TRACK 1: CAPITAL AND FINANCE

CAPITAL AND FINANCE ISSUES: TRIBAL ENTERPRISES

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CAPITAL AND FINANCE ISSUES:

ON-RESERVATION PRIVATE SECTOR GROWTH

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This paper was commissioned for the National Congress of American Indians Policy Research Center (Center) for the purpose of stimulating discussion at the National Native American Economic Summit (Summit) to be held in Phoenix, Arizona on May 15-17, 2007. The paper is not intended to be comprehensive, but to provide an introduction to relevant issues and policies and some preliminary thoughts about the appropriate role of federal and tribal policy-makers. The positions and opinions found within this paper are the views of the authors only and are not representative of the views of the Center or the Summit participants.

Capital and Finance Issues: Tribal Enterprises

By Gavin Clarkson[1]

The primary fuel for economic development is capital, and Indian Country suffers from a number of capital deficits that impede its economic vitality. Upwards of $50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development. Private enterprise in Indian Country is similarly challenged, as the equity investment gap in Indian Country is $44 billion according to the US Treasury Department.

This paper covers several capital and finance issues in Indian Country, The paper will examine debt financing in Indian Country for tribal entities in detail and briefly review current challenges to equity financing.

Economic Challenges

Tribal communities are often burdened with extreme economic challenges including: low educational achievement,[2] high unemployment,[3] high poverty,[4] and low per capita income.[5] For many tribes, the only source of capital to address these problems is limited to grants and other assistance from the federal government. However, such funds are often insufficient to address the myriad responsibilities facing tribal governments. Most tribes have an economy that is on par with developing countries. Extensive land bases, spread out communities, and homesteads mired in one long-standing poverty cycle characterize many reservations.[6] The need for economic development in Indian Country remains acute and affects nearly every aspect of reservation life.

All too many tribal governments lack the ability to provide the basic infrastructure most U.S. citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity, and telephone services that come with a modern home. According to the U.S. Census Bureau, approximately 20% of American Indian and Alaska Native households on reservations lack complete plumbing facilities, compared to 1% of all U.S. households.[7] About 1 in 5

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[2] RAYMOND C. ETCITTY, ADVISORY COMM. ON TAX EXEMPT AND GOV'T ENTITIES, TRIBAL ADVICE AND GUIDANCE POLICY II-7 (2004), http://ftp.qai.irs.gov/pub/irs-tege/act_rpt3_part2.pdf.

[3] Average unemployment on Indian reservations is 13.6% (with some reservations having unemployment levels above 50%). The general U.S. population has unemployment rate of 5.8%. See U.S. Census Bureau 2000 .

[4] The average percentage of American Indians living in poverty is 25.67%, compared 12.38% for the general population. See U.S. Census Bureau 2000.

[5] Per capital income for American Indians is $12,893.00, compared to the overall U.S. average of $21,587.00. See U.S. Census Bureau 2000.

[6] *Entrepreneurial Sector Is the Key to Indian Country Development*, INDIAN COUNTRY TODAY, Sept. 6, 2002, at A2.

[7] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE HOUSING OF AMERICAN INDIAN ON RESERVATIONS - PLUMBING., (1995) (SuDoc # C3.205/8:95-9), *available at* http://www.census.gov/apsd/www/statbrief/sb95_11.pdf.

reservation households dispose of sewage by means other than public sewer, septic tanks, or cesspool.[8] The Navajo reservation is the same size as West Virginia, yet it only has 2,000 miles of paved roads whereas West Virginia has 18,000 miles.[9] Investors and employers, even in the most distressed inner cities of the United States, take roads, telephones, electricity, and the like for granted. Their absence from large portions of Indian country poses a daunting barrier to tribal leaders' attempts to attract new private sector investment and jobs.

Such realities highlight the importance of stimulating economic development to create economic opportunity for tribal members. Many scholars, investors, and tribal officials charged with developing their economies are well aware that access to capital for tribes is a significant and pressing problem. The unanswered question is one of capital formation: How do tribal governments and entrepreneurs obtain the necessary capital to build a permanent economic base in Indian Country? The answer should be to access the capital markets in the same way that non-Indian entities do to finance their own economic development and entrepreneurial activities, however, severe impediments to a level playing field continue to plague Indian Country.

Indian Country Debt Financing

One possibility for financing governmental activities is debt financing. Although tribal governments generally have more options than individual Indian Country entrepreneurs, neither set of potential borrowers enjoy the same opportunities as borrowers outside of Indian Country. Just like state and local governments, Indian tribes, as separate sovereign governments, have an obligation to improve the lives of their citizens. When such governmental entities engage in economic development activities to elevate the economic status of their constituencies, they often seek outside funding to finance those activities. State and local governments obtain revenues to finance their operations primarily through three channels: tax revenues, borrowing, and federal grants.[10] Because of the low cost of money, flexibility and longer maturities, borrowing has increasingly become a favored method of raising revenue for state and local governments.[11]

Unfortunately, borrowing on terms equal to states and local governments is too restrictive or generally not available in Indian Country. While many tribal economies still resemble those of a developing country, a small number of tribal economies have been able to expand,[12] and

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[8] *Id.*

[9] Michael J. Kurman, *Indian Investment and Employment Tax Incentives*, 41 FED. B. NEWS & J. 578 (1994).

[10] M. DAVID GELFAND, STATE AND LOCAL GOVERNMENT DEBT FINANCING, § 1.04 (2003)

[11] Such obligations fall under the heading of "municipal securities" in Section 3(a)(29) of the Securities Exchange Act of 1934 [hereinafter 1934 Act]. The applicable definition under this section for our purposes describes a municipal security as "direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, an any municipal corporate instrumentality of one or more states…" Therefore, municipal security or municipal debt, when used in this article, can refer to a state, municipality, or an agency or instrumentality of either.

[12] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.03[1] (2005 ed., LexisNexis 2005), [hereinafter COHEN] (Professor Clarkson was a contributing author for this most recent edition of the HANDBOOK, providing material on tribal finance, tribal corporations, economic development, and intellectual property).

approximately 15% of the tribes[13] have been able to obtain tax-exempt financing from a variety of lenders[14] to "finance economic development activities and infrastructure improvements."[15] Most tribes, however, are still unable to access the capital markets competitively, if at all.

