens for the hotel and casino and a local print production company that now produces the majority of the casino's marketing materials.<sup>56</sup> The White Earth Band of Ojibwe in Minnesota is developing a tribal small business incubator to assist entrepreneurial tribe members.<sup>57</sup>

The most sophisticated level of diversification involves acquisition of off-reservation businesses and other investments involving off-reservation entities.<sup>58</sup> Unfortunately, this level-four diversification is the least frequent because tribes are reluctant to give up the competitive advantages they enjoy on reservations.<sup>59</sup> For example, tribes will likely have to grant partial or limited waivers of sovereign immunity, pay state taxes, and comply with other laws and regulations that other businesses are subject to—such as civil and tort liability.<sup>60</sup> Although diversification at this level comes with inherent risks, it provides the opportunity for tremendous rewards because tribes have access to different economic bases. However, the perceived barriers to off-reservation diversification have impeded tribes from engaging in more sophisticated investment opportunities.<sup>61</sup>

### III. Barriers to Investment Diversification

As one author notes:

Jurisdiction is the most significant and mind-bending issue

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54. *Id.*

55. *Id.*

56. *Our Businesses*, MILLE LACS CORP. VENTURES, <http://mlcorporateventures.com/businesses/> (last visited May 26, 2016).

57. MINN. INDIAN AFFAIRS COUNCIL, REPORT TO GOVERNOR MARK DAYTON & THE MINNESOTA STATE LEGISLATURE 41 (2014), <http://archive.leg.state.mn.us/docs/2014/mandated/141174.pdf>.

58. Meister et al., *supra* note 45, at 396.

59. *Id.*

60. *Id.*

61. *Id.*

that Indian law practitioners face. It turns on whether the parties are Indian or not, where the incident falls on the criminal/prohibitory versus civil/regulatory spectrum, and the status of the land on which an incident occurs. Determining the 'who' and the 'where' are critical to determining whether a tribe, the United States, a state, or some combination of these governments has jurisdiction.<sup>62</sup>

Because nearly all tribes do not have well-developed bodies of corporate law, most non-Indian entities will not agree to being governed by tribal law and hailed into tribal courts.<sup>63</sup> Many tribal courts operate with very few written laws and rely on custom, practice, and tradition. Non-Indian entities such as lenders, bondholders, and private equity funds are usually unfamiliar with tribal law, especially if tribal law does not contain the customary statutes, codes, or provisions businesses are used to seeing govern transactions.<sup>64</sup> Moreover, most private equity funds are formed as limited partnerships in Delaware, where the body of business law is well developed, predictable, and business-friendly.<sup>65</sup> One of the barriers to entering private equity investing occurs when tribes are adamant about chartering their business entities under their business code and are reluctant to grant waivers of immunity.<sup>66</sup> Without these concessions, it is unlikely tribes will be eligible to participate in private equity investing. Moreover, even with a limited waiver of immunity, tribes still need to satisfy the financial requirements under the Securities Exchange Commission's (SEC) definition of "accredited investor" in order to invest in private equity funds.<sup>67</sup>

#### IV. SEC Definition of Accredited Investor

Stemming from the Securities Act of 1933, accredited investors fulfill certain net worth requirements and are deemed to have an understanding of the inherent risks of certain

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62. Jessie Stomski Seim & Jessica Intermill, *The Nations Within: An Indian Law FAQ*, BENCH & B. MINN. (Oct. 8, 2015), <http://mnbenchbar.com/2015/10/indian-law-faq/>; see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (elaborating on the criminal/prohibitory and civil/regulatory law distinctions).

63. Seim & Intermill, *supra* note 62.

64. See Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 5 (2008).

65. See Marco V. Masotti et al., *Delaware LLLPs: A Viable Option for Private Investment Funds?*, LEXOLOGY (Aug. 19, 2010), <http://www.lexology.com/library/detail.aspx?g=e0960620-e20e-4c64-8ab7-eaf09acab341>.

