



Raising the Bar of Continuing Education

Tribal Tax and Business Development

November 10, 2011

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Tribal Tax & Business Development

Thursday, November 10, 2011

9:00 Introduction and Overview

Howard G. Arnett, Program Co-Chair
Karnopp Petersen LLP

John M. Schultz, Program Co-Chair
Ater Wynne LLP

Dave Tovey, Program Co-Chair
Confederated Tribes of the Umatilla Reservation

9:10 Developing Tribal Tax Code and Tribal Administrative Systems as a Source of Revenue ~

A Panel Discussion

Tribal Authority and Taxation of Non-Tribal Entities; Developing a Tribal Tax Code and Creating Tribal Expertise; Examples of Tribal Codes and Administrative Regulations; Effective Types of Tribal Taxes

John M. Schultz, Moderator
Ater Wynne LLP

Eric M. Shepard, Atty. Gen.
Colorado River Indian Tribes

Rob Roy Smith
Ater Wynne LLP

Bruce Zimmerman, CPA, Tax Admin.
Confederated Tribes of the Umatilla Reservation

10:30 Break

10:45 Tribal Tax as a Source of Revenue and Taxation

~ A Panel Discussion

State Tax Issues/ Tax Compacts with State; Structuring Transactions to Minimize States' Ability to Tax Within Indian Country; Tribal Business Entity Development to Maximize State and Federal Tax Advantages

John M. Schultz, Moderator
Ater Wynne LLP

Craig J. Dorsay
Dorsay & Easton LLP

Elizabeth S. Harchenko, Former Dir.
Oregon Department of Revenue

12:00 Lunch (on your own)

1:15 Creative Ways to Monetize Tax

Building Tax Credits into Business Deals; Expanding Enterprise Zones; Off-Reservation Enterprise; Property Tax Exemptions; Choice of Entity; Effective Lobbying

Dave Tovey, Moderator
Confederated Tribes of the Umatilla Reservation

Ellen H. Grover
Karnopp Petersen LLP

Michael Mason
Attorney at Law

Bruce Zimmerman, CPA, Tax Admin.
Confederated Tribes of the Umatilla Indian Reservation

2:45 Break

3:00 Tribal Business Development – Case Studies

Tribal Business Parks; Industrial Park Management; Joint Ventures; Tribal Renewable Energy Projects; Long Term Land Leasing as a Source of Revenue; Case Examples

Howard G. Arnett, Moderator
Karnopp Peterson LLP

Douglas C. MacCourt
Ater Wynne LLP

James Manion, General Manager
Warm Springs Power and Water Enterprises

J.D. Williams
Williams Johnson Stacy LLP

Chad R. Wright, CEO
Marine View Ventures, Inc.

5:00 Adjourn

Howard G. Arnett
Program Co-Chair

Howard G. Arnett is an attorney with Karnopp Petersen LLP. His practice specializes in Indian Law with additional expertise in civil litigation and appellate practice. He represents the Confederated Tribes of the Warm Springs Reservation of Oregon on matters involving treaty rights and tribal sovereignty.

Currently, Mr. Arnett serves on the Oregon State Bar's Legal Services Stakeholders Task Force and the executive committees of the Bar's Indian Law and Legal Services sections. In the past, he was a member of the Board of Bar Examiners, the Bar Examiners' Review Board, the Ninth Circuit Judicial Conference and the Appellate Practice Section Executive Committee.

Mr. Arnett serves as an adjunct professor at Northwestern School of Law at Lewis and Clark College where he teaches Federal Indian Law. He is also a member of the Dean's Advisory Council of the University of Oregon School of Law.

John M. Schultz
Program Co-Chair

John M. Schultz, a partner with Ater Wynne LLP, serves as department chair of the firm's Regulated Industries Group, where he focuses on environmental, natural resources, federal Indian, and occupational safety and health law. He has also served as founding co-chair of the firm's Indian Law Group to advise tribal governments on gaming regulations, contract, environmental, and real estate issues. In the last 16 years, he has worked with over 30 tribes in the West on gaming and other economic development projects.

Mr. Schultz is AV-rated by Martindale-Hubbell and has been listed in *The Best Lawyers in America* since 2007 for his expertise in Indian law. He holds a B.A. from Yale University, earned his J.D. from the University of Virginia School of Law, and attended the University of Stockholm School of Law as a Diploma Student.

Dave Tovey
Program Co-Chair

Dave Tovey was named Executive Director of the Confederated Tribes of the Umatilla Reservation in April 2011, returning to the organization after serving there from 1986-2002. From 2002-2011, he worked with various tribal organizations throughout the Northwest including the Coquille Tribe, the Siletz Tribe, the Affiliated Tribes of Northwest Indians Economic Development Corporation, and Cayuse Technologies.

Developing Tribal Tax Code and Tribal Administrative Systems as a Source of Revenue

John M. Schultz

Ater Wynne LLP

Eric M. Shepard

Colorado River Indian Tribes

Rob Roy Smith

Ater Wynne LLP

Bruce Zimmerman, CPA

Confederated Tribes of the Umatilla Reservation

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Rob Roy Smith
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Eric M. Shepard

Eric M. Shepard is the Attorney General of the Colorado River Indian Tribes. In that capacity, he serves as the chief legal officer and principal advisor to the Chairman and Tribal Council on litigation, federal and state legislative and regulatory affairs, as well as land use and economic development proposals.

Prior to serving the Colorado River Indian Tribes, Mr. Shepard clerked for the Indian Country Environmental Justice Clinic and the Conservation Law Foundation and was a fellow at the Soros Open Society Institute in Bucharest, Romania. He holds an undergraduate degree from Linfield College, and earned a law degree and an MSEL degree from Vermont Law School.

Rob Roy Smith

Rob Roy Smith, a shareholder with Ater Wynne LLP, is a member of the firm's Indian law and Litigation Departments. He advises Indian tribal clients and others doing business in Indian Country on all aspects of federal, state, and tribal law, including economic development, natural and cultural resource protection, taxation, tribal sovereignty and gaming. For over a decade, he has successfully represented Indian tribal governments, individual Indians, and businesses in complex litigation before state and federal trial and appellate courts, as well as the Idaho Supreme Court. He has filed briefs before the U.S. Supreme Court and the U.S. Court of Federal Claims on a variety of issues, including tribal jurisdiction and fiduciary duty. He also serves as an adjunct professor at Seattle University School of Law.

Mr. Smith holds a B.A. from College of the Holy Cross and earned his J.D., *cum laude*, from the Northwestern School of Lewis and Clark College, where he served as Editor-In-Chief of the *Animal Law Journal* and the *Environmental Law Review*, and was the recipient of the Natural Resources Leadership Award.

Tribal Tax and Business Development:

Developing Tribal Tax Codes and Administrative Systems

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ROB ROY SMITH is a Shareholder with Ater Wynne's Indian law Practice Group in Seattle, Washington. Rob advises Indian tribal clients and those doing business in Indian Country on all aspects of federal law, including economic development, natural and cultural resource protection, taxation, tribal sovereignty and gaming. He has extensive experience involving all aspects of Indian tax law including drafting and enforcing tribal taxation codes, and defending against Internal Revenue Service examinations of Indian tribal governments.

ERIC N. SHEPARD is the Attorney General of the Colorado River Indian Tribes. In that capacity he serves as the chief legal officer and principal advisor to the Chairman and Tribal Council on litigation, federal and state legislative and regulatory affairs, as well as land use and economic development proposals. Prior to serving the Colorado River Indian Tribes, Mr. Shepard clerked for the Indian Country Environmental Justice Clinic and the Conservation Law Foundation and was a fellow at the Soros Open Society Institute in Bucharest, Romania. Mr. Shepard received his law degree from Vermont Law School in 2001, his MSEL degree from Vermont Law School in 1998, and his undergraduate degree from Linfield College in 1995.

I. INTRODUCTION

Nothing is more fundamental to the long-term success and viability of sovereign governments as taxation. Tribal governments have long been recognized as having the inherent power to impose taxes to raise critical government revenues. However, until recently, Indian tribes have been reluctant to exercise their inherent sovereign taxation powers.

The working hypothesis of this seminar paper is that Indian tribes should aggressively explore developing comprehensive business licensing and taxation codes, imposed against both tribal members and nonmember business activities within reservation lands, to enhance tribal sovereignty and raise funds for the delivery of tribal government services to tribal members. A number of Indian tribes have successful tribal tax programs, such as the Colorado River Indian Tribes and Navajo Nation. Given recent downturns in the economy, this seminar paper explores what Indian tribes need to consider when developing a Tribal taxation code to boost tribal revenues.

Federal Indian tax law is constantly evolving. This seminar paper provides a broad overview of Federal Indian tax law and the administrative matters that should be considered when developing a Tribal taxation code, and does not constitute legal advice. Each Indian tribe's situation is unique. For instance, some tribes may have language in their constitutions that limit taxing authority. The author recommends that an Indian tribe considering developing a taxation code consult with experienced Federal Indian law attorneys to discuss the specific jurisdictional and tax consequences of such an approach. The terms "nonmember" and "non-Indian" are used interchangeably within in this paper.

II. FEDERAL INDIAN TAX LAW OVERVIEW

Indian tribes have long been recognized as having taxing powers. This power is regarded as one of the fundamental aspects of tribal sovereignty. The famous 1934 Opinion of Solicitor Margold, which was quoted in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), *rev. denied*, 448 U.S. 991 (1980), states this principle as follows:

Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Opinion of the Solicitor of the Department of Interior, 55 I.D. 14, 46 (1934); *Colville*, 447 U.S. at 152 ("The power to tax transactions [with non-Indians] occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Tribes clearly have broad power to tax their own members that extends to activities on both "Indian" and "non-Indian" land within the exterior boundaries of the Reservation. This

taxation power extends to off-Reservation and nonreservation activities of members when the Tribes can show a significant governmental interest in the activity.

However, tribal jurisdiction over nonmember activities on and off the Reservation is more narrow. As discussed below, U.S. Supreme Court Indian tax precedent generally makes clear that a tribal tax on a non-Indian transaction or activity occurring within the boundaries of a reservation will be upheld against a court challenge only if: (1) the transaction being taxed takes place on trust land; or (2) the transaction or activity being taxed takes place on non-Indian fee land and either (a) the non-Indian is involved in a consensual relationship with the tribe or its members; or (b) the impact of the transaction or activity on the tribe is demonstrably serious and imperils the political integrity, economic security, or health and welfare of the tribe.

1. Nonmembers and Non-Indian Fee Lands

The ability to enforce a tribal tax depends upon both the person or entity upon whom the incidence of the tax falls and, to a lesser extent, where the taxed transaction or activity takes place. When a tribal tax is imposed on non-Indian activities, the tax may only be enforced if certain conditions are met. The two exceptions to the rule that tribes lack authority over nonmembers on non-Indian land were established in the case of *Montana v. United States*, but have been dramatically narrowed by subsequent opinions culminating in the 2001 U.S. Supreme Court decision of *Atkinson Trading v. Shirley*.

Atkinson Trading involved a challenge to a lodging tax imposed on consumers by the Navajo Nation brought by a hotel owner located on non-Indian fee land within the exterior boundaries of the Navajo Reservation. 455 U.S. 645 (2001). The U.S. Supreme Court invalidated the tax, finding that tribes lack civil regulatory authority over the conduct on nonmembers on non-Indian land within a reservation. The Court found that a tribe's inherent authority to tax was limited solely to transactions "occurring on trust lands and significantly involving a tribe or its members." *Id.* at 657. The Court also dismissed the Navajo Nation's argument that the provision of tribal police and fire services created a consensual relationship sufficient to meet the first *Montana* exception. The Court clarified that the general availability of tribal fire, police or medical services was not sufficient and that the "consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 658-59. The Court limited the second exception to "nonmember conduct that threatens the Indian tribe" and causes a "drain" on tribal services and resource that is "so severe that it actually 'imperils' the political integrity of the tribe." *Id.* at 657 n.12.

The requirement of a "formal consensual relationship" for tribal civil jurisdiction to extend to the activities of a non-Indian on non-Indian land has not been abrogated by subsequent decisions. In *Smith v. Salish Kootenai College*, No. 03-35306 (9th Cir., Jan. 10, 2006), an *en banc* Ninth Circuit panel confirmed tribal civil jurisdiction over a nonmember Indian. The Court reiterated that tribal civil jurisdiction exists where "private individuals . . . voluntarily submit[] themselves to tribal regulatory jurisdiction by the arrangements that they . . . entered into." *Id.* at 121. Put differently, the Court noted that tribes have jurisdiction over nonmembers "who choose to affiliate with the Indians or their tribes . . . when their contracts affect the tribe or its members." *Id.* at 123. While this finding highlights the importance of obtaining business licenses for nonmember businesses and compiling facts that demonstrate actions by the

businesses that create a connection with the Tribes, *Salish Kootenai* does not lessen the “formal consensual relationship” requirement. The Court noted the importance of the relationship between the cause of action and tribal lands, but confirmed that “[t]he ownership status of the lands . . . is only one factor to consider.” *Id.* at 113, 118 (citing *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)).

In addition, the consensual relations factor has also been a key finding in the U.S. Supreme Court’s conclusions that tribes have authority over activities of non-Indians within their reservation boundaries on lands burdened by easements and leases. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, *rev. den.*, 448 U.S. 991 (1980), the U.S. Supreme Court upheld tribal taxes on sales to non-Indians who came on the reservation to do business with tribal vendors. Likewise in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the U.S. Supreme Court upheld tribal taxes on mineral production by non-Indian lessees doing business on the reservation, and in *Kerr McGee Corp. v. Navajo Tribe of Indians*, 195 U.S. 195 (1985), the U.S. Supreme Court upheld a tribal tax on activities related to non-Indian lessees’ mineral production on the reservation. Although these cases are instructive, *Atkinson Trading* has brought into question their relevance for tribal taxes today.

2. Nexus to Support Taxation of Nonmembers

There is no question that Indian tribes have the power to regulate the conduct of business on their reservations to protect and preserve the political integrity of the tribe, and the health and welfare of tribal members. *E.g.*, *Merrion*, 455 U.S. at 144 (tribes can place conditions on non-Indian’s conduct or continued presence on the reservation). This regulation of conduct is a necessary tool of tribal self-government that has been recognized by Congress. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980).