The Types of Governmental Debt

Depending on the source of funds used to repay the debt, governmental debt, commonly referred to as tax exempt or "municipal" debt,[16] can take a number of forms, generally under the umbrella of either general obligation or revenue bonds issued under Section 103 of the Tax Code. [17]

A general obligation bond can be either secured or, more commonly, unsecured. In the latter case, the issuer will generally promise to repay principal and interest from any of the issuer's available funds.[18] In both secured and unsecured general obligation bonds, the general credit of the issuer is pledged.[19]

A revenue bond differs from a general obligation bond in that the debt obligation is limited in terms of recourse to a specifically identified source of revenue that is pledged to secure the debt.[20] The issuer does not pledge its general credit. In contrast to general obligation bonds, revenue bonds pledge only the earnings from revenue-producing activities, usually to project being financed.[21]

One type of revenue bond important to the instant inquiry is the private activity bond ("PAB"). State or local governments will issue PABs to provide financing for private businesses or individuals, and the revenues from the financed activities are then usually pledged to cover the debt service for the bonds.[22] For example, state and local governments often issue tax-exempt PABs for the benefit of nonprofit corporations for projects such as charity hospitals, or to finance low-income residential rental property or mortgage loans for first-time low- income

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[13] *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N. C. L. REV. 1009, ____ (2007).

[14] FITCH RATINGS, REVENUE CRITERIA REPORT: TRIBAL GOVERNMENTS IN THE BOND MARKET 1 (2004).

[15] COHEN, *supra* note 12, § 21.03[1]; Townsend Hyatt, Perry E. Israel & Alan Benjamin, *An Introduction to Indian Tribal Finance* 1-33 (2005), *available at* http://www.orrick.com/fileupload/246.pdf.

[16] Municipal debt is not limited to municipalities, as such debt can be issued by any non-federal governmental entity.

[17] 26 U.S.C. §103 (1986).

[18] *See* ROBERT A. FIPPINGER, THE SECURITIES LAW OF PUBLIC FINANCE § 1:2.2 (2002).

[19] *Id. See also* GELFAND, *supra* note 10, § 2:05.

[20] *See* FIPPINGER, *supra* note 18, § 1:2.3; GELFAND, *supra* note 10, § 2:13; Recourse refers to the set of actions that the lender can take to obtain payment. In this instance, the lender can only look to the revenues specifically pledged. If those are insufficient, the lender cannot look to other assets of the issuer.

[21] FIPPINGER, *supra* note 18, § 1:2.4; GELFAND, *supra* note 10, § 2:13

[22] GELFAND, *supra* note 10, § 5:23

homebuyers.[23] Private activity bonds are also issued for airports, docks and wharves, solid waste facilities, and sewage facilities, and certain other facilities.[24]

Public Debt Instruments

Although bank debt and bond indentures both represent a promise to pay a specific sum of money (principal amount) at a specified date or dates in the future (maturity date) together with periodic interest at a specified rate, each type of debt has unique attributes and establishes a relationship with a different set of lenders. Additionally, given the same level of earnings, an issuer will likely be able to borrow larger amounts for longer periods by issuing bonds rather than by borrowing from a bank.

Bank Debt

Commercial banks typically lend money to governmental borrowers as part of an ongoing business relationship. A borrower can usually borrow up to two times its annual earnings from a bank or bank syndicate (group of banks), and the term of a bank loan is generally three to five and sometimes up to seven years. Bank debt can also be used as temporary financing when a borrower plans to subsequently issue more debt through a bond offering to finance a larger project. A portion of the bond proceeds are then used to pay off the bank note.

Bond Indentures

Unlike bank debt that generally has a single lender holding the note, a bond indenture provides for negotiable instruments – bonds that can be bought and sold in the capital markets. Thus the lenders, or bondholders, often have no direct relationship with the issuer. While issuing a bond is typically a more complex transaction than obtaining a bank loan, issuers can generally borrow larger amounts for longer terms. An issuer can borrow as much as three to four times its annual revenues by issuing bonds, and the payments can be stretched over ten, fifteen, or even thirty years in some cases.

Bond transactions often involve a financial intermediary, usually an investment banking firm, that assists issuers in finding buyers for the bond. By marketing to a larger audience in the broader capital markets, the financial intermediary attempts to obtain the best possible interest rate and terms for the issuer, which may often be better than those available from commercial banks. An important distinction between bank debt and bond indentures is that unlike bank loans, bonds are classified as "securities" and are therefore subject to a variety of securities laws.[25]

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[23] GELFAND, *supra* note 10, §§ 4:25:20, 5:25.

[24] GELFAND, *supra* note 10, § 5:25.

[25] Note, however, that Section 103(c) of the Tax Code treats all obligations as "bonds" even if they are bank loans, finance leases, installment purchases, or actual bonds issued under bond indentures.26 U.S.C. § 103(c) (2006). This treatment is also the same for tribal debt under Section 7871(c) of the Tax Code. 26 U.S.C. § 7871(c) (2000). Thus, while the debt markets differentiate substantially between bank debt and bond indentures, the Tax Code does not. For purposes of clarity, subsequent use of the term "bonds" in this Article refers to bonds issued under bond indentures in the capital markets and does not include the other forms of governmental debt considered to be "bonds" under Section 103.

Tax-Exempt Debt

Tax-exempt debt is debt where the interest paid to the debt holder is not subject to taxation.[26] Governmental entities may, with some exceptions, issue so called "tax-exempt" bonds under Section 103 of the Tax Code. This tax-exempt status of municipal bonds has been a part of the federal Tax Code since its adoption in 1913.[27] One commentator explains that a tax-exempt bond is "a debt security in which the interest portion of the debt service paid is not included in gross income."[28] The tax-exempt status of municipal debt allows state and local governments to issue bonds at lower interest rates, since the income from those bonds results in the same level of after-tax income for taxpayers in higher tax brackets.

Because the interest is tax-free, investors are able to generate the same after-tax return with a lower interest rate as they would from a similar taxable investment that pays a higher interest rate. [29] In addition to the availability of lower interest rates, sometimes as much as 300 basis points lower,[30] longer terms are also available in the tax-exempt market.

While the rationale for tax-exempt bonds has evolved over time,[31] the modern rationale for exempting municipal bond interest from taxation is a federal policy of supporting states in their operation as governmental entities.[32] The ability to issue tax-free debt is crucial not to investors, but to states, because investors are willing to accept lower interest rates in exchange for the tax-exemption.[33]

Uses for Tax-Exempt Debt

States issue tax-exempt bonds not only to finance a core set of traditional governmental purposes such as building schools, roads, and sewers, but also to finance airports, docks, commuting facilities, utilities, mortgages, public golf courses, and even state lottery buildings

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[26] *See* GELFAND, *supra* note 10, §§ 5:01 et seq. for a thorough discussion of the history and policy rationale of tax-exempt municipal debt.

