

# INCENTIVES FOR JOINT VENTURES BETWEEN MICHIGAN’S TRIBES AND NON-INDIAN BUSINESSES

September 14, 2011

The goal of the Michigan Economic Development Corporation’s tribal business development unit is to be a resource to Michigan’s federally recognized Indian tribes in achieving sustainable tribal economies through business diversification, and to build state-tribal relationships that foster business development beyond gaming. In furtherance of the MEDC’s mission, this guide summarizes opportunities and advantages available to tribal businesses and non-Indian businesses that partner with Tribes in business ventures. Because each business venture will require further fact-specific analysis, this guide also provides links to resources for more information.

## **I. TRIBAL PREFERENTIAL STATUS**

In recognition of both the sovereign status of Indian tribes and historical economic hardships, tribes and Indian-owned (whether by the tribe or by individual members) businesses today enjoy a variety of opportunities that are generally unavailable to non-Indian businesses. In some instances, tribes are granted preferential status, particularly in the context of government contracts. Non-Indian businesses can also share in the advantages of this preferential status through partnering with a tribally owned business or a member-owned business, or by developing on Indian-owned lands. Some such opportunities are briefly described below.

***Historically Underutilized Business Zones.*** The “HUBZone” program seeks to create jobs in historically depressed areas, which includes “lands within the external boundaries of an Indian reservation.”<sup>1</sup> To accomplish this goal, the program gives qualified participants preference when

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<sup>1</sup> “Indian reservation,” for purposes of a HUBZone, “(i) has the same meaning as the term “Indian country” in section 1151 of title 18, except that such term does not include—

(I) any lands that are located within a State in which a tribe did not exercise governmental jurisdiction on December 21, 2000, unless that tribe is recognized after December 21, 2000, by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (part 83 of title 25, Code of Federal Regulations); and

(II) lands taken into trust or acquired by an Indian tribe after December 21, 2000, if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status on December 21, 2000; and

(ii) in the State of Oklahoma, means lands that—

(I) are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and

(II) are recognized by the Secretary of the Interior as eligible for trust

competing for federal contracts. In order to be deemed a “qualified participant,” a business must meet the following criteria: (1) be owned and controlled at least 51% by United States citizens, a Community Development Corporation, an agricultural cooperative, or an Indian tribe; (2) ensure that 35% of its employees reside in a HUBZone; (3) maintain principal offices in the HUBZone; and (4) qualify as a “small business” under the Small Business Administration’s (“SBA”) regulations. Based on this criteria, non-Indian businesses and Indian-owned businesses<sup>2</sup> that qualify can benefit from locating their business and employing individuals within the external boundaries of an Indian reservation.

The following Indian Country areas are currently qualified HUBZones in Michigan: Bay Mills Reservation, Grand Traverse Reservation, Hannahville Community, Huron Potawatomi Reservation, Isabella Reservation, L’Anse (Ontonagon) Reservation, L’Anse Reservation, Lac Vieux Desert Reservation, Little River Band of Ottawa Indians of Michigan, Little Traverse Bay Bands Reservation, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, Pokagon Band of Potawatomi Indians, Michigan TDSA, and Sault Ste. Marie Trust Land.

To find a HUBZone in Michigan, visit <http://map.sba.gov/hubzone/hzqry.asp?state=mi>.

For more information on qualifying as a small business by the SBA, visit <http://www.sba.gov/content/am-i-small-business>.

For more general information on HUBZone Certification, visit <http://www.sba.gov/content/understanding-hubzone-program>.

For HUBZone Program Certification for Applicants Owned by Indian Tribal Governments, visit [http://www.sba.gov/sites/default/files/hubzone\\_signature\\_itg.pdf](http://www.sba.gov/sites/default/files/hubzone_signature_itg.pdf)

To apply for the HUBZone Program, visit <http://www.sba.gov/content/applying-hubzone-program>

**Buy Indian Act.** The Buy Indian Act directs, within the discretion of the Secretary of the Department of the Interior, that “[s]o far as may be practicable[,] Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market.” This Act gives Indian-owned businesses a strong opportunity to obtain government contracts. Similarly, the Secretary of the Department of Health and Human Services may use these same principles in the acquisition of hospital and health facilities for Indians and related health conservation. The Buy Indian Act is available to a joint venture so long there is at least 51% tribal ownership.

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land status under part 151 of title 25, Code of Federal Regulations (as in effect on December 21, 2000).

<sup>2</sup> For purposes of this Guide, unless otherwise noted, the term “tribally owned business” refers to a business owned by an Indian tribe. The term “member-owned business” refers to businesses owned by an individual tribal member, and the term “Indian-owned business” refers to both types collectively.

In fact, the Energy Policy Act of 2005 specifically provides that the federal government may give preference to enterprises, partnerships, corporations, or another type of business organization that is majority-owned by a tribe when purchasing electricity or other energy byproduct. The current administration is in the process of promulgating new rules for the Bureau of Indian Affairs to administer.

