

FINANCIAL ASSISTANCE PROGRAMS: WORKING SUCCESSFULLY WITH YOUR LENDER

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FINANCIAL ASSISTANCE PROGRAMS: WORKING WITH YOUR LENDER

I. Opportunities

1. General programs promoting federal contracting with minority businesses.
 - a. SBA 8(a) program for Individual Indians
 - b. SBA HubZone Program
 - c. SBA Small Disadvantaged Business Program
2. Special Federal Procurement Rights Available to Indian-Owned Businesses
 - a. SBA 8(a) Program
 - b. DOD A-76 Program
3. Loan Guaranty/Grant Program
 - a. BIA Guaranty and Insured Loan Program
 - b. SBA Loan Program
 - c. Rural Development Administration Loan Guaranty Program
 - d. USDA and USDA re-lending program for start up
 - e. HHS Administration for Native Americans
 - f. DOE Grant Program
4. Tax Benefits –Employing and Training Subsidies
 - a. Tax Benefits
 - b. Training Funds, Wage Subsidies, Employee Supportive Seminars

II. Challenges

1. Impediments to development of rural and reservation economies
 - a. Lack of Infrastructure
 - b. Problems incident to small or declining populations
 - c. Lack of jobs

- d. Out-migration
 - e. Primary employer: tribal or federal government
 - f. Lack of support services
 - access to health care, transportation and child care
 - g. Tribal sovereignty
 - h. Unique status of land
2. Legal
- a. Understanding tribal sovereignty, tribal immunity and tribal law
 - b. Understanding federal law
 - c. Institutionalization of dispute resolution/unbiased court system
 - d. Commercial and business codes
 - e. Taxation
 - f. Lack of familiarity leads to poor lending practices
 - g. Willingness to loan to tribes and tribal businesses only with proven economic track records
3. Political and Cultural
- a. Identifying business opportunities that are culturally compatible with the tribe
 - b. Duplicative, conflicting, confusing federal programs and regulations
 - c. Tribal reticence to be transparent about culture
 - d. Tribe as government and as business owner
 - e. Small business owner in Indian country
 - f. Uncertainty caused in tribal political leadership
 - g. Understanding tribal government and politics
4. Economic
- a. Absence of trained workforce

- b. Distrust of traditional banks and credit
- c. Extraordinary time and expense to complete transactions
- d. BIA approvals
- e. Delays in getting land title status reports from the BIA
- f. No standardized practices or documents
- g. Review by the tribe
- h. Title, survey and access issues

III. Suggestions

1. Selection of business entity
 - a. Tribally created entity federally chartered
 - b. Tribally chartered §17 Corporation
 - c. Created under state or tribal law
 - Corporation
 - Limited Liability Company
 - Limited Partnership
 - Etc.
2. Elements of tribal economic success
 - a. Government continuity – staggered terms
 - b. Separation of business and politics – business accountable to tribe, but not operated by it
 - c. Create or strengthen institutions necessary to effective governing and business regulation
 - d. Develop business loans and regulation
 - e. Limited waivers of sovereign immunity
 - f. Comprehensive Economic Development Plan
 - g. Intra-tribal coordination of resources

- consider a holding company
 - engage in business planning
3. Build a team and prepare a plan
 4. Vet the plan
 - a. Cultural compatibility
 - b. Economic feasibility
 - c. Timing
 - d. Tax consequences
 5. Seek out opportunities
 - a. Renewable energy – DOE grants
 - b. FCC – telecommunications grants/technical assistance
 - c. Loan guaranties and grants
 - d. Legislation

IV. **Application: What Do You Need¹**

1. Precise **legal name, address, and tax identification number** or social security number.
2. Proof of the borrower's **eligibility**.
3. A statement signed by the borrower, indicating that it is **not delinquent** on any federal tax or other debt obligation.
4. The borrower's **business plan**, including resumes of all principals and a service to be offered, market factors, the borrower's marketing strategy.
5. A detailed description of the borrower's **equity** in the business being financed, including the method(s) of valuation.
6. The borrower's **balance sheets and operating statements for the preceding 3 years**, or so much of that period that the borrower has been in business.
7. The **borrower's current financial statement**, and the **financial statements of all co-makers and guarantors** of the loan (other than BIA).