[27] Eric J. Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 424 (2004).

[28] FIPPINGER, *supra* note 18, § 1:2.2.

[29] To illustrate this phenomenon, assume that a taxpayer whose effective federal tax rate is 35% purchases a $1000 taxable bond from a corporation that pays interest of 10%. She will receive an annual interest payment of $100, but she must pay $35 of that in taxes, resulting in a net income of $65. If she were to purchase a $1000 tax-exempt bond from a municipality that pays 6.5% in interest, she would still receive $65 and would be economically indifferent between the two bonds, assuming that all other attributes of the bonds were equivalent, such as the risk of default and the dates of payment. Thus, the municipality can raise the same amount of capital as the corporation for substantially less in interest expense.

[30] *See* COHEN, *supra* note 12, § 21.03[2][d]. Financial measures are often expressed in terms of "basis points." A 300 basis point difference is the same as a three percent difference.

[31] *See* Clarkson, *supra* note 13, p. ___.

[32] As noted previously, the exemption from federal taxation for interest paid on state-issued debt is also related to a notion of state sovereignty. *See supra* Introduction. This notion of state sovereignty roughly parallels the doctrine of tribal sovereignty and thus provides analogous support for equal tax-free bond authority.

[33] WILLIAM A. KLEIN, JOSEPH BANKMAN & DANIEL SHAVIRO, FEDERAL INCOME TAXATION 185 (14th ed. 2006).

and horse race tracks. Changes to the Tax Code in 1986 sought to restrict this practice by placing limitations on private activity bonds.[34] After these changes, some municipalities began locating other sources of revenue to remain within the permissible tax-exempt bounds while still supporting private use projects such as stadiums and other sports complexes.[35]

In order to develop a baseline against which to compare tribal tax-exempt bonding authority, the Senate Finance Committee recently commissioned a study by the Government Accountability Office ("GAO") to determine the scope of projects financed by state and local governments in eight particular categories between 2000 and 2004.[36] The GAO identified:

- $46.4 billion in 3,557 tax-exempt bond issues for multifamily housing projects
- $61.4 billion in 1,094 tax-exempt issues for toll roads and highways
- $3.5 billion in 220 tax-exempt issues for parking facilities
- $60.9 billion in 3,085 tax-exempt issues to build parks and recreational facilities
- $11.1 billion in 236 tax-exempt issues related to convention centers[37]

The GAO report was commissioned, in part, because the restrictions on tribal tax-exempt bonding have been "difficult to enforce by the [IRS and have] increased the tax compliance

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[34] IRS Revenue Ruling 03-116 explains the section 141 definition of private activity bonds as follows:

> Section 141 provides, in part, that a bond is a private activity bond if the bond is issued as part of an issue that meets the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2). The private business use test is met if more than 10 percent of the proceeds of an issue are to be used for any private business use. The private security or payment test is met if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of an issue is directly or indirectly (1) secured by an interest in property used or to be used for a private business use, (2) secured by an interest in payments in respect of such property, or (3) to be derived from payments, whether or not to the issuer, in respect of property, or borrowed money, used or to be used for a private business use.

Rev. Rul. 2003-116, *available at* http://www.irs.ustreas.gov/pub/irs-drop/rr-03-116.pdf. Section 141(e) provides, in part, that the term "qualified bond" includes any private activity bond that (1) is a qualified 501(c)(3) bond; (2) meets the applicable requirements of section 146; and (3) meets the applicable requirements of each subsection of section 147. While section 103(a) of the 1986 Tax Code exempts from gross income interest on state and local bonds, such exemption is not extended to private activity bonds which are not also qualified bonds. 26 U.S.C. §§ 141, 103(b)(1) (2000)

[35] *See* Clarkson, *supra* note 13, p. ___.

[36] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL TAX POLICY: INFORMATION ON SELECTED CAPITAL FACILITIES RELATED TO THE ESSENTIAL GOVERNMENTAL FUNCTION TEST, pp. 4-5 (2006).

[37] Specifically, the GAO noted that as of 2005, there were about 2,400 municipal golf courses in the United States, and tax-exempt bonds had financed or partially financed at least 120 golf courses in 29 states. The GAO also identified 51 hotel projects that were financed by tax-exempt bonds. Finally, the GAO noted that all but two states have some form of legal gaming, and tax-exempt financing has been used to benefit gaming operations in several states.

burden on Indian tribal governments."[38] Literally thousands of projects exist that state and local governmental have financed with tax-exempt bonds, but which would have to be financed with more expensive taxable debt if undertaken by tribal governments.[39]

Tribal Governmental Debt Financing Issues

The primary roadblocks to the tax-exempt bond market are certain provisions of the 1982 Indian Tribal Governmental Tax Status Act ("Tribal Tax Status Act"),[40] part of the Internal Revenue Code ("Tax Code"). While the goal of the Tribal Tax Status Act was to treat tribes and states equally in the Tax Code,[41] the Act falls far short of achieving the goal of equal treatment desired by tribes[42] and, in fact, substantially limits the ability of tribes to raise debt for economic development activities.

Although the federal policy of exempting from federal taxation interest paid on state bonds issued to finance and effectuate state policy is a recognition and affirmation of that state's sovereignty, a similar recognition and affirmation of sovereignty unfortunately does not extend to Indian tribes. Tribes face three additional restrictions that do not apply to their state and local governmental counterparts. In the first instance, tribes cannot issue private activity bonds.[43] In addition, the Tribal Tax Status Act requires that tribal tax-free bond proceeds be used only for "essential governmental functions,"[44] a restriction not applicable to state and municipal bonds. Finally, in the Act was amended to further restrict tribal tax-exempt bonding authority to projects "customarily"[45] financed by states and local governments.

As a result of these restrictions, Indian tribes can only issue tax-exempt debt if "substantially all" of the borrowed proceeds "are to be used in the exercise of any essential governmental function,"[46] and "the term 'essential governmental function' shall not include any

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[38] *Id.* at 1

[39] *See* Clarkson, *supra* note 13, p. ___.

[40] Indian Tribal Governmental Tax Act, Pub. L. 97-473, 96 Stat. 2608 (1983) (codified at 26 U.S.C. § 7871).