For more on the proposed rules, visit

<http://www.indianaffairs.gov/idc/groups/xopa/documents/text/idc008923.pdf>.

***Indian Incentive Program.*** The Indian Incentive Program is a congressionally sponsored program, originating from the Buy Indian Act, that provides a 5% rebate to Department of Defense prime contractors, with a contract for \$500,000 or more, on the total amount paid to Indian-owned economic enterprises or Indian organizations. To qualify for this rebate, the subcontractor must be either (1) “any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise” or (2) “the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe[.]” See DFARS 252.226-7001. A non-Indian business seeking to participate in this program will want to ensure that the Indian-owned business or Indian organization qualifies under federal law. For more information on this program, please visit the following resources:

For information on tribal business who have participated in this process previously, visit [www.ccr.gov](http://www.ccr.gov) and search the Small Business Dynamic Search for Native American owned businesses.

For Frequently Asked Questions about the program, visit

<http://www.acq.osd.mil/osbp/sb/programs/iip/faqs.shtml>.

To participate in the program, visit

<http://www.acq.osd.mil/osbp/sb/programs/iip/participate.shtml>.

***SBA 8(a) Business Development Program.*** The SBA’s 8(a) Business Development Program offers a broad range of assistance to businesses with at least 51% tribal ownership. The program helps small businesses gain competitive advantages and build business savvy. Section 8(a) participants may take advantage of specialized business training, counseling, marketing assistance, and high-level executive development provided by the SBA. Tribal businesses, as well as individually owned Indian businesses, can apply to participate in this program. Tribes are allowed by law to apply for certification of multiple businesses as long as no two entities have the same SIC/NAICS Code for its primary business focus. Individuals are limited to one-time participation in the program. An individual involved in the management or daily business operations of a tribally owned business is not considered, however, to have used his or her individual eligibility under the SBA regulations. Generally, 8(a) participants are eligible to receive sole-source contracts, up to a ceiling of \$4 million for goods and services and \$6.5 million for manufacturing. Tribally owned businesses, however, are excluded from the dollar limits on sole source contracts.

Participants in the 8(a) Business Development Program may also participate in the Mentor-Protégé program. Non-Indian businesses and Indian-owned businesses alike can greatly benefit from participating in the Mentor-Protégé program. Businesses that are 51% or more Indian-owned may qualify to act as a protégé in the program. The business must be a small business, as certified by the SBA, and the owners must be economically and socially disadvantaged. Native Americans are presumed to be socially disadvantaged for purposes of the program, but the owners, including if the owner is a tribe, will still need to demonstrate that they are economically disadvantaged as well. In order to qualify as a protégé firm, the business must be in the beginning stages of the 8(a) program and have yet to receive an 8(a) contract. Participation as a protégé can yield many benefits, including technical, financial, and management assistance from both the SBA and the mentor firm.

Non-Indian businesses can benefit under 8(a) as well by acting as a mentor to a protégé firm. Any business that demonstrates that it is in a favorable financial position (as defined in the 8(a) regulations to include profitability for the preceding two years), possesses good character, is not listed as a disbarred or suspended contractor on the federal list, and can impart value to a protégé business is eligible for program benefits. Mentors can enter joint business ventures with their protégé in order to gain advantages in obtaining government contracts. Mentors can also gain access to “sole source” contracts that may be available to tribally owned businesses. This access provides excellent opportunities to procure contracts without going through the rigors of competing on the open market. A post-award incentive for subcontracting plan credit is available for any costs incurred by a mentor in providing assistance to its protégé.

For more general information on the 8(a) program, including how to apply, visit <http://www.sba.gov/content/8a-business-development>.

For eligibility requirements for tribes and tribal members to qualify for the 8(a) program, visit [http://www.access.gpo.gov/nara/cfr/waisidx\\_06/13cfr124\\_06.html](http://www.access.gpo.gov/nara/cfr/waisidx_06/13cfr124_06.html) and see §§ 124.103, 124.104, and 124.109.

For more on eligibility requirements to act as a mentor, visit [http://www.access.gpo.gov/nara/cfr/waisidx\\_06/13cfr124\\_06.html](http://www.access.gpo.gov/nara/cfr/waisidx_06/13cfr124_06.html) and see § 124.520.

## **II. FEDERAL BUSINESS GRANTS**

Tribes and Indian-owned businesses are also uniquely eligible for a number of federal grants. The benefits of these grants can extend to non-Indian businesses in certain circumstances as well—whether by providing funding to hire non-Indian businesses, by providing a tribe with a unique opportunity to benefit the larger community in its region, or by providing opportunities to joint ventures between tribes and non-Indian businesses. These grants can be used for a multitude of business needs. Summaries of several available opportunities are explained below.

