Harnessing Private Equity for Indigenous Peoples

Carla F. Fredericks | Kate R. Finn

First Peoples Worldwide
UNIVERSITY OF COLORADO BOULDER

Core Values

Significant economic opportunity within Indian Country is ready to be scaled to the benefit of tribes, Native entrepreneurs and investors alike, utilizing the following core values that are embedded throughout this research.

Indigenous Self-Determination

Financial Excellence

Equity in Power and Decision-Making

Positive Social Impact

In the past, development of resources in Indian Country has typically proceeded based on financial deals that privilege outside developers or institutions. These deal structures often subordinate the tribe or Native entrepreneurs' participatory rights and commodify resources by separating the economic and social impacts of the project, even though revenue is based on use of the tribe's resources and the tribe is responsible for the socio-economic wellbeing of its citizens. This detrimental pattern compounds the ongoing issue of lack of access to private capital that is otherwise necessary to vision long-term economic prosperity. At its root, the scarcity of capital hinders Indigenous Peoples' ability to activate their right to self-determination because they are fundamentally limited in the ways they can seek and create economic growth aligned with sustainable development and Indigenous values. Tribes often find themselves having to choose between any access to capital, and capital that may not align with their self-determined goals.

However, there is significant economic opportunity within Indian Country that is ready to be scaled to the benefit of tribes, Native entrepreneurs and investors alike. This is especially true in the renewable energy sector, where there exists economic potential of over $75 billion in project investment for solar and wind energy. Renewable energy is clearly a growth sector that offers economic and social benefit to Native communities.

Concurrently, socially responsible and impact investing have become mainstream, as over the last decade investors seek to maximize financial returns both by avoiding environmental and social risks and by seeding sustainable development aligned with regenerative finance principles. In the past, investment and growth opportunities based on considerations of Indigenous rights and values have been generally limited to small scale capital and grants but impact investors are increasingly searching for investments that strengthen their double bottom line approach. Given the opportunities and readiness in Indian Country to diversify towards renewable energy projects and investor readiness to deploy large-scale capital, bringing impact and Indian Country together could catalyze a new phase of sustainable economic development for Indian Country.

This article details research to better understand how to bridge the need for large-scale financing in Indian Country, with a particular focus on advancing private equity as a potential means to align financial success with impact-oriented values such as tribal sovereignty and social wellbeing. The methodology includes desk-based research as well as consultations with experts and partners, and this article details 1) the ecosystem of interest and need for large-scale Indian Country development, 2) the core values that must center an Indigenous-focused investment vehicle, and 3) the necessary components of a private equity strategy aligned with core values. The findings show the incredible readiness and opportunity that exists for delivery of large-scale and impact-aligned private capital to tribes, tribal enterprise and Native entrepreneurs.

I. INTRODUCTION[1]

The issue of lack of access to capital is not new in Indian Country. Scholars, academics and practitioners, policy makers and advocates have worked tirelessly to build bridges and solutions to prime economic development for tribes and Native communities. Advocates have set up microlending institutions, championed Native Community Development Financial Institutions, established Native banking institutions and advocated for tribal access to the private markets for decades.

[1] Carla F. Fredericks is Executive Director of The Christensen Fund; she served as Clinical Professor and Director of the American Indian Law Clinic, University of Colorado Law School, and Faculty Director of First Peoples Worldwide during preparation of this article. Kate R. Finn is Executive Director, First Peoples Worldwide, University of Colorado Boulder. We are grateful to the First Peoples Worldwide staff for their significant contributions and to research assistants Evan Dewitt and Laura McClure. We wish to gratefully acknowledge Jason Campbell, Tim Willink, Bill Stoddart, Jeff Batton, Sarah Fitzgerald, Wes Shifrin, Wizipan Little Elk, Dave Archambault, Eric Thayer, Peter Ortego, Margaret Schaff, Pilar Thomas, and the National Center for American Indian Economic Development for their contributions of time, expertise and insight on this topic. Any errors are ours alone.

And, remarkable progress has been made not only to find local solutions but to install broader policies that create bridges for Native entrepreneurs and tribes to greater economic prosperity. However, there are still considerable challenges to scaling enterprise in Indian Country, particularly as to financing large-scale development. Tribal leaders and Native entrepreneurs must often choose between larger scale financing that limits their decision-making power and subordinates their development goals, or one-off financing options that allow for moderate growth but retains control over their lands or intellectual property.

Through our extensive work to accelerate respect for Indigenous Peoples in the capital markets, First Peoples Worldwide (First Peoples) has formed vital partnerships with impact investors and has seen the enormous potential of collaboration between investors and Indigenous Peoples to catalyze meaningful change in both local communities as with institutional approaches to Indigenous Peoples. However, through these relationships across multiple sectors it has become clear that there are still serious gaps in the ways that large-scale projects are capitalized in Indian Country. There is will, effort and energy on both sides but a failure to connect in meaningful ways.

Thus, First Peoples began a research project to better understand how to bridge the need for large-scale financing in Indian Country, with a particular focus on advancing private equity as a potential means to align financial success with values such as tribal sovereignty and social wellbeing. In brief, this article collates and presents the core design tenets of a private equity strategy as a targeted solution to activating the rights of Indigenous Peoples within the private markets. Although private equity capital does exist in Indian Country, it is project specific and driven by traditional approaches to private equity that are focused solely on traditional return on investment (ROI) metrics. The private equity strategy contemplated within this article is designed to disrupt this traditional model inasmuch as the power dynamics of the traditional model perpetuate long-term economic disparity and social injustice. The driving force of the research is to test how, when and whether this type of strategy can deploy an impact thesis and drive beneficial outcomes for Indigenous Peoples and investors alike.

This article contemplates the orientation, research and design of a private equity strategy in three parts. The first section lays out the context for this type of financing solution as it would be situated within the particular context of law and business in Indian Country, as it would align with an impact investing thesis, and as affected by the somewhat unknown economic influence of the COVID-19 pandemic. The first section also covers the specific aspects of a private equity strategy that make it a potential fit for many projects in Indian Country and a means to deliver capital at scale. The second section reviews the research methodology that First Peoples deployed to gather data, to consult with tribal leaders and entrepreneurs, and to better understand the necessary elements of a private equity vehicle that aligns with Indigenous self-determination. The research for this strategy was cabined to its deployment within the United States. A core aspect of this research, and the strategy contemplated, is that the pieces and parts of a coherent strategy already exist; but, in large part those pieces haven't been unwound from their moorings in traditional extractive patterns of capitalism and recast to best fit the needs and values of Indigenous Peoples. Thus, the final section brings the constituent pieces together and forwards the core elements that are necessary to found a private equity fund or strategy that both aligns with the stated values and meets the practical needs of Native and Indigenous enterprises.

II. CONTEXT

This section will briefly review the specific economic and business context within Indian Country that informs access to capital and, in particular, informs the usefulness of creating additional access to the private markets. As noted, this research is limited geographically to the United States and contemplates being deployed solely to support tribes, tribal corporations, Native-owned businesses and Native entrepreneurs.

Economic Development in Indian Country

The momentum towards economic development in Indian Country began in earnest in the 1970s when President Nixon announced policies and proclaimed an era of “self-determination” for Indian Nations.[2] From this point forward, tribes have worked extensively to build economic development engines to power their local economies and the Native private sector has grown extensively.[3]

Economic development in Indian Country is a key driver for overall socio-economic health in a distinct way from other communities in the United States because, through the development of law and policy, tribes do not tax their citizens. Thus, economic development is the primary means to generate revenue to provide basic social and economic infrastructure to tribal communities. The success of tribal economic development efforts differs across the United States, where some tribes have been able to successfully develop commercial enterprises that provide amply for their members, and where some tribal economic development initiatives have not been enough to meet more than basic community needs.