[41] See 127 Cong. Rec. S5666-67 (daily ed. June 2, 1981) (statement of Sen. Wallop (R-Wyo.)).

[42] *See*, *e.g*., Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994); Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335 (1985).

[43] *See* Hyatt, et. al, *supra* note 15, at 19 ("State and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit corporations, or to finance mortgage loans for first-time low- and moderate-income home buyers, or to finance low- and moderate-income residential rental property. Private activity bonds are also issued for airports, docks, and wharves, solid waste facilities, sewage facilities, and certain other facilities."). Current law bars Indian tribes from issuing private activity bonds for anything other than a tribal manufacturing facility. 26 U.S.C. §§ 7871(c)(2)-(c)(3) (2000).

[44] *Id.* at § 7871(c)(1).

[45] 26 U.S.C. § 7871(e) (2000).

[46] 26 U.S.C. § 7871(c)(1) (2000). "Substantially all" is not defined in the statute but is believed to mean at least 95% of the proceeds. See HYATT, ET AL, *supra* note 15, p. 18

function which is not customarily performed by state and local governments with general taxing powers."[47] Section 7871(e) does not provide any guidance, however, as to when a particular activity becomes "customary" for a municipal government.

Given that the federal government holds most tribal land in trust, those lands are not available for property taxes,[48] and thus the tax-base of a tribe is usually insufficient for a tribe to issue general obligation bonds.[49] Since the revenue from a revenue bond is usually linked to the project being financed, both the prohibition on private activity bonds and the additional restriction to "customary" governmental activity place tribes at a significant disadvantage relative to state and local governments in the capital markets and is inequitable when compared to other forms of municipal debt.

The narrow interpretation of this language by the Internal Revenue Service ("IRS") has had a stifling effect on tribes' tax-free bonding authority.[50] These restrictions on the scope of what can be financed with tax-exempt debt in particular deny poor tribes the opportunity to address their glaring infrastructure and economic development needs. Tribes with substantial natural resources or significant gaming operations have the option of financing certain activities on a taxable basis even if the restrictions in the Tax Code prevent them from financing those activities on a tax-exempt basis. Poorer tribes, however, do not have that luxury, [51] and upwards of $50 billion in annual capital needs go unmet in Indian Country,[52] in part because the debt service required to finance the projects to meet those needs is too expensive at taxable rates.[53]

The IRS's interpretation of tribal tax-exempt bonding authority has also meant a substantially higher audit risk for tribal bonds, as tribal governments are also victims of a

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[47] 26 U.S.C. § 7871(e) (2000).

[48] *See* COHEN, *supra* note 12, § 8.03[1][e].

[49] A general obligation bond involves borrowing against the general credit of a particular government; no specific collateral or revenues are pledged.

[50] *See* COHEN, *supra* note 12, § 21.03[2][c].

[51] Suppose that the municipality from the financing example mentioned in footnote 29, is instead a tribe. If the tribe wants to finance a project but cannot obtain tax-exempt treatment for the debt, it will have to pay 10% in taxable interest rather than the tax-exempt rate of 6.5%. Assume also that the revenues from the project will be insufficient to cover the debt service at 10%, but would at 6.5%. If the tribe has sufficient funds from other sources (i.e. natural resources or gaming revenues) and still wants to pursue the project, it could still issue the bonds and use those other sources to cover the portion of the debt service not covered by project revenues. In reality, the poorer tribes simply do not have those other sources of money available, and thus the project is never undertaken. In addition, given the substantial balance sheets of some of the wealthier tribes, they would likely be able to borrow at lower taxable rates than the poorer tribes would because the wealthier tribes would almost certainly receive better taxable bond ratings from credit rating agencies.

[52] *See* ERIC HENSON & JONATHON B. TAYLOR, HARVARD PROJECT ON AM. INDIAN ECON. DEV., NATIVE AMERICA AT THE NEW MILLENNIUM 120 (2001).

[53] *Encouraging Economic Self-Determination in Indian Country: Hearing Before the Subcomm. on Long-Term Growth and Debt Reduction of the S. Comm. on Finance*, 109th Cong. 1 (2006) (statement of Gavin Clarkson, Assistant Professor, University of Michigan School of Information, School of Law and Native American Studies) *available at* www.senate.gov/~finance/hearings/testimony/2005test/052306testgc.pdf.

demonstrably disproportionate number of IRS enforcement actions. Fewer than 1% of the tax-exempt municipal offerings are audited by the IRS each year, but direct tribal tax-exempt issuances are thirty times more likely to be audited within four years of issue,[54] and 100% of tribal conduit issuances have been or are currently being challenged by the IRS.

The deleterious impact of the statutory restrictions and regulatory confusion towards tribal bonds can be seen in the relative paucity of tribal tax-exempt financings. For the years 2002, 2003, and 2004, state and local governments issued an average of 14,038 tax exempt bonds.[55] Over the same period, tribal governments annually issued an average of five tax-exempt bonds.[56] In dollar terms, for the years 2002-2004, state and local governments issued on average $363.6 billion of tax-exempt debt[57] while tribal governments issued on average only $202 million of tax-exempt debt.[58]

Given the relative numbers of municipal and tribal issuers,[59] the expected number of tribal tax-exempt issues should be more than an order of magnitude higher. American Indians and Alaska Natives account for more than 1.5% of the national population, yet tribes issue less than one-tenth of 1% of the tax-exempt bonds each year.[60] The high rate of tribal audits becomes even more troubling given the relative minimal rate of tribal tax-exempt bonding activity.

Market Access Challenges to Tribal Governmental Financing

In addition to the challenges associated with the scope of tax-exempt bonding authority, Indian tribes face another challenge when accessing the capital markets. As mentioned earlier, unlike a typical bank loan, a bond is a "security" subject to federal securities laws as well as regulation by the Securities and Exchange Commission. The relevant federal securities laws are

[54] *See* Clarkson, *supra* note 13, p. ___.

[55] *See* Clarkson, *supra* note 13, p. ___. For 2002, 2003, and 2004, state and local governments issued 14,056, 14,752, and 13,306 tax-exempt short and long-term bonds respectively.

[56] *Id*. For 2002, 2003, and 2004, tribal governments issued four, six, and five tax-exempt short and long-term bonds respectively.

[57] *Id.* For 2002, 2003, and 2004, state and local governments issued $355.5 billion, $379.0 billion, and $356.5 billion dollars of tax-exempt debt respectively.