***Comprehensive Economic Development Strategy Funding.*** Under this program, federal funding is available to tribes to create a Comprehensive Economic Development Strategy (“CEDS”). A CEDS is designed to diversify and strengthen regional economies. The CEDS establishes regional goals and objectives and identifies investment priorities and funding sources. This creates a stable business environment with effective and clear communication. Only a

“planning organization” may be eligible for Economic Development Administration (the “EDA”) planning assistance. Generally only tribes or economic development districts qualify as a planning organization. To qualify for CEDS funding, the tribe’s reservation must have an unemployment rate that is at least 1% higher than the national average or a per capita income that is 80% or less of the national per capita income. Tribes with a CEDS can benefit non-Indian businesses by clarifying roles and expectations in the regional economy because CEDS are designed to supply quantitative and qualitative measures for an area, which identify important goals and provide non-Indian businesses with valuable market insight.

A planning organization must submit the following in a CEDS to EDA: (1) background of the economic development of the region, discussing the economy, population, geography, workforce development and use, transportation access, resources, and environment; (2) an analysis of economic development problems and opportunities; (3) the CEDS goals and objectives; (4) community and private sector participation; (5) strategic projects, programs, and activities; (6) a plan of action; and (7) performance measures to evaluate the planning organization’s successful development and implementation of the CEDS. The EDA awards “Investment Assistance” to a qualifying planning organization to develop, revise, and replace a CEDS.

CEDS Summary Requirements, <http://www.eda.gov/PDF/CEDSFlyer081706.pdf>

***USDA Rural Business Enterprise Grants.*** The United States Department of Agriculture, through the Rural Business Enterprise Grant (“RBEG”) program, provides grants to rural public entities (e.g., towns, State agencies, etc.), federally recognized Indian tribes, and rural private non-profit corporations to finance and facilitate development of small and emerging rural businesses and other related programs. “Small and emerging rural businesses” are those business projects that employ 50 or fewer employees and have less than \$1 million in projected gross revenues. Available grants range from \$10,000 to \$500,000, with smaller businesses gaining higher priority, and can be used by businesses for developing land, constructing buildings, acquiring machinery and equipment, job training, project planning, and much more. Thus, non-Indian businesses that work with tribes on eligible projects can benefit directly from these grants.

For more information, including on how to apply for these grants, visit [http://www.rurdev.usda.gov/bcp\\_rbeg.html](http://www.rurdev.usda.gov/bcp_rbeg.html).

***The EPA Re-Powering Program.*** The Environmental Protection Agency’s (“EPA”) Re-Powering Program gives federal grants to tribes who wish to develop renewable energy on potentially or formerly contaminated properties. The purpose of this program is to reuse contaminated sites in order to improve communities, create jobs, develop business, and increase the amount of renewable energy generated. This program benefits energy developers looking to locate in Indian Country by providing significant groundwork funding.

To qualify, the applicant must be a tribal government, demonstrate that the site is a current or former contaminated site and is suitable for the proposed renewable energy project, and state a commitment to the project’s success. Currently the EPA is soliciting applications from tribes, among others, that want to evaluate the potential development of renewable energy. The Department of Energy National Renewable Energy Laboratory will determine the best renewable energy technology, potential energy generating capacity, the return on investment, and the

economic feasibility of the renewable energy projects. The EPA will give technical assistance to successful applicants. The renewable energy types that are considered are: solar photovoltaic, concentrated solar power, wind, biorefinery from wood or crop waste, and biopower from wood or crop waste. The applicant must form a team to work with the EPA and NREL. The team may include representatives from relevant sectors. The team will be responsible for working with NREL and applicant to make sure all important stakeholders are represented.

For the 2011 Application Request, visit

[http://www.epa.gov/oswercpa/docs/repowering\\_epa\\_nrel\\_2011\\_rfa.pdf](http://www.epa.gov/oswercpa/docs/repowering_epa_nrel_2011_rfa.pdf)

State and National Maps of Opportunities for Renewable Energy Generation, visit

<http://www.epa.gov/renewableenergyland/maps.htm>

For the Re-Powering Fact sheet, visit

[http://www.epa.gov/renewableenergyland/docs/repower\\_contaminated\\_land\\_factsheet.pdf](http://www.epa.gov/renewableenergyland/docs/repower_contaminated_land_factsheet.pdf).

***Native American Housing Block Grants.*** The Native American Housing Block Grant program, authorized by the Native American Housing Assistance and Self-Determination Act of 1996, assists tribes in developing, operating, maintaining, and supporting affordable housing for rental and homeownership. The program funds a tribally designated entity to prepare an Indian Housing Plan (“IHP”). The IHP must be submitted to the U.S. Department of Housing and Urban Development (“HUD”) each year in order to receive funding. If approved, funds can be awarded and used for acquisition, new construction, rehabilitation of affordable housing, site improvement, development and rehabilitation of utilities and infrastructure, utility services, conversion, demolition, financing, administration, planning, and improvement to achieve greater energy efficiency. Priority is given to projects that will spur development and rehabilitation and create employment opportunities for low income workers and the unemployed. Any non-Indian business that is in a line of business that the funds could be used for may benefit from the availability of these grants.

