Many practical and legal barriers make the prospect of financing on-reservation projects daunting, whether through loans or capitalization. However, these barriers are slowly being lowered as more and more banks and businesses venture into the potentially lucrative realm of reservation development. While tribal governments are often pleased at the increased willingness of outsiders to do business on-reservation, they are correctly cautious about the possibility of diminishing their tribal sovereignty. Protecting sovereignty in financing transactions on-reservation can be addressed by asking, then answering, two main questions:

1. How do we maintain the maximum control over the deal, the land, and our tribal assets?
2. How do we limit tribal liability?

Maximizing Control

Most tribes will be dismayed by the loss of their flexibility and control over their lands and assets once a lender/financier becomes involved. Typically, supervision, notice, and approval are required at every step. If collateral secures the deal, it cannot be freely used, sold, or traded. If a leasehold secures the deal, the land cannot be used or encumbered without prior written permission. But, while the party with the money inevitably controls a great deal of how a transaction is structured, the tribe as borrower has numerous options available to maximize the nature and scope of its ultimate control. A few commonly-used options follow.

Leasing.

Maximizing Control
Provisions for Encumbrancing.

Capital Participation.

Dispute Resolution.
Covenant Regarding Laws.

Business Plan.

Limiting Tribal Liability

Waivers; Agreement as to Choice of Law; Jurisdiction.
choice of law. This can and often does result in the application of tribal law. In instances in which a tribe does not have well-developed commercial, building, environmental, and other codes useful in guiding business transactions and disputes, agreeing to use state law or even federal law can make lenders and their attorneys more comfortable, while conveniently filling in any gaps in the tribal laws.

Related to the immunity issue is the issue of jurisdiction. Contrary to what many lenders attempt, parties cannot contract to confer jurisdiction on a particular court; courts either have it or don't. Where a cause of action arises may determine which court has jurisdiction to decide the controversy, but where the cause occurs is not always easy to determine. Where does a cause arise when a payment, required to be posted on-reservation, fails to be received at an off-reservation bank? Or when the tribal entity files a (federal) bankruptcy? Jurisdiction may also be affected by the nature of the law being enforced. For example, a case involving violation of federal environmental laws might be brought in federal court, a case involving an off-reservation contract with a bank might be brought in state court, and a case involving a tribal lease might be brought in tribal court (unless it involved a termination, in which case it might be brought in a BIA administrative forum). In sum, attempting to negotiate jurisdiction is not a valuable method of limiting tribal liability.

Off-Reservation Collateral.

Many tribes prefer not to waive their immunity in any way; yet without recourse in the event of default, a lender or financier is rarely willing to provide financing. In such a case, the tribe may offer to allow the lender to secure its loan by collateralizing itself with assets located off-reservation. Escrow accounts held in a bank and released under pre-agreed terms are one example of this, as are assignments of trust income. Also, some banks are willing to lend money to tribal individuals or entities to the extent that the loans are secured by tribal certificates of deposit or other bank-held collateral.

Insurance for Various Types of Liability.

Insurance, typically thought of as a protection for the lender, also offers an excellent way in which to minimize tribal liability. Liability insurance, title insurance, environmental insurance, property insurance, and others all help to protect a project.
Insurance requirements should and usually are a part of every loan transaction, on- or off-reservation. Indemnification and Releases.

Indemnifications and releases, like insurance requirements, are standard mechanisms of lender protection, but can also serve to protect a tribe from environmental accidents and other injuries caused by those coming on to the reservation to do business. Promises by a lender, or more critically, a developer or financier to release the tribe from liability for various acts and omissions, and to indemnify it from claims by third parties, will help protect the tribe against various claims that may arise out of the transaction documents or the development of the project itself.

Tribal Corporations.

As mentioned above, the creation and use of a tribal corporation to handle the development of a particular business or project offers many advantages. While it helps separate the economic goals of the tribe from its essentially governmental duties, it also separates the tribal government and tribal assets from the corporation and its assets. In this way, the tribe is one step further removed from liability for failures or accidents related to the project.

Conclusion

Because of the unique status of tribal lands and the sovereign nature of tribes themselves, lenders and developers otherwise interested in investing in economic opportunities on-reservation are wary about doing business with tribes. By recognizing the lender’s realistic need to protect its investment in some way, a tribe can offer a variety of creative options that meet the lender’s need for security while allowing the tribe to maximize its own control and minimize its liability.