[58] *Id.* For 2002, 2003, and 2004, tribal governments issued $194.4 million, $233.3 million, and $178.4 million dollars of tax-exempt debt respectively. *Id.*

[59] As of November 2005 there were 561 federally recognized Indian Tribes and Alaskan Native Villages that could potentially issue municipal debt, as compared to 87,575 state, county, and local governmental entities. *See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 70 Fed. Reg. 226, 71193 (Nov. 25, 2005); U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, VOLUME 1, NO. 1, GOVERNMENT ORGANIZATION *available at* http://www.census.gov/prod/2003pubs/gc021x1.pdf. In 2002, these non-tribal governmental entities issued 14,056 tax-exempt bonds. Thomson Financial Data Extract, *supra* note 268. Assuming the same ratio of issuers to bonds, the expected number of tribal issues would have been 90, significantly more than the 4 tribal bonds issued that year.

[60] *See* Clarkson, *supra* note 13, p. ___.

the Securities Act of 1933[61] and the Securities Exchange Act of 1934.[62] Securities issued by states or local governments are generally exempt from the registration and reporting requirements of the Exchange Act.

Unlike state and local municipal securities, tribal municipal debt is not exempt from securities registration requirements and is thus less liquid than comparable municipal debt that is exempt from registration. This lack of an exemption is detrimental to tribes' abilities to employ debt finance, to perform the municipal functions they are required to perform, and to lay the foundations for tribes' economic development.

Registration of securities is an expensive proposition and the required reporting costs the issuing entity approximately two million dollars per year.[63] Once an entity is already reporting to the SEC, however, the marginal costs for subsequent issues of registered debt are negligible. Securities that are exempt from registration avoid these costs while still being available for purchase by both institutional investors and individual retail investors.

A small handful of tribes have incurred the additional and substantial costs associated with registering municipal securities, such as the Mississippi Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Seneca Nation of Indians. Most tribes opt to issue municipal bonds in special transactions called private placements,[64] which results in a less liquid market for their bonds because they can be offered only to certain "qualified institutional buyers" as defined under SEC Rule 144A or to a limited number of sophisticated investors as defined under SEC Rule 506. Privately placed bonds are also restricted in terms of resale, as they can typically be resold only to other qualified institutional buyers or in limited offering situations, since transactional exemptions such as a private placement do not make the underlying security exempt from registration. Because of these limitations, privately placed bonds will be somewhat less liquid than bonds sold as registered securities,[65] and the investors who purchase tribal bonds in a private placement may charge the tribe a liquidity premium in the form of additional interest to offset their restrictions on resale.[66]

Disclosure requirements also vary depending on whether a security is registered, exempt from registration, or unregistered but sold under Rule 144A. While existing research has identified a separate premium associated with limited disclosure,[67] issuers have the option to

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[61] 15 USC §§ 77

[62] 15 USC §§ 78

[63] Logan, D. (2003). *You'll have to spend to attain Sarbanes-Oxley compliance* (No. SPA-21-0462): Gartner Research.; O'Connor, C. M. (Apr 25, 2005). Computershare turns to privates for acquisition: Cost of rating still exceeds the cost of public debt, so why bother? *The Investment Dealers' Digest,* p. 1.

[64] See Securities Act § 4(2); SEC Regulation D (containing Rules 501 through 508)

[65] *See* Livingston, M., & Zhou, L. (2002). The impact of rule 144a debt offerings upon bond yields and underwriter fees. *Financial Management, 31*(4), 5.

[66] Hyatt, supra note 15.

[67] *See e.g.* Healy, P. M., Hutton, A. P., & Palepu, K. G. (1999). Stock performance and intermediation changes surrounding sustained increases in disclosure. *Contemporary Accounting Research, 16*(3), 485; Healy, P. M., &

voluntarily disclose more information than is minimally required, and empirical studies have documented that voluntary increased disclosure reduces the limited disclosure premium.[68]

In summary, the legal requirements for registration and exemption have created the following situation: municipalities wishing to finance municipal debt are exempt from registration, yet can sell securities to the combined market of both qualified institutional buyers and retail buyers who, in turn, are permitted to sell those bonds to any buyer of their choosing. Those tribes that can afford registration, and choose to do so, have access to this same market, but must first pay large registration costs, continuing and substantial reporting costs, and smaller marginal registration costs for each subsequent issuance. Other tribes simply issue securities to the limited set of qualified institutional buyers they can access in the private placement bond market. This smaller market suggests relative illiquidity, which produces a liquidity premium for these tribes. Current federal securities law forces tribal governments wishing to avoid the liquidity premium to incur large ongoing registration costs Many tribes cannot absorb these costs and as a result, because of differential treatment under federal securities law, their governments must abandon bond-financed projects altogether or turn to more expensive private placement.

Financing is a key element when any government entity considers the feasibility of any project. Considerations include the term of the loan, the cost of borrowing funds and the interest rate of the loan. State and local governments know very well the necessity of maintaining a good credit rating because any lowering of credit directly affects the ability of the borrower to raise funds on more favorable terms. An extra point (interest percentage) attached to the rate can translate into millions over the life of the loan, therefore, maintaining the highest rating means better terms and more funds to apply directly to projects.

Tribes are limited not only in their use of public funding, but they also confront greater cost of funds and higher rates. The registration process and the annual maintenance of tribal issues are higher because of their use of private placements and limited access to the full and open market. Additionally, the increased scrutiny from the IRS means even greater expense associated with audits and additional recordkeeping. As a result, tribes pay much more in time and expense for building their infrastructure and serving their citizens' basic needs.

Indian Country Equity Financing

Indian Country's Equity Investment Gap

According to a Treasury Department study commissioned to examine private equity in Indian Country, Indian Country is estimated to have $10 billion in equity capital,[69] which is only

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Palepu, K. G. (2001). Information asymmetry, corporate disclosure, and the capital markets: A review of the empirical disclosure literature. *Journal of Accounting & Economics, 31*(1-3), 405.

[68] *See e.g.* Botosan, C. A. (1997). Disclosure level and the cost of equity capital. *The Accounting Review, 72*(3), 323; Botosan, C. A., & Plumlee, M. A. (2002). A re-examination of disclosure level and the expected cost of equity capital. *Journal of Accounting Research, 40*(1), 21; Sengupta, P. (1998). Corporate disclosure quality and the cost of debt. *The Accounting Review, 73*(4), 459.

[69] CDFI Equity Study, p. 55.

