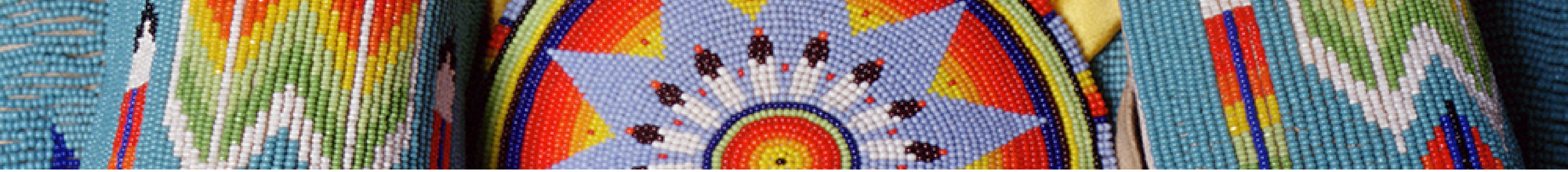
Best Practices in Tribal Energy Business Models

April 25, 2018

Holland & Knight



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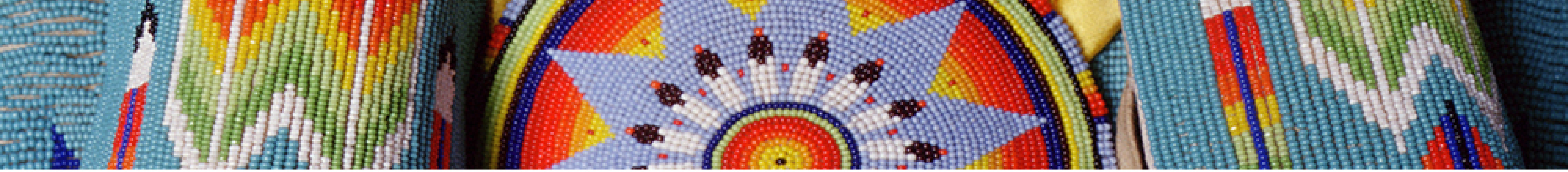
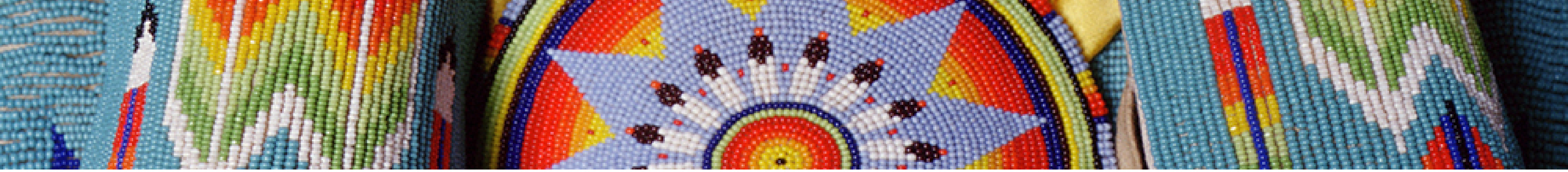


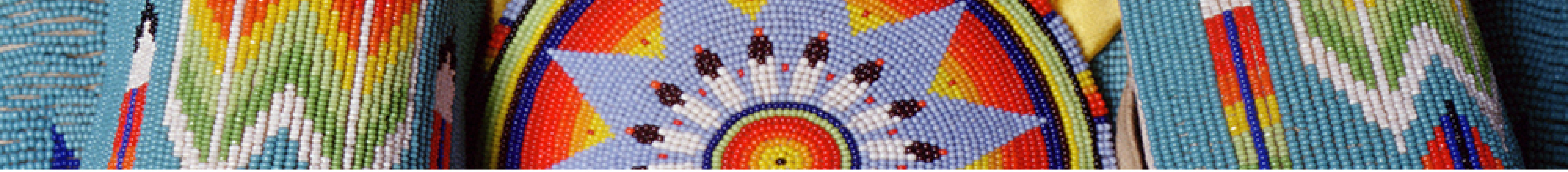
Overview

- Key Factors in Choosing a Structure
- Available Structures
- Pros and Cons
- Special Considerations for Joint Ventures