The Ninth Circuit Court of Appeals has expressly found that tribes can exercise civil regulatory jurisdiction over nonmembers located either on non-Indian land or off-reservation where “[t]he transaction regulated . . . occurs on the reservation.” *Babbitt Ford Inc., v. Navajo Indian Tribe*, 710 F.2d 587, 597 (9th Cir. 1983). The Court found that the non-Indians in *Babbitt Ford* must “enter tribal lands . . . [b]y so doing, they have entered the Tribe’s jurisdiction.” *Id.* at 593. The Court rejected the argument that the tribe’s law did not apply because the relevant contracts were entered into off-reservation. *Id.* at 594, 597. *Salish Kootenai* cited with approval *Babbitt Ford*. The *en banc* panel of the Ninth Circuit concluded:

[i]f the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce within Indians. . . . it is true that ‘a tribe has no authority over nonmembers until the nonmember enters tribal land or conducts business with the tribe.’

Salish Kootenai, Slip Op. at 126 (citing *Babbitt Ford* and quoting *Merrion*, 455 U.S. at 142) (emphasis added). The Ninth Circuit has thus made clear that, as a threshold matter, either entry

onto “tribal lands” or conducting business with the tribe is a necessary precondition for a tribe to exercise civil jurisdiction over the off-reservation nonmember’s conduct.

Some “formal consensual relationship” between a tribe and a non-Indian business is also necessary to provide for tribal civil jurisdiction over the non-Indian’s conduct within a reservation. After *Atkinson*, in order to regulate nonmember and non-Indian transactions and activities on any reservation lands (tribal trust land and or non-Indian fee land), tribes need to establish the necessary consensual relationships with the retailers prior to the imposition of tribal law. The best way to think of this requirement is that the relationship must be “formal,” *i.e.* expressed in writing and somehow binding on the parties. One such relationship might be formed with the assistance of the enactment of a tribal business code.

III. TRIBAL BUSINESS LICENSES

Federal courts have consistently upheld the authority of tribes to issue tribal business licenses to nonmembers trading with Indians within reservations on both tribally owned and non-Indian fee land. Tribes retain jurisdiction to regulate the activities of nonmembers who operate businesses or reside on tribal lands. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the United States Supreme Court described this tribal power as follows:

Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on-reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.

Id. at 144; *see Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (sustaining tribal business license fee on non-Indian trading with Indians on Indian land); *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984) (upholding tribal business license fee and tax on non-Indian businesses conducting business on reservation fee land). *Atkinson Trading* did not directly address the authority of tribes to issue business licenses, but suggests that some caution is required in implementing a tribal business license code on non-Indian fee land within the reservation post-*Atkinson*. The same can be said of the recent *Plains Commerce Bank* decision.

Tribal business license programs play a number of important roles. First, tribal business license programs allow tribes to flex their sovereign governmental muscles by allowing tribes to regulate the conduct of business within their lands. Because all municipalities and many states have business license requirements, retailers are familiar with obtaining licenses and are likely to be receptive to a tribal business licensing program. As an ancillary benefit, a business license program can raise modest revenues for the tribe through licensure fees. Tribes can develop a host of types of licenses for different types of businesses or events, and can stagger the fee schedules accordingly. Tribes can also exempt 501(c)(3) organizations, churches, and/or small-businesses from either the license fee provisions or the licensure requirements all together. For instance, tribes might want to provide reduced fees for tribal member-owned businesses to

encourage tribal member economic development and entrepreneurship. Tribal business license programs can be as narrow or expansive as the Tribal government wishes.

Second, as suggested above, a tribal business licenses might help with jurisdictional concerns. Although no Federal court case has squarely addressed the issue, a strong case can be made that tribal business licenses can form the necessary “formal consensual relationship” for Indian tribes to regulate the activities of non-Indians. This is especially true if the business license application form clearly indicates that, by applying for and obtaining a business license, the business licensee consents to the application of all Tribal laws and the jurisdiction of the Tribal Court, if any. This knowing, voluntary consent by non-Indians to tribal regulation, created by contract, boosts tribal sovereignty and reduces the possibility of a successful challenge being launched to challenge the tribe’s regulatory authority in Federal or state court.

Third, in addition to jurisdiction and sovereignty implications, tribal business licenses also play an important role in the administration and collection of tribal taxes. Working in conjunction with a tribal taxation code and specific tax ordinances, tribal business licenses could provide stronger “consensual relationships” to satisfy the first *Montana* exception to support the imposition of taxes on nonmembers doing business within the reservation. Further, an efficient business license system should enable tribes to impose tax identification numbers on businesses operating within reservations, and should make it easier to collect taxes and, if necessary, bring enforcement actions against delinquent taxpayers.

Tribes should seek a “formal consensual relationship,” such as with a tribal business license, with all nonmember businesses and tribal member businesses conducting business within a reservation, whether making deliveries or physically located within a reservation. This can be implemented over time. One way to deal with this, in a business license code and in a taxation code, is to build in a provision to provide the tribal regulatory agency with jurisdiction over tribal business and tax revenue laws with the authority to develop and implement a procedure to determine the extent of tribal jurisdiction on non-Indian fee lands within the reservation. This procedure should help avoid jurisdictional disputes while strengthening tribal sovereignty.

IV. TRIBAL TAXATION CODE

Once these jurisdictional prerequisites are met, Indian tribes may consider developing a tribal taxation code. Any taxation code will contain at least two elements: (1) an administrative section providing for the creation of a tax department and the various rules for implementation and enforcement of the taxation code; and (2) specific tribal tax ordinances.

With respect to administrative matters, there are many issues to consider. For instance, tribes must consider, at least, the following issues:

- Who will be responsible for implementing the taxation code – a Director or a Commission?
- How much enforcement and investigative authority will tax agents have?
- Where will the tax money collected be kept and what will the revenues be used for?
- What will the audit and examination procedures be?
- How will enforcement be addressed?

- Administrative due process?
- Creation of a tribal tax court?
- In addition to unpaid taxes, what about penalties, interest, and costs of collection?
 - How should those be calculated?
- How closely should the tribal tax system follow state or federal tax models?

In addition, the applicable tribal regulatory agency will need to develop a host of forms, including: business license applications and forms; tax returns and corresponding schedules; certificates for tax exemption; form letters indicating license denials or other problems with tax reporting; as well as, a comprehensive system for keeping track of deadlines to ensure that, if a business misses a tax or business license deadline, the business is promptly notified and the tribal regulatory agency can ensure prompt payment or initiate the necessary administrative or judicial actions to collect unpaid fees. Some due process should also be guaranteed to taxpayers.

Other issues must be considered when the tribal government is ready to explore the substantive taxation ordinances. These consideration can be broken down into three main categories as follows:

- Who to tax?
 - Retailers or consumers or wholesalers?
 - Can the tax be “passed through”?
 - Non-members? Tribal members?
 - Equal protection concerns?
 - What exemptions should be made available?
- What to tax?
 - Cigarettes?
 - Intergovernmental Agreement?
 - Liquor?
 - Federal delegation?
 - Retail Sales?
 - Food sales?
 - Utility sales?
- How much to tax?
 - What tax rate can the market bear?
 - Tax Base Study?

As the foregoing makes clear, these are weighty questions. With respect to the “how much to tax” inquiry, the question can be resolved by contracting with a economist (or a professor of economics at a local school) to study local tax rates to assist the tribal government in determining what additional tax local retailers and consumers can bear before the tax forces businesses and consumers to shop elsewhere. Such a study will help the tribal government make informed decision about the tax rate.

At the very least, when developing tribal taxation codes, tribes should include a provision that grants the applicable tribal regulatory agency the authority to develop and implement a procedure to determine the extent of tribal jurisdiction on non-Indian fee lands

within the reservation. This procedure should help avoid jurisdictional disputes while strengthening tribal sovereignty.

In addition, tribes should consider placing the legal incidence of all tribal taxes on the retailer to increase the ability of the Indian tribe to meet the requirements of the first *Montana* exception as explained by *Atkinson Trading*. Tribes are far more likely to have “formal consensual relationships” with a retailer, rather than a consumer. And, of course, the tribal government must exercise common sense in developing the taxation code. A taxation code might not be for every tribe or situation depending on the nature and extent of business development on a reservation. For example, the benefits of Federal-delegated authority to Indian tribes to implement a liquor tax might not be worthwhile for a “dry” reservation. Likewise, while taxing all retailers or consumers regardless of tribal affiliation might satisfy nonmember concerns and might avoid a discrimination or equal protection challenge, taxing tribal members might prove politically disastrous for elected tribal officials.

V. CONCLUSION

In these unsettled economic times, Indian tribes might be able to seek comfort in a secure tax base. By following the outline described above, Indian tribes can consider developing tribal business and taxation codes that meet their governmental needs, adequately protect retail businesses and tribal members, and provide assurances against jurisdictional challenges. Tribal taxation holds the key to the future of tribal government expansion.

Tribal Tax and Business Development

**Developing Tribal Tax Codes
and Administrative Systems**

Rob Roy Smith
Shareholder, Indian Law Practice Group

Eric N. Shepard
Attorney General, Colorado River Indian Tribes

ATERWYNNE^{LLP}
ATTORNEYS AT LAW

Why are Tribal Taxation Codes Important?

- Enhance tribal sovereignty
- Extend tribal civil jurisdiction
- Raise funds for the delivery of tribal government services to tribal members
- Boost revenues without creating business enterprises

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Considerations Before Developing a Taxation Code

- Federal Law
 - Reach of Tribal Civil Jurisdiction
- Tribal Law
 - Tax administrative provisions
 - Tax ordinances
- Practical
 - Can the local economy bear another tax
 - Who, What, and How of Tax Collection

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Tribal Tax Jurisdiction

“Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.”

- Opinion of the Solicitor of the Department of Interior, 55 I.D. 14, 46 (1934)

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Tribal Tax Jurisdiction

- Tribal Members
 - Tribes clearly have broad power to tax their own members that extends to activities on both “Indian” and “non-Indian” land within the exterior boundaries of the Reservation.
- Nonmembers/ Non-Indians
 - depends upon both the person or entity upon whom the incidence of the tax falls and, to a lesser extent, where the taxed transaction or activity takes place.

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ATTORNEYS AT LAW

Tribal Tax Jurisdiction Over Nonmembers

- A tribal tax on a non-Indian transaction or activity occurring within the boundaries of a reservation will be upheld against a court challenge only if: (1) the transaction being taxed takes place on trust land; or (2) the transaction or activity being taxed takes place on non-Indian fee land and either
 - (a) the non-Indian is involved in a consensual relationship with the tribe or its members; or
 - (b) the impact of the transaction or activity on the tribe is demonstrably serious and imperils the political integrity, economic security, or health and welfare of the tribe.

ATERWYNNE^{LLP}
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Tribal Tax Jurisdiction Over Nonmembers

- How to create “consensual relationship” and ensure a “nexus”
 - Tribal Business License
 - o Knowing, voluntary consent by non-Indians to tribal regulation
 - o Can be linked to Taxation Code
 - o Enhances sovereignty
 - o Business license program can raise modest revenues for the tribe through licensure fees

ATERWYNNE LLP
ATTORNEYS AT LAW

Taxation Code Development: Administrative Issues

- Who will be responsible for implementing the tax code?
- How much enforcement and investigative authority will tax agents have?
- Where will the tax money collected be kept and what will the revenues be used for?
- What will the audit and examination procedures be?
- How will enforcement be addressed? Court?
- What about penalties, interest, and costs of collection?
- How closely should the tribal tax system follow state or federal tax models?
- Forms and Standard notice letters

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ATTORNEYS AT LAW

Taxation Code Development: Ordinance Issues

- Who to tax?
 - Retailers or consumers?
 - Non-members? Tribal members?
 - What exemptions should be made available?
- What to tax?
 - Cigarettes?
 - Liquor?
 - Retail Sales?
 - Food sales?
 - Utility sales?
- How much to tax?
 - What tax rate can the market bear?
 - Tax Base Study?

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Bruce Zimmerman, CPA
Confederated Tribes of the Umatilla Reservation

Bruce Zimmerman, CPA

Bruce Zimmerman, CPA, is the Tax Administrator for the Confederated Tribes of the Umatilla Indian Reservation and has over 28 years of experience in the area of taxation, with over 20 years specializing in the field of ad valorem and utility property taxes. Since 1996, he has worked to design, development, and manage the tribal utility taxation system for the Umatilla Indian Reservation. His duties also include being responsible for compliance issues involving the tobacco tax agreement and the motor fuels tax agreement with the State of Oregon, and the administration of the tribal transient lodging tax, tribal liquor tax, tribal solid waste transfer station tax, and the Coyote Business Park ad valorem property tax.

In addition to his duties as tribal Tax Administrator, Mr. Zimmerman is also responsible to manage Yaka Energy, a natural gas and energy marketing company, the Rattlesnake Wind Energy Farm, tribal energy development projects, and utility rights-of-way requests across tribal lands. Prior to working for the Confederated Tribes, he was employed for 10 years at the Oregon Department of Revenue, where he was the coordinator of the centrally assessed property taxation program for three years and valued and appraised numerous complex utility and industrial properties. He has provided expert witness testimony regarding the valuation and taxation of complex industrial and utility properties to the Oregon Tax Court and to the Oregon Legislator. He holds a B.S. in Accounting, is a licensed Certified Public Accountant and a member of the American Institute of Certified Public Accountants.



**Confederated Tribes
of the
*Umatilla Indian Reservation***

**Tribal Tax & Business Development
Portland, OR
November 10, 2011**

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Development of Tribal Tax Codes (Problems)

The issue of taxation on an Indian Reservations is generally vary complex, confusing, and, at times, unpredictable.

Why

- Multiple Taxing Authorities:
 - Federal Government
 - State Government
 - Tribal Government
- The interaction of these different taxing authorities and taxing systems are largely guided by Federal and State court decisions rather than by the Constitution, Federal legislation (or lack thereof), and State legislation.

Development of Tribal Tax Codes (Problems)

Court decisions dealing with State-Tribal taxation issue have often produced amorphous results that have infringe on tax neutrality between a State and a Tribal government within its own Reservations.

- The courts have generally focused on the “legal incidence” of the tax rather than the actual economic incidence or reality of the tax.
- Issue of double taxation.
- Current fiscal woes of the States and Counties.