66. See Jensen, *supra* note 65, at 92–93.

67. 17 C.F.R. § 230.501 (2013).

investments.<sup>68</sup> Being deemed an accredited investor is essential for investing in the private equity market for a number of reasons. Because private equity is considered a more sophisticated form of investing, firms selling securities prefer to sell to accredited investors in order to comply with federal and state securities laws.<sup>69</sup> When private equity firms sell securities to non-accredited investors, they take on higher risks and costs: investor risk premiums, legal fees, and additional, more detailed disclosure documents.<sup>70</sup> Even though private equity firms are not prohibited from selling securities to non-accredited investors, due to the higher-risk nature of these investments, lawyers advise firms to restrict sales to only accredited investors.<sup>71</sup> As a result of not being included in the definition of accredited investors, Indian tribes have been limited to deploying capital through direct investment, and most have not been able to participate in private equity investing to help grow businesses in Indian Country.<sup>72</sup>

Gavin Clarkson has written extensively on the equity investment gap that exists in Indian Country.<sup>73</sup> Clarkson lobbied the SEC to add Indian tribes to the definition of accredited investors. In 2007, the SEC proposed revisions to Regulation D that included Indian tribes in the definition of accredited investors under Rule 501(a)(3).<sup>74</sup> However, the SEC failed to adopt the proposed changes.<sup>75</sup> As a result, in order for tribes to qualify as accredited investors, they need to form business entities that are separated and insulated from the tribe and fulfill the qualifications of Regulation D.

On December 18, 2015, the SEC issued its initial report on the definition of accredited investor and made recommendations to revise the definition.<sup>76</sup> The SEC is required to review the definition of accredited investor every four years to comply with

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68. *Id.*

69. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 290 (2009).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 291.

74. Revisions of Limited Offering Exemptions in Regulation D, 72 Fed. Reg. 45, 116, 126 (Aug. 10, 2007).

75. 17 C.F.R. § 230.501 (2013).

76. U.S. SEC. AND EXCH. COMM'N [SEC], REPORT ON THE REVIEW OF THE DEFINITION OF "ACCREDITED INVESTOR," (2015), <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

the Dodd-Frank Wall Street Reform and Consumer Protection Act. The report recognizes that “the omission of Tribes from the accredited investor definition has limited their investment opportunities and created capital raising difficulties for tribal enterprises.”<sup>77</sup> As a result, the staff makes the recommendation to the SEC that the list-based approach for entities to qualify as accredited investors should be revised because specifically enumerating entities has excluded some entities (including Indian tribes) that likely should be accredited investors.<sup>78</sup>

The report recommends that the SEC permit all entities, including Indian tribes, with investments in excess of \$5 million to qualify as accredited investors.<sup>79</sup> This would provide a mechanism for many business entities such as LLC’s, tribes, labor unions, sovereign wealth funds, and other entities that are not specifically listed in the definition to qualify as accredited investors.<sup>80</sup> Although this approach would not open the door for all tribes to qualify as accredited investors, it addresses the concerns that have categorically excluded tribes from the definition. Moreover, a \$5 million investment threshold is reasonable and attainable for tribes who want to participate in private equity investments.

## V. Doing Business in Indian Country

As nations with inherent sovereignty, tribes possess the ability to legislate on matters that define the contours of transacting with tribal entities.<sup>81</sup> However, just as the SEC is reluctant to add tribes to the definition of accredited investors, many banks and companies are similarly hesitant to avail themselves to tribal laws and courts.<sup>82</sup> When conducting business away from Indian Country where sovereignty is at its lowest point, tribes should avoid conflict of laws and be careful not to use sovereignty as a “sword and a shield.” As a result, rather than argue for the modern approach that tribes should incorporate their business entities under tribal corporate codes, tribes could create layers of protection by chartering their entities under state law,

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77. *Id.*; Clarkson, *supra* note 69, at 295.

78. SEC, *supra* note 76.

79. *Id.*

80. *Id.*

81. See *Civil Rights 101: Native Americans*, THE LEADERSHIP CONFERENCE (2001), <http://www.civilrights.org/resources/civilrights101/native.html>.

82. See Keith Goldberg, *7 Tips for Energy Companies Working in Indian Country*, LAW 360, (Apr. 9, 2015, 5:40 PM), <http://www.law360.com/articles/639552/7-tips-for-energy-companies-working-in-indian-country>.

especially Delaware law. There are a number of advantages to transacting under uniform principles that are familiar to most non-Indian entities, including reduced transaction costs and predictability. Tribes that have adopted the Uniform Commercial Code or the Model Tribal Secured Transactions Act (MTSTA) will be more familiar to lenders and other businesses.<sup>83</sup> Accordingly, these advancements in tribal law will help to create richer bodies of law that will be more attractive to non-Indian entities.