Some of the most successful economic development ventures in Indian Country have been in high-risk industries such as gaming, fossil fuels, cigarettes and payday lending. While these provide important revenue to build economies, these ventures are not guaranteed to be successful in the long term and they do not always provide the ability for tribes to assess and manage social, environmental and financial risk. Currently, many tribes are seeking diversification of their economic development efforts for these reasons.

In other parts of Indian Country, the local economies still most closely resemble those of the developing world.[4] On many reservations, community members commute long distances to do basic grocery shopping and banking, creating a stark disparity between Native communities and the cities nearest them.[5] The fact that income must be spent outside the community exemplifies a wider issue, which is that there are few structures in place to ensure that revenue generated in Indian Country inures benefits directly to the tribe and the community. Where complex projects have been constructed and operated in Native communities, beyond providing temporary jobs, the ownership equity and revenue generated from those projects rarely stays within that community.

In fact, the colonial history of “measured separatism” between the United States economy and Indian Country is an important aspect to understanding the history of economic development.[6] When the federal government began to remove Native nations from their traditional territories, federal policy shifted and created the basis for federal Indian law as it exists currently. A trilogy of cases written by Justice Marshall laid out the bounds of tribal sovereignty in ways that continue to define tribes’ relationship with the government and in business dealings.

First, the Supreme Court held that private citizens could not purchase land from individual Indians or Tribes,[7] which had the effect of establishing the federal government’s authority over land transactions with tribes.[8]

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2 President Richard Nixon, Special Message on Indian Affairs (July 8, 1970), www.ncai.org/attachments/Consultation_IJaOfGZqlYSuxpPUqoSSWIaNTkEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf This policy change was implemented as the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 25 U.S.C. § 5301 (2017).

3 Miriam Jorgensen, *Introduction, in* CREATING PRIVATE SECTOR ECONOMIES IN NATIVE AMERICA: SUSTAINABLE DEVELOPMENT THROUGH ENTREPRENEURSHIP 3 (2019).

4 Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 JBUSEL 129, 130 (2019).

5 *Id.*

6 CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 113 (1987).

7 *Johnson v. M’Intosh*, 21 U.S. 543, 603 (1823).

8 *Oversight Hearing on Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing before the S. Comm. On Indian Affairs*, 112th Cong. 2 (2012) (statement of Matthew L.M. Fletcher, Professor of Law, Michigan State University College of Law).

Second, tribes were held to be "domestic dependent nations" thereby subordinating tribes' full sovereignty to that of the U.S. government while also upholding some measure of political independence.[9] Finally, Justice Marshall further asserted that, per the Constitution's Supremacy Clause, Indian treaties would have "full force" and that the federal government, not the states, would have exclusive authority in Indian Country.[10]

These cases announced the beginning of the trust doctrine – the notion that though tribes possess certain rights of self-government, they have a special relationship with the federal government where the federal government has a responsibility to confer certain benefits, services, and protections.[11] The Supreme Court bolstered this concept in 1886 in *U.S. v. Kagama*, affirming that Congress has plenary power over all Indian Affairs.[12]

The particular development of the trust doctrine and federal Indian law and its overlay on business transactions creates complexity in several ways. First, Congress has a greater role in economic development in Indian Country than in the rest of the United States.[13] In practical terms, this means the federal government is deeply involved in the day-to-day business transactions that occur in Indian Country, including navigating issues such as taxation and licensing, financing and entity formation, jurisdiction and dispute resolution, and utility and resource regulation.[14] These processes are well-known and most tribes have the capacity to garner approvals in a timely manner, but this regulatory complexity is an added step to transactions and may be unfamiliar with those who have not worked inside Indian Country.

Second, the federal government is the legal owner of most of the land in Indian Country, and governs the lands and assets as the legal guardian per the trust doctrine.[15] So, tribes must generally solicit the federal government for approval to develop land-based resources and some Native entrepreneurs lack the ability to use their home or land as collateral since they are not the legal owner of that land.

Earlier federal policies of termination and allotment further complicate the status of land in Indian Country. In Indian Country, land that is otherwise physically identical within reservation boundaries may be subject to different forms of ownership that have distinct regulatory requirements.[16] This "checkerboard" land status is important to recognize early because it can add time to transactions that require large-scale infrastructure or land use because there may be multiple private owners, in addition to a tribal owner, where each owner may have differing legal and regulatory requirements before entering into a land use agreement.

Third, tribes are sovereign governments that operate apart from state or federal governments. Therefore, tribes enjoy common-law sovereign immunity from any lawsuit.[17] In fact, tribes cannot be sued absent an express waiver of that sovereign immunity.[18] Sovereign immunity applies to both tribes' on-reservation and off-reservation activities.[19]

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[9] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[10] *Worcester v Georgia*, 31 U.S. 515 (1832)

[11] Dept. of Interior, Office of Assistant Secretary-Indian Affairs, 2013 American Indian Population and Labor Force Report 5 (Jan. 16, 2014), www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf.

[12] 118 U.S. 374 (1886).

[13] ROBERT MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 40 (2012).

[14] *Id.*

[15] *E.g., U.S. v. Mitchell*, 463 U.S. 206, 225 (1983) (holding that a fiduciary relationship "necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians").

[16] Jessica A. Shoemaker, *The Challenges of American Indian Land Tenure and the Vastness of Entrepreneurial Potential, in* CREATING PRIVATE SECTOR ECONOMIES IN NATIVE AMERICA: SUSTAINABLE DEVELOPMENT THROUGH ENTREPRENEURSHIP 70 (2019).

[17] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers").

[18] *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

[19] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014); *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 756 (1998).

In general, sovereign immunity also extends to tribal corporations, thereby introducing the issue into corporate formation and capitalization and financing deals.[20] Thus, most deals with tribes or tribally formed corporations must contemplate the issue of sovereign immunity and, in general, different tribes and tribal entities have different levels of comfort as to negotiating waivers of sovereign immunity.

Historically, the issue of sovereign immunity has deterred business ventures with tribes and tribal entities because this issue is one that is unique to working with tribes and is viewed as creating more risk for the venture.[21] In fact, there are hundreds of deals in which this issue has been successfully navigated and, when negotiated successfully, gives access to the ample opportunity available in Indian Country as a domestic emerging market.[22] Finally, the caselaw on sovereign immunity is becoming more settled, allowing businesses and investors a basis in precedent for their negotiations around the issue.[23]

Similarly, the choice of law question as to tribal courts is one that has consistently stymied business development in Indian Country.[24] Many businesses cite unfamiliarity with tribal courts as a reason to refuse adjudication in those arenas, or non-Indian businesses are concerned they will not receive a fair hearing in tribal court.[25] In fact, evidence suggests that cases against non-Indian litigants are treated as fairly as Indian litigants and tribal courts are growing in sophistication.[26] Courts and tribal governments are both aware of the need to attract business ventures through passing business-friendly regulatory codes and other measures to assure non-Indian business ventures that disputes will be handled in predictable ways in accordance with legal principles.

Fourth, the jurisdictional overlay of federal Indian law is distinct to Indian Country and has been a deterrent to economic development in the past. Again, though jurisdiction in Indian Country is indeed distinct, it is far from unknown. In brief, tribes generally have sovereign authority over issues internal to the tribe.[27] Tribes can adjudicate disputes between member and non-member Indians, and regulate business entities that work on their lands. Tribes also generally have civil jurisdiction over non-Indian business entities that work on Indian lands if they have consented to the jurisdiction, or if the conduct has a direct effect on the tribe's welfare.[28]

However, tribes have no criminal jurisdiction over non-Indian individuals on their lands, meaning that tribes do not have full ability to control some of the ancillary effects of development.[29] For example, tribes have only limited civil jurisdiction and no criminal jurisdiction over the workers that come on to the reservation, creating issues

[20] *E.g., Dine Citizens Against Ruining Our Env't v. Bureau of Indian Aff.*, 932 F.3d 843 (9th Cir. 2019).

[21] *See* ROBERT MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 40 (2012).