For more information on these block grants, visit

<http://portal.hud.gov/hudportal/HUD?src=/programdescription/ihbg>.

### **III. FEDERAL AND STATE TAX SAVINGS**

A number of federal and state tax benefits are available for non-Indian businesses that partner with Indian-owned businesses or employ members of Indian tribes. The exact tax benefits available depend on the exact nature of the business involved. Examples of the potential tax savings available for businesses are summarized below.

***Tax Status as Tribal Government.*** Tribal corporations that are operated as “arms of the tribe” are not subject to federal income tax. To qualify as a non-taxable tribal corporation, the IRS will examine whether the entity operates as an arm of the tribe under a six-part test. Most non-Indian business entities are not granted tax-exempt status. However, non-Indian entities can reduce taxable income by entering a joint venture with a tribe and entering into a management agreement instead of a lease.

The IRS six-factor test to consider in determining whether an entity operates as an arm of the tribe is: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more governmental unit; (3) whether there are any private interests involved, or whether the governmental unit has the powers and interests of an owner; (4) whether control and supervision of the organization is vested in a public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.

A non-Indian corporation doing business on Indian lands may be subject to taxation by the tribe and the State. Investors are advised to contact an attorney who is familiar with the taxation by a particular tribe or Michigan.

For more information on the treatment of tribes and federal income taxes, visit <http://www.irs.gov/govt/tribes/index.html>.

For more information on economic development on Indian lands, see Charles R. Zeh, *Development Considerations on Indian Lands*, 13 *Natural Resources & Environment* 350 (1998).

***State Tax Exemptions.*** According to federal law, states cannot tax Indian tribes in Indian Country. In some situations, some contend that this principle even extends to non-Indian businesses operating within the boundaries of a reservation. This conclusion will likely be a matter of dispute with the State. Michigan is unique in its handling of tax issues for tribes and tribal members. Nine tribes have negotiated tax agreements with the State on when state taxes will be paid or will not be paid under certain circumstances, including the payment of income and business taxes. These agreements are currently undergoing review and revision based on recent changes to the State's business taxes, but both tribal members and non-tribal members should be aware that Michigan has specific methods for calculating State taxes for tribal businesses and their business partners for the nine tribes with agreements. Those tribes that have not entered into tax agreements have had difficulties determining when, or whether, state taxes apply—meaning tribal members or their non-member partners could find themselves in the middle of a legal dispute over the applicability of state taxes.

For copies of the current tax agreements and more information of the Michigan-Tribal Tax Agreements, visit [http://www.michigan.gov/taxes/0,1607,7-238-43513\\_43517---,00.html](http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html).

***Accelerated Depreciation.*** Under federal law, manufacturers that locate in Indian Country can use shorter recovery periods when calculating depreciation deductions for equipment. The recovery period is approximately 40%. For example, the regular depreciation on a commercial building with a cost of \$1 million would be \$25,641 annually for 39 years. The accelerated depreciation would be \$45,454 annually for 22 years. The depreciation tax savings are significant.

To qualify, the property must be mainly used for the purposes of trade or business, and must be 3-, 5-, 7-, 10-, 15-, or 20-year property, or non-residential real property. Certain property that is

located off the reservation but connected to infrastructure on the reservation may qualify for shorter recovery periods. Real property that is rented to others on an Indian reservation is eligible for accelerated depreciation as well.

The shorter recovery periods for Indian and “qualified infrastructure property” are in addition to the regular expense deduction available for equipment purchased and put into service in the same tax year under section 179 of the Internal Revenue Code, which for 2011, depending on the amount of section 179 property placed into service during the tax year and sufficient taxable income, is \$500,000.

While this program is statutorily set to expire on December 31, 2011, there have been congressional bills to extend the accelerated depreciation permanently.

For more information, visit

<http://www.nwiba.org/pdfs/Leveraging%20Tribal%20Sovereign%20Economies%20Gala%20nda.pdf>

***New Markets Tax Credits*** (“NMTC”). This program permits non-Indian investors to receive a federal income tax credit for making certain kinds of investments in designated Community Development Entities (CDE’s). To qualify as a CDE, the entity must (1) be a domestic corporation or partnership at the time of application, (2) demonstrate a primary mission of service or providing capital for low income communities, which includes Indian reservations, and (3) maintain accountability to residents of low income communities through representation on a governing board. Off reservation tribal land, especially in rural areas, can also be deemed “low income” for tax credits. A targeted population for the NMTC includes Indian tribes that (1) qualify as “low income,” as defined under federal law or (2) otherwise lack adequate access to loans or equity investments.