Tribes that adopt the MTSTA (“Act”) create a consistent and predictable legal framework for secured transactions involving the tribe, tribal member, or their personal property.<sup>84</sup> A secured transactions code provides a reliable, accurate, and publicly accessible security interest filing system that promotes access to affordable credit for tribal enterprises and tribal members. The Act was created to promote economic development and encourage commerce in Indian Country.<sup>85</sup> As Tim Berg, chair of the committee that drafted the MTSTA, explains in his article:

Access to financing and capital is key to economic growth, and such access is hampered in Indian Country by the lack of standard laws governing business and lending transactions. Lenders and other sources of capital want the protection of commercial laws with which they are familiar. When it comes to loans on personal property . . . they are looking for enforceability of their security interest. And when a dispute arises, they seek assurance that they have sufficient recourse to enforce that security interest.<sup>86</sup>

The MTSTA is a flexible template that allows the tribe to incorporate customs and cultural traditions that are in line with the tribe’s values. For example, drafters of the Act considered potential conflicts such as the transfer of sacred objects out of tribal possession. The Act becomes tribal law when: (1) the tribe enacts a version of it, and (2) claims under the Act are recognized by the tribal court.<sup>87</sup> When a tribe transacts with a non-Indian or non-member Indian, the Act allows the parties to choose whether to be governed either by the Act or by the law of the other party’s

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83. See MODEL TRIBAL SECURED TRANSACTIONS ACT [MTSTA], (Nat’l Conference of Comm’rs on Uniform State Laws 2005), [http://www.uniformlaws.org/shared/docs/mtsta/mtsta\\_aug05\\_final.pdf](http://www.uniformlaws.org/shared/docs/mtsta/mtsta_aug05_final.pdf).

84. See *id.*

85. *Id.* at §9-103.

86. Tim Berg, *Growing Indian Economies: The Model Tribal Secured Transactions Act*, ARIZ. ATTY 30, 32 (Mar. 2006), [http://www.myazbar.org/AZAttorney/PDF\\_Articles/0306Tribal.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/0306Tribal.pdf).

87. MTSTA, *supra* note 83.

state or tribe.<sup>88</sup> These provisions provide protection for the tribe and tribal members from exploitation by off-reservation lenders. In addition, enacting the MTSTA is more comprehensive than adopting sections of the Uniform Commercial Code.<sup>89</sup>

Potential investors in Indian Country look for indicia of political stability and economic soundness in the same way they analyze the fundamentals, e.g., debt, cash flow, accounting, or leadership, of public corporations and private companies. Joseph Kalt stresses that investors need to get to know the tribe they are dealing with.<sup>90</sup> “Investors should pay attention to the term limits, turnover rates, and term staggering in the relevant tribal council . . . [t]ribes with stable governance, strong court systems, and modernized constitutions perform much better than tribes that lack those civic foundations . . . .”<sup>91</sup> As a result, tribal councils should view their roles like boards of directors in public corporations with fiduciary duties and obligations to shareholders.

## VI. Investment Banking is Critical to Off-Reservation Diversification

Investment banking is a specific division of banking related to the creation of capital for companies, governments, and other entities. Many large investment banks are affiliated with or subsidiaries of larger commercial banking institutions.<sup>92</sup> Businesses and institutions turn to investment banks because of their high level of market awareness and because they have their finger on the pulse of the current investment markets.

Tribes should position themselves in the capital market to take advantage of companies looking for capital infusions in exchange for an interest in the company. Investment banks provide their clients with access to private placement products that are not available to the public.<sup>93</sup> Although tribes have been

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88. *Id.*

89. See Bruce A. King, *The Model Secured Transactions Act and Tribal Economic Development*, GARVEY SCHUBERT BARER (Mar. 27, 2008), [http://www.gsblaw.com/images/ps\\_attachment/attachment247.pdf](http://www.gsblaw.com/images/ps_attachment/attachment247.pdf).

90. Allen, *supra* note 46.

91. *Id.*

92. See Dafna Avraham et al., *A Structural View of U.S. Bank Holding Companies*, FRBNY ECON. POLY REV., July 2012, at 65, 71, <https://www.newyorkfed.org/medialibrary/media/research/epr/12v18n2/1207avra.pdf>.