[22] For example, the Indian Gaming industry has continued to grow steadily, and in 2019 grossed $34.58 billion nationwide. *FY15-FY19 Gaming Revenues by Range*, NAT'L INDIAN GAMING COMM'N, www.nigc.gov/images/uploads/2019_GGR_Charts_by_Range.pdf (last visited Dec. 15, 2020).

[23] *E.g., Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016); *Inyo Cty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003) ("The United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes"); *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001) (holding that a tribe's express agreement to an arbitration clause in a contract with a non-Indian commercial entity constitutes a waiver of sovereign immunity); *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998) ("Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. *See, e.g.*, 25 U.S.C. § 450f(c)(3) (mandatory liability insurance); § 2710(d)(7)(A)(ii) (gaming activities). And in other statutes it has declared an intention not to alter it"); *Santa Clara Pueblo v. Martinez*, 406 U.S. 49 (1978).

[24] Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1371-72 (2019).

[25] *Id.*

[26] Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285–87, 351–52 (1998) (analyzing 85 tribal court cases and concluding that they demonstrated fairness to non-Indian litigants).

[27] *Williams v. Lee*, 358 U.S. 217 (1959).

[28] *Montana v. United States*, 450 U.S. 544 (1981).

[29] *See Oliphant v. Suquamish*, 435 U.S. 191, 195 (1978) (holding that tribes do not have criminal jurisdiction over Non-Natives).

if there are traffic accidents or illegal behavior on the reservation during the course of business. For example, some industries have negative social and cultural impacts such as the influx of temporary workers that result in an increase in human trafficking and violence in local communities. This is particularly common in extractive industries and bears noting that where the workers and the construction are temporary, the trauma of an increase in criminal violence stays with the community for generations.[30] This lack of tribal jurisdiction over the criminal acts of non-Indians on their territories directly intersects the overall economic and social development goals of a tribe inasmuch as tribal leaders must balance the ways that Indian and non-Indians will interact as part of any economic venture.

The impacts of the legal and regulatory structure of federal Indian law have created a unique economic, social and environmental context for current business and finance deals. Most tribes have a limited set of physical resources from which to build economic success for their communities, and those resources exist on their reserved lands. Thus, tribal governments must hold in the balance the economic, social, cultural and environmental outcomes when pursuing any type of development. As noted earlier, the socio-economic statistics for American Indian households lag behind the rest of the nation. Nationwide, the poverty rate is 14.0%, but for American Indian and Alaska Native households in 2016 the poverty rate was 26.2%.[31] Similarly, the median income was $39,719, compared to $57,617 for the nation as a whole, shining a light on the high unemployment rates in many communities.[32] Many reservation communities have low rates of educational attainment, high rates of suicide, and high rates of crime. All of these factors must be considered as part of a long-term economic development plan, not only to find economic success to the benefit of the community, but to ensure that economic development is sustainable as a matter of social and cultural health of the community.

Because the legal and regulatory regimes in Indian Country are perceived as high-risk for outside investors, one of the ways that developers have “de-risked” ventures has been to take an outsized amount of control, and therefore benefit, from the deal. In general, developers reap the economic benefits of the deals and tribes are passive landlords on the transaction. Thus, the full benefit of the deal for use of tribal resources does not inure to the community.

Other communities are facing hard economic shifts that coincide with an intentional shift towards more sustainable energy development and away from fossil fuels. The Hopi and Navajo Nations, for example, are facing the economic and social complexities of closing the Navajo Generating Station, a coal plant.[33] The plant employed more than 750 people at its peak, many of whom lived on the Navajo Nation. The closure of the coal plant also forced the closure of the Kayenta Mine, which provided jobs for an entire community. The choice to close the plant also means a loss of $30 to $50 million in annual revenue to the Navajo Nation.[34] Hopi and Navajo Nation government officials, transitioning from fossil fuel to a more sustainable energy as an economic driver, must now find a pathway for gainful employment, re-training and financial support for the most affected communities while paving a pathway for new energy sources.

[30] *See* Kathleen Finn ET. AL., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L. & GENDER 1 (2017).

[31] Census Bureau, American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf.

[32] *Id.*

[33] Ryan Randazzo, *What to know about the closure of the Navajo coal plant and mine*, AZ CENTRAL (Oct. 15, 2019), www.azcentral.com/story/money/business/energy/2019/10/15/navajo-generating-station-kayenta-mine-what-to-know-about-closure/3848232002.

[34] *Building a just and renewable future on the Navajo Nation*, GRIST CREATIVE (May 6, 2020), grist.org/sponsored/building-a-just-and-renewable-future-on-the-navajo-nation.

This history and current socio-economic reality together are what makes any investment in Indian Country an impact investment. By its very nature, delivery of capital in a means consonant with tribal sovereignty serves an economic, environmental and social justice purpose and will benefit an entire community.

Rise of Impact and ESG Investing Ecosystem

For two decades, Indigenous Peoples and concerned investors have allied to elevate Indigenous concerns through shareholder advocacy and other market-based strategies. Catalyzed in part by the fierce media attention associated with the Standing Rock Sioux Tribe's opposition to the Dakota Access Pipeline, the awareness of modern tribal concerns has grown through impact investing and philanthropic sectors in the last several years. In fact, the current environmental, social and governance (ESG) and impact investing ecosystem is one that is ripe for leveraging against the needs and opportunities available by and for Indigenous Peoples in the United States.

In 2019, BlackRock Chairman and CEO Larry Fink announced that the firm would begin making investment decisions with environmental sustainability as a core value.[35] Similarly, in August 2019, Business Roundtable, a non-profit association of the CEOs of almost 200 major U.S. companies, issued a statement to redefine the purpose of a corporation not only as one that only advances the interests of the shareholders, but also invests in employees, protects the environment, and deals fairly and ethically with suppliers.[36] These announcements highlight the growing trend of investors, financial institutions, corporations and other private entities acknowledging social and environmental impacts of their business and to their business.

In fact, ESG investing is mainstreaming. According to the US SIF Foundation's *2020 Report on US Sustainable and Responsible Investing Trends*, about one in three dollars under professional management in the United States was invested according to SRI (Socially Responsible Investment) strategies.[37] This alone represents an increase in 42% from 2018, moving from $12.5 trillion invested in 2018 to $17.1 trillion in 2020. Since the report first came out in 1995, the SRI industry has grown 25-fold.[38]

While there are myriad issues that fall under the umbrella of impact or ESG criteria, the 2020 report notes that the top issues for asset managers and institutional investors are climate change, conflict risk (i.e., terrorist or repressive regimes), and anti-corruption.[39] Another growing issue is attention to human rights.

[35] Larry Fink, *Larry Fink's 2019 Letter to CEOs - Purpose & Profit*, BLACKROCK, www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter (last visited Dec. 14, 2020).

[36] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans',* BUS. ROUNDTABLE (Aug. 19, 2019), www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[37] *Report on US Sustainable and Impact Investing Trends 2020*, US SIF FOUND. 1 (Nov. 16, 2020), www.ussif.org/files/US%20SIF%20Trends%20Report%202020%20Executive%20Summary.pdf.

[38] *Id.*

[39] *Id.* at 5.

The current ecosystem of ESG and impact investing is one that can be leveraged for the benefit of Indigenous Peoples, as many impact investors have worked with Indigenous Peoples and for Indigenous communities for years. First, this familiarity with issues and existing relationships creates a pathway for different types of partnerships. Second, investing in Indigenous communities in the United States represents a ripe model to drive capital in a way that creates economic, environmental and social benefits together, and is done with the overall protections provided by the U.S. regulatory environment. Third, there is increasing appetite for impact investing opportunities in all asset classes, and few exist in the private markets and in Indian Country. In 2018, 780 alternative investment vehicles, including private equity and venture capital funds, hedge funds, and real estate investment trusts or other property funds, had $588 billion ESG assets under management.[40] These statistics point to increasing investor readiness for a private equity strategy with an impact thesis, leading to the availability and readiness of Indian Country to participate in the private markets in this way.