Summary of Potential Tax Conflicts

- Infringement of Sovereignty (i.e. regulatory authority)
- Tax Revenues (Who can impose & Who can collect)
- State Taxes
 - Income Taxes
 - Excise Taxes (cigarettes, motor fuels, alcohol etc.)
 - Property Taxes
 - Sales & Use Taxes
- Umatilla County Taxes
 - Infringement of Regulatory Authority
 - State Funding of governmental programs
 - Property Taxes
 - Franchise Fees and Taxes

Key Components to a Tribal Tax Code

- Identify the type of tax. (Property, sales & use, excise, income, etc.)
- Identify the potential taxpayers. (Who)
- Potential fiscal impact. (Dollars: Tribes & Taxpayer)
- What taxes are typical for the Industry?
- Understand the taxpayer's ability to "recover" or "pass through" the cost tax.
- Communicate with the potential taxpayers before enacting the tribal tax. (Public input)
- The tribal tax must be simple and cost effective.
- Easy for the taxpayer to comply.

Summary of CTUIR Tax Revenues

- | | |
|---|---------------------------|
| • Utility Taxes | \$ 600,000 |
| • Coyote Business Park Taxes | 150,000 |
| • Occupancy Lodging Taxes | 150,000 |
| • Cigarette Taxes (State-Tribal Agreement) | 100,000 |
| • Motor Fuel Taxes (State-Tribal Agreement) | 150,000 |
| • Alcohol/Liquor Taxes | 40,000 |
| • Solid Waste Taxes | <u>10,000</u> |
| • Total Tribal Taxes | <u>\$1,200,000</u> |
- All Reservation residents (Indian and non-Indian) receive fire protection, police protection, water/sewer, solid waste disposal, zoning and land-use planning services without a major tax base like cities and counties.

Tribal Tax as a Source of Revenue and Taxation

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Mr. Dorsay worked as an Assistant Attorney General for the Navajo Nation for three years and was an editor of the *Cohen Indian Law Treatise*. He teaches and writes extensively on the ICWA and other Indian law issues.

Mr. Dorsay holds a B.S. in Natural Resources from the University of Michigan and earned his J.D. from the University of Oregon.

Elizabeth S. Harchenko

Elizabeth S. Harchenko served as Director of the Oregon Department of Revenue until March, 2011. She was appointed to the position in May, 1997, and reappointed in 2001, 2005 and 2009. As Director, she was responsible for a staff of 1,000 employees whose responsibilities include administering state personal and corporate income taxes, tobacco taxes, and inheritance taxes; supervising the property tax system; and assessing large industrial and utility properties and Oregon forest and timberland.

Prior to her appointment at Revenue, Ms. Harchenko was Special Counsel to Attorneys General Hardy Myers and Ted Kulongoski, where she served as a key advisor on revenue, tribal gaming, retirement, ethics, and legislative issues. Her experience includes serving as Attorney-in-Charge of the Tax Section at the Department of Justice where she supervised legal services to the Department of Revenue for eight years. She also served as chair of the Multistate Tax Commission, a national organization dedicated to uniformity and consistency in state tax administration, from January, 2001 through July, 2003. She is past president of the Western States Association of Tax Administrators. In July, 2004 she was awarded the first Wade Anderson Memorial Medal for Leadership in State Tax Cooperation by the Federation of Tax Administrators and the Multistate Tax Commission.

Ms. Harchenko holds a B.S. in Science and Mathematics from Willamette University and earned her J.D. from the Willamette University College of Law.

**STATE AND TRIBAL TAX ISSUES
AFFECTING BUSINESS DEVELOPMENT BY INDIAN TRIBES**

The Seminar Group: Tribal Tax & Business Development

November 10, 2011

Craig Dorsay and Elizabeth Harchenko

I. Federal Judicial Principles Governing State Taxation Affecting Indian Tribes

1. Introduction. Taxation of tribal land and businesses is a key element in the profitability and sustainability of tribal economic development. Tribal taxation of tribal businesses is a source of revenue to fund tribal government and services. Revenues of tribal businesses will be adversely affected if they are subject to multiple or overlapping taxes, and tribal business models may be dependent upon exemption from state taxation. States also have a valid interest in imposing all authorized state taxes, to generate revenues to fund governmental functions and state services, including services to citizens who are members of Indian tribes.
2. Concurrent State and Tribal Taxation Authority. Indian tribes and states share concurrent taxing authority over some non-Indian business activity within Indian country, and over some Indian business activity outside Indian country. The presence of tribal taxes, by itself and of their own force do not preempt concurrent state taxes. *Washington v. Confederated Tribes of the Colville Indian Res.*, 447 U.S. 134, 158 (1980). *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158 n. 26 (1982)(Interstate commerce clause does not limit tribal taxation of activity also taxed by the state, where tribal tax limited to activity occurring on tribal land); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)(dual state and tribal taxes on on-reservation non-Indian oil and gas production does not violate interstate commerce clause if fairly apportioned and related to state services).
3. *Per Se* Rule. States are categorically prohibited from taxing Indian tribes or tribal members for transactions that take place within Indian country. *California v. Cabazon Band of Indians*, 480 U.S. 202, 216 n. 17 (1987)(“In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule” prohibiting state taxation of on-reservation transactions, absent express congressional authorization); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

4. Preemption Test. Where the legal incidence of a state tax falls on a non-tribal entity engaged in a transaction with an Indian tribe or tribal members in Indian country, the Supreme Court has applied a balancing test to determine if the state tax is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). This balancing test requires a particularized inquiry into the nature of the state, federal, and tribal interests at stake to determine whether, in a specific context, the exercise of state authority would violate federal law. The test requires an examination of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. The inquiry is not dependent on mechanical or absolute conceptions of tribal or state sovereignty.
5. Taxation of Transactions Outside Indian Country. State taxation of non-Indian business transactions occurring outside of Indian country, even where the ultimate situs or destination of the transaction is within Indian country and with a tribe or tribal members, is generally allowable. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).
6. Legal Incidence of a Tax. The critical element in determining whether state taxation of business transactions involving Indian country, tribes and tribal members is permissible where the “legal incidence” of a state tax is located. Many business transactions begin off-reservation and end up on-reservation. Transactions involving fuel sales, cigarette sales, and alcohol sales, for example, involve suppliers, distributors, retailers, and consumers. If the legal incidence of a state’s taxation of this transaction is on the off-reservation part of the transaction (supplier, distributor), the state tax is generally valid. If the legal incidence of a state’s taxation of this transaction is on the on-reservation part of the transaction, where it falls on the tribe or on tribal members, the state tax is generally invalid. *Wagnon, supra*, 546 U.S. at 102-03; *Chickasaw, supra*, 515 U.S. at 459. While a state’s declaration in law of where the legal incidence of a particular tax lies is given some deference, *Wagnon, supra*, 546 U.S. at 102, courts routinely analyze where the legal incidence of a tax actually lies in determining whether a state tax is valid or not, applying a number of factors. *E.g.*, *Coeur d’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004); *Squaxin Island Tribe v. Stephens*, 400 F.Supp.2d 1250 (W.D.Wash. 2005).
7. State taxation of cigarette sales by Indian tribes on-reservation. Under these principles, state taxation of on-reservation cigarette sales to tribal members is preempted. State taxation of on-reservation cigarette sales to non-members (non-Indians and Indians from other tribes) is not preempted and is valid. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154-157, 100 S.Ct. 2069, 2081-2083, 65 L.Ed.2d 10 (1980). Tribes have the power to impose their cigarette taxes on nontribal purchases since the

power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Id.* at 136. *But see Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)(tribal taxation of non-Indians on non-Indian fee lands within a reservation where legal incidence of tax fell on nonmember hotel guests is subject to the rule in *Montana v. U.S.*, 450 U.S. 544, 565-66 (1980), that tribes generally lack authority over non-Indians on non-Indian fee land within a reservation). A state can impose *de minimis* burdens on a tribe to collect these taxes and keep records, *id.*, but tribal sovereign immunity from suit by a state is not waived so a state may have difficulty enforcing the tax. *See Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73, 114 S.Ct., 2028, 2036, 129 L.Ed.2d 52 (1994); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *Okla. Tax Commn. V. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991)(Indian tribe maintains sovereign immunity from suit by state).

8. Tribal activity off-reservation. Indians, Indian tribes, and tribal businesses going beyond Indian country are generally subject to state authority and state taxation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Chickasaw Nation*, *supra*, 515 U.S. at 453. Where Indians engage in taxable activity both within and outside Indian country, a state may only tax the activity occurring outside Indian country. If the state tax is not apportioned, it is invalid. *Washington v. Colville Tribes*, *supra*, 447 U.S. at 163.
9. Taxation of Tribal Property On-Reservation. Tribal property on-reservation is normally not subject to state taxation. *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976). This immunity applies to both real and personal property. *Id.*; *Washington v. Colville Tribes*, *supra*, 447 U.S. at 162-63 (state tax on motor vehicles owned on-reservation but used both on and off reservation invalid; if state excise tax had been properly apportioned, it might have been sustained). The taxation of tribal real property owned in fee within a reservation is more complicated. A county real property tax on such land was upheld in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), on the ground that a federal statute authorizing fee-patenting of such land had expressly made such property subject to ad valorem taxes, but invalidated county excise taxes on the sale of such land because the federal statute did not authorize state taxes “with respect” to such land or on “transactions involving” such land. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court held that allotted land like this would reassume its tax exempt status from ad valorem taxes when it went back into trust status.
10. Income taxation. Income earned by tribal members who both live and work in Indian country is not subject to state income taxation. *McClanahan v. Ariz. State Tax Commn.*,

411 U.S. 164 (1973). If both these conditions are not met – the tribal member lives off-reservation or works off-reservation, the tribal member’s income is subject to state taxation. See *Chickasaw Nation, supra*, 515 U.S. at 453. In *Fond du Lac Band of Lake Superior Chippewa v. Frans*, ___ F.3d ___, 2011 WL 3518182 (8th Cir. 2011), the Court upheld state income taxation of out-of-state pension income earned by an on-reservation tribal member.

11. Form of tribal business. Tribes can establish corporations under tribal authority (either inherent tribal authority or pursuant to a tribal corporation code) as a tribal corporation, as a federal corporation pursuant to § 17 of the Indian Reorganization Act, 25 U.S.C. § 477, or under state law. State law tribal corporations are generally subject to state taxation; tribal corporations formed under tribal law or federal law generally are not subject to state authority or transaction taxes for on-reservation activity. Section 17 tribal corporations are exempt from federal income tax, Rev. Rul. 94-16, but tribal corporations chartered under state law are not tax exempt. *Id.* Indian tribes are not subject to federal income tax. Rev. Rul. 67-284. Tribal corporations chartered under tribal law are likely exempt from federal income tax when they are structured as an “integral part” of the tribe. IRS PLR 200409033. As discussed above, tribal corporations doing business outside Indian country are likely subject to applicable state and local taxes for activity occurring off-reservation.
12. Non-Indian partnerships. Many tribal economic development enterprises are now structured as partnerships, LLCs, or other joint operations. Such transactions may include the leasing of tribal lands or tribal business interests to non-Indian companies. State taxation of the non-Indian owned portion of such tribal joint economic development ventures has generally been upheld, depending upon application of the *White Mt. Apache Tribe v. Bracker* balancing test. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997); *Gila River Indian Tribe v. Waddell*, 91 F.3d 1232 (9th Cir. 1996); *Confederated Tribes of the Chehalis Res. v. Thurston County Bd. of Equal.*, 2010 WL 1406524 (W.D.Wash.)(unreported)(Great Wolf Lodge), *on appeal*.

II. Oregon and Washington State Tax Laws

1. Introduction. State revenue agencies administer their states’ tax laws and must carry out legislative policy. As they do so, they must also comply with federal law governing taxation of activities within Indian country and of activities conducted by tribes or tribal members. In some areas, the legislatures have explicitly provided for exemption or special tax rules affecting tribes or tribal members. In others, the revenue agencies must determine how their actions are affected by federal law. The State of Washington Department of Revenue has adopted a comprehensive rule “harmonizing... federal law,

Washington state tax law, and the policies and objectives” of other authorities affecting administration of the state’s tax laws. (See WAC 458-20-192.) Washington DOR also has issued an Indian Tax Guide to assist tribes, tribal members and any other persons engaging in activities within Indian country to understand the application of state tax laws with respect to sales of goods or services, and to activities conducted pursuant to treaty rights. (See, Indian Tax Guide, <http://dor.wa.gov/content/FindTaxesAndRates/RetailSalesTax/Indians/IndianTaxGuide/default.aspx>.) The Oregon Department of Revenue has issued draft policy papers discussing the applicability of Oregon personal income tax, corporate excise tax and property tax with respect to Indian tribes and tribal members. These drafts were first released in 2008. (See, Oregon Department of Revenue Presentation to the Legislative Commission on Indian Services, March 11, 2008.) The policy on personal income taxation has been published (see http://www.oregon.gov/DOR/tribal_tax.shtml). The papers on corporate tax and property tax have not been finalized. The Oregon Department of Revenue also has adopted administrative rules in connection with state tax law affecting tribes and tribal members.