93. *Private Placement*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/privateplacement.asp> (last visited Apr. 13, 2016) (“A private placement is the sale of securities to a relatively small number of select investors as a way of raising capital.”).

reluctant to invest in companies off the reservation, they should consider these opportunities as avenues to enter larger markets and diversify their economic base. As Gavin Clarkson contends, “[h]istorically, the only mechanism for deploying [gaming revenue] has been through direct investment.”<sup>94</sup> The problem is that “many tribal councils, however, have neither the necessary experience to evaluate such investments nor the time to thoroughly examine numerous direct investment opportunities.”<sup>95</sup>

Tribes have not had the opportunity, until recently, to make higher risk investments because most of their funds were use-restricted by the federal government.<sup>96</sup> The conventional wisdom has been that tribes should invest in social and economic infrastructure on the reservation in order to enhance self-sufficiency of the tribe and to create jobs for tribal members and local small businesses. As Ross Swimmer, former Assistant Secretary for Indian Affairs in the Reagan administration, explains: “I think the conservatism of tribes is the carry-over from the way the BIA [Bureau of Indian Affairs] invested their funds.”<sup>97</sup>

Tribes, such as the Mille Lacs Band of Ojibwe and Winnebago Tribe of Nebraska, that recruit sophisticated and experienced economic development professionals and make significant investments in businesses off reservation, out of state, and in foreign countries reap tremendous rewards. The Mille Lacs tribe works with real estate investment trusts<sup>98</sup> to purchase hotels and restaurants in thriving markets including Minnesota’s Twin Cities area and Oklahoma City, Oklahoma.<sup>99</sup> The Winnebago Tribe of Nebraska operates thirty-five subsidiaries with offices in ten states and four foreign countries.<sup>100</sup>

Tribes should be working with investment banks instead of traditional investment advisers to deploy capital and diversify

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94. Clarkson, *supra* note 69.

95. *Id.*

96. Davidson, *supra* note 3.

97. *Id.*

98. *Real Estate Investment Trust-REIT*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/reit.asp> (last visited Apr. 13, 2016) (“A REIT is a type of security that invests in real estate through property or mortgages and often trades on major exchanges like a stock. REITs provide investors with an extremely liquid stake in real estate.”).

99. Sam Black, *Mille Lacs Tribe Buys Hotel in Oklahoma City*, MINNEAPOLIS/ST. PAUL BUS. J. (Nov. 21, 2014, 4:48 PM), [http://www.bizjournals.com/twincities/blog/real\\_estate/2014/11/mille-lacs-tribe-buys-hotel-in-oklahoma-city.html](http://www.bizjournals.com/twincities/blog/real_estate/2014/11/mille-lacs-tribe-buys-hotel-in-oklahoma-city.html).

100. See HO CHUNK, INC., HO-CHUNK, INC. ANNUAL REPORT (2014), <http://www.hochunkinc.com/2014%20Flip%20Book/2014annualreport.html>.

their portfolios. The alternative to conventional investment products and direct investment is for tribes to “deploy capital in the same way as other wealthy individuals or corporations: investing in a private-equity or venture-capital fund where financial professionals can evaluate various businesses and select the best opportunities in order to maximize investment returns.”<sup>101</sup> Investment banks differ from traditional investment advisers in the types of transactions that they advise their clients on. Investment advisers generally work with individuals, couples, and families to develop short and long term investment strategies. In Contrast, investment banks work with companies, institutional investors, and other sophisticated investors to provide mezzanine financing,<sup>102</sup> to support mergers and acquisitions, and to back leveraged buyouts.<sup>103</sup> Investment banks provide access to business deals and capital sources that are not readily available in public markets because they usually involve private companies. However, most tribes continue to work with investment advisers that advise them to invest in standard investment vehicles such as treasury bonds and other low-yield products that do not provide meaningful returns and cash flows.<sup>104</sup>

## VII. Introduction to Private Equity

On the other hand, private equity consists of investors and funds that use collected pools of capital from wealthy individuals (accredited investors),<sup>105</sup> pension funds, endowments, etc. to invest in private businesses. Private equity funds invest directly in companies, primarily by purchasing private companies and using

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101. Clarkson, *supra* note 69.

