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Tribal Government Enterprise Structures

Preface

How tribal governments promote food sovereignty activities are unique to their operation structure, level of specialization regarding agriculture development. Tribal governments must account for their scope of operation, e.g. whether its purchasing, production, and market will extend beyond its jurisdictional bounds; managing continuity of operation, as leadership may transition during time intensive activities; and whether the enterprise activities serve an explicit government function or are operating on a for-profit, revenue generating basis. Each of these considerations informs what type of enterprise structure a tribe should consider adopting in service to its community or market.

Corporation(State Law)

Jurisdiction of Establishment

State Law

Operating Considerations

Tribal corporations are separate from Tribal government, allowing these enterprises to be regulated by the Tribe's code. Operating structures and articles of incorporation should comply with active Tribal regulation/law, be filed by the designated Tribal official, and approved by Tribal Council. Officers of the Enterprise Board set the strategy and enterprise objectives in accordance with the vision and mission identified by Tribal Council and as reflected in the articles of incorporation.

Where the Board operates in good faith for its purpose and articles of incorporation, adhering to applicable law as necessary, the Tribe may not be directly liable for activities conducted by the enterprise. Where these conditions do not hold true, external parties may attempt to "pierce the corporate veil," and apply liability to tribal assets.

Management Structure

Tribal (Business) Council appoints an Enterprise Board that appoints a CEO

Tax Liability (Federal)

Domestic companies established under state law may incur federal income liability as indicated by IRS Revenue Ruling 94-16

Tax Liability (State)

Corporations established under state law are generally subject to state taxation. Agreements between states and tribes on business application may provide for additional or separate considerations.

Sovereign Immunity and Other Liability Considerations

Most state laws authorizing business incorporation include the ability to sue and be sued. Tribal sovereign immunity may not apply to these business entities. Court precedence varies.

General Advantages

- The Below advantages may apply, short of sovereign immunity which may vary based on precedence and state requirements for articles of incorporation
- Corporations maintain assets distinct from the Tribe.
- Tribal incorporation of this business structure is relatively easy and may maintain tribal sovereign immunity.
- Maintaining a business entity distinct from the Tribe provides for continuity of operations across election seasons.
- Tribal corporations may maintain immunity from federal and state taxation.
- Corporations certified under Section 8(a) may sole source goods for federal procurement without a cap, as long as the Tribe maintains at least 51% ownership stake

General Disadvantages

- Corporations are capital intensive to incorporate and maintain.
- Corporations incur tax liability on revenue generated and the distribution of profits to the tribe. .

Corporation(Tribal Business Code)

Jurisdiction of Establishment

Tribal Business Code

Operating Considerations

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Management Structure

Tribal (Business) Council appoints an Enterprise Board that appoints a CEO

Tax Liability (Federal)

Similar to Tribal LLCs chartered under Tribal law, federal taxation may not apply to revenue or other assets generated by enterprise activities

Tax Liability (State)

Activities generating revenue owned by a Tribe within Indian country may generally be exempt from state tax liability. Other agreements between a state and the owner Tribe may apply.

Sovereign Immunity and Other Liability Considerations

The application of sovereign immunity may depend on whether the authorizing Tribal Business Code enforces the maintenance of sovereign immunity. Court precedence includes a number of principles, such as whether the enterprise is legally separate from the tribe and retains assets distinct from those maintained by the tribe.

General Advantages

- Corporations maintain assets distinct from the Tribe.
- Tribal incorporation of this business structure is relatively easy and may maintain tribal sovereign immunity.
- Maintaining a business entity distinct from the Tribe provides for continuity of operations across election seasons.
- Tribal corporations may maintain immunity from federal and state taxation.
- Corporations certified under Section 8(a) may sole source goods for federal procurement without a cap, as long as the Tribe maintains at least 51% ownership stake

General Disadvantages

- Private financiers may still be apprehensive in partnering with an entity that retains sovereign immunity and is not incorporated under a state law.
- The ability for these entities to issue tax-exempt financing to other agriculture enterprises is not clearly determined by IRS.

Instrumentality of Tribal Government

Jurisdiction of Establishment

Tribal Government

Operating Considerations

These instrumentalities are unincorporated as a structure of Tribal governance. Entities of tribal government typically must waive sovereign immunity to contract with vendors and partners outside tribal jurisdiction. Relationships and supply chain logistics should be managed accordingly.

Federal approval may be required for business activities, including land leases, contracts, or other agreements that encumber Indian land for more than 7 years. Agriculture operations are extrinsically tied to the land and cannot typically be moved. The American Indian Agricultural Resource Management Act (25 USC 39) may be a meaningful way of instating tribal sovereignty over land management activities related to this enterprise.

Instrumentalities that intend to conduct business outside tribal jurisdiction should file as a "foreign corporation" or "foreign company" and otherwise comply with the regulatory requirements of that area, e.g. submitting a "Doing Business As" name to state government.

Management Structure

As part of tribal government, this enterprise structure is typically overseen by Tribal Council; however, Council may appoint a Board or Manager to coordinate daily activities..