2. Explicit Provisions affecting Tribes or Tribal Members

- a. Tobacco Taxes. Both Oregon and Washington law expressly address collection of tobacco taxes on products sold by Indian tribes to tribal members. Oregon Revised Statutes (ORS) 323.401 allows the Oregon Department of Revenue to enter into a cigarette tax refund agreement with an Indian tribe. The agreement establishes as agreed method for refunding prepaid cigarette taxes. A comparable statute, ORS 323.615, provides for refunds of taxes prepaid on other tobacco products that are sold by tribes to their members. Generally, these agreements define a method for calculating the amount of tax to be refunded by reference to overall smoking rates in the Native American population and to the enrolled membership of the tribe. Washington law, Revised Code of Washington (RCW) 43.06.455, allows the governor to enter into contracts with tribes that exempts from state tobacco and sales and use taxes any cigarettes sold in Indian country by Indian retailers so long as the tribes impose their own cigarette tax in lieu of the state taxes and the revenue is used for essential governmental services.
- b. Fuel Taxes. Both Oregon and Washington law expressly address the treatment of fuel taxes on sales of fuel made on a reservation for use by tribal members on reservation lands. ORS 319.382 and 319.525 authorize the state Department of Transportation to enter into fuel tax administration agreements with tribes. RCW 82.36.450 and 82.38.310 allow the governor to enter into agreements with federally recognized Indian tribes, that govern motor vehicle fuel and special fuel taxes included in the

- price of fuel delivered to a tribally owned and operated retail station located on reservation or trust property.
- c. **Property Taxes.** Both Oregon and Washington law expressly provide property tax exemptions for certain property owned by Indian tribes and tribal members. Under Oregon law, ORS 307.180 provides for exemption from local property taxes for certain real property of individual tribal members on-reservation, and ORS 307.181 provides for exemption for tribally owned land that is subject to a fee-to-trust application. ORS 307.040 generally provides for exemption of all property of the United States and is the state law authority for exemption of all tribal lands held in trust by the federal government. In Washington, RCW 84.36.010 exempts from property taxes all property belonging exclusively to any federally recognized Indian tribe located in the state, if that property is used exclusively for essential government services. (Similar legislation was proposed in Oregon during the 2011 Legislative Assembly, but was not enacted. See House Bill 2566.)
 - d. **Taxes on Tribal Gaming Activities.** Generally, state taxes on tribal gaming operations conducted pursuant to the Indian Gaming Regulatory Act are prohibited. *See 25 USC § 2701 et seq.* States are permitted under IGRA to obtain reimbursement of regulatory costs directly related to state oversight and regulation of Indian gaming.
3. **Oregon Corporate Excise Tax.** The Oregon Corporate Excise Tax applies to “Every centrally assessed corporation, the property of which is assessed by the Department of Revenue under ORS 308.505 to 308.665, and every mercantile, manufacturing and business corporation and every financial institution doing business within this state”. ORS 317.070. Generally, the corporate excise tax is intended to operate in the same way as the federal income tax on corporations. *See* ORS 317.018 (1). This is to be accomplished by application of the same definitions for corporations, of income, deductions, accounting methods, accounting periods, taxation of corporations, basis and other provisions of the Internal Revenue Code. ORS 317.080 (2). The corporate excise tax law does not explicitly refer to business organizations formed or owned by Indian tribes or their members, or exempt them.
4. It is most likely that Oregon would follow federal income tax principles in determining the appropriate treatment of corporations or other entities created or owned by Indian tribes or tribal members. As noted above (**Federal Judicial Principles** par. 11), the Internal Revenue Service has issued some guidance on the treatment of tribal governments and entities created by tribal governments or pursuant to tribal laws. Treasury Regulations establish that for federal tax purposes, Indian tribal governments are to be treated the same as States, and their subdivisions (to the extent that those

subdivisions have been delegated the right to exercise one or more of the substantial governmental functions of the Indian tribal government. Treas. Reg. sec. 305.7871-1(a) and (e). Further, Treas. Reg. sec. 301.7701-1 (3) provides that the general rule that an entity formed under local law may not be recognized as a separate entity for federal tax purposes if that entity is an integral part of the state. The regulation goes on to formalize the substance of prior revenue rulings that tribes incorporated under federal law (section 17 of the Indian Reorganization Act or section 3 of the Oklahoma Indian Welfare Act) are not recognized as separate entities for federal tax purposes. Finally, Treas. Reg. sec. 301.7701-2 (b) (1) provides that a corporation includes a business entity organized under a Federal or State statute, or under the statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate or body politic. Taken together, these regulations appear to recognize that the governing bodies of Indian tribes can create entities in the same way as states, that may end up being taxable. In Oregon, recent amendments to the statutes providing for the creation and recognition of different kinds of business entities (corporations, partnerships and limited liability entities) recognize the status of entities created pursuant to tribal laws as being the equivalent of business entities created pursuant to the laws of another state or country. (See Or Laws 2009, chapter 14.) It is possible that states could assert that a corporation created under tribal law would be a taxpayer for corporate excise tax purposes if that entity was also required to report and pay federal income tax, as an entity that is legally separate from the tribe and that does not have an exempt status as a political subdivision of the tribe. The tribes would not necessarily agree with this assertion.

5. Application of the Washington Business & Occupations tax is addressed in detail in the Indian Tax Guide with respect to activities of tribes, tribal businesses and tribal members.
6. Despite the existing provisions of state law addressing the application of the state property tax to tribal property, some complexities and questions arise when property ownership is not vested solely in the name of a tribe. In the Great Wolf case – *Confederated Tribes of the Chehalis Res. v. Thurston County Bd. of Equal.*, 2010 WL 1406524 (W.D.Wash.)(unreported)(Great Wolf Lodge), *on appeal*, the federal district court held that leasehold improvements owned by a Delaware corporation owned 51% by the Tribes and 49% by a non-tribal entity, were subject to Washington’s personalty tax, even though the improvements had been made to land held in trust for the tribes. There the court determined that the corporate lessee – which operated a hotel, conference center and indoor water park on tribal trust land – was subject to the personalty tax because the use of the improvements was by a privately owned business venture, and that venture controlled day-to-day business operations.

III. Looking Ahead

1. As Tribal governments pursue more diversified economic development opportunities for their members, it is likely that uncertainty about the boundaries between state and local taxes and tribal business will continue. Options for resolving questions, or at least narrowing the uncertainties exist. In appropriate situations, tribal governments, their business partners and state and local governments may consider a course of action that will limit uncertainty and limit the need for litigation to resolve questions as they arise.
2. The greatest likelihood of state or local taxes being applicable to a tribal business enterprise is when the activities of the enterprise are conducted in corporate form (established under state or tribal law) or are conducted outside of Indian country.
3. Additional risk arises when a tribe or tribal business enterprise enters into a business arrangement with a non-tribal entity.
4. Legislative Action. Tribes may be able to persuade state legislatures to explicitly recognize the status of tribally created entities for tax purposes; and to adapt their tax statutes to reflect the way in which tribal governments function.
5. Declaratory remedies. In Oregon, the Department of Revenue has the authority to issue a declaratory ruling on the tax treatment of specific facts and transactions. Such a ruling is binding as between the department and the party requesting the ruling. See, ORS 305.105. Washington law provides similar authority under its administrative procedures act. See, RCW 34.05.240. Tribes have the option of going to federal court to obtain declarations on the applicability of particular state or local taxing schemes.
6. Intergovernmental agreements. ORS 190.110 authorizes state agencies and local governments in Oregon to enter into agreements to cooperate with a tribe or tribal agency in the exercise of similar government functions. Washington law has a comparable provision. See RCW 39.34.030.

Disclaimer

The statements contained in this outline represent the personal views of the presenter who wrote them, and do not necessarily represent the views or positions of the presenters' clients or employers, past or present.

Creative Ways to Monetize Tax

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Building Tax Credits into Business Deals

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Structuring tax incentives into business relationships should be tailored to meet the objectives and goals of the individual circumstances of each unique project and business relationship. Accordingly, it is important to identify one's assets, goals and objectives early in the process. An effective way to do this is to develop a business plan which can be the basis for evaluating appropriate partners, incentives and business structures.

Develop a Business Plan

To develop the business plan, evaluate the goals and objective for the project: Is its main potential to: generate jobs, generate revenue, build capacity (portfolio, infrastructure, human), develop long-term relationships, other? Or some combination of these?

It is also critical to evaluate the needs, opportunities and constraints of any given project. For example, equity contributions, infrastructure, labor requirements/availability, access to markets/federal contracts, revenue potential, capital cost, risk attributes of the project.

Sample Business Plan: Wind Project.

The Project has the potential to generate significant job creation during construction only and to generate significant revenue; high capital cost; good access to energy markets; risk attributes include energy and renewable energy purchase contracts and transmission integration. The tribal sponsor has limited appetite for risk but does have some potential equity to contribute to project and desires to have long-term ownership of asset on tribal lands.

A primary objective for the project is to take advantage of revenue within the risk and ownership profile of the tribal sponsor. Given the high capital cost this probably means identifying strategies to reduce the capital cost and/or the cost of capital and may not prioritize initial tribal ownership of the project.

Evaluate Range of Potential Incentives

- Loan Guarantees; Low Interest Loans
- Tax Exempt/Low Interest Bonds
- Production Tax Credits (energy)
- Investment Tax Credits (energy)
- New Market Tax Credits
- Indian Wage Tax Credits
- State Tax exemptions/programs
 - Enterprise Zone Tax benefits
 - Strategic Investment Programs

Enlist a tax professional to assist in your evaluation of the magnitude and constraints associated with each incentive and/or a combination of incentives. If you and your partner are willing to be

flexible in the structure, it may have the benefit of enabling multiple incentives to be used and reaching goals more quickly.

For example, if the tribal sponsor of the wind project has contributions (cash, equipment, in kind, property) that can be credited as a 30% equity position with a partner and receive pro-rata distributions, such a structure may erode the benefit of the PTC and the local tax exemption under the Reservation Enterprise Zone. A better strategy may be to structure as nominal equity with a flip, or a landlord with a purchase option. The added tax incentive can speed equity return for the partner (and the flip) or produce more revenue for participation rent, for example, or for other financial terms of the relationship.

Caution: With added layering can come added complexity and cost of financing. Make sure the benefits merit such additional complexity and cost.

Business Terms

Once you settle on incentives, how you treat those incentives within the business structure and relationship should be targeted to meet your business plan goals and your partner's goals—it is best to align interests as much as possible. Not all elements of a business relationship will have a direct economic tie to the incentive value, but consider the incentive allocation as one element of the overall business relationship. Consider other attributes of siting a project on trust land and/or tribe as partner as part of the benefit mix (e.g., availability or cost of services, permitting, post-flip scenarios). A solid overall relationship is key to ensuring realization of these goals and minimizing/mitigating risk.

Structure allocation of tax incentive benefits

- Leverage them to lower capital cost or cost of capital
- Apply them to revenue (rate of return/flip/rental)
- Apply them as a purchase option credit
- Apply them for other project goals/attributes
 - training
 - job creation
 - infrastructure
 - services
 - community programs
 - natural and/or treaty resource enhancement
- Align with risk allocation

Reserve rights for potential future upsides

- Reserve sovereign right of taxation/development charges—within limits
- Reserve access to infrastructure or to install infrastructure (e.g., communications equipment on transmission facilities; right to install fiber optic cable along pipeline trench during construction; right to install generating unit on dam; upsize infrastructure)
- Reserve contracting/hiring preferences (SBA 8(a), tribal member preference)
- Consider what other tribal projects may benefit from reserved rights

Coordination/Collaboration

- Build in clauses to ensure information sharing, close coordination

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Michael Mason, an attorney and lobbyist, represents the Confederated Tribes of Warm Springs, Coquille Economic Development Cooperation, Native American Rehabilitation Association, Confederated Tribes of Siletz and Oregon Law Center. He also serves as President of Legal Aid Services of Oregon.

TRIBAL TAX AND BUSINESS DEVELOPMENT: BUILDING SOVEREIGNTY AND ADDING REVENUE IN INDIAN COUNTRY

CREATIVE WAYS TO MONETIZE TAX

WEAVING GOVERNMENT-TO-GOVERNMENT NETS

Michael D. Mason, Attorney at Law

November 10, 2011

I. INTRODUCTION: The Legislature In Session: Too Fast and Loose For Attorneys?

Like tribal leaders, most lawyers find the Legislative Assembly a very challenging environment. There are few apparent rules and the pace is maddeningly swift as the people's branch rumbles toward adjournment sine die. The products of the process often bear little resemblance to the dreamed of result. Still, the record of the Oregon Legislative Assembly in Indian Affairs is heartening, thanks to some legislators and staff who are dedicated to a strong relationship with tribes and to enhancing the climate for business development in tribal communities.

II. OBSTACLES TO TRIBAL REPRESENTATION IN SALEM

A. Democracy Does Not Work For Indians

1. Numbers and (Not Much) Representation: Of 30 Oregon senators, only six have reservations or trust land in their districts, a number 1/3 smaller than the tribes in our state. Throw in the senator with Chemawa Indian School and we are up to seven. This sharply limited representation is partly because four reservations are bounded by one senator's coastal district. Of 60 representatives, only 10 represent reservation or trust land. Because of the limited view of representation—democracy is all about people, not land—some of this select few may not understand that they represent a tribe. This misunderstanding has occurred when a district includes land that does not have more than a few Indian people living there.
2. Countering With Breadth: Significance of Ceded Areas and Service Areas
 - a. Treaty Ceded Areas include most of Oregon and can be helpful in making a legislator aware of a tribe's presence in her district. However, the actual number of legislative districts overlapping Ceded Areas where treaty activities are conducted, that do not also include trust land, is quite few.
 - b. Service Areas of restored tribes, overlapping as they do all major urban areas, are much more helpful to expanding legislative representation of tribes. These areas, drawn along county lines, reflected the tribal population centers that grew during the Termination Era and existed at the time of tribal restoration.

The following statutory service areas demonstrate the reach of most restored tribes into legislative districts:

- i. Confederated Tribes of Coos, Lower Umpqua & Siuslaw: Coos, Curry, Douglas, Lane & Lincoln Counties. Pub. L. 98-481, 98 Stat. 2250, 25 U.S.C. 714a(a).
 - ii. Confederated Tribes of the Grand Ronde Community of Oregon: Marion, Multnomah, Polk, Tillamook, Washington & Yamhill Counties. Pub. L. 98-165, 97 Stat. 1064, 25 U.S.C. 713b(c).
 - iii. Confederated Tribes of Siletz Indians: Benton, Lane, Lincoln, Linn, Marion, Polk, Tillamook & Yamhill. Pub. L. 95-195, 91 Stat. 1415, 25 U.S.C. 711a.
 - iv. Coquille Tribe: Coos, Curry, Douglas, Jackson & Lane Counties. Pub. L. 101-42, 103 Stat. 91, 25 U.S.C. 715(5).
- c. Service areas of Confederated Tribes of Umatilla and Warm Springs also extend beyond reservation counties. The Umatilla Service Area includes most of NE Oregon, while the Warm Springs' covers Central Oregon, Columbia River Gorge, and Multnomah County.

So Service Area legislators include those from every major metropolitan area in the state. Combining all districts in and around Portland, Eugene/Springfield, Salem, Medford, and Beaverton with reservation/trust land districts gives tribes a supermajority of legislators in both houses. Tribal activity in the Service Areas develops goodwill and demonstrates commitment to the communities of most legislators.