102. *Mezzanine Financing*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/mezzaninefinancing.asp> (last visited Apr. 13, 2016) (explaining that “mezzanine financing is a hybrid of debt and equity financing that is typically used to finance the expansion of existing companies. It has elements of both private equity and investment banking”).

103. *Leveraged Buyout*, INVESTOPEDIA, <http://www.investopedia.com/terms/l/leveragedbuyout.asp> (last visited Apr. 4, 2016) (defining a leveraged buyout “as the acquisition of another company using a significant amount of borrowed money . . . to meet the cost of acquisition. Often, the assets of the company being acquired are used as collateral for the loans in addition to the assets of the acquiring company. The purpose of leveraged buyouts is to allow companies to make large acquisitions without having to commit a lot of capital”).

104. See Lars Landre, *Is it Time to Send your Investment Advisor Through RFP?*, TRIBAL FIN. NEWS LETTER (Moss-Adams), Spring 2013, <http://www.mossadams.com/mossadams/media/Documents/Publications/Nfp/NFP TribalFinanceQuarterly-Spring2013.pdf?ext=.pdf>.

105. 17 C.F.R. § 230.501 (2013).

leveraged buyouts to acquire companies that may be financially distressed.<sup>106</sup> Private equity funds usually specialize in a certain market such as hospitality, energy, real estate, healthcare, technology, and emerging growth industries.<sup>107</sup> Typically, private equity investors focus on control oriented investments in cash-flow-generating, asset-based businesses with strong fundamentals.<sup>108</sup> However, there are a wide variety of funds—including leveraged buyout, growth equity, and venture capital—that vary depending on the client’s risk tolerance.<sup>109</sup>

As a practical matter, the opportunities available for private equity investment are not publicly advertised and are not available from conventional investment advisers.<sup>110</sup> In fact, a key component of a private equity fund’s success is its ability to identify and source attractive deals. Moreover, it takes a sophisticated view of the investment landscape to venture into private equity investing. Because tribes do not categorically qualify for accredited investor status, they need to create a separate entity such as a holding company (corporation or LLC) that would serve as the conduit for investing in private equity funds.<sup>111</sup> The only form that is not available to tribes is the S-corporation because tribes are not eligible to be S-corporation shareholders. It is more beneficial to create layers of separation between the tribe as a sovereign body and the entities that conduct economic development activities. This can be accomplished by creating a multiple-entity structure that consists of a holding entity that owns assets and an operating entity that has possession of the assets. In a typical private equity fund, the investor becomes a limited partner of the fund.<sup>112</sup> In the tribal

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106. See *Private Equity Market Landscape*, CHARTERED ALT. INV. ANALYST ASS’N, <https://caia.org/sites/default/files/curriculum-download/level-ii-chapter5-feb-2013.pdf> (last visited Apr. 13, 2016).

107. *Id.*

108. *Id.*

109. *Id.*

110. Unlike conventional investment advisers, private equity fund managers are not subject to registration and regulation under the Investment Advisers Act of 1940. In addition, Dodd-Frank added exemptions for advisers to venture capital funds and private fund advisers. See Investment Advisers Act of 1940, ch. 686 (as amended by Pub. L. No. 111-203, 124 Stat. 1578).

111. See NATIVE AMERICAN CAPITAL, LP, POLICY BRIEFING: NATIVE AMERICAN TRIBES REQUIRE REG D CHANGE, <https://www.sec.gov/rules/other/265-23/nac020306.pdf> (last visited Apr. 13, 2016).

112. See ROBERT W. BAIRD & CO., IMPORTANT INFORMATION ABOUT INVESTING IN PRIVATE EQUITY FUNDS 1 (2009), <http://www.rwbaird.com/bolimages/Media/PDF/Help/Investing-in-Private-Equity-Funds.pdf>.

context, the tribal entity that is separated by at least two layers from the tribe would be the limited partner.

The conventional wisdom has been for tribes to charter their entities under their own business codes or tribal law. Tribes should not be averse to incorporating their business entities in jurisdictions that are more corporate friendly and have well-established bodies of law, such as their home state or the state of Delaware. A tribe can “engage in economic activity directly, or it can form a corporate entity under federal, state, or tribal law. Each of these options has potential advantages and disadvantages.”<sup>113</sup> The issues of liability, taxation, and governance affect the choice of entity, especially when other non-Indian entities are parties to the agreement, as they likely would be in a private equity fund. One of the main advantages of incorporating under federal or tribal law is that the entity would be treated the same as the tribe for tax purposes. However, this Article pioneers a novel approach to tribal economic development that aims to provide a framework for tribes to remove some of the barriers that have hindered their participation in private equity fund investing.