¹ This list is based on Indian Financing Act application requirements, 25 C.F.R. 103.26, but is applicable generally.

8. At least 3 years of **financial projections** for the borrower's business consisting of pro-forma balance sheets, operating statements, and cash flow statements.
9. A detailed list of all **proposed collateral** for the loan, including asset values and the method(s) if valuation.
10. A detailed list of proposed hazard, liability, key man life, and other kinds of **insurance** the borrower will maintain on its business assets and operations.
11. If any significant portion of the loan will be used to finance **construction, renovation, or demolition** work, a statement to that effect.
 - Written **quotes** for the work from established and reputable contractors
 - To the extent available, copies of all **construction and architectural contracts** for the work, **plans and specifications** and applicable **building permits**
12. If the borrower is a **tribe** or a tribal enterprise, **resolutions** by the tribe and **proof of authority under tribal law** permitting the borrower to borrow the loan amount and offer the proposed loan collateral.
13. If the borrower is a **business entity**, **resolutions** by the appropriate governing officials and **proof of authority under its organizing documents** permitting the borrower to borrow the loan amount and offer the proposed loan collateral.

V. Due Diligence

1. Title Matters
 - ___ Abstract of title
 - ___ Commitment for mortgagee's policy of title insurance
 - ___ Exception documents
 - ___ Vested documents and requirement for title insurance coverage
 - ___ Survey
2. Personal Property
 - ___ UCC Search (name and trade name of borrower and prior owners)
 - ___ Local chattel record search (name and trade name of borrower and prior owners)
 - ___ Verification of accounts receivable
 - ___ Verification of inventory
 - ___ Leases and other contract rights
3. Organization Documents (Borrower/Guarantor and constituent entities)
 - ___ Articles of Incorporation
 - ___ Certificate of Good Standing
 - ___ Corporate Resolutions
 - ___ Bylaws

- ___ Pre-incorporation Agreement
- ___ Shareholder Agreement
- ___ Partnership Agreement
- ___ Certificate of Limited Partnership
- ___ Partnership Authorization
- ___ Trust Documents
- ___ Certificates of Authority of Foreign Entity to do Business
- ___ Tribal Constitution, Bylaws
- ___ Charter and Bylaws of §17 Corporation
- ___ Tribal Code of Law, Ordinances, Court Decisions
- ___ Authorizing Resolutions, including (limited) waiver of sovereign immunity, for where applicable

4. Litigation Search

- ___ State court local to collateral
- ___ State court where borrower is doing business locally
- ___ Federal court local to collateral
- ___ Federal court where borrower is doing business
- ___ Bankruptcy court where borrower is doing business
- ___ Tribal court
- ___ Audit letters

5. Environmental Matters

- ___ Phase I Audit
- ___ Subsequent environmental site assessments, as appropriate
- ___ Acceptable contract between borrower and auditor
- ___ Evidence of compliance with the National Environmental Policy Act (NEPA)

6. Additional Contracts

- ___ Debt instrument
- ___ Security agreements
- ___ Loan agreements
- ___ Separate property agreements
- ___ Divorce settlements
- ___ Side agreements among partners/shareholders
- ___ Ante-nuptial agreements
- ___ Other (varies from transaction to transaction)
- ___ Construction, renovation, demolition contracts, plans and specifications, permits

7. Law and Regulations (federal, tribal and local law governing all collateral)

- ___ Zoning
- ___ Subdivision ordinances
- ___ Permits
- ___ Other (varies from transaction to transaction)