According to a study conducted by the Morgan Stanley Institute for Sustainable Investing, 85% of investors and 95% of millennials in the United States today are interested in sustainable investment options.[41] The current market for social impact investing by private equity funds stands at over $4 billion in the United States,[42] while the global impact investing market stands around $502 billion.[43] The significant growth of impact investing over time will likely continue, and can be harnessed to the benefit of Indigenous Peoples.

Private Equity

This section explores and expands upon the fit between private equity as an investment vehicle and the unmet needs for capital delivery in Indian Country. In short, the structure of a private equity fund is one that is familiar to all investors, and adding an impact thesis may leverage that structure well for Indian Country by engaging the core aspects that are attractive to investors.

First, a primary element of private equity is that it entails patient capital and a more long-term investment strategy. Private equity investors are familiar with the J-curve aspect of these investments, and the illiquid nature of capital in private equity is understood on both sides of the transaction such that it can be leveraged here to provide the types of long-term support necessary for financially successful and technically complex projects. This meets the capital needs of tribal governments and businesses to seed growth of large-scale projects that diversify their economic development portfolio and may take several years to a decade to produce returns.

Second, private equity firms generally pair access to capital with technical assistance and business growth management consulting. In general, firms provide these services to maximize their profits upon exit. In this scenario, the technical assistance provided by operations and management support can serve as a bolster, where needed, for tribal business to grow and achieve maximum impact over time. In many cases, tribal enterprises have successfully completed smaller-scale projects and the technical assistance component would provide tribes the capacity necessary to manage larger projects. This type of assistance – that which provides the technical capability not only to participate in this project but to fill a c-suite with Native entrepreneurs who can build out other successful ventures – provides maximum benefit across economic and social metrics.

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[40] Ingrid S. Dyott, Sajjad Ladiwala & Manisha Kathuria, *ESG Investing Goes Mainstream*, NEUBERGER BERMAN (Nov. 21, 2018), www.nb.com/en/us/insights/esg-investing-goes-mainstream.

[41] Francois Botha, *How to Invest and Have Impact Through Funds*, FORBES (Mar. 19, 2020), www.forbes.com/sites/francoisbotha/2020/03/19/how-to-invest-and-have-impact-through-funds/?sh=4dd915c56f49.

[42] *Market for Social Impact Investing by Private Equity Funds Stands at $4 Billion in the United States*, PAC. CMTY. VENTURES (July 28, 2015), www.pacificcommunityventures.org/2015/07/28/market-for-social-impact-investing-by-private-equity-funds-stands-at-4-billion-in-the-united-states.

[43] Abhilash Mudaliar & Hannah Dithric, *Sizing the Impact Investing Market*, GIIN (Apr. 1, 2019), thegiin.org/research/publication/impinv-market-size.

Third, private equity firms can invest in or participate in a capital stack in many different ways. Private equity has generally gained skepticism for its preference for leveraged buyouts of mid-size companies with a drive towards quick exit at all costs, but firms invest in venture capital, direct project-level investment, management buy-in or buy-out, recapitalization and secondary buyouts, among other strategies.[44] Sometimes private equity firms are sector agnostic, seeking companies that meet their criteria for a successful IPO or other exit, where some private equity firms have a more targeted strategy. The commonality is that private equity firms create a high-risk, high-reward portfolio with the goal of outsized return on investment. But how they participate and to what extent varies depending on the firm. Where there is a clear need for large-scale capital in Indian Country, with projects sitting shovel-ready, this type of strategy is well known to provide the heft of capital and sector flexibility to meet those needs if there is will and expertise to do so.

Similarly, since private equity encompasses numerous types of deal structures, it allows for flexibility to contemplate the diverse nature of various tribal enterprises. For example, a quick survey of the tribal renewable energy sector demonstrates that tribal sophistication and readiness for large-scale projects varies immensely. And tribes may choose to capitalize deals differently depending on their resources, risk-tolerance, geography and other factors.

> *Within a private equity strategy, tribes may have a unique opportunity to maximize their self-determined economic priorities given the range of deal structures available.*

Investors in private equity funds include pension funds, mutual funds, insurance companies, university endowments, sovereign wealth funds and wealthy individuals, and are generally viewed as sophisticated investors by the Securities and Exchange Commission (SEC). The SEC balances the fact that private equity funds are not as heavily regulated as public funds by limiting the pool of investors to those who are deemed "accredited." The purpose of this limitation is to ensure that investors have a sufficient understanding of the high-risk profile of a private equity investment.

In the past this has presented a significant limitation for tribal investors as they were not listed as accredited investors according to the SEC. However, in August 2020, the SEC adopted amendments to a final rule that updated the definition of Accredited Investor to include American Indian Tribes.[45] The final rule expands the list of entities that may qualify to include Tribes and entities formed under tribal law that own assets in excess of $5 million.[46] Several entities, including the Native American Tribal Finance Officers Association and the Southern Ute Indian Tribe submitted comment letters in support of this change.[47] This is a significant move towards inclusion of qualifying Indian tribes in private market opportunities, and comes after a decade of advocacy building on the readiness and willingness of tribes to participate on all sides of financing large-scale deals.[48]

[44] *See generally* EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET (2014).

[45] This rule was finalized December 8th, 2020, at 17 C.F.R. § 230.501(a) (2020).

[46] Accredited Investor Definition, Securities Act Release Nos. 33-10824; 34-89669, at 54 (Aug. 26, 2020), www.sec.gov/rules/final/2020/33-10824.pdf ("We believe the term 'entity' is sufficiently broad in this context to encompass Indian tribes and the divisions and instrumentalities thereof…").

[47] *Id.* at n. 161.

[48] *See* Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity in Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285 (2009).

In sum, there is considerable opportunity in employing a private equity strategy for tribes and Native entrepreneurs and it has the potential to be impactful in multiple dimensions. By its mere existence, providing ready access to large-scale capital is a novel development. But the innovation is that, if deployed well, the capital access would not come with an assumed trade-off of sovereignty or self-determination. Encompassed in an impact-oriented model, each tribal entity and Native entrepreneur could have the space to negotiate based on their preferences and needs, and a private equity fund can be uniquely nimble to those needs by calibrating to the legal, regulatory, historical and modern realities of Indian Country.

To date, there are no funds that meet the needs of Indian Country as described above and maximize the opportunities available through private equity. Thus, First Peoples set forth to understand the ways that these missed opportunities could be recaptured to the benefit of Indigenous Peoples and investors alike.

III. RESEARCH BACKGROUND & METHODOLOGY

The ideas that brought about the conception of this type of strategy have been a topic of conversation in the field for many years.[49] The research to design this type of private equity strategy is unique because all of its elements – financial return, positive social and environmental impact, and a commitment to Indigenous values and thought – must be intertwined into one cohesive whole. This fact makes it innovative and first-of-its-kind as well as a challenge to design. Thus, our methodology flows from our desire to meet this challenge by gathering a comprehensive set of data that informs every aspect of the research.

[49] *Id*.

To distill the existing research, work and conversations into one place, First Peoples produced a Concept Note that detailed the several strands of scholarly and practical work behind the idea of access to private equity in Indian Country. The purpose of the concept note was to put forward a solution in hypothesis form to catalyze discussion and gather feedback. The core assumptions behind this research endeavor are as follows.

First, given the history of dispossession experienced by tribes in the United States, both in terms of resource extraction and barriers to access to capital in any form, tribes and Native entrepreneurs are still disadvantaged in terms of broad access to large-scale capital. In general, this means most tribes have not been able to build beneficial economic development projects in means consonant with their long-term priorities. For these historical reasons and their modern impacts, any investment in Indian Country is *per se* an impact investment.