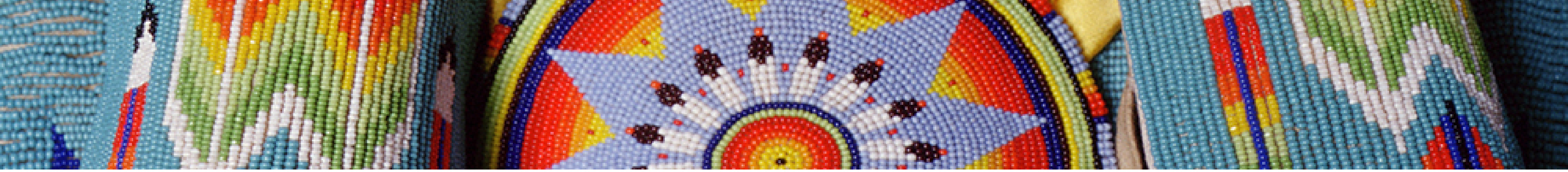
Key Factors

- Organizational considerations
- Protect tribal assets
- Preserve tribal sovereignty
- Minimize liability
- Maximize federal and state tax immunity (and other tax advantages)
- Facilitate compliance with lending requirements or financing conditions by business partners and regulatory authorities
- Type of project and Tribe's goals



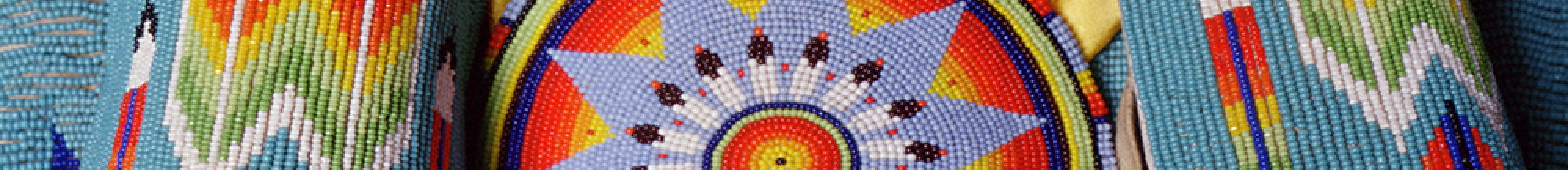
Common Structures

- Government Entities
  - Tribal government
  - Unincorporated division
  - Tribal authority
- Business Entities
  - Section 17 corporation
  - Tribally charted corporation
  - Limited liability company
  - Joint ventures



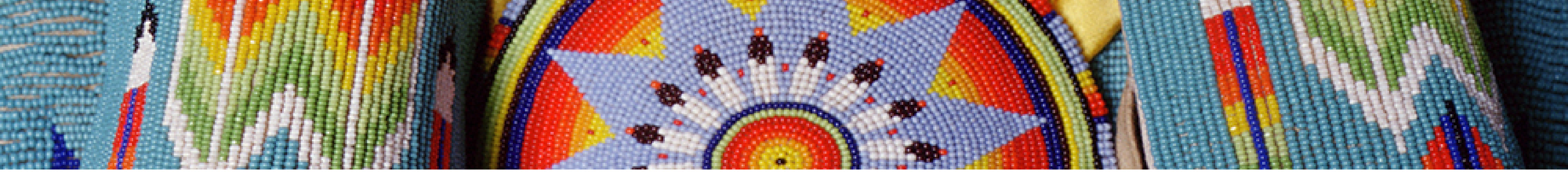
Tribal Government

- Tribes have inherent rights of self-government, including the power to engage in business
- Advantages:
  - Easy to organize
  - Access to capital
  - IRS has consistently ruled that an Indian tribe is not a taxable entity or off reservation. See Rev. Rul. 94-16
- Disadvantages:
  - No separation of business from politics



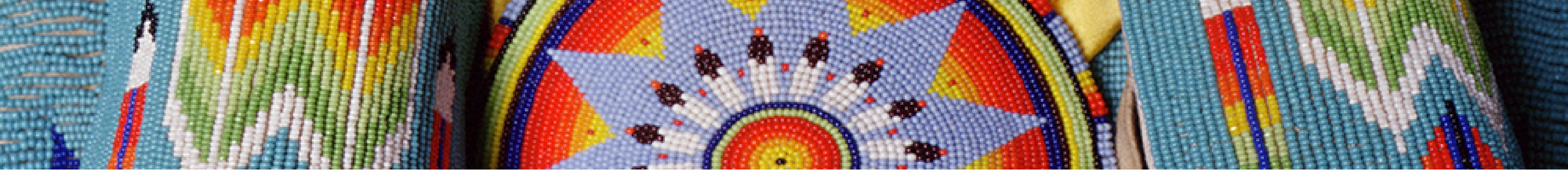
Unincorporated Divisions

- Tribes may operate a business tax-free through an unincorporated division or enterprise
- Advantages:
  - Certainty of tax treatment
  - Same privileges and immunities as the Tribe
- Disadvantages:
  - Governance issues
  - Requirements of partners, lenders and regulatory agencies
  - Mixing business and politics



