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

Holland & Knight
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
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)