> *Where impact investors seek to drive capital into deals that catalyze social, economic and financial benefits, because of the critical role of economic development in Indian Country as a key driver of socio-economic wellbeing, impact investing can have an outsized, positive impact when done in alignment with Indigenous values.*

Second, new deals that are done in Indian Country are largely patterned on past deals done in the oil and gas sector. The financial benefits in these past deals largely skewed towards the outside developers and companies without due consideration of the status of tribes as sovereign governments. Similarly, the tribes often had little in the way of participatory rights to design the projects or its impacts, even though it was their resources and land that were being used. To disrupt this pattern, this research has proceeded with the guiding value that tribes should get equity from day one. Where equity represents financial and participatory rights, it can serve to level the playing field to ensure negotiations reap benefits for Indian Country.

Third, this research has proceeded with a sector-specific focus on renewable energy. Renewable energy represents an emerging sector in Indian Country that can maximize existing resources, provide needed economic diversity and long-term economic, environmental and social benefits to Native communities. This focus allowed us to hone the conversations to understand and then disrupt existing deal structures and patterns. Finally, aside from community scale projects, renewable energy projects require large infusions of debt and equity capital, and require interaction with outside developers and contractors to complete. The deals themselves are essentially similar to other forms of resource development but, because the sector is emerging and because there are different investors involved who want more beneficial environmental outcomes, there exists an opportunity to create new deal models as this sector grows in Indian Country.

Thus, First Peoples then began further research to design a strategy around the following goals: 1) to understand the ecosystem of interest and need, and 2) to put together the core design concepts necessary to build a private equity strategy aligned with core values.

The core values that embed this research methodology and found the resulting analysis are:

- Indigenous self-determination
- Equity in power and decision-making
- Financial excellence
- Positive social impact

Of note, the global pandemic that hit the United States in February 2020 fundamentally changed the economic landscape that sets the context for this research. Tribal leaders' attention rightfully turned to ensuring the health and wellbeing of their communities. In addition, the economic impacts in Indian Country will be felt deeply for many years since many of the businesses that provide the revenue necessary for essential services in Indian Country have been shut down as part of nation-wide quarantines. Preliminary results from a Harvard Project on American Indian Economic Development study show that Indian Country stands to lose nearly $50 billion in economic activity because of the pandemic.[50] The study also states that tribal enterprise supports more than 1.1 million jobs that are held by Indians and non-Indians alike.[51] The total economic effects of the pandemic are unknown at this moment, as is the new economic context that will emerge in the next few months and years.

One of the distinctive initiatives of our research methodology was to deploy a consultation and information gathering process to gather experience, expertise and insight through formal and informal methods. The consultation process has formed a large portion of the research to activate First Peoples' core value to meaningfully integrate Indigenous and non-Indigenous expertise, insight and wisdom. The consultation phase included four parts: an online survey, an interactive webinar, a closed small group meeting, and informal conversations.

Overall, participants and partners represented the following sectors:

- Impact Investing
- Tribal Government
- Renewable Energy Construction, Production and Services
- Philanthropy
- Academia
- Law
- Financial Services & Asset Management

Participants included:

- Tribal leaders
- CEOs, and CFOs for tribal enterprises
- Indigenous community leaders
- Program & Senior Directors within Philanthropy
- Institutional investors
- Asset managers
- Legal scholars
- Indigenous entrepreneurs
- Consultants in financial services, renewable energy delivery, and policy

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[50] Press Release, Harvard Kennedy School, *Harvard Project on American Indian Economic Development releases research on allocation of COVID-19 response funds* (Apr. 13, 2020), ash.harvard.edu/news/harvard-project-american-indian-economic-development-releases-research-and-recommendations.

[51] *Id.*

The following section is divided by modality to provide further detail into how each method was operationalized. Of note, the information reported in this section is reported anonymously, unless participants gave their express permission to be quoted or identified.

Survey

The goal of the survey was to better understand the ecosystem of need and interest for this type of strategy within the United States. The survey was designed to elicit qualitative feedback on research questions. The majority of the questions were open-ended and there were no word limits. It was divided into 5 sections based on the participant's field:

- Tribes, Native American Entrepreneurs, Indigenous Peoples' Representatives and Organizations
- Impact Investing
- Philanthropy
- Renewable Energy
- Other Stakeholders (Including Utilities, Rural Electric Cooperatives, etc.)

Each section had questions tailored to the respective fields, but all sections asked participants about their view on the most important objective of this type of fund, the opportunities the participant saw for their work, and asked for any additional information.

The survey was released on October 1st and the survey period formally closed on October 31st, 2019. The length of the survey time period was arbitrary to the results, in that the only goal in cabining the time period was for our own research timeline. Six respondents completed the survey after the formal close and their answers are included in the findings.

In total, 42 participants completed the survey, representing 37 organizations. Participants self-reported their field and the breakdown of participants who completed the survey from each field are as follows: a) 38% from Impact Investing; b) 26% from Tribes; c) 21% from Philanthropy; d) 7% from the Renewable Energy sector; and e) 7% Other.

The majority of participants were from the United States, with 2 participants completing the survey from Canada. The areas with the most participants were New York and Colorado, with participants reporting from all other regions within the United States except the southeast.

Webinar Listening Session

First Peoples held a webinar on December 10th, 2019 as part of the larger consultative research process. The purpose of the webinar was to gather insight and expertise from a variety of stakeholders and spur a discussion around the following topics:

- The most important objective(s) of an impact-oriented private equity strategy;
- Top barriers to accessing capital for large-scale renewable energy projects;
- Training and technical assistance desired or necessary for these types of investments; and,
- The opportunities available for a tribe or organization to participate with this type of fund.

In total, 104 people registered for the webinar, with 78 people registering separate from the survey. Registrants represented 85 distinct entities. In total, 44 participants attended the webinar; most were from the United States and at least one person joined from Canada.

First Peoples staff moderated the discussion. Participants asked questions verbally during the webinar and added questions via the chat function as well. The three sectors most represented on the call were:

- Tribes, tribal business entities or Indigenous Peoples organizations;
- Impact investors; and,
- Philanthropy.

A sample of topics posed by participants during the webinar include:

- Whether the term "private equity" is appropriate given the extractive capitalist returns generally associated with that term;
- How due diligence could be conducted in terms of suitability, site suitability, etc. and be consonant with Indigenous Peoples' rights;
- The need for a strong methodology to measure impact;
- How to leverage tax credits since tribes cannot capture the credits;
- How to put environmental remediation on radar for potential projects;
- Highlighting that funding only utility scale eliminates a number of impactful projects;
- Discussing what types of entities a fund could invest in, i.e. tribal governments, Section 17 corporations that are utility authorities, limited liability corporations, etc.; and,
- Understanding how adverse impacts might be measured, reported, and handled to ensure a private equity fund is responsive to community or tribal government needs.

Individual Meetings, Conferences & Convenings

Activating networks was a key part of finding stakeholders who had expertise, interest and time to connect about this type of strategy. First Peoples staff connected with people via phone and in-person to discuss how a private equity strategy might play out given their sector, vantage point and expertise. Included in this category are the numerous small group exchanges where the research was part of the discussion but not a main agenda item. In sum, First Peoples had one-on-one conversations with over 100 individuals from the sectors listed above.

Also included in this section are the number of conferences that First Peoples attended in the fields of impact investing, philanthropy, renewable energy and economic development in Indian Country. Many of these conferences presented opportunities to discuss the research informally and these meetings led to further one-on-one conversations and introductions. Convenings attended were:

- National Tribal Energy Summit
- Site visits to tribal nations
- SOCAP 2019
- SRI Conference 2019
- Calvert Convening on Inequality 2019 at the Rockefeller Foundation
- Wisconsin Governor's Conference
- 3rd Annual Seminole Tribe of Florida Renewable Energy & Sustainability Conference 2020
- RES 2020, hosted by the National Center for American Indian Enterprise Development

Finally, First Peoples hosted one small group expert meeting. The meeting was conducted according to Chatham House rules to ensure the free and fair discussion of presently ongoing projects in Indian Country in ways that could ultimately inform technical aspects of what a private equity strategy might include. Participants included tribal enterprise leaders of several different tribes, attorneys with relevant energy and Indian law expertise, renewable energy developers, and financial services professionals, among others.