### VIII. Tribal Sovereignty: Why It Matters

Tribal sovereignty is an elusive concept for non-practitioners of federal Indian law and tribal law. Many practitioners conflate the sovereign immunity doctrine with the generalized view of tribal nations as sovereigns—with inherent power over their internal matters. However, these two concepts are distinctly separate and a proper understanding of the difference between sovereign immunity and inherent sovereignty is critical to conducting business in Indian Country.<sup>114</sup> Tribes that leverage their sovereignty to negotiate state tax compacts and create tribal tax systems can create competitive advantages in certain industries such as energy and natural resource development,

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113. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1325 (2012 ed.).

114. 18 U.S.C. § 1151 defines “Indian Country” as:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

hospitality, fuel blending, tobacco manufacturing, and tribal private equity funds.

### **IX. Inherent Tribal Sovereignty**

It is a well-established principle of Indian law that tribes possess “inherent powers of a limited sovereignty which has never been extinguished.”<sup>115</sup> It is a corollary of this principle that tribes retain all of their sovereign powers except those “withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”<sup>116</sup> Accordingly, many tribes enact business and commercial codes that govern business transactions with those tribes, as well as transactions with their tribal business entities. Therefore, this area of law presents opportunities and potential detriments to non-Indian businesses that desire to transact with Indian tribes.<sup>117</sup> For example, in *Montana v. United States*, the Supreme Court established that when tribes and tribal members enter into consensual relationships with non-Indians and conduct commercial transactions within Indian Country, the tribe has jurisdiction.<sup>118</sup> However, the Court is currently considering a challenge to the general rule established in *Montana*.<sup>119</sup> In certain cases, the tribe may have jurisdiction even when the initial transaction occurs outside of Indian country.<sup>120</sup> Furthermore, when tribes charter business entities under their own corporate or business codes, they will almost always choose to retain their immunity from suit (sovereign immunity) and select their tribal court as the forum to resolve disputes.

Some tribes are enacting their own health, safety, and environmental laws, as well as adopting uniform commercial codes and secured transaction codes. “Tribes face complicated questions when considering whether to operate a business under a corporate structure, as an arm of the tribal government, or as a tribal authority; but increasingly tribes are developing the infrastructure to create corporate structures under tribal

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115. *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978).

116. *Id.* at 323.

117. *See Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 135 S. Ct. 2833 (2015).

118. 450 U.S. 544, 565–66 (1981).

119. *Dollar Gen. Corp.*, 135 S. Ct. at 2833.

120. COHEN, *supra* note 113, at 1331 (citing *Babbitt Ford, Inc. v. Navajo Nation*, 710 F.2d 587 (9th Cir. 1983)).

regulatory regimes.”<sup>121</sup> These decisions are important because they ultimately determine jurisdictional issues.

#### X. Case Study: Mille Lacs Band of Ojibwe & Mille Lacs Corporate Ventures

The Mille Lacs Band of Ojibwe in Minnesota is one of the most economically sophisticated tribes in the United States because they engage in off-reservation economic development.<sup>122</sup> One reason for their success is a clear separation of powers between their executive, legislative, and judicial branches. Their economic development arm, known as Mille Lacs Corporate Ventures (MLCV), is insulated from political influence.<sup>123</sup> As a result, they have developed a sophisticated business structure that is welcoming and familiar to non-Indian entities. The separation of business and politics has been identified as one of the key elements of tribal economic success.<sup>124</sup>

MLCV has acquired three hotels in the Twin Cities metropolitan area and one in Oklahoma City, Oklahoma over the last three years.<sup>125</sup> The Mille Lacs Band of Ojibwe effectively owns 48% of the hotel rooms in Minnesota’s capital city, St. Paul.<sup>126</sup> MLCV represents the type of cutting-edge economic development that can occur when a tribe focuses its efforts on off-reservation businesses and building an expertise in one industry. In addition to hotels, the tribe is cementing its place in the hospitality

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121. Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 NEW ENG. L. REV. 517, 521–22 (2003).