___ Tribal land use plan/ordinance

VI. Questions to Expect from Your Lender/Investor

1. Is the tribe organized under the IRA? Does it have a constitution?
2. Who is the entity with whom I will be doing business? When was it formed? How was it formed? Was it given the power and authority to engage in the proposed business? To borrow money? To have business partners? What organizational documents and resolutions does it have?
3. Will the tribe/entity waive its immunity from suit?
4. Does the tribe have laws that govern the granting and perfection of liens on personal property and interest in real property, together with the enforcement of those liens?
5. Will the tribe tax the business?
6. Who has authority to bind the entity with whom I am going to do business? What documents are there showing that authority?
7. What approvals (federal, tribal, special) are required? How long will it take to get those approvals? What can be done to expedite the approval process?
8. What is the law of the tribe? Are copies of the laws and court cases available to me?
9. What is the status of the land? Have a survey, environment site assessment, NEPA assessment been done? Have a Title Status Report and a commitment for title insurance been obtained? Are all necessary utility easements in place? Is actual access available?
10. Who is the tribe's/entity's attorney? Business advisor? Accountant? What authority has been given to each?

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Profile

Nancy J. Appleby is the founder and Managing Member of Appleby Law PLLC, a firm specializing in federal Indian law, commercial real estate and financing.

Ms. Appleby's practice focuses on Indian law, real estate and finance. Ms. Appleby's extensive experience in Indian law includes representation of lenders, real estate and energy developers, governmental subdivisions, contractors, leasing companies and other business clients. Her primary areas of practice involving federal Indian law include tribal real estate and mortgage law; construction and permanent lending for commercial projects; title insurance; the Indian Financing Act Guaranteed Loan Program; commercial and retail leasing; project development and financing; traditional and alternative energy development; ground leasing; easements; land use covenants; conditions and restrictions; negotiating contracts, litigation and dispute resolution and regulatory and agency matters.

Ms. Appleby is a frequent speaker at, and author for, real property and federal Indian law conferences and symposia. She is a fellow and member of the Board of Regents of the American College of Mortgage Attorneys, a member of the leadership of the Real Property, Probate and Trust Law Section of the American Bar Association, an American Bar Association Fellow and a member of the American Land Titles Association Native American Lands Committee.

Affiliations

Member of Commonwealth of Virginia, District of Columbia, New Mexico and Federal Bar
American Bar Association
American College of Mortgage Attorneys Fellow and Member of the Board of Regents
American Land Title Association (Native American Lands Committee)
National Congress of American Indians

Professional Recognition

Chambers USA: Guide to America's Leading Lawyers for Business, *Native American Law*
U.S. News & World Report-Best Lawyers America – Top Indian Law Firms in the U.S.
Best Lawyers in America – Native American Law
The International Who's Who of Real Estate Lawyers
Virginia Super Lawyer, Native American Law
The Washington Post's Baltimore & Washington, D.C.'s Top Attorneys 2011
Martindale-Hubbell A (highest) Rating

Recent Speeches/Publications

Liability and Financial Risk Management Issues, Law Seminars International, Tribal Construction Projects Program, Albuquerque, NM (March, 2011)

Ten Reasons to Develop Projects on Indian Lands, Lockheed Martin (August, 2009)

Developing an Energy Project on Tribal Land – Development Agreements and Power Purchase Agreements, National Congress of American Indians Annual Meeting (October, 2008)

Developing Projects in the Navajo Nation, Navajo Bar Association Annual Meeting (June, 2008)

Commercial Real Estate Purchase and Sale Agreements, ABA Section of Real Property Trust and Estate Law e-CLE Series (October 2007) and 2007 ABA Section of Real Property Trust and Estate Law Spring Symposium (May, 2007)

Developing Projects in Indian Country: Unique Issues, 2005 New Mexico Bar Real Estate Institute (December 2005) and 2005 American College of Mortgage Attorneys Annual Meeting (October, 2005)

Choosing a Business Structure, Law Seminars International, Tribal Energy Southwest (April, 2005)

Accessing Capital: Opportunities and Challenges, 19th Annual National Reservation Economic Summit & American Indian Business Trade Show (February, 2005)

Upcoming Speeches/Publications

Acquiring Land to Support Tribal Energy Development: Process and protocol for tribes taking land into trust for energy development, Law Seminars International, Tribal Energy Development at the Federal Level, Washington, DC (July, 2011)