The purpose of the meeting was to discuss, in a small group setting, the specific challenges and opportunities to implement this type of private equity strategy. The agenda was constructed to follow the lifecycle of renewable energy projects on tribal lands and to discuss the technical aspects of a fund design at each stage. A guiding thread to the discussion was to pull together the constituent parts of a private equity strategy that can be accessed as a model – with known values, known metrics, and known return rates – but to ensure that the strategy could also flexible enough to be useful and beneficial to the 574 distinct federally recognized tribes in the United States.

Consultation Themes

The findings from each aspect of the research process have been collated in the following section for clarity.

1. Interest in a Private Equity-specific Investment Vehicle

Coequal prioritization of tenets

Respondents in all fields noted their interest and enthusiasm regarding the distinct nature of this vehicle as inclusive of a social justice mission, to access patient capital for projects in Indian Country, and the ability to provide a novel platform for impact investors to invest in Indigenous-led projects with market-rate returns. Indigenous respondents, in particular, expressed interest that this vehicle would allow for access to capital in a mode aligned with Indigenous self-determination and tribal goals. Similarly, a number of impact investors noted that they had clients who would be interested in this vehicle as one that could generate return and had a social impact thesis related to Indigenous Peoples.

The coequal prioritization and valuation of the tenets of this strategy piqued the interest of most respondents, where no one tenet was given more weight than another. The access to capital alongside return on investment, with a throughline of Indigenous self-determination, is what made this strategy unique, innovative and desirable.

Indigenous-led & consistent with sovereignty

Respondents were interested to see a capital infusion for Indigenous Peoples that spurred economic reconciliation and sustainability. Many respondents from philanthropy and impact investing noted that their top priority in choosing a fund like this would be to ensure that it was Indigenous-led and therefore actualizing in process the social justice mission of the fund.

An Indigenous-led fund as cognizable by mainstream investors

In the last few years, stakeholders in philanthropy and impact investing have been creating new spaces for the consideration of Indigenous Peoples' rights and how to drive capital into Indian Country with integrity. In part this could be due to the visibility of the Indigenous stand against the Dakota Access Pipeline, as well as the successful traction of Edgar Villanueva's book *Decolonizing Wealth*.

This was reflected in the language that many impact investors used, who stated that this fund should "diverge" from conventional private equity funds, and that it should have the power to "stand up" to and with conventional funds.

However, several investors noted the importance of any fund to be available and accessible through mainstream platforms, and there were questions regarding whether it would be characterized or tagged as "alternative." These statements clarify the desire for a fund to operate as a strong player within the set of mainstream funds, with the additional social justice and human rights criteria.

Private Equity & Financial Excellence

Similarly, investors noted that it was of equal importance that the fund be managed by a financial services partner that has a proven track record.

Many investors noted that they had taken part in conversations about the core values of this fund strategy in the past, but had not been able to find a product that could be added to their portfolio. In that vein, several impact investment stakeholders noted the need for a vehicle that returned at market rate, with ROI at more than 2% or 3% returns, while also stating that the returns would not need to be the same as outsized private equity returns. One investment advisor noted that there are dollars that are ready to go into a vehicle that has returns at 5% or 6%.

The reputation of private equity funds as merely extractive was discussed in several meetings, in particular with regards to find a way to leverage the benefits of private equity without repeating those same processes that burden the recipient entity to the financial gain of the investor. Of note, however, all respondents expressed interest in long-term, patient capital as a way to prioritize partnering and staying invested if done well and in alignment with stated values.

Locus of Native-specific expertise

Indigenous sector respondents noted the unique nature of this type of vehicle and, in particular, highlighted their interest in a fund management team that had expertise in the business and legal regimes distinct to Indian Country, such as taxation, alienability of lands, and tribal governance. Respondents from the renewable energy sector also highlighted the need for a team that understood the intricacies of working with tribal governments, within the tax and legal regime in Indian Country, and with tribal corporations. One participant summarized their experience that investors do not understand the needs of Indian Country and Indian Country doesn't often understand the needs of investors.

Similarly, several respondents noted that every time a renewable energy project deal happens in Indian Country, it seems like it is the first time a deal ever happened. Further discussion revealed that there is a need for information sharing about the different ways that tribes and tribal project champions can negotiate and develop renewable energy projects so that models can be "recycled" when beneficial to other tribes. In recognition of the diversity of projects, resources and tribes in the United States, participants expressed interest in standards to guide how a deal could proceed but also provides options and flexibility to attain different tribal goals.

Research also elevated the ways that tribally-owned and Native-owned businesses sometimes operate differently than other businesses. For example, tribal entities often provide jobs within tribal enterprises for reasons that extend beyond the absolute needs of the enterprise. One of the main reasons that many tribal enterprises exist is to employ tribal citizens, and the associated costs of employing these individuals are valued as core aspects of the enterprise. This operational strategy encompasses more than a bottom-line approach and there is a desire to see this strategy rewarded through financial investment that recognizes this as a human-centered investment in community and local economies.

As another example, in more than one tribal enterprise there were a number of ways that social return on investment occurred without being named as such. This ranged from employing more people within the enterprise than a similarly situated non-Native enterprise would employ, but it could also mean paying for an employee's schooling, or taking on interns based on an intern's desire rather than the enterprise's own needs.

Finally, conversations revealed there is still the idea in the broader financial sector that investment in Indian Country is inherently risky for many different reasons. Similarly, there is significant mistrust of investors and financial institutions in Indian Country. Both sets of ideas serve to deter economic development and deter creative and new approaches to deal frameworks.

Metrics

Impact investors noted that any fund must be held to the same standards as any other private equity fund. They noted the need for strong metrics both in terms of financial assessment and in terms of social impact metrics; the need for a fund to be able to clear standard due diligence processes; and to generate strong rates of return.

2. Readiness in Indian Country

Throughout the conversations and dialogue, participants affiliated with tribes or Indigenous organizations listed a number of projects, some in the concept phase, others in the development phase, and still others at a shovel-ready phase. While not explicit, the responses indicated that many of the projects are larger than community-scale projects and would require a capital infusion at a higher level.

Another indicator of readiness that surfaced in the surveys, as related to project readiness, was the fact that a majority of Indigenous sector respondents indicated that their tribe owned and managed business entities of various sizes. The responses indicate not only a high level of readiness but a high level of business acumen and technical expertise available in Indian Country. One of the dominant modes of economic development over the last 30 years has been creating tribally owned entities, and the responses to the survey indicate that this type of strategy is well poised to capture the business expertise and entrepreneurial ethos generated from that focus.

Many tribes are ready to capitalize projects and were interested in the technical capacity building aspect of a private equity strategy. Similarly, respondents from the Indigenous sector answered the question regarding technical assistance and training needs with a high degree of specificity, indicating a readiness to learn and build capacity towards activating opportunities. The types of technical assistance they specified that would be helpful included providing education regarding this type of investment to elected officials, and the skills needed to manage participation with a private equity fund, among others.

A theme that emerged from speaking with Native partners is that almost every successful tribal project, and especially those that include larger capital stacks, have a dedicated champion whose nearly full-time job is to push the project through pre-development and development. Sometimes this person was a member of an existing business entity and was taking on this role in addition to their existing role, and in some cases the tribe was able to hire someone to champion the project.

> *The breadth of conversations revealed that scaled, Native entrepreneurship is happening around the country and many Native entrepreneurs are seeking capital to grow on a national scale.*

Project champions experience the most barriers in the pre-construction and pre-development phases with large-scale projects

Many projects in Indian Country have gone through planning and design but have failed to launch at the pre-construction phase. Respondents didn't provide details as to why this was the case but, taking the responses as a whole, the issues were largely related to strategic planning and to access to steady capital throughout the lifecycle of the project, particularly funding that would get the project through feasibility and ensure timely implementation.