Tax Liability (Federal)

IRS Revenue Ruling 57-128, 1957-1 C.B. 311 indicates that an instrumentality incurs no federal tax liability if the following factors are considered:

- 1) whether it is used for a government purpose and performs a governmental functions;
- 2) whether performance of its function is on behalf of one or more states or political subdivisions;
- 3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner;
- 4) whether control and supervision of the organization is vested in public authority and authorities;
- 5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality and whether such authority exists; and
- 6) the degree of financial autonomy and the source of its operating expenses..

Tax Liability (State)

State tax liability is dependent on the type(s) of enterprise activity(ies) conducted and whether the tribe maintains any tax agreement with adjacent state boundaries.

General Advantages

- Tribes establish these functions easily.
- Instrumentality retains sovereign immunity.
- Tribal leaders maintain direct visibility to enterprise activities, opportunities, and barriers.
- Enterprise activities are not subject to federal tax liability.

General Disadvantages

- Tribal leadership may turnover during time sensitive agriculture activities.
- Assets of the tribe and instrumentality are not separate, increasing challenges to accessing federal and private financing.
- Tribal sovereign immunity may make federal and private financiers more apprehensive to support enterprise activities through financial capital.

Sovereign Immunity and Other Liability Considerations

Instrumentalities of tribal government maintain sovereign immunity. Inversely, the tribe assumes all liability for enterprise activity.

Limited Liability Company (Member Managed)

Jurisdiction of Establishment

Tribal Business Code or Uniform Limited Liability Company Act

Operating Considerations

Tribal business LLCs are established under articles of organization, using an operating agreement to indicate management structure: Member-Managed or Manager-Managed. Generally, these enterprises operate as quasi-separate structures from other Tribal government functions, where members are not directly liable for organization activities as long as they operate in good faith of the LLCs interests. Only LLC owned assets, under this premise, incur liability for enterprise activities. LLC assets are kept separate from other Tribal assets. LLCs established under Tribal Business Code should keep ownership assets within Tribal jurisdictional bounds.

Management Structure

Tribal (Business) Council manages day to day operations, including hiring and firing decisions, planting schedules, et al.

Tribal (Business) Council appoints a CEO or other enterprise leadership to oversee daily activities under the strategic vision of the Council.

Tax Liability (Federal)

The IRS generally treats LLCs with a single member owner, in this case the Tribe, as a branch of the member.

Sovereign Immunity and Other Liability Considerations

Case law is uncertain. The Tenth Circuit made a decision that sovereign immunity may apply in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino Resort* (629 F.3d 1173, 1185), depending on the following conditions:

- 1) The method of the corporation's creation;
- 2) Its purpose
- 3) Its structure, ownership, and management, including the amount of control the tribe has over the entities;
- 4) Whether the tribe intended for the entity to have tribal sovereign immunity
- 5) The financial relationship between the tribe and the entity
- 6) Whether the purposes of tribal sovereign immunity are served by granting immunity to the entity.

Tax Liability (State)

Activities generating revenue owned by a Tribe within Indian country may generally be exempt from state tax liability. Other agreements between a state and the owner

General Advantages

- LLC are broadly recognized by external partners, including most suppliers, as a business entity.
- LLC assets are generally kept separate from the Tribe, allowing for more immediate reporting on asset allocation, structuring, and return on assets.
- Tribal chartered LLCs may retain sovereign immunity.
- Tribes may structure LLCs in different ways depending on their strategic priorities.
- Tribal chartered LLCs may be exempt from federal and state tax liability

General Disadvantages

- Sovereign immunity may defer partnership opportunities from third-party financiers.
- Because LLCs are relatively new business structures, case law is still being defined.

Political Subdivision

Jurisdiction of Establishment

Tribal Government using an Economic Development Authority or Business Development Authority

Management Structure

Tribal Council may appoint and revoke membership of the subdivision's governing board. This Board must turn over its financials to be filed with Tribal Council at least quarterly, subject to its authorization.

Tax Liability (State)

State tax liability is dependent on the type(s) of enterprise activity(ies) conducted and whether the tribe maintains any tax agreement with adjacent state boundaries.

Operating Considerations

Political subdivisions are a unit of government that are partially distinct from the government itself with the intent to fulfill a government function using delegated tribal authorities.

Tax Liability (Federal)

Section 7871 of the Internal Revenue Code allows for political subdivisions to forego federal taxation insofar as these subdivisions received tribal delegation for substantial government functions. The political subdivision must be recognized by IRS as meeting these criteria for these tax benefits to apply.

General Advantages

- Sovereign immunity may remain in place assuming certain conditions are met.
- Federal tax liability may be foregone if certain conditions are met.
- Similarly, enterprise activities may be immune from state tax liability.
- Enterprise leadership may be separate from Tribal Council, allowing for greater continuity of operations.