B. Few Others Share the Worldview of Indian People

1. Fundamentally, almost no one among elected officials comprehends Indian people's continuing connection and commitment to the land, the water, and the beings that remain after the concerted efforts of the Hudson's Bay Co. and the United States over a century and a half.
2. Time and history are practically in parallel universes.
 - a. As the U.S. fought the Spanish-American War and built an overseas empire, tribes here were struggling with the U.S. government's breaking up of reservations and forcing land ownership by nuclear families.
 - b. When Prohibition dominated the national debate, corrupted law enforcement, and swamped the courts, the Tribes saw no impact as their reservations were all dry. Their major crisis was the devastation of fisheries by the voracious fish wheels.
 - c. When the U.S. surged to an unprecedented period of prosperity and industrial might, sacrificing Celilo in the process, tribes in the NW and California fought the U.S. government for their very existence.

3. Some lobbyists are actively hostile to the very idea of treasuring the land while promoting economic development. Some experience severe cognitive dissonance when observing a mill-owning tribe lobbying to reduce industrial toxic emissions.

III. EFFECTIVE LOBBYING REQUIRES FOUNDATIONAL WORK

A. Education and Forgetfulness -- Starting the conversation when historical memory is so impaired is probably the biggest challenge. So few nonIndians know the major tragedies and triumphs of tribes in Oregon, let alone current challenges.

1. Importance of Treaties: example of freshman representative hostility from district that had not seen a reservation since territorial days.
2. Rebuilding the Government-To-Government Relationship Is a Process, Not a Set of Bills

B. Senate Bill 770: Roof beam for Tribal-State government-to-government relationship passed in 2001; requires Governor to convene annual State-Tribal summits and state agencies to submit progress reports to Governor and Legislative Commission on Indian Services on communications and problem solving with tribes. ORS 182.162-182.168. Each agency must have a tribal liaison. ORS 182.164.

1. The LCIS has worked diligently over the SB 770 Decade to ensure that agencies understand that quarterly meetings of issue groups from state and tribal departments are essential for communication and problem solving.

C. Statutes Flowing From the SB 770 Process (bill nos. in **bold** intended to promote economic development:

1. Senate Bill 180 – From SB 770, included Tribes as governments to receive ODOT Special Transportation Fund grants for elder and disabled transport in 2003; ended application through counties (administration bill). ORS 184.675, 391.800, 391.810, 391.815, 391.820, and 391.830.
2. Senate Bill 362 – Required local governments and state agencies to change “S”-word place names, required consideration of Native language names, 2005. ORS 271.600.
3. Senate Bill 878 – Restored Oregon Health Plan Plus coverage for Indians; fully reimbursed by Medicare funds, 2003. ORS 414.025.
4. Senate Bill 855 -- Requires Department of Human Services to turn over Title V Maternal and Child Health Services Block Grant dollars to Tribes upon request and negotiate for other federal health dollars, 2005. ORS 431.375.
5. House Bill 2674 – Allows Tribes’ libraries to obtain state library funds, 2005. ORS 357.206 and 357.212.

6. Senate Joint Resolution 12 -- Directs state agencies and urges local governments to honor the promises of the 1855 Treaty With the Tribes of Middle Oregon, 2005.
7. **Senate Bill 589** -- Extends and makes permanent property tax exemption for tribal lands in the trust acquisition process. Response to undue delays in Department of the Interior's processing of tribes' trust acquisition requests during the '00's, that went longer than the original 5-year duration of the exemption. ORS 307.181.
8. **Senate Bill 726** -- Reservation Enterprise Zone expansion to all nine tribes with capitals in Oregon both on reservation and on trust land off-reservation (originally passed in 2001 at request of Warm Springs Tribes for reservation land only) and authorization of Tribal Partnership Enterprise Zones with cities, counties, and port districts. ORS 285C.306 and 285C.320.
9. **House Bill 3680**, Sec. 18-28 – 2010 Session follow on to SB 726 to clarify that tribes and local governments can partner with local governments to designate partnership enterprise zones on any reservation and tribal trust land of the nine tribes of Oregon. ORS 285C.050, 285C.090, 285C.115, 285C.245, 285C.255, 285C.300, 285C.309, 285C.320, and 314.752.
 - a. Extends sunset on the Reservation Enterprise Zone Tax Credit from 2014 to 2018 (imposed in 2009 by the Omnibus Tax Credit Sunset Act). See ORS 285C.309.
 - b. Applies the REZ Tax Credit to the new reservation partnership enterprise zones. ORS 285C.309 and 314.752.
10. **Senate Bill 412** – Establishes process for full peace officer status for tribal police throughout Oregon and concomitant cooperation between tribal and state and local law enforcement. The bill sets training, certification, tort claims, evidence, and public access to records requirements on tribal police operating outside of Indian Country that match requirements for Oregon State Police. ORS 40.275, 90.440, 131.605, 133.005, 133.033, 133.318, 133.525, 133.721, 133.726, 136.595, 147.425, 153.005, 161.015, 163.730, 165.535, 181.010, 181.781, 181.783, 181.796, 348.270, 414.805, 419B902, 420.905, 801.395, 810.410, 811.720, and 830.005.
11. House Bill 2566 was a tribal effort to achieve property tax equity with state/local governments based on use of property rather than location of or federal interest in the property. HB 2566 would have extended the government property tax exemption to tribal property held in fee—real and personal--beyond Indian Country. As with state/local government property, the tax exemption would only apply to tribal property used for governmental purposes. The House Revenue Committee plans to consider such a bill during the 2012 Legislative Session.

E. The bills passed are only important to the extent that they express legislators' belief in the government-to-government relationship and a commitment to expanding it.

1. Constant need for education, especially about the benefits tribes bestow on surrounding communities.

2. Success in lobbying is most evident when legislators move on to statewide and federal office and apply their knowledge of Indian affairs.

A note about intertribal protocol and legislative candidates: The fact of tribal economic development encourages candidates to treat tribes as businesses for purposes of campaign giving. Contribution requests create an opportunity for educating candidates about tribal history, especially aboriginal territory and former reservation areas.

Attachments: Senate Bills 770, 589, 726, and 412 (1st six pp.) and HB 2566.

Enrolled Senate Bill 770

Sponsored by Senators BROWN, CLARNO; Senators CASTILLO, CORCORAN, DECKERT, FERRIOLI, GORDLY, MESSERLE, METSGER, NELSON, SHIELDS, STARR, TROW, Representatives GARDNER, KNOPP, KRIEGER, MONNES ANDERSON, NOLAN, ROSENBAUM, G SMITH, VERGER, V WALKER, WESTLUND (at the request of Commission on Indian Services)

CHAPTER

AN ACT

Relating to government-to-government relations between the State of Oregon and American Indian tribes in Oregon.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 4 of this 2001 Act:

(1) "State agency" has the meaning given that term in ORS 358.635.

(2) "Tribe" means a federally recognized Indian tribe in Oregon.

SECTION 2. (1) A state agency shall develop and implement a policy that:

(a) Identifies individuals in the state agency who are responsible for developing and implementing programs of the state agency that affect tribes.

(b) Establishes a process to identify the programs of the state agency that affect tribes.

(c) Promotes communication between the state agency and tribes.

(d) Promotes positive government-to-government relations between the state and tribes.

(e) Establishes a method for notifying employees of the state agency of the provisions of sections 1 to 4 of this 2001 Act and the policy the state agency adopts under this section.

(2) In the process of identifying and developing the programs of the state agency that affect tribes, a state agency shall include representatives designated by the tribes.

(3) A state agency shall make a reasonable effort to cooperate with tribes in the development and implementation of programs of the state agency that affect tribes, including the use of agreements authorized by ORS 190.110.

SECTION 3. (1) At least once a year, the Oregon Department of Administrative Services, in consultation with the Commission on Indian Services, shall provide training to state agency managers and employees who have regular communication with tribes on the legal status of tribes, the legal rights of members of tribes and issues of concern to tribes.

(2) Once a year, the Governor shall convene a meeting at which representatives of state agencies and tribes may work together to achieve mutual goals.

(3) No later than December 15 of every year, a state agency shall submit a report to the Governor and to the Commission on Indian Services on the activities of the state agency under sections 1 to 4 of this 2001 Act. The report shall include:

(a) The policy the state agency adopted under section 2 of this 2001 Act.

(b) The names of the individuals in the state agency who are responsible for developing and implementing programs of the state agency that affect tribes.

(c) The process the state agency established to identify the programs of the state agency that affect tribes.

(d) The efforts of the state agency to promote communication between the state agency and tribes and government-to-government relations between the state and tribes.

(e) A description of the training required by subsection (1) of this section.

(f) The method the state agency established for notifying employees of the state agency of the provisions of sections 1 to 4 of this 2001 Act and the policy the state agency adopts under section 2 of this 2001 Act.

SECTION 4. Nothing in sections 1 to 4 of this 2001 Act creates a right of action against a state agency or a right of review of an action of a state agency.

Passed by Senate April 2, 2001

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Secretary of Senate

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President of Senate

Passed by House May 11, 2001

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Speaker of House

Received by Governor:

.....M.,....., 2001

Approved:

.....M.,....., 2001

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Governor

Filed in Office of Secretary of State:

.....M.,....., 2001

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Secretary of State

Enrolled Senate Bill 589

Sponsored by Senators FERRIOLI, DEVLIN, TELFER; Senators ATKINSON, MORRISETTE, ROSENBAUM, VERGER, Representatives HUFFMAN, RILEY, ROBLAN

CHAPTER

AN ACT

Relating to taxation of Indian tribal land; creating new provisions; amending ORS 307.181; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 307.181 is amended to read:

307.181. (1)[(a)] Land acquired by an Indian tribe by purchase, gift or without consideration is exempt from taxation if:

[(A)] (a) The land is located within the ancient tribal boundaries of the tribe; and

[(B) *Transfer of the land to a trust administered by the United States has been requested or is in process.*]

(b) Acquisition of the land by the United States in trust status has been requested or is in process.

[(b) The exemption under this section shall continue for no more than four years after the initial year of exemption under this section. If the land is not transferred to the trust within the five-tax-year exemption period, the exemption pursuant to this subsection shall cease commencing with the first tax year beginning after the expiration of the five-tax-year period.]

[(2) Property may not be exempt under this section for a tax year beginning on or after July 1, 2012.]

(2) The exemption under this section ceases if the federal government enters a final administrative determination denying the request for acquisition of the land in trust status and:

(a) The deadlines for all available federal administrative appeals and federal judicial review expire with no appeal or review initiated; or

(b) All federal administrative and judicial proceedings arising from or related to the request for or process of acquisition of the land in trust status that have been initiated are completed without overturning the administrative denial of the request.

SECTION 2. The amendments to ORS 307.181 by section 1 of this 2009 Act apply to property tax years beginning on or after July 1, 2008.

SECTION 3. This 2009 Act takes effect on the 91st day after the date on which the regular session of the Seventy-fifth Legislative Assembly adjourns sine die.

Passed by Senate April 6, 2009

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Secretary of Senate

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President of Senate

Passed by House June 2, 2009

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Speaker of House

Received by Governor:

.....M.,....., 2009

Approved:

.....M.,....., 2009

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Governor

Filed in Office of Secretary of State:

.....M.,....., 2009

.....
Secretary of State

Enrolled Senate Bill 726

Sponsored by Senator FERRIOLI; Senators ATKINSON, BOQUIST, DEVLIN, KRUSE, TELFER, VERGER, Representatives BERGER, FREEMAN, HUFFMAN, JENSON, KAHL, RILEY, ROBLAN, G SMITH, WHISNANT

CHAPTER

AN ACT

Relating to reservation enterprise zones; amending ORS 285C.306 and 285C.320.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 285C.306 is amended to read:

285C.306. *[(1) Trust land of an Indian tribe that meets all of the following requirements is designated as a reservation enterprise zone for the purposes of ORS 285C.300 to 285C.320:]*

(1) As used in this section, “eligible Indian tribe” means each of the Burns Paiute Tribe, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes of Siletz Indians of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of Warm Springs, the Coquille Indian Tribe, the Cow Creek Band of Umpqua Tribe of Indians and the Klamath Tribes, as long as each remains a federally recognized Indian tribe.

(2)(a) The government of an eligible Indian tribe may request the Economic and Community Development Department to designate one reservation enterprise zone. The reservation enterprise zone may cover an area of no more than 12 square miles, which does not have to be contiguous.

[(a) The Indian tribe is a federally recognized Indian tribe;]

[(b) The reservation of the Indian tribe is entirely within the boundaries of this state;]

[(c)] (b) Upon request, the department shall designate a reservation enterprise zone if the land for which zone designation is sought is:

(A) Land held in trust by the United States for the benefit of the *[Indian tribe and is]* tribe;

(B) Land for which an application to transfer the land into trust has been filed with the federal government and is pending; or

(C) Land that is located *[entirely]* within the boundaries of the tribe’s reservation[;].

(c) Land designated as a reservation enterprise zone pursuant to paragraph (b)(A) or (B) of this subsection may be outside the boundaries of the tribe’s reservation.

[(d) Fifty percent or more of the households within the boundaries of the reservation have incomes below 80 percent of the median income of this state, as defined by the most recent federal decennial census; and]

[(e) The unemployment rate within the reservation for all enrolled members of the tribe is at least 2.0 percentage points greater than the comparable unemployment rate for this state, as defined by the most recently available data published or officially provided and verified by the United States Gov-

ernment, the Employment Department, the Portland State University Population Research Center or a special study conducted under a contract with a regional academic institution.]

[(2) At the request of a tribal government, the Economic and Community Development Department shall determine if trust land is designated as a reservation enterprise zone under this section.]

(3)(a) **The government of an eligible Indian tribe may cosponsor a reservation partnership zone comprising an area of up to 12 square miles. A reservation partnership zone includes lands within the jurisdiction of a cosponsoring city, county or port and may include both lands held in trust by the federal government for the benefit of the tribe and lands within the boundaries of the tribe's reservation.**

(b) **A reservation partnership zone must be cosponsored by the government of an eligible Indian tribe and a city, county or port pursuant to an agreement formed under ORS 190.110 to perform the duties imposed on a sponsor under ORS 285C.050 to 285C.250.**

SECTION 2. ORS 285C.320 is amended to read:

285C.320. (1) A reservation enterprise zone [*shall be considered to be*] **is** a rural enterprise zone for purposes of ORS 285C.050 to 285C.250. The tribal government of the reservation [*shall be considered to be*] **is** the sponsor of the reservation enterprise zone.