Tribal Authorities

- Often used as holding companies for certain tribal business operations, including tribal utilities
- Can be organized as either unincorporated instrumentalities or as political subdivisions of the tribal government
  - Instrumentalities generally possess sovereign immunity but their ability to limit liability is questionable
  - Political subdivisions exercise sovereign powers, and may obtain an IRS ruling on their tax treatment and ability to issue tax-exempt debt



Section 17 Corporations

- Wholly owned by the tribe
- Shares same privileges and immunities as the tribe, including immunity from suit
- Typically used to operate leasing, construction, manufacturing, gaming, agricultural enterprises, and government contracting
- Can be utilized as a holding company for tribal subsidiaries
- Charter issued by the Secretary of the Interior

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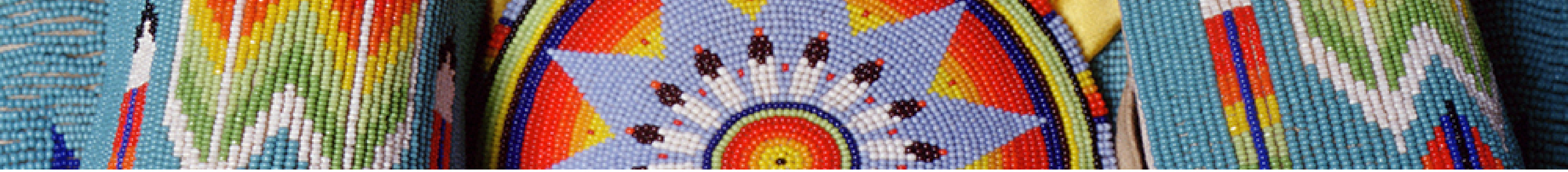
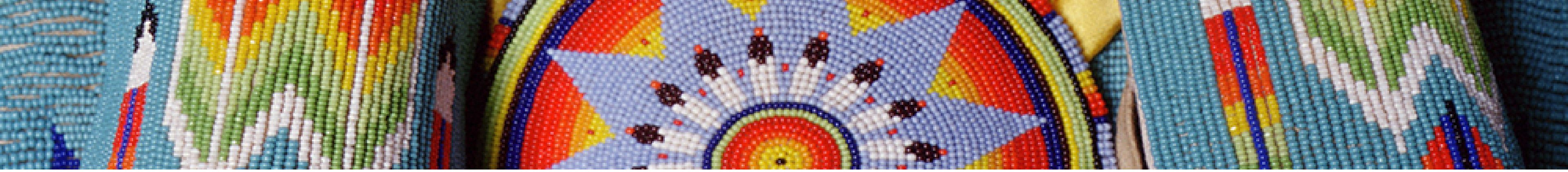


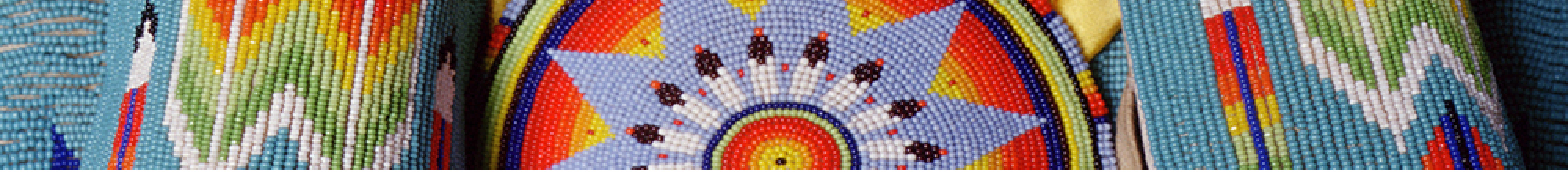
Section 17 Corporations

- Advantages:
  - Same federal tax treatment as the Tribe
  - Segregates assets and liabilities of business from tribal liabilities
  - If properly organized, immune from suit (but may waive immunity)
  - Leasing authority
  - Arrange financing without subjecting Tribe’s government assets to risks and liabilities



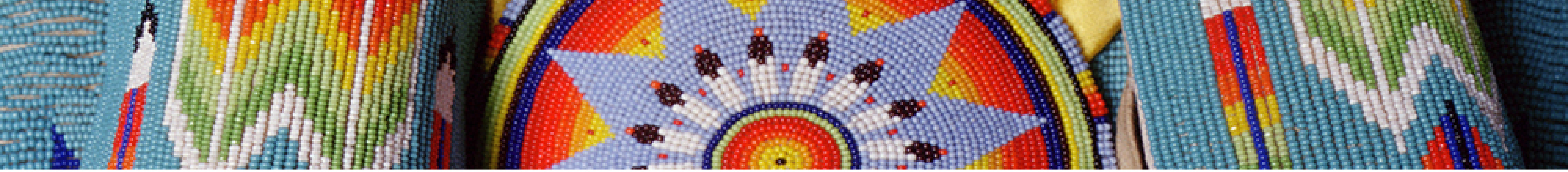
Section 17 Corporations

- Disadvantages:
  - Charter approval and amendment process may be lengthy
  - Charter can only be revoked by an Act of Congress
  - Business partners, lenders and regulatory agencies may be unfamiliar with federal chartering