122. See, e.g., Neal St. Anthony, *Intercontinental St. Paul-Riverfront Hotel Latest Mille Lacs Band Venture*, STAR TRIB. (June 10, 2015, 10:58 AM), <http://www.startribune.com/intercontinental-st-paul-riverfront-hotel-latest-mille-lacs-band-venture/306349981/> (discussing the Mille Lacs Band’s strategy in expanding economic development to off-reservation investments).

123. See *Indian Tribal Good Governance Practices as they Relate to Economic Development: Hearing Before the Comm. on Indian Affairs*, 107th Cong. 28–30, 96–104 (2002) (statements of Andrew J. Lee, Executive Director, Harvard Project on American Indian Economic Development).

124. S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 693 (2010).

125. See MILLE LACS CORP. VENTURES, *supra* note 5; see also Nick Halter, *Mille Lacs Band Buys Double Tree in St. Louis Park for \$37 Million*, MINNEAPOLIS/ST. PAUL BUS. J. (Oct. 20, 2015, 4:33 PM), <http://www.bizjournals.com/twincities/news/2015/10/20/mille-lacs-band-buys-double-tree-in-st-louis-park.html>.

126. See MILLE LACS CORP. VENTURES, *supra* note 5.

industry by renovating a restaurant in one of its hotels and by acquiring and rebranding another restaurant.<sup>127</sup>

Of course, another reason for the Mille Lacs tribe's success in economic development is directly related to the success of their two gaming facilities: Grand Casino Mille Lacs and Grand Casino Hinckley. Both of these gaming facilities are located less than ninety miles from the Twin Cities metropolitan area. Grand Casino Mille Lacs sits across the street from Mille Lacs lake, one of the most esteemed fishing lakes in the entire Midwest. The Mille Lacs tribe capitalizes on a steady influx of summer tourists visiting their region.<sup>128</sup> Unlike some tribes that are reluctant to develop their lakeshore, the Mille Lacs tribe embraces the opportunity to create amenities for reservation guests.

Joe Nayquonabe, Jr., a Mille Lacs tribal member with a Master of Business Administration degree from the University of Minnesota Carlson School of Management, leads MLCV<sup>129</sup> and represents the type of economic development leader that tribes need. As CEO of MLCV, Nayquonabe has increased the number of MLCV subsidiaries from seven to nineteen.<sup>130</sup> The business diversification has turned their economic development enterprises from an operating loss to a yearly revenue of over \$50 million with over \$200 million in assets under management.<sup>131</sup> He recently stated that the short-term goal of MLCV is to attain \$250 million in hospitality assets.<sup>132</sup>

#### **XI. Case Study: Winnebago Tribe of Nebraska & Ho-Chunk, Inc.**

The Winnebago Tribe of Nebraska has been at the forefront of innovative and aggressive economic development in Indian Country. It started its economic development corporation, Ho-Chunk, Inc., with one employee and used gaming revenue as start-up capital.<sup>133</sup> Today, Ho-Chunk, Inc. operates thirty-five

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127. St. Anthony, *supra* note 122.

128. See *Welcome and Explore Minnesota- Mille Lacs Lake Style*, LAKE MILLE LACS, <http://millelacs.com> (last visited Apr. 13, 2016).

129. Andy McPartland, *Joe Nayquonabe Named NAFOA Executive of the Year*, MILLE LACS BAND OF OJIBWE (May 7, 2015), [http://millelacsband.com/district\\_news/joe-nayquonabe-named-nafoa-executive-year/](http://millelacsband.com/district_news/joe-nayquonabe-named-nafoa-executive-year/).