(2) Reservation enterprise zones may not be taken into account in determining the number of rural enterprise zones allowable in this state under ORS 285C.050 to 285C.250, and are not subject to numerical limitation under ORS 285C.050 to 285C.250.

(3) **Exemptions and tax credits available in connection with an enterprise zone are available in connection with a reservation enterprise zone.** In order for property within a reservation enterprise zone to be exempt under ORS 285C.175, the business firm and property must meet [*all of*] the requirements applicable to business firms and property in [*any rural*] **an** enterprise zone.

(4) As used in this section, "business firm" has the meaning given that term in ORS 285C.050.

Passed by Senate June 11, 2009

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Secretary of Senate

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President of Senate

Passed by House June 22, 2009

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Speaker of House

Received by Governor:

.....M.,....., 2009

Approved:

.....M.,....., 2009

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Governor

Filed in Office of Secretary of State:

.....M.,....., 2009

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Secretary of State

Enrolled Senate Bill 412

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary)

CHAPTER

AN ACT

Relating to tribal police officers; creating new provisions; amending ORS 40.275, 90.440, 131.605, 133.005, 133.033, 133.318, 133.525, 133.721, 133.726, 136.595, 147.425, 153.005, 161.015, 163.730, 165.535, 181.010, 181.610, 181.781, 181.783, 181.796, 348.270, 414.805, 419B.902, 420.905, 801.395, 810.410, 811.720 and 830.005; repealing sections 4, 14, 15, 16, 17, 23, 24 and 39, chapter 506, Oregon Laws 2011 (Enrolled Senate Bill 405); and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 4 of this 2011 Act:

- (1) "Authorized tribal police officer" means a tribal police officer who is acting:**
 - (a) In accordance with sections 1 to 4 of this 2011 Act; and**
 - (b) While employed by a tribal government that is in compliance with sections 1 to 4 of this 2011 Act.**
- (2) "Indian country" has the meaning given that term in 18 U.S.C. 1151.**
- (3) "Tribal government" means a federally recognized sovereign tribal government whose borders lie within this state or an intertribal organization formed by two or more of those governments.**
- (4) "Tribal police officer" means an employee of a tribal government whose duties include the enforcement of criminal law.**

SECTION 2. A tribal police officer is eligible to act as an authorized tribal police officer if the officer:

- (1) Is acting within the scope of employment as a tribal police officer;**
- (2) Is certified as a police officer under the provisions of ORS 181.610 to 181.712;**
- (3) Is in compliance with any rules adopted by the Department of Public Safety Standards and Training under sections 1 to 4 of this 2011 Act; and**
- (4) Is employed by a tribal government that:**
 - (a) Is in compliance with the requirements of ORS 181.610 to 181.712 applicable to a law enforcement unit as defined in ORS 181.610;**
 - (b) Is in compliance with sections 1 to 4 of this 2011 Act and any rules adopted by the department under sections 1 to 4 of this 2011 Act;**
 - (c) Has submitted to the department the resolution and documents described in section 3 of this 2011 Act;**
 - (d) Has adopted a provision of tribal law:**

(A) That requires the tribal government to participate in, and be bound by, a deadly physical force plan approved under ORS 181.781 to 181.796, to the same extent that the county sheriff is required to participate in, and be bound by, the plan;

(B) That requires the tribal government to retain records related to the exercise of the authority granted to authorized tribal police officers under sections 1 to 4 of this 2011 Act in a manner substantially similar to the manner in which the provisions of ORS 192.005 to 192.170 require the Department of State Police to retain public records;

(C) That provides members of the public with the right to inspect records of the tribal government related to the exercise of the authority granted to authorized tribal police officers under sections 1 to 4 of this 2011 Act in a manner substantially similar to the manner in which the provisions of ORS 192.410 to 192.505 provide members of the public with the right to inspect public records of the Department of State Police;

(D) That requires the tribal government to preserve biological evidence in a manner substantially similar to sections 2 to 6, chapter 275, Oregon Laws 2011, when the biological evidence:

(i) Is collected as part of a criminal investigation, conducted by an authorized tribal police officer, into a covered offense as defined in section 2, chapter 275, Oregon Laws 2011; or

(ii) Is otherwise in the possession of the tribal government and reasonably may be used to incriminate or exculpate any person for a covered offense as defined in section 2, chapter 275, Oregon Laws 2011; and

(E) That waives sovereign immunity, in a manner similar to the waiver expressed in ORS 30.260 to 30.300, as to tort claims asserted in the tribal government's court that arise from the conduct of an authorized tribal police officer. The waiver described in this subparagraph:

(i) Must apply to the conduct of an authorized tribal police officer that occurs while the provision of tribal law is in effect;

(ii) Must allow for recovery against the tribal government in an amount equal to or greater than the amounts described in ORS 30.260 to 30.300 that are applicable to a local public body;

(iii) May require that the claim be asserted in accordance with any applicable tort claims procedures of the tribal government; and

(iv) May exclude claims that could be brought in federal court under the Federal Tort Claims Act; and

(e) Has adopted or is exempt from adopting, in accordance with this paragraph, a written pretrial discovery policy that describes how a tribal government and its authorized tribal police officers will assist the district attorney, in criminal prosecutions conducted in state court in which an authorized tribal police officer arrested or cited the defendant, in meeting the pretrial discovery obligations imposed on the state by ORS 135.805 to 135.873. The process for adopting, and determining whether a tribal government is exempt from adopting, a written pretrial discovery policy is as follows:

(A) A tribal government may request in writing that the sheriff of a county with land that is contiguous to the land of the tribal government provide the tribal government with a copy of any written pretrial discovery policy adopted by the sheriff that describes how the sheriff's office assists the district attorney in meeting the pretrial discovery obligations imposed by ORS 135.805 to 135.873. Not later than 30 days after receiving the request, the sheriff shall provide the tribal government with a copy of the policy or notify the tribal government that the sheriff has not adopted the policy.

(B) If a tribal government fails to submit a written request to each sheriff of a county that is contiguous to the land of the tribal government or if each sheriff has adopted a written pretrial discovery policy described in subparagraph (A) of this paragraph, the tribal government shall, not later than 90 days after the effective date of this 2011 Act, adopt a written pretrial discovery policy.

(C) A tribal government may create and adopt a written pretrial discovery policy or may adopt the written pretrial discovery policy adopted by the sheriff of a county with land that is contiguous to the land of the tribal government.

(D) If the sheriff of any county with land that is contiguous to the land of the tribal government has not, on the date the sheriff receives a request described in subparagraph (A) of this paragraph, adopted a written pretrial discovery policy, the tribal government is exempt from adopting a written pretrial discovery policy.

SECTION 3. (1) The Legislative Assembly finds and declares that the purpose of sections 1 to 4 of this 2011 Act is to provide authorized tribal police officers with a limited ability to exercise the powers of, and to receive the same authority and protections provided to, law enforcement officers under the laws of this state, without incurring any additional costs or loss of revenue to the State of Oregon or a political subdivision of the State of Oregon.

(2) Notwithstanding section 2 of this 2011 Act, a tribal police officer may not act as an authorized tribal police officer outside of Indian country, unless the officer:

- (a) Is investigating an offense alleged to have been committed within Indian country;
- (b) Leaves Indian country in fresh pursuit as defined in ORS 133.420;
- (c) Is acting in response to an offense committed in the officer's presence; or
- (d) Has received the express approval of a law enforcement agency having jurisdiction over the geographic area in which the tribal police officer is acting.

(3) When an authorized tribal police officer issues a citation for the commission of an offense for which the State of Oregon has jurisdiction and the tribal government employing the officer does not have jurisdiction, the citation must:

- (a) Summon the person cited to appear in the circuit court of the county in which the offense was committed; and
- (b) Be submitted to the district attorney of the county in which the offense was committed.

(4) A tribal government that employs tribal police officers may submit to the Department of Public Safety Standards and Training a resolution declaring that the tribal government is self-insured or has purchased and maintains in force:

- (a) Public liability and property damage insurance for vehicles operated by authorized tribal police officers; and
- (b) Police professional liability insurance from a company licensed to sell insurance in this state.

(5) The tribal government shall attach the following documents to the resolution submitted to the department under subsection (4) of this section:

(a) A declaration that the tribal government has complied with the requirements of sections 1 to 4 of this 2011 Act; and

(b)(A) A full copy of the public liability and property damage insurance policy for vehicles operated by the tribal government's authorized tribal police officers and a full copy of the police professional liability insurance policy from a company licensed to sell insurance in this state; or

(B) A description of the tribal government's self-insurance program.

(6) A self-insurance program or insurance policy described in subsections (4) and (5) of this section must provide:

(a) That the self-insurance program or insurance policy is available to satisfy settlements and judgments arising from the tortious conduct of authorized tribal police officers in an amount equal to or greater than the amounts described in ORS 30.260 to 30.300 that are applicable to a local public body; and

(b) That the tribal government and the insurance carrier will not raise the defense of sovereign immunity for claims that are asserted in the tribal government's court and involve the tortious conduct of an authorized tribal police officer, provided that the claims:

(A) Are asserted in accordance with any applicable tort claims procedures of the tribal government; and

(B) Could not be brought in federal court under the Federal Tort Claims Act.

(7) If, after submitting the resolution and documents described in subsections (4) and (5) of this section, there is a material change in the tribal government's self-insurance program or insurance policy, the tribal government shall file with the department a written description of the change within 30 days of the effective date of the change.

(8) The department shall maintain a file of submissions made by tribal governments under this section. The department shall permit inspection and copying of the submissions in accordance with ORS 192.410 to 192.505.

(9) For purposes of ORS 30.260 to 30.300, an authorized tribal police officer is not an officer, employee or agent of the State of Oregon or of any other public body as defined in ORS 174.109. A public body or an officer, employee or agent of a public body is not liable for certifying a tribal police officer under ORS 181.610 to 181.712, for accepting for filing the resolution and documents described in subsections (4) and (5) of this section or for the acts or omissions of an authorized tribal police officer.

(10) Nothing in sections 1 to 4 of this 2011 Act:

(a) Affects the authority of a county sheriff to appoint duly commissioned police officers as deputy sheriffs authorized to enforce the criminal and traffic laws of the State of Oregon;

(b) Affects the existing status and sovereignty of tribal governments whose traditional lands and territories lie within the borders of the State of Oregon as established under the laws of the United States; or

(c) Authorizes a tribal government to receive funds from, or in lieu of, the State of Oregon or a political subdivision of the State of Oregon.

(11) A tribal government or tribal police department is not a seizing agency for purposes of ORS 131.550 to 131.600 or ORS chapter 131A.

(12) The department may adopt rules to carry out the provisions of sections 1 to 4 of this 2011 Act and shall require tribal governments that employ authorized tribal police officers to reimburse the department for any costs incurred in carrying out the provisions of sections 1 to 4 of this 2011 Act.

SECTION 4. (1) Not later than 90 days after the effective date of this 2011 Act, the Superintendent of State Police, the sheriff of any county with land that is contiguous to the land of a tribal government, or the chief executive officer of any other local law enforcement unit whose political boundaries are contiguous to the land of a tribal government, may submit a written application requesting that the tribal government authorize nontribal police officers employed by the applicant to exercise all or a portion of the powers of a tribal police officer while on tribal land. The application shall be addressed to the tribal government and shall propose terms and conditions under which the nontribal police officers employed by the applicant would be eligible to exercise all or a portion of the powers of a tribal police officer while on tribal lands. The application:

(a) Must name each proposed nontribal police officer employed by the applicant;

(b) Must describe how the nontribal police officers employed by the applicant will comply with requirements established by the tribal government that are substantially similar to the requirements necessary for a tribal police officer to act as an authorized tribal police officer under sections 1 to 4 of this 2011 Act;

(c) Must describe how the political entity that employs the nontribal police officers will comply with requirements established by the tribal government that are substantially similar to the requirements necessary for a tribal government to employ authorized tribal police officers under sections 1 to 4 of this 2011 Act;

(d) May propose that the tribal government authorize nontribal police officers employed by the applicant to enforce state or tribal law while on tribal lands;

(e) May propose that the tribal government adopt provisions of state criminal law into the tribal code; and

(f) Must indicate that the nontribal police officers employed by the applicant will complete, before exercising all or a portion of the powers of a tribal police officer while on tribal land, any training and educational prerequisites specified by the tribal government, including instruction in the tribal government's history, culture, sovereign authority, tribal code and court procedures.

(2) When a citation for the commission of a tribal offense is issued by a nontribal police officer employed by an applicant and authorized by a tribal government to exercise all or a portion of the powers of a tribal police officer as to tribal members suspected of committing violations of tribal law while on tribal land, the citation must:

(a) Summon the person cited to appear in the tribal court of the tribal government on whose lands the offense was committed; and

(b) Be submitted to the prosecutor of the tribal government on whose lands the tribal offense was committed.

(3)(a) A tribal government may adopt a provision of tribal law providing that, for purposes of the Tort Claims Act of the tribal government, a nontribal police officer employed by an applicant and authorized by a tribal government to exercise all or a portion of the powers of a tribal police officer while on tribal land is not an officer, employee or agent of the tribal government.

(b) Unless the law of the tribal government provides otherwise, a tribal government is not liable for authorizing a nontribal police officer employed by an applicant to exercise all or a portion of the powers of a tribal police officer while on tribal land or for the acts or omissions of a nontribal police officer authorized under this section.

(4) Nothing in this section:

(a) Affects the authority of the tribal government to appoint any person as a tribal police officer for any purpose;

(b) Affects the existing status and sovereignty of the State of Oregon or the tribal government; or

(c) Authorizes the State of Oregon or any of its political subdivisions to receive funds from, or in lieu of, a tribal government.

(5) A tribal government that authorizes a nontribal police officer employed by an applicant to exercise all or a portion of the powers of a tribal police officer while on tribal land may require the applicant to reimburse the tribal government for any costs incurred in carrying out the provisions of this section.

(6)(a) A tribal government that employs, or seeks to employ, authorized tribal police officers under sections 1 to 4 of this 2011 Act, no later than 90 days after receiving an application under subsection (1) of this section, or within such additional time as the tribal government determines is appropriate, shall accept, accept with modifications or reject an application filed under this section.