The benefits of the program include (1) access to financing not otherwise available in the traditional credit market, (2) below market interest rates, and (3) loan forgiveness of around 20% at the end of seven years. Non-Indian businesses can benefit from the program by becoming a CDE, investing in an already existing CDE, or creating a joint venture with a tribal enterprise.

Qualified investments made through CDEs will allow investors tax credits equal to 39% of their investment over a seven year period. For the first three years of the seven year period, investors receive a credit equal to five percent of total amount paid for the investment at the time of purchase. For the remaining four years of the seven year period, the investors receive a credit equal to six percent annually. The 2010 Tax Act established a national designated limitation for the tax credit at \$3.5 billion in 2010 and 2011, but permitted unused credits to be carried over to 2016.

A CDE applicant may be a for-profit or non-profit entity. Also, an applicant may apply for certification for itself or for itself and on behalf of one or more subsidiaries with a single application. The applicant must provide specific information on how it meets the “Primary Mission Test” (i.e. the entity’s primary mission is serving or providing investment capital for low income persons or communities). This means that an applicant must be able to show that at least

60 percent of its activities are dedicated to serving low income communities or low income persons. The Community Development Financial Institutions Fund evaluates each CDE application. Once a CDE certification is granted, the certification will continue until it is revoked. The certified CDE must attest annually that the CDE continues to meet the necessary requirements previously discussed.

For more information, including application information, visit <http://www.cdfifund.gov/docs/nmtc/2011/2011%20Online%20Application%20Instructions%20-%20Final.pdf>.

NMTC Program, Online Allocation Application 2011 Instruction Manual, visit: <http://www.cdfifund.gov/docs/nmtc/Targeted%20Population%20QA.pdf>.

For Certified CDEs by State, visit <http://www.cdfifund.gov/docs/certification/cde/CDE-List-by-State-with-Subs-5-31-11.pdf>

For Certified CDEs by Organization Name, visit <http://www.cdfifund.gov/docs/certification/cde/CDE-List-by-Name-with-Subs-5-31-11.pdf>

To apply to become a CDE, visit <http://www.cdfifund.gov/docs/certification/CDE/CDEcertificationApplication.pdf>

For Certification Guidance, visit [http://www.cdfifund.gov/docs/2002\\_nmtc\\_cde\\_certification\\_guidance.pdf](http://www.cdfifund.gov/docs/2002_nmtc_cde_certification_guidance.pdf)

***Indian Employment Tax Credit.*** The Indian Employment Tax Credit encourages businesses to hire members of Indian tribes who live on or near an Indian reservation. Under this program, these businesses can get a \$4,000 tax credit for each “qualified employee” who is paid “qualified wages.” A qualified employee is (1) an enrolled member of an Indian tribe or the spouse of a member, (2) who performs a substantial amount of his or her services on the reservation, and (3) who resides on or near the reservation. “Qualified wages” include any wages the business paid or costs incurred for services a “qualified employee” performed, this also includes health insurance costs. Qualified wages do not include any amount paid or incurred for work performed by a qualified employee during the one-year period beginning on the date the individual begins work for the company, if any part of these wages are used to claim the Work Opportunity Credit, which is described below.

Currently, this tax credit is established to give tax credits for tax years beginning on or before December 31, 2011, but Congress may extend the tax credit for future tax years.

For more information, visit IRS Fact Sheet at <http://www.irs.gov/govt/tribes/article/0,,id=108421,00.html>

**Work Opportunity Tax Credit.** The Work Opportunity Tax Credit (“WOTC”) is a federal tax incentive for businesses who hire individuals from one of twelve target groups who have historically faced obstacles to employment. The credit is up to \$2,400 for each new hire, \$4,800 for each disabled veteran hire, and \$9,000 for each new long term TANF (“temporary assistance for needy families”) recipient. The business can hire as many qualified employees as it desires.

Target Groups for the WOTC include short-term TANF recipients, long-term TANF recipients, qualified veterans, food stamp recipients (ages 18-39), vocational rehabilitation work plan participants, SSI recipients, ex-felons, designated community resident (individuals ages 18-39 who live within an Empowerment Zone or Rural Renewal County), summer youth (ages 16-17), unemployed veterans, and disconnected youth (ages 16-24).

New employees who qualify must also work at least 120 hours for the business to claim a 25% credit and at least 400 hours for the business to claim a 40% credit on the first gross wages paid in the first year of employment. For each new hire for whom an employer would like to receive the credit, the employer must submit a pre-screening form and the individual characteristics form to the State Work Force Agency (the “SWA”) to make sure that the employee is a member of the targeted group who qualifies for the credit. The employer may also need to submit other documentation to prove that the employee is a target group member. The SWA in Michigan is the Unemployment Insurance Agency. The WOTC has currently been extended until December 31, 2011. A bill introduced in June 2011 titled the Work Opportunity Credit Improvement Act would extend the WOTC through 2014.