Participants were asked to describe barriers to finding capital for projects. A sample of their responses are as follows:

- Difficulty finding funding to cover design phase including technical assistance for tribes looking to grow into the renewable energy field, having experts available to assist; and coming up with matching funds to be eligible for federal grants.
- Getting through feasibility studies, negotiating power purchase agreements, and then technical training and assistance to maintain and upgrade systems.
- How to integrate tax credits and tax incentives, and then dealing with sovereign immunity and specifics related to overlay of federal Indian law.
- Participants noted that it would be hard to have a one-size-fits-all fund that funds specific types of projects because utilities function differently in each state and tribes have different relationships with utilities even within the same state.

There is a significant need for capital in the early stages of project design and development prior to capitalization via a fund of this type. The requirement for a tribal match to secure federal grants at this stage is a barrier for many tribes who would otherwise apply.

There are already a number of different financing options available for enterprises within Indian Country, however it takes a significant amount of time and energy to access and make the most of them. It can take years to get seed funding via grants to get the project started and then to cultivate the next rounds of funding. Commonly discussed opportunities via the federal government were grants via the Department of Energy Office of Indian Energy Policy and Programs, and technical assistance grants through that office and via the United States Department of Agriculture Rural Energy Assistance Program. The Tribal Energy Loan Guarantee Program, through the United States Department of Energy, can provide up to $2 billion in partial loan guarantees to support tribal energy development projects, including renewable energy and transmission infrastructure and energy storage.[52] The application fees to the Loans Program Office are about $35,000.[53]

Finally, the largest amount of work for this type of project occurs in pre-development, which can last anywhere from two to ten years. This is another point where developer and investor access to legal and business acumen specific to federal Indian law is imperative, as decisions regarding points of sale and waivers of sovereign immunity, for example, set the course for the entire project and are generally made at the end of the pre-development timeline.

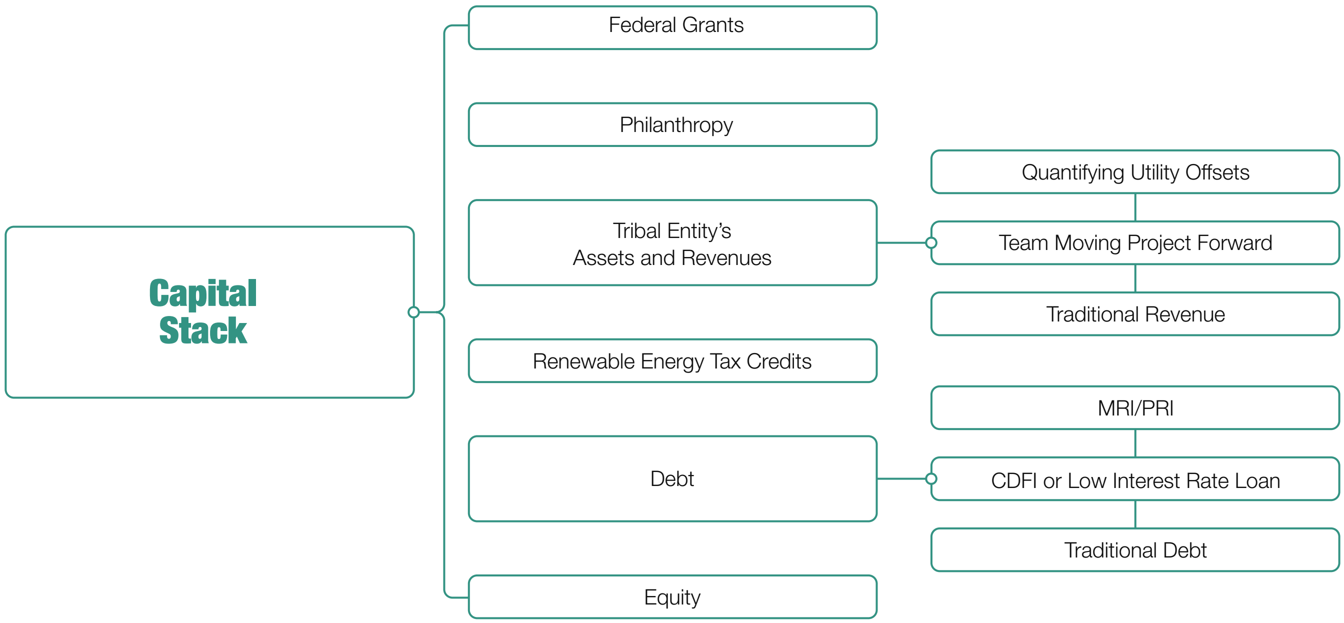
3. Renewable Energy Deals in Indian Country

Renewable energy as a field is very diverse and implementation of projects varies distinctly from building battery storage, to developing wind resources, to implementing solar arrays. There are a range of renewable energy projects that have been deployed in Indian Country successfully. Most of these projects took at least a decade to get off the ground and many larger scale projects were completed after smaller scale projects proved successful.

Many, but not all tribal projects, combine a number of different enterprises under one roof for several reasons: 1) to round out the capital stack by creating streams of revenue and/or alternate streams of funding for the project, and 2) space, time and resource constraints make it maximally effective to build one building with multiple functions, i.e. office space, wellness center, clinic, gym, plus space for a battery or solar array on the property. These projects have a renewable energy component but have bigger community impact and revenue generation capabilities.

[52] Dept. of Energy, Loan Programs Office, Tribal Energy Loan Guarantee Program (2020), www.energy.gov/sites/prod/files/2020/01/f70/DOE-LPO-Tribal-Energy-Jan2020.pdf.

[53] Dept. of Energy, Loan Programs Office, Loan Guarantee Solicitation Announcement - Tribal Energy Development Projects 19 (Jan. 16, 2020), www.energy.gov/sites/prod/files/2020/01/f70/DOE-LPO_TELGP_Solicitation_16Jan20.pdf.



The capital stack for a typical renewable energy project includes funding from many different sources: grants from a tribe, the federal or state government, or philanthropic sources; low- interest loans from federal or conventional sources; commercial loans from commercial banks; tax credit offsets; and revenue generating ventures within the project (i.e. building a grocery store or wellness center with revenue generating capacity).

When a tribe or tribal enterprise wants to complete a project, existing employees of the tribal enterprise, usually the CEO or equivalent, must reallocate their time to develop the project. In general, this means that the employee is spending additional time on top of their regular work responsibilities to complete tasks related to project development. One consistent challenge is to put together the human capital necessary to drive a project through pre-development to completion.

Throughout the process of project development, Native and tribal advocates expend a large amount of time explaining and discussing the intricacies of the legal and regulatory regime unique to building on tribal lands. These discussions ranged from discussing the technical possibilities of a project, such as the tribe's ability to buy or sell power from a power utility, to discussing the common misconceptions that still burden Native peoples in their transactions with outside entities. For example, tribal champions often have to build capacity of developers and investors to understand that the federal government does not automatically disburse funding to tribes, a common myth, and moreover that federal fund cannot and will not fund the entirety of a power project.

Tribal champions also spend time in vetting companies and businesses who seek to do business with the tribe. There must be someone in the tribe who is knowledgeable to do this work or the projects get sidelined for lack of ability to choose the best partners.

As there are more stakeholders (i.e. tribal government, bank, philanthropy, investors) the project team spends time reporting on progress and targets and, in general, each of the entities have different reporting needs.

Finally, participants noted that small wins are important to demonstrate the possibilities of a project both in terms of demonstration projects to garner additional funding in larger amounts and also in terms of keeping the tribal government apprised and excited about a potential project.

Desk Research

1. Landscape Analysis

The ecosystem to create access to private capital in Indian Country is growing rapidly. There is a small network of funds and vehicles that are substantially similar to the one proposed and useful for comparison and consultation. The following is a small snapshot of some of these funds.