130. MILLE LACS CORP. VENTURES, *supra* note 5.

131. *Id.*

132. Black, *supra* note 99.

133. Mantonya & Wall, *supra* note 6.

subsidiaries in a diverse range of industries.<sup>134</sup> Ho-Chunk, Inc. has made significant investments in off-reservation businesses including foreign countries. The mission of Ho-Chunk, Inc. is “to use the Tribe’s various economic and legal advantages to develop and operate successful business enterprises and provide job opportunities for tribal members.”<sup>135</sup> One of the legal advantages that Ho-Chunk, Inc. leverages is its certification as a disadvantaged small business with the U.S. Small Business Administration’s (SBA) 8(a) Contracting Program.<sup>136</sup>

Ho-Chunk, Inc. owns a wide variety of businesses in four different divisions: construction services, professional services, business products, and consumer products.<sup>137</sup> Ho-Chunk, Inc. also has interests in businesses including commercial real estate, gasoline wholesaling and retailing, and system-built home construction.<sup>138</sup> They own one of the largest tribal cigarette and tobacco distribution companies in the United States.<sup>139</sup> Their “All Native Group” is a network of small businesses that serves the professional, health, and technical needs of the United States federal government at home and abroad.<sup>140</sup> The SBA 8(a) certified “All Native Group” has been awarded substantial federal contracts from the U.S. Air Force, U.S. Department of State, and U.S. Department of Defense.<sup>141</sup>

Of special interest to tribes seeking to enter the tribal cigarette and tobacco industry, Ho-Chunk, Inc. also provides consultation to tribes through its HCI Distribution subsidiary. The subsidiary assists with complex tax issues in the industry. Tribes should adopt their own tax codes and negotiate or renegotiate tax compacts with their home states. The attributes of a tribe’s tax systems are important factors courts consider when deciding if they are preempted by state taxes.<sup>142</sup> The tribal cigarette and tobacco industry is a good example of tribes creating

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134. MILLE LACS CORP. VENTURES, *supra* note 5.

135. *Id.*

136. 13 C.F.R. § 124.109 (2013).

137. HO-CHUNK, INC., *supra* note 100.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

a competitive advantage for business by adopting a less burdensome regulatory scheme than exists under state law.

Ho-Chunk, Inc. is also a model for alleviating horizontal information asymmetries because they provide consultation to other tribes in order to facilitate replication of their business diversification methods. Ho-Chunk, Inc. believes that successful and sustainable economic development occurs in an environment with four critical elements: “government continuity, separation of business and politics, proper strategy, and intra-tribal coordination of resources.”<sup>143</sup> When these elements are aligned, tribes are operating at the apex of inherent sovereignty and economic power.

In his recent lecture “The Rise of Tribes & The Fall of Federal Indian Law,”<sup>144</sup> Ho-Chunk, Inc. founder and CEO Lance Morgan declared that tribes are in an era of expansive tribal law as opposed to a regime of restrictive and anachronistic federal Indian law. Like Matthew L.M. Fletcher argued, Morgan doesn’t think tribes should wait around for the federal government to “fix” laws that restrict Indian activities.<sup>145</sup> Rather, tribes should leverage their inherent sovereignty and regulatory authority to create economic development opportunities.<sup>146</sup> Morgan contends that tribes should adopt gasoline and hotel taxes that are applicable to all consumers, both Indian and non-Indian, but should not be afraid to share a portion with the state.<sup>147</sup>

### **Conclusion**

In the face of federal Indian laws and policy controls governing the market, the need for tribal business diversification is greater than ever. Tribes once controlled the trading markets in the United States, but lost control to Europeans due to federal Indian laws and controls of measured separatism. As Fletcher concluded in his article, the new form of measured separatism has created limitations for off-reservation gaming and thwarted some

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143. SHAWN BORDEAUX, OFFICE OF THE COMPTROLLER OF CURRENCY, TRIBAL ECONOMIC DEVELOPMENT: “A TOTAL APPROACH” (2003), <http://www.occ.gov/topics/community-affairs/resource-directories/native-american/bordeaux.pdf>.

144. Lance G. Morgan, President and CEO Ho-Chunk, Inc., *The Rise of Tribes & The Fall of Federal Indian Law*, Ninth Annual William C. Canby Jr. Lecture (Jan. 28, 2016), <http://mediasite.law.asu.edu/media/Play/e1f180d74aa64c2e860a6d73d81e2ebb1d>.

145. *Id.*

146. *Id.*

147. *Id.*

tribe's efforts to enter the global market.<sup>148</sup> "These controls should be a call for tribal business interests to drop some of their reliance on federal Indian law, which creates *some* economic advantages, and re-enter the larger economic world."<sup>149</sup> In other words, tribes and tribal businesses must be ready and willing to engage opportunities to bring in outside capital and go to where the capital is located—most likely away from the reservation.

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148. Fletcher, *supra* note 10.

149. *Id.*