Pre-Screening Notice and Certification Request for the Work Opportunity Credit, visit [http://www.michigan.gov/documents/uia\\_8850\\_76119\\_7.pdf](http://www.michigan.gov/documents/uia_8850_76119_7.pdf)

For the form for Work Opportunity Credit, visit <http://www.irs.gov/pub/irs-pdf/f5884.pdf>.

Michigan Summary of the Program, visit <http://www.michigan.gov/uia/0,1607,7-118--78849--,00.html>.

Summary of the Program and the Process, visit [http://www.michigan.gov/documents/uia\\_wotcw2wfactsheet79\\_79131\\_7.pdf](http://www.michigan.gov/documents/uia_wotcw2wfactsheet79_79131_7.pdf)

**Low-Income Housing Tax Credit Program.** Under this program, tax credits are available for low-income housing projects. The program is an indirect Federal subsidy used to finance the development of affordable rental housing. Tribal developers of affordable housing can sell the credits to investors to raise capital for their housing projects, which substantially reduces debt. To be eligible, the development must be a residential property with restricted rent over a period of at least 30 years.

The tax credits are only available for housing projects on homes that were built, rehabilitated, or acquired after 1986. For non-federally subsidized units, the tax credit is 70 percent of the qualified basis of the unit. For units that are financed with tax-exempt bonds or other subsidies, the tax credit will be 30 percent of the qualified basis of the units. The credit must be claimed

over a 10 year period, and the property must continue to meet the low income requirements for 15 years. The Program is an option for many types of developments, such as single family housing, multi-family housing, elderly housing, fire or police substations, or any non-commercial community service like playgrounds.

For more information, visit

<http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/>.

**Empowerment Zones.** Empowerment Zones provide tax incentives for businesses located with certain areas designated by the Secretary of the Department of Housing and Urban Development and the Secretary of Agriculture. Such zones are areas with conditions of poverty, high unemployment, and general economic distress. Many Indian reservations qualify. The benefits of locating within a reservation Empowerment Zone include employment credits, a 0% tax on capital gains, increased tax deductions on equipment, and accelerated real property depreciation.

There are numerous incentives if a business locates in an Empowerment Zone (“EZ”). Under the EZ Employment Credit, businesses may obtain an annual tax credit of \$3,000 for certain people who reside and work for the employer within the EZ. Employers just need to verify their business location and the employee’s address, showing that both are within the EZ. A business can obtain a tax credit of \$2,400 for each new employee (ages 18-39) who lives in an EZ under the Work Opportunity Tax Credit described above. Businesses within an EZ may also take an increased deduction on eligible equipment purchases.

Only tribal governments, local governments, and states can apply for EZ designation. Congress has previously authorized three rounds of competitions for EZ designation in 1994, 1998, and 2001. Should Congress authorize a fourth round, HUD will publish a notice for applications in the Federal Register.

Michigan currently has four EZ zones—Clare County Enterprise Community, Detroit, MI Empowerment Zone, Detroit, MI Renewal Community, and Flint, MI Renewal Community.

To apply for the employment credits, use Form 8844 for the Empowerment Zone and Renewal Community Employment Credit, available at <http://www.irs.gov/pub/irs-pdf/f8844.pdf>.

IRS Fact Sheet for Indian Tribal Governments regarding the Empowerment Zone Employment Credit, visit <http://www.irs.gov/govt/tribes/article/0,,id=108424,00.html>.

HUD’s EZ Locator, visit <http://egis.hud.gov/>.

#### **IV. UNIQUE FINANCING OPPORTUNITIES**

Developing businesses on Indian land and/or partnering with tribal governments offers a variety of unique financing opportunities for non-Indian businesses.

**Tax Exempt Financing.** Indian tribes can issue tax-exempt debt so long as the proceeds are used for an essential government function. Examples of government functions include constructing government buildings, hospitals, schools, libraries, roads, parks, parking lots, and

water sewer systems. This tax-exempt financing translates to lower costs because the interest payments made to repay the debt are not treated as taxable income. The savings realized by using such debt are passed on to businesses that develop or lease land in Indian Country.

Because the lender, in the case of a tax exempt loan, or investor, in the case of tax exempt bonds, will not be paying income tax on their interest payments, they are willing to accept a lower interest rate on the tax exempt loan or tax exempt bond. The Indian Tribal Governmental Tax Status Act allows those tribal governments that are “recognized” to borrow on a tax exempt basis. (“Recognized,” in this context, means federal recognition and an acknowledgment process with the IRS.) Also, a tribal government may borrow and transfer the money to wholly owned tribal enterprises to use provided the government complies with certain restrictions.