(b) Before acting on an application, a tribal government that employs, or seeks to employ, authorized tribal police officers shall engage in good faith consultation with the applicant concerning the terms and conditions of the proposed authorization of nontribal police officers.

(7)(a) If the tribal government rejects the application, or accepts the application with modifications that are rejected by the applicant:

(A) The applicant and a tribal government that employs, or seeks to employ, authorized tribal police officers shall, from the date of rejection until June 1, 2012, collect individualized data on the frequency of instances known to the applicant or the tribal government in which nontribal police officers employed by the applicant encountered, but were forced to release without further action due to a lack of legal authority, persons suspected of committing violations of the law while on tribal lands;

(B) The applicant shall promptly report any such instance to the tribal government and the tribal government shall promptly report any such instance to the applicant;

(C) The applicant and tribal government shall classify the suspected offenses according to their potential to endanger public safety; and

(D) The tribal government and applicant shall engage in good faith consultation concerning the collection and classification of data; and

(b) No later than September 1, 2013, the tribal government shall report to the Legislative Assembly, in the manner provided in ORS 192.245, on the data collected under paragraph (a) of this subsection. The tribal government and the applicant shall engage in good faith consultation concerning the contents of the report.

SECTION 5. Sections 1 to 4 of this 2011 Act become operative on the effective date of this 2011 Act.

PROVISIONS APPLICABLE FROM JULY 1, 2013, TO JUNE 30, 2015

SECTION 6. Section 3 of this 2011 Act is amended to read:

Sec. 3. (1) The Legislative Assembly finds and declares that the purpose of sections 1 to 4 of this 2011 Act is to provide authorized tribal police officers with *[a limited]* **the** ability to exercise the powers of, and to receive the same authority and protections provided to, law enforcement officers under the laws of this state, without incurring any additional costs or loss of revenue to the State of Oregon or a political subdivision of the State of Oregon.

[(2) Notwithstanding section 2 of this 2011 Act, a tribal police officer may not act as an authorized tribal police officer outside of Indian country, unless the officer:]

[(a) Is investigating an offense alleged to have been committed within Indian country;]

[(b) Leaves Indian country in fresh pursuit as defined in ORS 133.420;]

[(c) Is acting in response to an offense committed in the officer's presence; or]

[(d) Has received the express approval of a law enforcement agency having jurisdiction over the geographic area in which the tribal police officer is acting.]

[(3)] **(2)** When an authorized tribal police officer issues a citation for the commission of an offense for which the State of Oregon has jurisdiction and the tribal government employing the officer does not have jurisdiction, the citation must:

(a) Summon the person cited to appear in the circuit court of the county in which the offense was committed; and

(b) Be submitted to the district attorney of the county in which the offense was committed.

[(4)] **(3)** A tribal government that employs tribal police officers may submit to the Department of Public Safety Standards and Training a resolution declaring that the tribal government is self-insured or has purchased and maintains in force:

(a) Public liability and property damage insurance for vehicles operated by authorized tribal police officers; and

(b) Police professional liability insurance from a company licensed to sell insurance in this state.

[(5)] **(4)** The tribal government shall attach the following documents to the resolution submitted to the department under subsection *[(4)]* **(3)** of this section:

(a) A declaration that the tribal government has complied with the requirements of sections 1 to 4 of this 2011 Act; and

(b)(A) A full copy of the public liability and property damage insurance policy for vehicles operated by the tribal government's authorized tribal police officers and a full copy of the police professional liability insurance policy from a company licensed to sell insurance in this state; or

(B) A description of the tribal government's self-insurance program.

[(6)] **(5)** A self-insurance program or insurance policy described in subsections *[(4) and (5)]* **(3) and (4)** of this section must provide:

House Bill 2566

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of House Interim Committee on Revenue)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Exempts from taxation property owned, acquired or possessed by Indian tribe in Oregon or by entity owned by Indian tribe in Oregon if property is used for government services.

Applies to tax years beginning on or after July 1, 2011.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

Relating to taxation of Indian tribe property; creating new provisions; amending ORS 307.090; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 307.090 is amended to read:

307.090. (1)(a) Except as provided by law, all property of the state and all public or corporate property used or intended for corporate purposes of the several counties, cities, towns, school districts, irrigation districts, drainage districts, ports, water districts, housing authorities and all other public or municipal corporations in this state, is exempt from taxation.

(b) All property owned, acquired or possessed by a federally recognized Indian tribe in Oregon or by an entity owned by a federally recognized Indian tribe in Oregon is exempt from taxation if the property is used for government services.

(2) [Any] A city may agree with [any] a school district to make payments in lieu of taxes on all property of the city located in [any such] the school district[,] and [which] that is exempt from taxation under subsection (1) of this section when [such] the property is outside the boundaries of the city and owned, used or operated for the production, transmission, distribution or furnishing of electric power or energy or electric service for or to the public.

(3) As used in this section, "government services" includes the provision of services related to tribal administration, tribal and public facilities, fire, police, tribal and public health, education, sewer, water, environmental and fish and wildlife management and restoration activities, land use, transportation, telecommunications, energy generation, utility services, traditional cultural uses, cemeteries, ceremonial cultural sites and the exercise of rights derived from treaties, intergovernmental agreements, statutes and other laws.

SECTION 2. The amendments to ORS 307.090 by section 1 of this 2011 Act apply to tax years beginning on or after July 1, 2011.

SECTION 3. This 2011 Act takes effect on the 91st day after the date on which the 2011 session of the Seventy-sixth Legislative Assembly adjourns sine die.

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

Bruce Zimmerman, CPA
Confederated Tribes of the Umatilla Reservation



**Confederated Tribes
of the
*Umatilla Indian Reservation***

**Tribal Tax & Business Development
Portland, OR
November 10, 2011**

**Bruce D. Zimmerman, CPA
Tax Administrator
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Pendleton, OR 97801
(541) 429-7484
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Monetizing Tax Credits & Benefits

To calculate the value (i.e. monetizing) of any tax credits or tax benefits is a complex and very **fact specific** exercise.

The first step is to ask some very basic questions:

- Who are the parties that are involved?
- What is the transaction or activity?
- Where is the activity or transaction occurring?

Monetizing Tax Credits & Benefits

Who

- Tribal Entities
 - Tribal Governmental Entities, Enterprises, Departments, etc.
 - Federally Chartered Entities (i.e. Section 17 Corporation)
 - Tribally Chartered Entities
 - State Chartered Entities
- Non-Tribal Entity or Person
- Type of Legal Organizational Structure
 - Wholly Owned
 - Separate Legal Entity, Subsidiary, Disregarded Entity, etc.
 - Joint Ownership
 - Corporation or Partnership (Note – Tribes can't be a stockholder of a Subchapter S Corp)
 - Non-Profit Entities

Monetizing Tax Credits & Benefits

What

- What is the activity or transaction?
 - Is the income generally classified or considered to be:
 - “Earned” Income
 - “Rental” Income
 - “Intangible” income
 - Who is controlling and/or performing the activity?
- What are the tax credits, benefits and tax issues that are involved?
 - Income Taxes
 - Property Taxes (Locally Assessed v. State Assessed)
 - Sales & Use Taxes
 - Franchise Taxes

Monetizing Tax Credits & Benefits

Where

- Reservation Lands
 - Trust Land
 - Who is the “owner” of the trust land?
 - Fee Land within a Reservation
- Off-Reservation Lands
 - Trust Land
 - Tribally owned off-Reservation fee land
 - Leased Land

Tools Available that can Help

- Leasing Agreements
 - Operating Leases
 - Capital Leases
- Sell & Lease Back Agreements
- Operating & Management Agreements
 - Structured Options and Buyout Provisions
- Royalty & Licensing Agreements

Rattlesnake Road Wind Farm



Key Attributes to Consider

- Who – Identify the Parties
- What is the activity: (Development and Operation of a Wind Farm)
 - Permit
 - Construct
 - Operate
- Where is the activity being conducted?
- What tax credits or benefits at issue?
 - 1603 Treasury grant program
 - Production Tax Credits (PTCs) / Investment Tax Credits (ITCs)
 - Depreciation Expense
 - State Enterprise Zone or Strategic Investment Program (SIP)
- What are the taxes at issue?
 - Income Taxes
 - Federal
 - State
 - Property Taxes (State Assessed Property)

Tribal Business Development

Howard G. Arnett

Karnopp Peterson LLP

Douglas C. MacCourt

Ater Wynne LLP

James Manion

Warm Springs Power and Water Enterprises

J.D. Williams

Williams Johnson LLP

Chad R. Wright

Marine View Ventures, Inc.

Howard G. Arnett
Karnopp Peterson LLP

Douglas C. MacCourt
Ater Wynne LLP

Douglas C. MacCourt

Douglas C. MacCourt, a partner with Ater Wynne LLP, serves as Chair of the firm's Indian Law Group, Co-Chair of the Sustainable Practices Advisory Group, and advises tribal governments and enterprises on environmental, energy, federal Indian law and property transactions. He concentrates his practice on environmental and natural resources law, energy development, land use, and property transactions. For the past 20 years, he has represented private and public sector clients to permit, construct and operate energy, industrial and economic development projects.

Mr. MacCourt has extensive experience with state and federal cleanup and hazardous waste laws, natural resources restoration and damages, endangered species, water rights and water quality issues associated with contaminated properties and spills. He advises client/consultant teams in all phases of local, state, and federal cleanup, development and natural resources permitting. He represents clients before state legislative bodies and Congress on appropriations and project matters and has successfully defended clients' rights on appeal before the Oregon Land Use Board of Appeals, Oregon Court of Appeals, U.S. District Court and U.S. Ninth Circuit Court of Appeals.

Mr. MacCourt is listed in *The Best Lawyers in America* in the Native American and Natural Resources Law categories. He holds a B.S., *cum laude*, from Humboldt State University and earned his J.D. from the University of Oregon.

ATERWYNNE LLP
ATTORNEYS AT LAW

Tribal Business Development

Renewable Energy Case Study

Shandiin Solar PV Project – New Mexico

Douglas C. MacCourt

Ater Wynne LLP

Tribal Tax & Business Development
November 10, 2011 – Portland, Oregon
The Seminar Group

ATERWYNNE LLP
ATTORNEYS AT LAW

Project Team



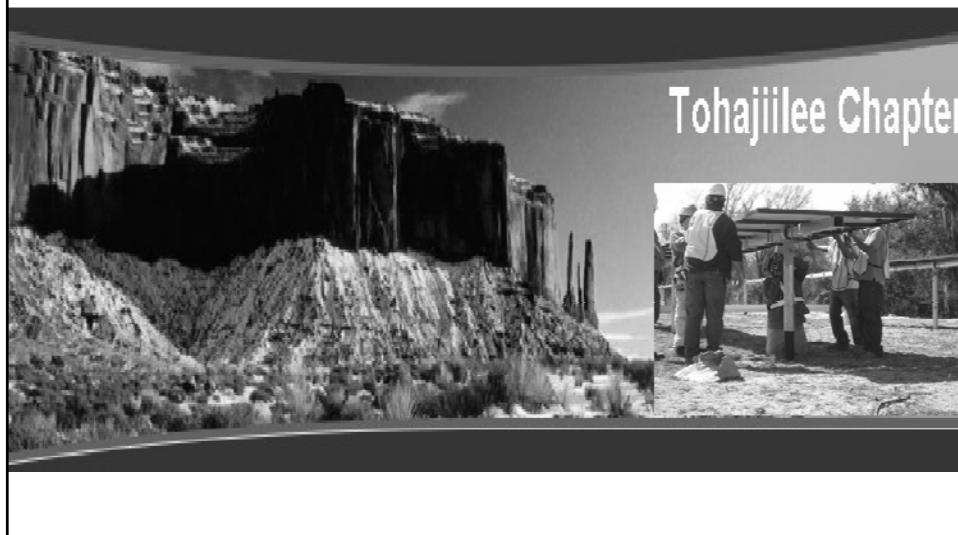
RBC Capital Markets¹

- To'Hajiilee Economic Development Inc. (TEDI), Lead Developer and Landholder
- SunPower Corporation, Co-Developer & Technology Provider
- RBC Capital Markets, Project Financing Agent
- Rural Community Innovations
- First American Financial Advisors
- Ater Wynne LLP, Project Legal Counsel
- Janov Law Offices, Legal Council for TEDI

JANOV LAW OFFICES, P.C.