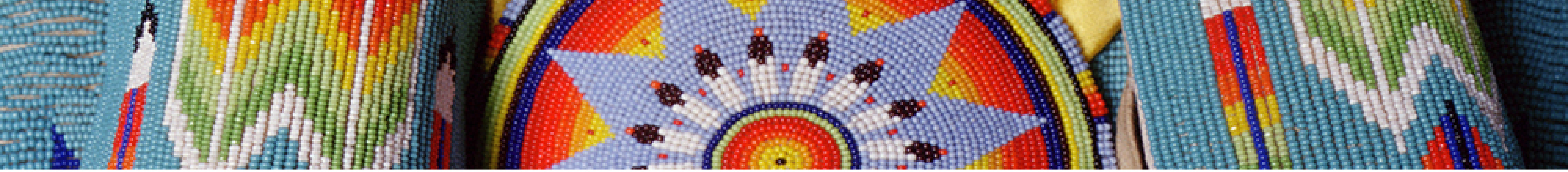
Tribal Law Corporations

- Formed under a Tribe's corporate code or by resolution as a one-off
- Advantages:
  - Easy to establish
  - Limited liability
  - Sovereign immunity if satisfies arm-of-tribe test
- Disadvantages:
  - Uncertain tax status (state and federal)
  - Rev. Rul. 94-16 held that state-law corporations are taxable even if wholly owned by a Tribe
    - But IRS has failed to clarify tax treatment of tribally chartered corporations



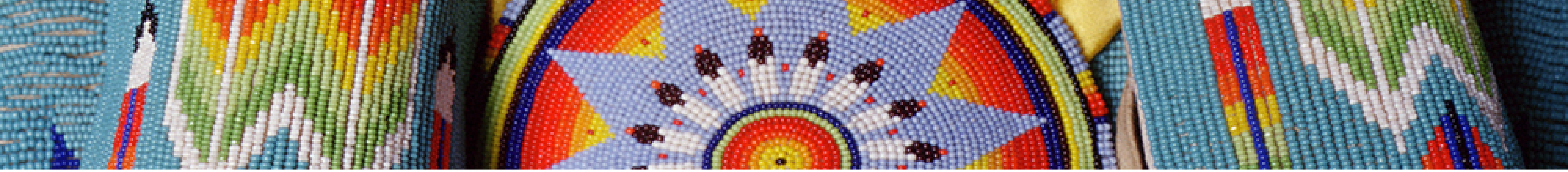
Tribal Law LLCs

- An increasingly popular choice of business entity, commonly used for energy projects
- LLCs provide their owners with limited liability but are not subject to double taxation



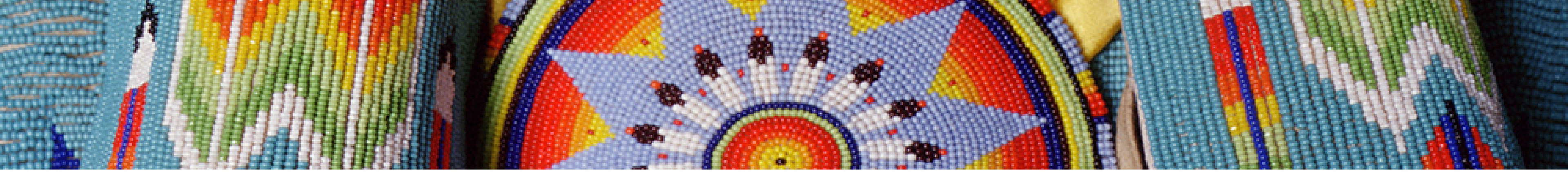
Tribal Law LLCs

- Advantages:
  - Easy to form
  - Can be wholly owned by Tribe, or may be organized as a joint venture
    - Disregarded as a separate entity for federal income tax purposes if wholly owned
  - Familiar to lenders and business partners
- Disadvantages:
  - Taxation is somewhat uncertain
  - Probably not immune from suit
  - Limitations on federally subsidized financing



Joint Ventures

- Choice of entity:
  - Corporation
  - Partnership/LLC
- Formation (choice of law)
  - State
  - Tribal



Joint Ventures

- Common Considerations
  - Whether to own the JV interest directly or through an intermediary business entity
  - Sovereign immunity does not extend to the JV
  - Flow-through tax treatment for Tribe and business partners
  - Tribe and JV partner can structure allocation of profits, losses, deductions, and tax credits (within limits)