Specific restrictions on how the funds may be spent include that Indian tribes may only use the funds generated to pay for “essential governmental functions.” According to the federal tax code, “essential government functions” includes functions “customarily performed by state or local governments with general taxing powers.” This would include schools, roads, and governmental buildings. The tax code does not expressly preclude the use of proceeds for commercial or industrial activities, but the IRS views essential governmental functions to not include any commercial or industrial activities, even if they are ones that are customarily done by the state and local governments. Second, tribes may not loan or use the funds to benefit private parties either through leasing, use, management, or other agreements. These are referred to as “private activity bond” arrangements, which are allowed for local governments, but not for tribes generally. The one exception to this rule is that tribes may make “private activity bond” arrangements for manufacturing.

The type of tax-exempt financing described above differs from tribal economic development bonds (“TEDBs”), which were permitted for a certain time period under the American Recovery and Reinvestment Act (“ARRA”). TEDBs allowed tribes to use tax-exempt financing for any activity within a reservation that a state or local government can finance using tax-exempt bonds, except gaming. Although these bonds are not currently available, there has been some discussion about reauthorizing such a program.

For information, visit [http://www.nafoa.org/pdf/10555\\_Tribal\\_Finance.pdf](http://www.nafoa.org/pdf/10555_Tribal_Finance.pdf).

For more information on TEDBs, visit <http://www.irs.gov/taxexemptbond/article/0,,id=206034,00.html>.

***BIA Indian Loan Guaranty, Insurance, and Interest Subsidy Program (the “Program”).*** Under this Program, the federal government backs loans to Indian businesses that would not otherwise qualify for a loan. Loans can be used for operating capital, purchasing equipment, refinancing business, and constructing buildings. Non-Indian businesses are able to open a line of credit for the tribe or enter into financial agreements with a tribe with the backing of the federal government.

The historically underutilized Program is available to all non-Indian businesses that partner with a tribe where the tribal ownership is at least 51%. The borrower’s business must be located on or near an Indian reservation and contribute to the economy of the reservation. The Program was

established by the Indian Financing Act of 1974 in order to provide reservation businesses access to investment capital and is managed by the Division of Capital Investment within the Department of Interior. The Program is open to federally recognized tribes, Alaska Native groups, individually enrolled members of such tribes or groups, or business organizations with at least 51% ownership by American Indians or Alaska Natives.

Any lending institution may obtain a guaranty as long as the institution is regularly engaged in making business loans and has the ability to evaluate and service the loan. The percentage of the loan that is guaranteed may not exceed 90 percent of the unpaid principal balance and interest. The Program is not available to those that are delinquent on any federal debt obligations. The loan guaranteed for individuals may not exceed \$500,000. The Program may guarantee greater amounts for tribes, tribal enterprises, or business entities.

The lending institution will determine the maturity date for the loan, but the loan term cannot be greater than 30 years. The interest rates are also to be determined by the lending institution, but there are limitations established by policy. Finally, the borrower must be projected to have, at a minimum, 20 percent equity in the business being financed immediately after the loan is funded.

For a complete list and links to all of the forms for the Program, visit <http://www.bia.gov/WhoWeAre/AS-IA/IEED/DCI/index.htm>

For additional information, visit <http://www.bia.gov/idc/groups/public/documents/text/idc002692.pdf>

***USDA Business and Industry Guaranteed Loan Program.*** This program guarantees quality loans, up to \$10 million, to provide lasting community benefits in rural communities. To be considered a “rural community,” the location must be a rural area, which include all areas other than cities or towns of more than 50,000 people and the contiguous and adjacent urbanized area of such cities or towns. Also, priority will be given to applications in rural communities that have population of 25,000 or less. This includes many (but not all) Indian reservations. The B & I Program guarantees loans for manufacturers, wholesalers, retailers, and other businesses, so long as they provide employment, improve the economy or the environment, promote conservation of water for aquaculture, or reduce reliance on nonrenewable energy resources.

Loans may be used for a variety of business needs, such as business acquisitions, the purchase and development of land, the purchase of equipment, and business enlargement and modernization.

In order to qualify, the business must cater to a rural area such as an Indian reservation and demonstrate a commitment to providing employment and bolstering the economic and environmental health of the community. Most cooperative organizations, corporations, partnerships, or other profit and non-profit organizations are eligible.

There is the ability to be given an exception to the \$10 million limit for loans of \$25 million under certain circumstances. Further, the Secretary may approve guaranteed loans over \$25 million, for up to \$40 million for rural cooperative organizations. Loans from the B & I Program can be combined up to \$50 million, and \$65 million for cooperative organizations. This

financial backing is available to non-Indian business that locate in a rural parts of Indian Country.

The maximum amount guaranteed for loans of \$5 million or less is 80 percent. The maximum guarantee for loans between \$5 million and \$10 million is 70 percent. The maximum guarantee for loans greater than \$10 million is 60 percent. The actual percentage guarantee for a specific transaction is negotiated between the lender and the USDA, but can be not greater than the limits. The USDA requires the borrower to pledge sufficient collateral to protect the lender and agency's interest.