0.03% of U.S. total equity.[70] Given the current economic conditions in Indian Country, which are substantially below the average for the United States as a whole, Indian Country faces at least a $10 billion equity investment gap.[71] The gap between the current Indian Country equity level and the level that should exist based on Indian Country's size relative to the entire United States is $44 billion.[72]

The Treasury Department also noted significant potential benefits if this equity investment gap is eliminated. Bridging the $10 billion equity investment gap in Indian Country would create around $16 Billion in additional GDP for Indian Country, roughly doubling it.[73] This improvement, according to the study, "translates to approximately $10,000 more in per capita income, bridging the roughly $9,000 per person gap in income between Native Americans and the U.S. average, and would lift more people in Indian Country out of poverty."[74]

Other Challenges to Equity Financing in Indian Country

While some federal regulations and policies directly harm tribal economies, other regulations retard economic self-sufficiency as a result of mere oversight, or, "benign neglect." One such regulatory oversight is the failure to include American Indian Tribes in the list of "accredited investors" under Regulation D of the Securities Act of 1933.

For a growing number of American Indian-sponsored venture capital and private equity firms that are seeking to raise funds from prosperous tribes, the practical effect of tribes being defined as "non-accredited investors" is to eliminate this important source of funding. Since these private equity firms are mission-driven to reinvest their raised capital back into Indian Country business projects, the net effect of tribes being deemed non-accredited is to inhibit capital formation and investment in Indian Country. While there are a number of pathways through which a private equity firm can avail itself of this filing exemption, as a practical business matter, the pathway most commonly followed and looked to by successful firms is to offer their securities only to Accredited Investors.

As a general rule, securities lawyers advise startup private equity funds to restrict the sale of securities (i.e., raise their "blind pool" of capital) to Accredited Investors, given the high risk nature of equity investments. In short, a private investment firm that must raise its capital from non-accredited investors will pay higher costs for these funds.

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[70] CDFI Equity Study, p. 7.

[71] CDFI Equity Study, p. 55.

[72] *Id*.

[73] *Id* at 57.

[74] *Id*. (internal citations omitted)

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Capital and Finance Issues: On-Reservation Private Sector Growth

By Elsie Meeks and Peter Morris[1]

Studies show that over the last decade, small businesses owned by tribal citizens have become an increasingly important part of the economic base in many Native communities.[2] Between 1992 and 1997, the number of Native-owned businesses grew by 84% to a total of 197,300 businesses, and their receipts increased by 179%.[3] The largest concentration of American Indian and Alaska Native-owned businesses operate in the Business and Service industry (17%), followed closely by firms in the construction industry (16%).[4] A recent report from the Department of Commerce credits several factors for this growth including:

1. significant growth in the establishment of Native Community Development Financial Institutions (CDFIs) that can provide technical assistance, capacity-building, and start up capital to Native entrepreneurs;

2. increased participation in the SBA 8(a) contracting program; and

3. tax incentives that attract business owners onto Indian lands.5

While entrepreneurship is on the rise however, significant challenges remain for Native people in accessing capital for small business development.

The Need for Credible Institutions

It is a truism of economic development theory that credible institutions are essential to successful development, yet most Native communities lack the nonprofit institutions that are taken for granted in urban and rural communities around the country and many lack a developed private sector economy. The situation is even more serious when it comes to mainstream financial institutions. According to the *Native American Lending Study (NALS)*, conducted by the CDFI Fund in 2001, 15 percent of Native communities are more than 100 miles from the nearest ATM or bank, and 86 percent of Native communities lack a single financial institution within

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[1] Elsie Meeks is the Executive Director of the First Nations Oweesta Corporation (OWEESTA), a subsidiary of First Nations Development Institute. Peter Morris is the Research Director of First Nations Development Institute.

[2] Jennifer Malkin, et al., CFED, "Native Entrepreneurship," (Dec. 2004).

[3] U.S. Census Bureau, 1997 Survey of Minority-Owned Business Enterprises. A more recent report using data from 1997 to 2002, however, indicates that Native-owned businesses increased by only 4%. MBDA, "State of Minority Business Enterprises," (Sept. 2005).

This dramatic difference is likely due in large part to the fact that in 1997, tribally-owned businesses were included in the survey, while in 2002 only businesses owned by individual Indians were included. This shift in methodology is indicative of the difficulty encountered finding accurate data on economic activity in Indian country. It also reflects the common practice of conflating private businesses owned by tribal members with tribally-owned businesses that provide a larger public benefit through the tribe's general revenue fund.

[4] U.S. Census Bureau, 1997 Survey of Minority-Owned Business Enterprises.

[5] U.S Dept. of the Treasury, Comptroller of the Currency, "Commercial Lending in Indian Country: Potential Opportunities in an Emerging Market," (March, 2006).

their borders.[6] The *National Strategy for Financial Literacy (NSFL)*, released last month, demonstrates that this problem persists to the present. The report explicitly identifies Native communities as underserved by financial institutions and in need of specific strategies to increase the availability of "financial services resources."[7]

The lack of financial institutions poses a fundamental problem in accessing basic financial services and leaves tribal citizens uniquely vulnerable to predatory lending. Even more seriously, it makes business financing almost impossible to obtain. The *NALS* found that over 60 percent of respondents reported business loans were difficult (37 percent) to impossible (24 percent) to obtain. That rate rose to almost 70 percent with loans of $100,000 or more.[8] In addition, unlike the majority of Americans, many tribal citizens are unable to tap the equity in their homes to access start-up capital because of the complications of trust land status and the reliance on HUD-assisted housing that does not build equity. Analysis by *NALS* of investments in Native American and Native Hawaiian economies revealed a $44 billion gap from those in the United States economy as a whole.

Strategies for Building the Private Sector Economy

More and more Native communities are creating Native Community Development Financial Institutions (NCDFIs) in order to address the lack of traditional financial services available in tribal communities. These organizations are community based financing entities governed by representative boards that meet this need for accessible, affordable loans and other financial products that are often tied to intensive training and technical assistance. CDFIs have been around for many years, but when Congress created the CDFI Fund under the Department of the Treasury back in 1994 there were very few established NCDFIs. In fact, before 2000 only two NCDFIs had received certification from the CDFI Fund. Today there are over 80 Native financial institutions in various stages of the development and certification process, including 36 certified NCDFIs. These institutions can help form the foundation to develop the private sector and lead the emergence of a nonprofit sector in reservation economies.

