Native American Tribes—
Trends In Alternative Investments

By Sean Balkin, Randolph Barnhouse, Kelli Keegan,
John Koeppel, Lee Redeye and Michael Rossetti

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Prior to the COVID-19 Pandemic, as a result of successes in economic investments in gaming, hospitality and other industries, Native American tribes had seen significant increases in revenues over the last several years. Unfortunately, in addition to the significant social and cultural burdens shouldered by tribes as a result of the COVID-19 pandemic, it has caused significant negative financial impacts across the hospitality sector, driving down the very revenues that fund services to tribal members.

While this is certainly an unfortunate turn of events in the short term, it has given many tribes an opportunity to re-evaluate their investment strategies to ensure that economic development does not hinge upon the health of a single sector. Many tribes are evaluating the benefit of diversifying and expanding (or in certain cases, beginning) the holding of alternative investments, including private equity funds, venture capital funds, and other direct investment opportunities. This article discusses three key investment approaches for tribes.

1. Indirect Investments

One alternative investment option for tribes is to make indirect investments in buyout, venture capital, real estate, and other investments funds. This passive style of investing can offer the tribe a chance to diversify its investment portfolio (and ultimately revenue streams) while relying on the industry-specific investment knowledge of fund managers. One example of an indirect investment is the Native American Venture Fund, which invests capital from tribes and other investors in areas such as free trade zones, opportunity zones, logistics, pharmaceuticals, cannabis, and carbon credits. From the tribe's perspective, the threshold necessary to make these investments is relatively low – the tribe must simply have assets sufficient to qualify to make the investment and it must be able to feel comfortable evaluating the underlying economics of the investment (which, in addition to independent evaluation, in many cases, can be determined by looking at the track record of the fund with which the tribe is investing). The downside is that the tribe will be a passive investor and, as a result, will have limited (if any) control over the specific investments made by the fund outside protections in the fund's operating documents limiting the scope of potential investments. When evaluating this sort of alternative investment, it is helpful to engage sophisticated advisors to assist the tribe in drafting investment guidelines and ensuring that the investment documents provided are on market terms.

2. Co-Investments

A second alternative for tribes is to act as co-investors alongside a traditional investment firm in a specific deal or transaction. To do so, a tribe should first identify the types of deals in which it wants to participate – whether commercial real estate, hospitality, clean energy, or some other type of investment. Once it has done so, the tribe should be able to identify specific investment firms willing to co-invest in one-off deals alongside the tribe. The benefit to the tribe in this sort of transaction is that it can get a direct piece of the action (and likely an increased slice of the upside) for bringing in a large chunk of capital, while also partnering with a firm with industry-specific knowledge. One option in this vein may be to partner with a boutique independent sponsor style private equity firm to purchase a controlling stake in an operating business, with a plan to grow and sell the business in a three-to-five year window. Independent sponsors are often excellent partners with access to transactions or deals in industries in which they have extensive experience and operational ability, but that need a capital partner to close the deal.

In evaluating this style of investment, and in addition to considering the underlying fundamental economics of any particular deal, it is crucial that the tribe as co-investor pay careful attention to the documentation of both its partnership with its co-investor, as well as any investment or purchase and sale documents related to the underlying investment. These documents will not only determine how the economics of the deal will be split, but will also address crucial operational issues like how decisions will be made at investee-companies and how the tribe's interest in the investment can be transferred or liquidated.

3. Direct Investments

Finally, tribes may choose to make direct investments by purchasing commercial real estate, forming a business, or acquiring an existing business on its own. Many tribes already are experienced in this type of investment through formation of their own Section 17 corporations or wholly owned tribal business entities (e.g., gas stations, convenience stores, or casinos). This form of investment can require meaningful infrastructure and upfront time-and-money investments from the tribe including commitment of resources to handle deal sourcing, valuation models, building operations teams, and developing industry expertise. But this type of investment also may offer the highest potential upside as the tribe will own, and control, the entirety of the business in which it is making its investment. In considering this style of investment, a tribe is fully in the driver's seat and may wish to partner with sophisticated advisors to assist with conducting due diligence on any target investment to identify material legal and other issues with the target, structuring the initial acquisition (including evaluating forms of consideration or purchase price), and negotiating the key legal terms of the transaction (such as indemnification, representations and warranties, and closing conditions).

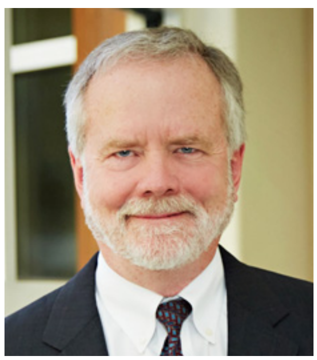
In evaluating the investment options above, it is important to note that each option has the benefit of increasing the diversity of the investing tribe's portfolio – ideally creating a well-balanced and healthy financial picture. The ultimate question for tribal leaders is "what is right for our tribe" and which includes the need for balancing potential upside against how involved the tribe wants to be in the "cradle to grave" investment process.

Investments may also provide important non-monetary benefits to tribal governments. Tribes can use the revenues derived from their investments to consolidate off-reservation land holdings, strengthen culture and tradition, and protect tribal intellectual property through use. Investment revenues, or the investment itself, can also be utilized to protect and/or preserve a tribe's natural resources. In short, tribal investments can provide a range of benefits that go beyond simply generating revenue.

For more information on investment options or any other Native American tribal matter, please contact any of the attorneys below. This article was written in collaboration with Lippes Mathias and Barnhouse Keegan Solimon & West LLP.

Releated Team:

Sean Balkin
Senior Associate
Lippes Mathias
716.853.5100 x1264



Randolph Barnhouse
Partner
Barnhouse Keegan
Solimon & West LLP
505.842.6123

Kelli Keegan
Managing Partner
Barnhouse Keegan
Solimon & West LLP
505.842.6123

John Koeppel
Partner
Lippes Mathias
716.262.9330

Lee Redeye
Associate
Lippes Mathias
716.853.5100 x1382

Michael Rossetti
Partner
Lippes Mathias
202.888.7610 x1601