

# ***Key Issues in Tribal Energy Development***

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## ***Common Issues, Causes and Solutions***

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## **Overview of Presentation**

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- **Overview of Handbook**
- **A note on Alaska**
- **Common development issues and solutions**

# 1. Finding Early Stage Risk Capital

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- **Necessary for planning and preconstruction development activities**
- **Pre-construction capital often more scarce; when you get to debt risk and construction risk, the risks become larger and harder to walk away from**
- **If funding comes in from outside the tribe, the terms range from moderately flexible (self-funded, debt) to harsh (venture capital)**

## **What are the Risks?**

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- **Timing/Market Risk**
- **Input/Technology Risk**
- **Construction Risk**
- **Operational Risk**
- **Output Risk**
- **Sales/Growth/Reinvestment Risk**

## **What Investors (and others) Will Ask\***

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- **Is this investment “right sized?”**
- **Can this team execute?**
- **Can I get a reasonable return in a reasonable time?**

***A key consideration for creating the right business structure is matching the tribal authority and support (financial, political and legal), to the risks of the venture.***

## **2. Organization Matters**

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- **The tribe's choice of business organization to "do the deal" will have a significant impact on:**
  - **Level of difficulty or efficiency in seeking and obtaining approvals for the project (tribal, federal and other levels)**
  - **The type of financial incentives that can be obtained for the project**
  - **The separation of politics from day-to-day business of project development**

## Getting Organized

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- Tribes are free to choose the form of governmental or non-governmental organization through which they do business. *Mescalero Apache Tribe v. Jones*, 411 US 145, 157 n 13, 93 SCt 1267 (1973).
- Project advisors play a key role in helping the tribe form the right business entity, get the right team together, and carry out project development

## **The Balancing Act**

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- **Many business transactions do not rise to a level requiring review and approval by Tribal Council**
- **The non-tribal party may insist on tribal approval or at least clear lines of authority and support**
- **Review and approval of contracts by Tribal Council is usually required. Tribal Council and/or the Native Corporation Board must be fully and constantly informed on all major issues**



# Doing Business With Tribal Government

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- **The Tribe**
  - **Many successful ventures have been undertaken directly with the tribe.**
  - **Benefits include sovereign immunity, exemption from income tax, ability to issue tax exempt bonds, direct authority.**
  - **Downside includes exposing tribal assets to liability, delays in approvals due to political processes, lack of experience with business ventures**

## Part of the Tribe, or Not?

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- **The enterprise may or may not be a legal entity separate from the tribe. A tribal enterprise which is an integral part of a tribe enjoys all the privileges and immunities of the tribe itself for activities conducted on or off reservation. *Central Machinery Co. v. Arizona Tax Comm.*, 448 US 160, 164 n 3, 100 SCt 2599, 65 LEd2d 684 (1980).**

## **Tribal Law Governs**

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- **The power of a subordinate agency, enterprise or corporation is a matter of tribal law. *Navajo Tribe v. Bank of New Mexico*, 700 F2d 1285, 1288 (10th Cir 1993).**
- **A non-Indian party's claim that it detrimentally relied on a subordinate tribal entity's apparent authority will not save an *ultra vires* contract.**

### **3. Pick the Right Project at the Right Time**

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- **Modest or small projects may be ideal for today's market**
- **Focus on reduction of risks**
- **Understand the demand by knowing it, knowing the offtakers, their legal and financial constraints**

***SCALABILITY AND FLEXIBILITY***

## **4. Is the Project Affordable?**

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- **Not just a question of the size, scope and cost of the project, but the options for financing**
- **Going from grants to project finance requires a thorough, unvarnished evaluation of all the facts and circumstances of the project to determine which path is best**

## ***Borrowing***

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- **Not the only way to pay for projects, but if the interest paid over time is less than the earnings that could be made from tribal cash assets, it should be considered**
- **General obligation vs. limited obligations and non-recourse debt**
- **Risks include payment terms, contractual covenants that restrict revenue distributions or operating flexibility, disclosure of confidential financial information**

## ***Credit Enhancements & Tax Incentives***

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- **Letters of credit, loan guarantees, bond insurance, credit ratings**
- **Point is to lower the interest rate of borrowing**
- **Does any part of the financing qualify for cheaper tax exempt financing**
- **How do tax based incentives really work for the project under consideration**

## **Key Issues to Consider for Project Finance**

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- **How much does it really cost?**
- **What are the risks?**
- **How is the tribe protected?**
- **Has the deal clearly been explained?**
- **Is there a limited sovereign immunity waiver?**
- **Have all legal requirements been met?**



## **5. Tribe as Developer or Co-Developer**

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- **Undertaking a manageable project is one of the best ways to develop project development expertise**
- **If the tribe doesn't have this experience, or the funding, forming a joint venture is one way to accomplish this objective**
- **A “Request for Qualifications” or “Request for Proposals” can give you a sense of the likely suspects**

## **What Is Project Development?**

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- **Initial project design and layout**
- **Regulatory and permitting analysis**
- **Negotiation of key agreements (e.g., land, water, fuel supply, offtake, interconnection and transmission, EPC, financing, shareholders)**
- **Market analysis for power sales**
- **Selection and management of advisors, EPC contractors**
- **Community and government relations**
- **Finance (projections, debt, investors, etc.)**
- **Operation and maintenance plans and budgets**

## 6. The Tribe and Tribal Council

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- **Successful ventures, no matter how large or small, require 3 elements:**
  - **Efficient business structures**
  - **Standardized and fair regulatory processes administered by reliable, stable and transparent government authorities**
  - **Enforceable, fair and balanced contracts**
- **Once a level playing field is established, these three elements can foster a wide variety of economic opportunities**

## **Tribal Authority Controls**

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- **A tribe's constitution, treaty, executive order, bylaw or codes are the starting point for understanding the scope of its powers in the business context.**
- **Many tribal constitutions or codes do not spell out the scope of the tribe's authority as applied to particular types of business transactions.**
- **When examining a tribe's constitution the focus should be on express *limitations* on authority rather than on express grants of authority.**

## **7. Whose Project Is It, Anyway?**

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- **As the tribe works through the development process and encounters financial, permitting, leasing, or other difficulties, there will be increasing pressure to accommodate the bottom line to save the project.**
- **This should not come at the expense of the goals or vision for the project.**

## **Tribal Objectives**

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- **Enhanced tribal capacity for conducting business, attracting investment, and planning options for future economic development**
- **Strengthening sovereignty**
- **Tribal employment and contracting**
  - **Including tribal preference**
- **Protecting tribal assets**

## **How Best to Stay on Track?**

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- **Anticipate problems before they happen**
- **Know enough about the market you are about to enter to assess your relative strengths and weaknesses and know your options**
- **Build in options to the deal that protect tribal assets, capture upside opportunities and minimize exposure if things go wrong**
- **Assembling and maintaining a strong team of tribal representatives and project advisors to look out for the tribe's interests**

## **For More Information**

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