The graphic below, which was developed by First Nations Development Institute, explains "integrated asset building strategies" as a model for building stronger reservation economies and therefore stronger Native communities. It describes a proactive, holistic and long-term approach to the challenges of poverty in Native communities. Many Americans seem to assume that Indian gaming has 'solved' the problems created by poverty in Native communities. However, gaming has been a boon to only a small number of tribes. Many Native people, regardless of income, still lack the basic resources to protect their financial future (even if their governments own profitable enterprises).

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[6] U.S. Department of the Treasury, "Community Development Financial Institutions Fund," Native American Lending Study (Dec. 2000).

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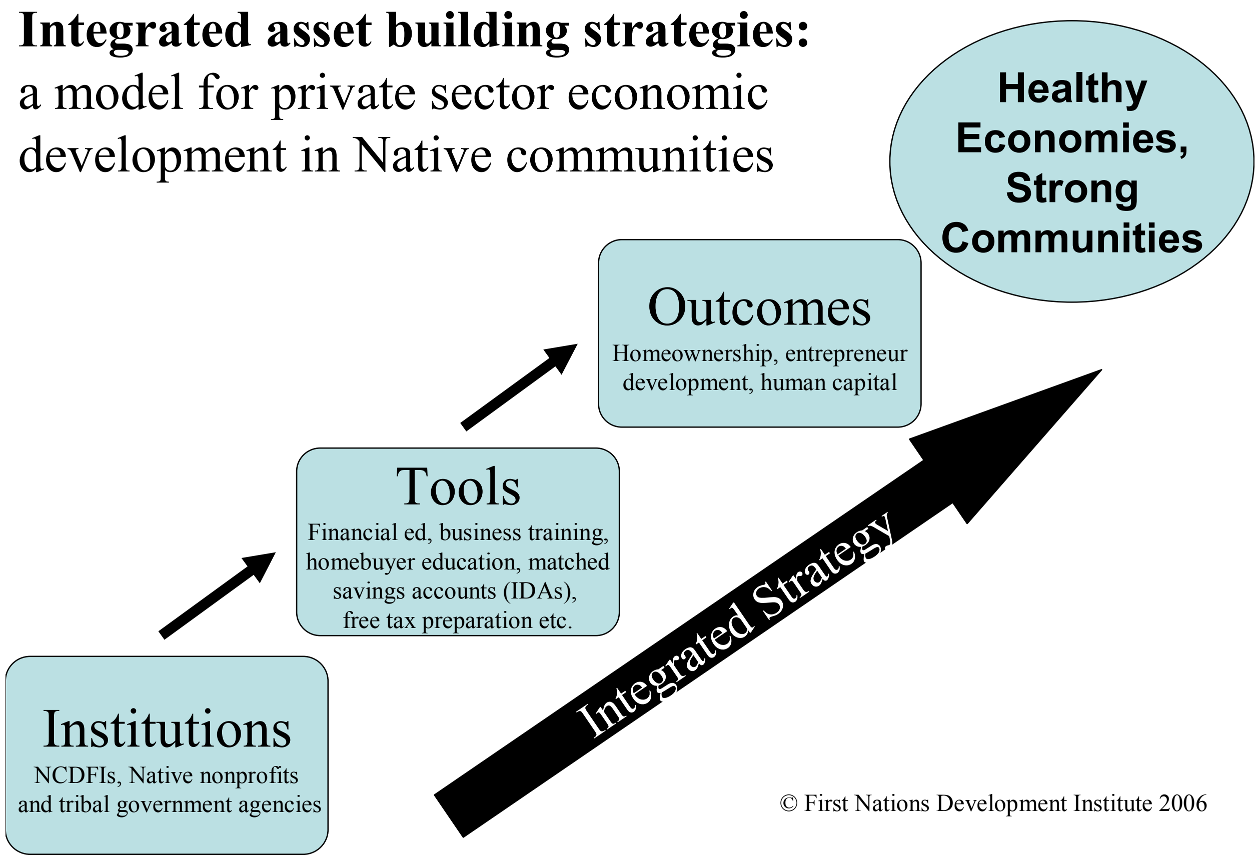
[8] NALS Study, *supra* note 1.

"Integrated asset building" is a term that was developed to describe what community-based organizations are *doing* in Native communities to address the challenges of poverty. The structure of the graphic is not unintentional. Strong institutions, including NCDFIs, are at the very foundation of successful, culturally appropriate economic development in Native communities. Many of these institutions are developing an integrated range of services including education (e.g. homebuyer education, business training) and financial products (e.g. Individual Development Accounts (IDAs), loans, checking and savings accounts), among others. These services are tools used by the institutions to engage tribal citizens and achieve desirable outcomes for Native individuals and families such as: homeownership, small business development, and increased human capital through access to post-secondary education. The circle in the upper right, 'Healthy Economies, Stronger Communities,' represents the fact that many of these institutions see their role as not just assisting individuals and families but building a healthier economy and stronger community.

An underlying foundation of all effective economic development, that is implied but not explicit in the graphic, is the role of financial education in preparing effective leaders and citizens in every sector of Native society. Effective tribal leaders must have the information they need to make good financial decisions for themselves and their communities. Tribes cannot have effective business leaders if they lack good financial management skills. Tribes cannot have a vibrant nonprofit sector without leaders who are able to fundraise and manage money in a transparent and capable fashion. Investments in youth financial education have been proven to positively impact parents and other community members and constitute a long-term investment in the future health of reservation economies and strength of Native communities.



The Impact of Successful NCDFIs

South Dakota

The story of the Lakota Fund and the growth of NCDFIs in South Dakota illustrate the critical role of strong, independent institutions in improving the economic situation of Native communities. When the Lakota Fund began lending in 1986, it conducted a survey that revealed that 85 percent of its borrowers had never had a checking or savings account and 75 percent had never had a loan. Other challenges included: (1) a lack of business experience as less than five percent of borrowers had ever owned a business before; (2) the fact that business ownership had never been a part of Lakota culture; and (3) the more contemporary perception that businesses should be owned by the tribal government, instead of by individual entrepreneurs.

In spite of these enormous barriers to success and in a context that lacked a local support network, more than 20 years of operation at the Lakota Fund has led to over 600 loans, most ranging from $1,000 – $75,000, for a total of over $3 million invested in reservation entrepreneurs. In addition, training, technical assistance, and marketing services have been offered to hundreds of Native business owners, including 1,600 arts and crafts micro-entrepreneurs. The loans and related services have leveraged significant private sector growth with businesses such as the Crazy Horse Construction company that has grown from one part-time subcontractor to a multi-million dollar company. The Big Bats Convenience Store is another example of tremendous success, and currently has over $1 million in revenue.