Sovereign Immunity and Other Liability Considerations

Sovereign immunity generally applies to activities of political subdivisions, and these enterprises may execute a limited waiver of sovereign immunity as necessary and applicable under their authorization.

General Disadvantages

- Federal and private financiers may not understand the nuances of how enterprise assets remain separate from the whole of tribal government assets.
- Sovereign immunity may, similarly, make federal and private financiers apprehensive to provide for debt capital without a (limited) waiver of sovereign immunity

Section 17 Corporations

Jurisdiction of Establishment

Federal Law

Operating Considerations

Section 17 Corporations follow many of the same operating principles as Tribal Charter corporations except that they must be filed and approved by the Secretary of the Interior.

Management Structure

Tribal (Business) Council appoints an Enterprise Board that appoints a CEO

Sovereign Immunity and Other Liability Considerations

Section 17 Corporations may retain tribal sovereign immunity; however, some courts have ruled that the "sue or be sued" provision for corporate articles of incorporation waives immunity.

Tax Liability (Federal)

The IRS has treated Section 17 Corporations as similar to political subdivisions, not subject to federal taxation, per Section 7871, for income derived on or off Indian country.

Tax Liability (State)

State tax liability is dependent on the type(s) of enterprise activity(ies) conducted and whether the tribe maintains any tax agreement with adjacent state boundaries.

General Advantages

- Section 17 Corporations likely do not incur federal tax liability and may/may not incur state tax liability based on the scope of operation and inter-governmental tax agreements.
- Sovereign immunity may apply.
- Maintaining a business entity separate from the Tribe may support continuity of operations across transitions in Tribal government.

General Disadvantages

- Establishing a Section 17 Corporation is time intensive as the Tribe must first apply with the Department of the Interior and subsequently receive approval from the IRS.
- Many private financiers and even government agencies are not familiar with how this business structure operates.

Tribal Citizen Enterprise Structures

Preface

Tribal citizens promoting agricultural operations often work tirelessly to grow, process, and/or distribute food for their communities and markets. Short of assuming a more formal enterprise structure, anyone selling food is managing a personal business enterprise. These individuals are sole proprietors or partners. People selling food from a farm or processing food above the threshold authorized in their tribe's cottage food law, if applicable, take on personal liability for these activities. Here, personal liability means that their consumers or partners can claim harm and sue against both the operation and owner's assets (tools, equipment, monetary savings, etc.). Taking on a more formal enterprise structure requires start-up costs (both money and time) but can be an important step in separating personal assets from the operation's assets.

Where a Tribal citizen files to establish their business depends on their scope and area of operation, e.g. whether they operate and sell on Tribal reservations exclusively; and whether the Tribe maintains an authorizing business code.

Limited Liability Company (Manager Managed)

Operating Considerations

Tribal business LLCs are established under articles of organization, using an operating agreement to indicate management structure: Member-Managed or Manager-Managed Only LLC owned assets incur liability for enterprise activities. LLC assets are kept separate from other personal assets. LLCs established under Tribal Business Code should keep ownership assets within Tribal jurisdictional bounds. LLC established under Tribal Business Code that seek to conduct operations outside Tribal lands may need to file with the state.

LLC are widely recognized by both private and federal partners for debt and grant financing. This enterprise structure may even be preferred by third party partners as they do not incur liability for providing support to the enterprise.

LLC representatives (members or managers) can hire and manage staff as necessary to fulfill the member (owner) goals and objectives. To hire staff, LLC must apply for an Employer Identification Number through the IRS, confirm that these employees are eligible to work in the U.S., and manage tax payments as applicable. LLC, not member-owners, generally hold responsibility for any damages caused by workers, volunteers, et al.

By bringing in family as co-member owners, the LLC may be easily passed across generations as necessary. Generally, membership stake or ownership rights are attributed to the level of contribution provided by each member. A member with 51% ownership stake holds majority ownership and holds primary decision-making authority.

Tax Liability (Federal)

These entities operate as a "pass through," where members must pay self-employment taxes to the IRS. The revenue generated by these enterprises is not also taxed, i.e. double taxation does not apply. Partners receive profits or losses based on their ownership interest.

Tax Liability (State)

These enterprises, when chartered under state law, are subject to state taxes, even for activities conducted in Indian country; however, when chartered under tribal law, they may not be subject to state taxation for activities conducted on Tribal reservations.

Management Structure

In manager-managed LLCs, members hire managers to maintain all aspects of day-to-day operations with member oversight.

Limited Liability Company (Member Managed)

Operating Considerations

Tribal business LLCs are established under articles of organization, using an operating agreement to indicate management structure: Member-Managed or Manager-Managed Only LLC owned assets incur liability for enterprise activities. LLC assets are kept separate from other personal assets. LLCs established under Tribal Business Code should keep ownership assets within Tribal jurisdictional bounds. LLC established under Tribal Business Code that seek to conduct operations outside Tribal lands may need to file with the state.

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Management Structure

In member-managed LLCs, the member(s) own and manage operation activities, setting goals, prioritizing objectives, and maintaining staff as necessary.