ATERWYNNE LLP
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Cañoncito Band of Navajo Trust Lands

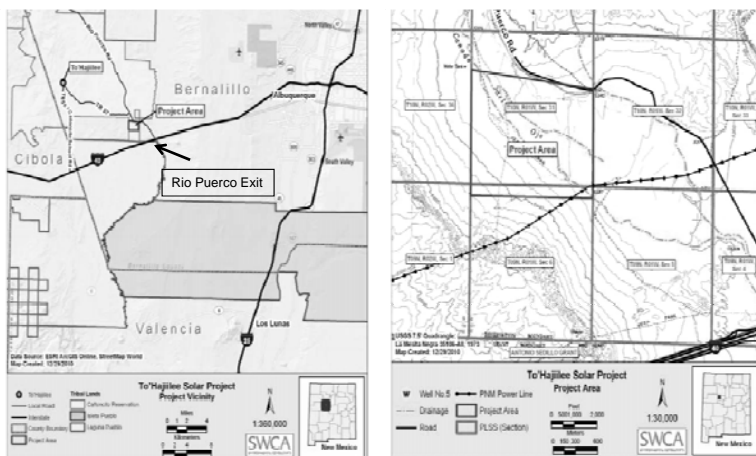


ATERWYNNE LLP
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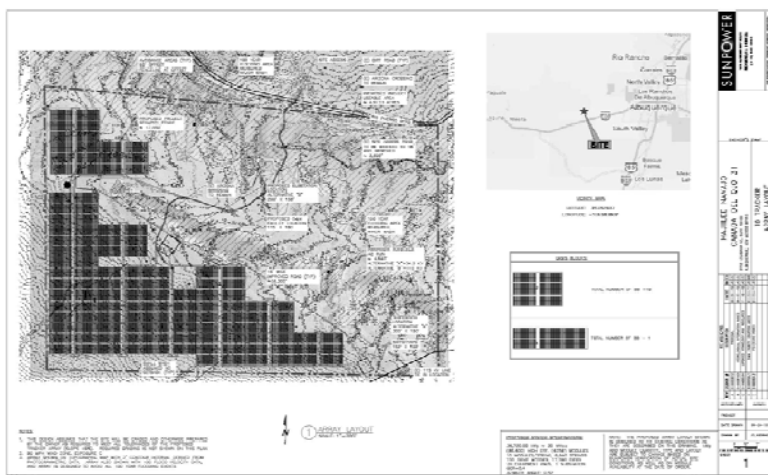
Project Details

- 30 MW project located on 195 acres in western Bernalillo County – 1.8 miles NW of the intersection of Interstate 40 and Rio Puerco Road on CBN trust land
- Twenty 1.5 MW blocks, each approximately 7.2 acres. Each block consists of 18 rows of forty 425 watt solar panels
- Each block includes inverters and transformers stepping up to 34.5 kV are located on concrete pads with a 12'X 24' footprint
- The medium voltage circuits carry power underground to a proposed substation located next to the PNM 115-kV Bluewater transmission line
- A 30,000 square foot substation will include a switchyard, main transformer and a control room to house communication and equipment necessary to interconnect to the PNM system

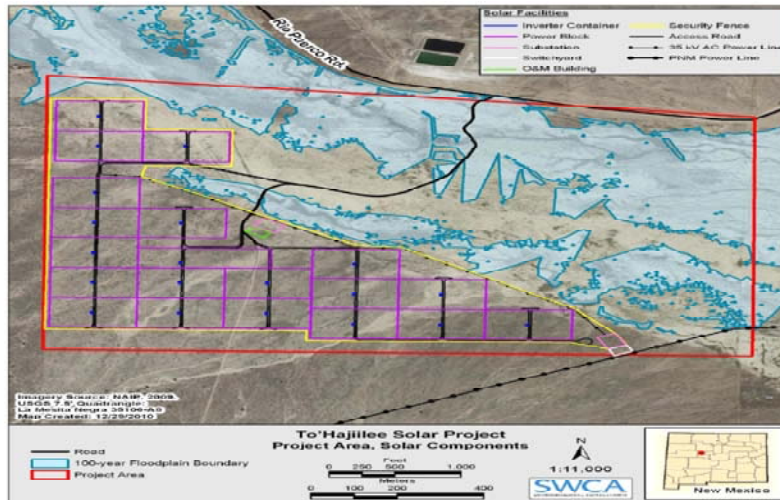
Shandiin Solar Project Location



Shandiin Solar Project Layout



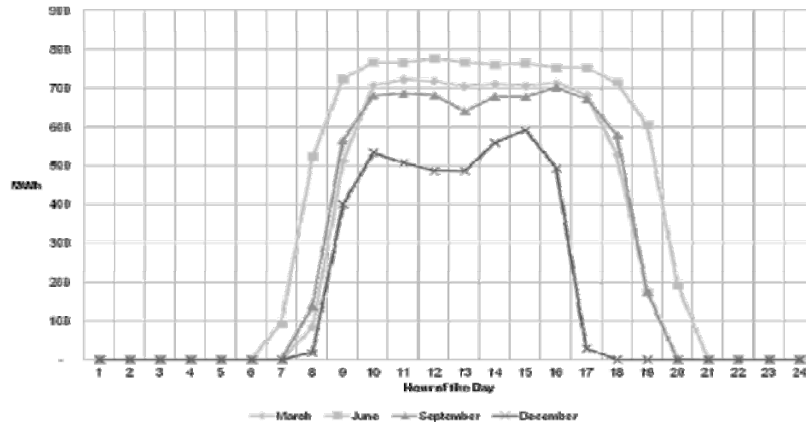
Shandiin Solar Components Layout



Shandiin Project Development Schedule

Date	Milestones
• 5/27/2011	Finding of No Significant Impact
• 5/19/2011	Interconnection Application
• 9/21/2011	System Impact Report
• 1/24/2012	Facilities Study
• 3/24/2012	Large Generator Interconnection Agreement
• 6/22/2012	Complete Financing
• 6/30/2012	Register Project with WREGIS
• 8/21/2012	Begin Construction
• 12/19/2012	Required Network Upgrades
• 4/18/2013	Begin Final Project Commissioning
• 5/18/2013	Commercial Operation Date

Average Daily Output of Shandiin Facility



First Year Output of Shandiin Solar

Time Range	Daylight Hours	Gh (kWh/m ² /day)	AC Energy (kWh)
Jan	308.0	3.13	4,697,983
Feb	301.1	4.17	5,360,671
Mar	368.1	5.32	7,199,677
Apr	387.2	6.73	8,167,512
May	428.9	7.55	8,893,741
Jun	429.5	8.19	9,175,338
Jul	437.5	7.61	8,710,760
Aug	413.3	6.67	8,031,983
Sep	368.8	5.80	7,211,531
Oct	347.0	4.48	6,077,404
Nov	306.5	3.56	4,959,542
Dec	300.5	3.07	4,700,477
Year 1	4,394.3	5.53	83,186,639
Shandiin Simulation	4,394.3	5.53	83,186,639

Itemized Annual Energy Losses	%
Shading Loss	0.00
Soiling Loss	-1.00
Angle-of-Incidence Loss	-0.72
Air Mass Adjustment	-0.13
Operating Temperature Adjustment	-5.01
Efficiency vs. Irradiance Adjustment	-0.75
Module Flash Adjustment	0.23
Module Mismatch Loss	-1.00
DC Wiring Loss	-1.50
Inverter DC Limit Loss	0.00
Inverter Efficiency Adjustment	-1.83
Inverter AC-Capacity Clipping Loss	-1.99
Transformer Efficiency Loss (Day)	-1.40
Transformer Efficiency Loss (Night)	-0.30
AC Wiring Loss	-0.90
Site Shading Loss	0.00
Auxiliary Load Loss	-0.30
Annual Availability	98.00

Shandiin Project Pricing Options Model

- **Three alternative offerings available**
 - **Direct purchase of project upon commercial operation.**
 - **25 year PPA based on utility credit rating**
 - **25 year PPA based on credit enhancement through a federal government 20 year direct loan or loan guarantees**
- **Turnkey project sale/100% utility ownership**
 - **Sale price upon commercial operation - \$129,000,000.**
 - **Annual O&M at \$800,000 for first year escalating at 3% annually**
- **25 year PPA based on utility's existing credit rating.**
 - **First year PPA rate of \$91.00/MWh, escalating at \$1.00/MWh per year**
- **Pricing does not include seller's costs associated with any required transmission upgrades**

Options – Hybrid PPA & Tax Exempt Bond

- **Economics of transaction may be enhanced by the prepayment of the PPA by the load serving municipality utility selling tax exempt bonds to prepay its obligations**
 - **2005 Energy Act permits load serving municipal utilities to sell tax exempt bonds to prepay an electricity PPA or a natural gas delivery contract**
 - **Ownership would have to reside in a private entity. Pre-pay bonds would not invalidate ITCs or depreciation**
 - **Structure will permit 30% to 40% of project costs to be offset by Section 1603 Cash Grant or ITC and monetization of depreciation to a tax equity investor**

PPA and Tax Exempt Bond, cont.

- **Municipal utility sells tax exempt bonds to prepay PPA with private energy company**
 - **Prepayment amount is calculated by present valuing the cash flows of the PPA using a discount factor somewhere between the private company's borrowing rate and the Municipal Utility's tax exempt borrowing rate**
- **Since there is a tangible asset (renewable energy project), the prepayment of the PPA may be secured by a first lien position on the asset and the power produced**

SunPower Utility-Scale Projects Around the World

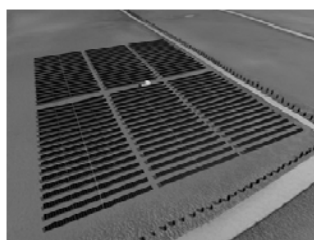


SunPower Tracking Technology



- Significant global applications allow for performance verification
- Horizontal single-axis tracking follows the sun east to west
- Tracking produces approx. 25% more energy than fixed-tilt
- Software eliminates row-to-row shading in morning and evening
- Linked rows minimizes moving parts and power requirements

SunPower Oasis Power Block



- The SunPower Oasis 1.5 MW power block delivers a high capacity factor in a small amount of land
- Pre-manufactured components install quickly
- Track record of reliable performance

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For More Information

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James Manion

Warm Springs Power and Water Enterprises

James Manion

James Manion is General Manager of Warm Springs Power & Water Enterprises and Chair of the Deschutes River Conservancy. He is of Wasco descent, one of the three distinct tribes that make up the Confederated Tribes of Warm Springs. He has worked for Warm Springs Power Enterprises since its inception in 1981, and has served as General Manager since 1986.

Through this responsibility, Mr. Manion manages the Tribe's interest in the largest hydroelectric project within Oregon — the Pelton-Round Butte Hydroelectric Project. He was responsible for negotiating with Portland General Electric for joint ownership of the Project — an unprecedented negotiation in Indian country. Through this process, he led a tribal effort to prepare a license application to the Federal Energy Regulatory Commission (FERC) which provided more substantial tribal vision for the Project, including more focus on environmental mitigation, fish and wildlife usage. Through several layers of negotiations, restoration of fish passage above the Project was included in a long-term settlement agreement, ultimately securing \$125 million in mitigation and enhancement funding to achieve this goal.

As Chair of the Deschutes River Conservancy, Mr. Manion guides a diverse group of individuals from State, local, and federal agencies, as well as NGOs and private interests to make decisions that benefit the health of the Deschutes River Basin. He is the recipient of the 2009 Ecotrust Indigenous Leadership Award.

J.D. Williams
Williams Johnson LLP

J.D. Williams

J.D. Williams is a partner with Williams Johnson LLP, a Portland-based law firm that is majority owned by Native Americans. The firm represents Tribal governments, businesses, utilities, and schools as well as those doing business in Indian country.

An attorney for 16 years, Mr. Williams is also a Chief Judge for a tribal court as well as an appellate judge for different tribal courts. Licensed in Oregon and Washington, his practice focuses on economic development in Indian country, especially in telecommunications and energy as well as the protection of Tribal natural and cultural resources, sovereignty and jurisdiction.

Chad R. Wright
Marine View Ventures, Inc.

Chad R. Wright

Chad R. Wright, CEO of Marine View Ventures, Inc. (MVV) has been with the company since 2007. During that time, he has participated in the execution and implementation of the SSA/MVV Container Terminal Agreement and the SSA/MVV/Puyallup Tribe/Port of Tacoma Agreement.

Immediately prior to joining MVV, Mr. Wright served in various roles for the Puyallup Tribal Council. He is currently a member of the boards of Tacoma Goodwill and Mary Bridge Children's Foundation. He holds a B.S., from Boston College, an M.B.A. from Stanford University Graduate School of Business, and earned his J.D. from Pepperdine University School of Law.

Puyallup Tribal Terminal

November 10, 2011

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- I. Strategy Review– Structuring a deal to maximize reward and minimize risk
- II. Impact of Market Collapse – Recession halts positive deal progress and changes container terminal economics
- III. MVV Response – Search to preserve transaction rationale

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I. Strategy Review–

Structuring a deal to maximize reward and minimize risk

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Overview of Tribe's Property

- Description
 - 128 Acres
 - Waterfront access (2 berths)
- Pros
 - One of few remaining undeveloped **deep-water** properties on West Coast
 - **Keystone** to Port of Tacoma future development (Blair and EB1)
- Cons
 - Awkward configuration (bottleneck decreases efficiency/value)
 - Significant investment required to access value of waterfront
 - Full value only realized when combined with adjacent properties



p. 4

Strategic Objectives

- Maximize economic return from Tribal assets
 - Determine best use for Tribe's Blair Waterway land assets
 - Structure transaction to bridge isolated properties
- Minimize risk
 - Operational involvement introduces risk for MVV and partner
 - \$350,000,000 project is risky in current business climate
- Create Social Value
 - Maximize job creation
 - Mitigate tribal lands as part of the project
- Establish precedents for partnering with non-tribal entities
 - Sharing structural advantages with non-tribal parties
 - Facilitate the business/government divide

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II. Impact of Market Collapse –

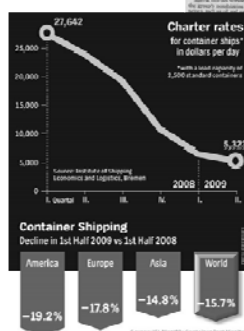
Recession halts positive deal progress and changes container terminal economics

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The global recession has significantly reduced volumes...

"The global container shipping industry remains in a "very fragile" state due to weak demand and a glut of ships"
Maersk -- the world's largest shipping company 3/24/10

- US companies spent \$244 billion less to transport and store their goods in 2009 than in 2008
- Over-capacity (i.e. over-investment) drove substantial losses of ~\$15 billion in 2009 (Similar to gaming, housing, etc.)
- Port of Tacoma TEU volume down to 1.39 million TEUs from 2.1 million. Max capacity = 3.7 million TEUs
- Excess capacity will likely drive consolidation in terminal operations – further reducing need for new terminals to be brought online near-term.
 (Example: NYK Line → APM Terminals)



...And severely impacted the economics of container terminal operations

- The reduced volumes no longer support capital investments required by container terminals
 - Private or public sector's ability to finance large scale projects significantly reduced
- High likelihood that there will be no need for new container terminal developments
 - Insiders report that it will take 10-15 years to return to pre-recession volumes
 - Even in 2007, terminals at the Port of Tacoma were not operated at close to capacity
 2.1 million TEUs in 2006 / Max capacity is 3.7 million TEUs
- Other terminal uses are the only realistic development options in the near future
 - Lower capital investments
 - Support the container terminal operations that exist today

III. MVV Response to Market Collapse – *Search to preserve deal's rationale*

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Major changes created new opportunities

- Major changes since 2007
 - NYK abandoned independent Port of Tacoma terminal
 - The Port of Tacoma changed leadership
 - MVV and the Port have developed a very strong relationship
 - The market changed, increasing risk to SSA of moving forward with development
- Change galvanized relationship with SSA
 - Parties added flexibility to the existing agreements
 - Deal structure supports collaboration
 - “Our” project
- Commitment by parties to see PTT become a reality
 - Joint marketing efforts
 - Combine lobbying efforts
 - Initiated tribal employment