Applications for the Program should be sent to the USDA Rural Development State Office in the state where the project will be located. The following is a link to the various state offices: [http://www.rurdev.usda.gov/recd\\_map.html](http://www.rurdev.usda.gov/recd_map.html).

For more general information, visit [http://www.rurdev.usda.gov/rbs/busp/b&i\\_gar.htm](http://www.rurdev.usda.gov/rbs/busp/b&i_gar.htm) or <http://www.rurdev.usda.gov/ne/gbifsht.pdf>

## V. **REGULATORY ADVANTAGES AND ISSUES**

Finally, developing businesses on Indian lands can present different issues concerning land use regulation, as the tribe generally has primary authority (local zoning and regulations do not apply) except to the extent limited by the federal government. Federal approvals are often required, particularly for agreements that encumber Indian lands. For some types of business activity, however, streamlined approvals are possible. One example is business development pursuant to Tribal Energy Resource Agreements.

***Tribal Energy Resource Agreements.*** Energy development on tribal lands can be difficult because of procedural constraints, such as permitting processes and required government approvals. Indian tribes that are approved for Tribal Energy Resource Agreements (“TERA”) are authorized, however, to enter into business agreements for energy development without federal approval from the Secretary of the Interior. Tribes can engage in many energy development projects without this procedural burden. Tribes can grant rights-of-way for pipelines, electric transmission lines, and distribution lines without the Secretary's approval. Such rights-of-way can be for: (1) an electric, transmission or distribution facility on tribal land or (2) a facility that processes or refines energy resources developed on tribal land. Tribes with a TERA can also authorize processing facilities for resources developed on tribal lands.

The requirements for TERA qualification are that (1) the tribe demonstrates a capacity to regulate the development of energy projects, (2) the tribe has an environmental review process and remedies for breach of the TERA to ensure compliance with the agreement, (3) the tribe allows the Department of the Interior to monitor tribal energy projects periodically, and (4) the tribe passes an initial environmental review process conducted by the Department of the Interior.

Additionally, without the Secretary's approval, a tribe with a TERA may enter into and manage leases and business agreements for energy development within tribal lands for a variety of uses. Such uses include: (1) exploring, extracting, or developing energy mineral resources located on tribal land, including, but not limited to, marketing or distribution; (2) constructing or operating

on tribal land, electric generation, transmission, or distribution facilities; and (3) processing or refining energy resources that are developed on tribal land.

Although a tribe may enter into these agreements without Secretary approval, each TERA must have a provision in it in which the tribe agrees to comply with the environmental review process for individual leases, business agreements, and rights-of-way (25 CFR 224.63(c)). Each TERA must also provide for the following: (1) interested party petitions, which allow interested parties to petition the Secretary of Interior to review a tribe's compliance with a TERA, (2) periodic reviews by the Office of Indian Energy and Economic Development, (3) reassumption of authority by the Department of Interior if it issues a written finding of imminent jeopardy to a physical trust asset as part of its response to an interested party petition or a periodic review and evaluation, (4) rescission of authority by the tribe to the Department of Interior, and (5) general appeals of any Department of Interior decision or inaction. Thus, while TERAs do offer some advantages to non-Indian businesses seeking to develop energy in Indian Country, there are still a number of procedural hurdles that must be complied with under a TERA.

For more information, visit <http://teeic.anl.gov/abouttera/index.cfm>.

## **VI. OTHER CONSIDERATIONS**

Before any business enters into a joint venture with a tribe, there are certain considerations that should be contemplated given a tribe's sovereign status. For instance, tribes enjoy sovereign immunity from lawsuits. This immunity applies to tribal government actions on and off the reservation and applies in tribal, state, and federal courts. Tribal immunity can only be abrogated through two methods—(1) by the tribe expressly waiving immunity or (2) through an act of Congress. Accordingly, businesses contracting with tribes often seek a limited waiver of sovereign immunity from suit to be able to enforce contracts. Not only must such waivers be express, but they must also be given in accordance with the tribe's own constitution and laws. For this reason, it is advisable that non-Indian businesses seek a legal opinion from a tribe's counsel that a waiver was executed pursuant to tribal and other applicable laws.

Moreover, as sovereign governments, Indian tribes have significant legal and regulatory jurisdiction over those conducting business with the tribe or on Indian land. Many tribes also have comprehensive sets of laws and regulations, including labor laws, to which a non-Indian business may become subject by doing business with a tribe or on Indian land. There may also be environmental approvals necessary for certain projects as well. With these issues considered by the parties, working with a tribe or on Indian land may provide both parties with great opportunities and successful business ventures.

*This Guide was prepared by R. Lance Boldrey and Courtney F. Kissel of Dykema Gossett PLLC in coordination with the Michigan Economic Development Corporation and is current as of September 14, 2011. This Guide is intended for informational purposes and should not be construed as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned here. Rules of certain state supreme courts may consider this advertising and require us to advise you of such designation.*