These businesses, together with many others that the Lakota Fund provides assistance, have significantly impacted income growth and contributed to a decline in unemployment on the Pine Ridge Reservation. Analysis by *South Dakota Business Review* in June 2003 began to quantify the impact of this work to develop a private sector economy on Pine Ridge. According to its analysis, since 1985 real per capita personal income in Shannon County (encompassing the Pine Ridge Reservation) grew by 80 percent compared to statewide growth of 44 percent. Furthermore, Shannon County's employment growth of 80 percent during the 1990s was the second fastest of all South Dakota counties.

Beyond direct services, the Lakota Fund played a central role in establishing the Pine Ridge Area Chamber of Commerce (PRACC). Over the past several years, the Lakota Fund has worked with PRACC and the Oglala Lakota tribal government to create and amend laws to provide a more conducive environment for the development of private enterprise on the reservation. Recent efforts to establish the Wawokiye Business Institute, in partnership with Oglala Lakota College and PRACC, have begun to build a permanent foundation for an improved culturally sensitive business environment on Pine Ridge.

The many years of hard work at the Lakota Fund have not gone unnoticed. Other Native communities in South Dakota, facing similar problems, have begun to see the critical role NCDFIs play in developing a private sector economy. On the Cheyenne River Reservation for example, Four Bands Community Fund (Four Bands), a certified Native CDFI, looked to the Lakota Fund for lessons learned in the development of their NCDFI. The organization was established in 2000 to meet the significant economic challenges facing the community. In just six years of operation, Four Bands has made 71 loans totaling $322,974, helped create or retain 107 jobs on the reservation and graduated 103 people from their business training course. As part of their integrated strategy, Four Bands offers basic financial education in local schools and has developed a youth entrepreneurship program to impart financial and business management skills to the next generation of tribal leaders. In addition to Four Bands, there are at least seven other Native financial institutions in various stages of development in the state of South Dakota alone.

<u>Arizona</u>

Arizona is another of the leading states in the development and implementation of integrated asset building strategies in Native communities. Arizona is home to 11 Native financial institutions in various stages of development including Hopi Credit Association which has been in operation since 1952 and was among the first NCDFIs to receive certification from the CDFI Fund. Over the past five years, Hopi Credit has made loans totaling an average of $1 million a year, leveraging off-reservation funding sources from private foundations, banks, the tribe, and the federal government. Navajo Partnership for Housing (NPH), a NCDFI established in 1996, with the goal of building a real estate market on and around the Navajo Nation, has generated over $19 million in mortgage loans since they began. Almost $17 million of that impact has come since they received certification in 2002. As a part of its work to prepare the Navajo people for homeownership, NPH has initiated a Navajo Nation-wide financial literacy campaign, offered homebuyer education classes to over 2000 community members, offered free-tax preparation services through the Volunteer Income Tax Assistance program of the IRS, and an Individual Development Account (IDA) program that provides matching dollars and financial education to aspiring homebuyers.

Successful models lead to even more successful models when other communities realize how NCDFIs act as catalysts for economic growth in their community. For example, the Salt River Pima Maricopa Indian Community has recently launched a CDFI. They combined the success and lessons learned of lending through its Housing Division and the desire and needs of community members to create and start new businesses. Through joining business and mortgage lending and combining it with financial education, community members will have the support and coaching necessary to expand entrepreneurship and address housing needs. The 'ripple effect' of NCDFIs reverberated at Salt River when the executive director of the Citizen Potawatomi Community Development Corporation (CPCDC), a certified NCDFI in Oklahoma, was invited to explain to the Salt River Tribal Council the impact an NCDFI had on their community. This partnership led to successful passage of a resolution of support for the creation of the NCDFI at Salt River.

A broader example of efforts to build Native communities' interest and awareness in integrated asset building strategies is the newly launched Arizona Native Assets Coalition. This Coalition is composed of organizations seeking to provide peer-mentoring and networking opportunities to build interest in asset building strategies like NCDFIs throughout the state. The Navajo Partnership for Housing, Hopi Credit and Salt River Housing Division, in addition to numerous other Native nonprofits, tribal agencies, and non-Native organizations, are involved in this Coalition This infrastructure is present because Arizona is home to 20 percent of the nation's Native Individual Development Account (IDA) programs, one of the highest numbers of Native financial institutions and an innovative Volunteer Income Tax Assistance program run by the Inter Tribal Council of Arizona in several reservation and urban communities.

Individual Development Accounts (IDAs) – A Tool for Engaging Future Entrepreneurs

IDAs are matched savings accounts utilized by tribal governments, NCDFIs and other Native organizations as a tool to engage future entrepreneurs, provide start-up capital and prepare them for successful business ventures. IDA programs are generally funded by public and private sources to offer low- and middle-income people assistance in reaching their goals of homeownership, entrepreneurship, post-secondary education, and other appreciable assets. Participants in IDAs attend financial education classes and receive matching dollars to encourage positive savings and provide capital to meet financial goals that are otherwise unattainable. The match is generally at least one dollar for every dollar saved, but is often more than that. The only dedicated federal funding source for IDAs, the Assets For Independence (AFI) program, explicitly excludes tribes from receiving direct funding.

NCDFIs, Native nonprofits, and tribal government agencies have successfully modeled this asset building strategy to the benefit of over 1,000 savers since the first Native IDA program in 1998.

In spite of their inability to access AFI program dollars, Native IDA programs have been able to access some federal funding, primarily from the Department of Housing and Urban Development. Successful programs have also leveraged federal investments to access a range of funding from private foundations, tribal and state governments. Partially because of this funding reality, more than half of Native IDA graduates use their savings to purchase or repair their home. While these housing programs meet a critical need in Native communities, the lack of direct access to federal IDA funding that can support aspiring Native entrepreneurs, unnecessarily restricts the Congress's investment in healthy reservation economies.

Conclusion

The growing class of tribal entrepreneurs continue to face a number of challenges accessing capital and traditional financial services. Although some communities have developed innovative solutions to overcome these challenges, an important role remains for tribal and federal policymakers. In addition to supporting Native institutions like NCDFIs, federal policy should work to provide incentives for mainstream financial institutions to serve Native communities and stimulate home-ownership among tribal citizens. Policies should also support the components of an integrated asset-building strategy including: financial education, IDA, and Earned-Income Tax Credit programs.