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# How to Structure Your Tribal Member-Owned Business

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Gabriel S. Galanda

Office of Indian Energy & Economic  
Development, U.S. Department of the Interior  
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# Tribal Member-Owned Business

- Incorporating your business is important for several reasons:
    - Legitimizes the business
    - Helps separate family from business
    - Can insulate you from personal liability
    - Can minimizes state regulation/taxation
    - Helps attract business partners like lenders
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# State-Chartered Entities

## ➤ The Pros:

- Very certain and relatively easy state governmental systems for incorporation
- Incorporation and renewal is apolitical, and does not require disclosure of sensitive information
- Business partners like lenders are comfortable with state- chartered entities

## ➤ The Cons:

- Attempted state regulation/taxation of the business' activities
  - Potential loss of “tribal member” jurisdictional status
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# State-Chartered Entities

## ➤ On the one hand:

- *Workforce Safety & Ins. v. JFK Raingutters*, 733 N.W.2d 248, 250 (N.D. 2007): tribally owned, state-chartered corporation subject to state workers' compensation laws
  - *Airvator v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983): tribally owned, state-chartered corporation subject to state jurisdiction
  - *Baraga Prods. v. Comm'r of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997): member-owned, state-chartered corporation “is a legal fiction owing its existence to state law, [and] is not the legal equivalent of a member of the Tribe.”
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# State-Chartered Entities

## ➤ On the other hand:

- *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395 (S.D. 2003): Oglala Sioux tribal member-owned, state-chartered corporation was immune from state taxation
    - The “sole shareholder is an enrolled member of the Tribe, the business is operated on the reservation, the vast majority of its customers are Indians residing on the reservation, and it is licensed by the Tribe to do business on the reservation.”
    - “Behind incorporation, there remain individuals who maintain a distinct racial identity that protects them from some government actions.”
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# State-Chartered Entities

## ➤ On the other hand:

- *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999): “the mere organization of such an entity under state law does not preclude its characterization as a tribal organization as well.”
  - *Giedosh v. Little Wound School Bd., Inc.*, 995 F.Supp. 1052 (D.S.D. 1997): “[T]he fact that the Board is incorporated as a nonprofit corporation under [state] law does not affect its [tribal] status . . .”
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# Tribally-Chartered Entities

## ➤ The Pros:

- Protects against attempted state regulation/taxation of the business' activities
- Enhances “tribal member” jurisdictional status

## ➤ The Cons:

- Less certain and possibly more complicated systems for incorporation; lack of tribal corporate codes
  - Incorporation and renewal can be political, and can require disclosure of sensitive information
  - Business partners like lenders are less comfortable with/more ignorant about tribally-chartered entities
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# Tribally-Chartered Entities

- Indian Law Favors Tribal Incorporation:
    - Preemption of state regulation and taxation “is most assured for tribal corporations organized pursuant to . . . tribal law” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.06 (2012 ed.)
    - *In re: Stuart B. Mills*, Op. No. 111, 1985 WL 168597 (Neb. A.G. Jul. 8, 1985): “[T]he personal property of a tribally-chartered corporation doing business upon an Indian land or reservation, where the majority of the corporation’s stock is owned by Indians, is immune from [state] tax . . . .”
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# Limited/General Partnerships

- LPs are not generally recommended
    - General partners assume personal liability for the entity's activities
    - Insulates limited partners from personal liability in excess of their equity
    - But limited partners are not allowed to manage or control the company
  - GPs are even less popular
    - Do not insulate the general partners from liability and is therefore even less popular
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# The Limited Liability Company (LLC)

- LLCs are recommended, and popular
    - Insulates the members (owners) from personal liability
      - Commercial general liability should be procured for the LLC too; provides legal defense and indemnity
    - Allows members, as “managers,” to manage and control the company
    - Avoids double taxation of the business and the owners; taxes “pass through” to members (owners), if at all
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# The Joint Venture (JV)

- Typically a contractual arrangement between parties or “partners”
    - Does not require governmental formation or renewal
    - Private arrangement between the parties
    - Allows each partner to retain their own legal status
    - Not a “marriage” that can lead to a messy “divorce”
    - Generally no limited liability protection for the partners
  - Contractual JVs may work better for tribal governments than tribal members
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## The “Indian Business”

- Generally speaking, a “mixed” Indians/non-Indian entity can still be treated as an Indian business, if the Indian(s) owns at least 51% of the company.
    - *See* 25 C.F.R. § 103.25(b), § 273.2(e); Wash. Admin. Code § 458-20-192(5)(d) (“business will be considered as satisfying the ‘comprised solely’ criteria if at least half of the owners are enrolled members of the tribe”)
    - *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P. 2d 805 (N.M. Ct. App. 1976): struck down a state gross receipts tax, after looking “to the fact that 51% of its stock is owned by individual Navajo Indians.”
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## The Need for Tribal Legislation

- Many, if not most, tribes do not have corporate entities codes on the books
  - Tribal member incorporation and legal protection is more assured if the tribe has legislated entity formation options
  - Urge your tribal leaders to pass a corporate entities code if they have not yet done so
  - Particular attention should be given to outsiders' views of tribally chartered entities
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## Recommendations

1. Form your business to suit your unique needs
    - Tribal environment and politics
    - Liability protections
    - Capital needs
  2. Incorporate under tribal law if optimal
  3. If under state law, get a tribal business license
  4. Consider the LLC to limit your own liability
  5. Insure your business to further protect yourself
  6. In any JV, ensure at least 51% Indian ownership
  7. Site your business or headquarters on Indian lands
  8. Centralize your activities on Indian lands
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# Thank You

**Gabriel S. Galanda**

gabe@galandabroadman.com

(206) 300-7801

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