The most similar are the Raven Indigenous Impact Funds, operated by Raven Indigenous Capital Partners, an Indigenous-led financial intermediary in Canada whose mission is to empower Indigenous entrepreneurs with the capital and expertise they need to succeed.[54]

In the United States, a similar fund is the Southern Ute Indian Tribe Growth Fund, which operates and manages the Southern Ute Indian Tribe's businesses and business investments.[55] However, the Growth Fund is not sector specific. In 2008, the Southern Ute Indian Tribe Growth Fund capitalized another fund called Southern Ute Alternative Energy, LLC, to deploy renewable energy projects, however the entity no longer exists.

Similar impact-oriented funds that create direct access for Indigenous Peoples include the Olamina Fund (loan fund),[56] and the Native American Venture Fund (Indigenous-led venture fund).[57] In June 2019, Travois launched an open-ended impact fund to develop Native American communities; the fund is designed to attract socially responsible investors and will work as a general obligation bond.[58] As of June 2019, the fund was awaiting approval from the SEC before opening the fund to investment.

First Nations Capital Partners, LLC is an inter-tribally controlled private equity firm that operates in the United States.[59] The anchor investors are two Indian Nations located in California and Wells Fargo Bank. Their mission is to provide strategic resources, including patient capital, for growing, profitable companies in traditional industries.

Native American Capital was formed in 2004 as a merchant bank and private equity firm,[60] but has since moved toward providing consulting services to promote tribal enterprise through assisting tribes and tribal business to raise capital and hone business management.[61]

2. Current Renewable Energy Project Development in Indian Country

The following section discusses the status of renewable energy projects in Indian Country today, considering only current wind and solar projects. According to a recent study by the National Renewable Energy Laboratory (NREL), tribes have the potential to generate 6,035 GW of utility scale solar power (5.4% of the total potential in the United States), and 891 GW of utility scale wind power, (7.8% of the national potential).[62]

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54 *Raven Indigenous Impact Funds*, RAVEN CAP. PARTNERS, https://ravencapitalpartners.ca/index.php/what-we-do/fund1 (last visited Dec. 15, 2020).

55 *About Us*, S. UTE GROWTH FUND, www.sugf.com/about (last visited Dec. 15, 2020).

56 *About the Fund*, CANDIDE GRP., candidegroup.com/olamina-fund (last visited Dec. 15, 2020).

57 *About Us*, NATIVE AM. VENTURE FUND, navf.net/about-us (last visited Dec. 15, 2020).

58 James Dornbrook, *This KC firm's impact investing already exceeds $200M. Now, it's starting an impact fund*, KAN. CITY BUS. J. (June 28, 2019), bizjournals.com/kansascity/news/2019/06/28/travois-native-american-impact-fund.html.

59 *Visionary Capital at Work*, FIRST NATIONS CAP. PARTNERS, www.firstnationscapitalpartners.com/team.html (last visited Dec. 15, 2020).

60 *Native American Capital, LP, Launched to Support Native American Business*, BUS. WIRE (Nov. 18, 2003), www.businesswire.com/news/home/20031117006195/en/Native-American-Capital-LP-Launched-Support-Native; see Gavin Clarkson, Accredited Indians: Increasing the Flow of Private Equity in Indian Country as a Domestic Emerging Market, 80 U. COLO. L.REV. 285 (2009).

61 *About Us*, NAC, nativeamericancapital.com/about (last visited Dec. 15, 2020).

62 Anelia Milbrandt, Donna Heimiller & Paul Schwabe, *Techno-Economic Renewable Energy Potential on Tribal Lands*, NREL (July 2018), www.nrel.gov/docs/fy18osti/70807.pdf.

These figures represent considerable generation potential, as Indian trust lands account for slightly less than 3% of the total land in the United States.[63]

Despite the enormous renewable energy generation potential in Indian Country, tribes still appear to face numerous barriers to development and electrification. Barriers to accessing capital, limited technical expertise, insubstantial transmission infrastructure, regulatory hurdles distinct to Indian Country, and limited knowledge of sovereignty and federal Indian law among business and financial institutions currently prevents tribes from reaping the benefits enjoyed by the rest of the renewable energy sector in the United States.[64] However, there has also been a recent push for development from tribes and the Department of Energy ("DOE") to overcome these obstacles in order to boost local economies and to combat climate change.

This section will first explore recent efforts made by the DOE's Office of Indian Energy Policy and Programs to increase tribal renewable energy project accessibility. Second, this section describes developing wind and solar projects along with background on the partnerships tribes have been forming to actualize those projects.

a. The Department of Energy Office of Indian Energy Policy and Programs

Broadly speaking, the majority of major renewable projects in Indian Country today are partially funded by the DOE. The Office of Indian Energy Policy and Programs ("The Office") is the sector of the DOE designed to provide grants, loans, and technical assistance in support of tribal energy projects. The Office is authorized to fund and implement a variety of programmatic activities that assist tribes with energy development, capacity building, and energy cost reduction. The Office matches money from funds like the Tribal Solar Accelerator Fund and other sources to help increase funding for tribal solar projects.[65] Under the current regulatory regime, tribes must contribute a 50% non-federal cost share to apply for matching funds through the DOE. If the projects are approved by the DOE, tribes will be reimbursed by the federal government for the share to which they are entitled.[66] Since 2017, the DOE has issued over $32 million in grants to nearly 60 tribal energy projects valued at $78 million.[67]

In 2019, the DOE committed $17 million to assist tribes in developing energy infrastructure on tribal lands.[68] On March 27, 2020, the DOE committed $15 million of federal funding for renewable energy projects in Indian Country.[69] According to the Office, "[t]he intended results of the 50% cost-shared projects selected [by the DOE] are to reduce or stabilize energy costs and increase energy security and resiliency for Indian Tribes and tribal members."[70] Through the planned DOE fund, the Office will solicit applications from tribes to install renewable energy infrastructure and deploy community-scale energy generating systems. This funding opportunity opens for new applications on an annual basis and builds on previous efforts under the Energy Policy Act of 2005 to accelerate the deployment of energy infrastructure in Indian Country.

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63 Daniel P. Bigelow & Allison Borchers, *Major Uses of Land in the United States, 2012*, ECON. INFO. BULLETIN NO. 178 (Aug. 2017), www.ers.usda.gov/webdocs/publications/84880/eib-178.pdf?v=0.

64 *See* Margaret Tallmadge, *What Is Holding Back Renewable Energy Development in Indian Country?*, CLEAN ENERGY FIN. FORUM (DEC. 11, 2019), cleanenergyfinanceforum.com/2019/12/11/what-is-holding-back-renewable-energy-development-in-indian-country.

65 *2020 Tribal Solar Funding*, TRIBAL SOLAR ACCELERATOR FUND, tribalsolaraccelerator.org (last visited Dec. 15, 2020).

66 Kelsey Misbrener, *Multi-level Solar Policies Can Transform Native American Energy Mix in the Southwest and Beyond*, SOLAR POWER WORLD (Nov. 21, 2019), www.solarpowerworldonline.com/2019/11/multi-level-solar-policies-transform-native-american-energy-southwest.

67 *DOE Announces $17 Million to Deploy Energy Infrastructure on Tribal Lands*, NS ENERGY (Nov. 14, 2019), www.nsenergybusiness.com/news/doe-announces-15-million-to-deploy-energy-infrastructure-on-tribal-lands.

68 *Id.*

69 *Department of Energy Announces Up To $15 Million for Tribes to Deploy Energy Technology*, DEPT. OF ENERGY (Mar. 27, 2020), www.energy.gov/articles/department-energy-announces-15-million-tribes-deploy-energy-technology.

70 *Id.*

In addition to these funding opportunities, the Office's website hosts the Tribal Energy Projects Database. The Tribal Energy Projects Database contains valuable information related to renewable energy projects partially or fully funded by the DOE in Indian Country and tracks the status of the corresponding project.[71] The database includes data for seven types of renewable energy technology: biomass, geothermal, hydropower, solar, tidal, wind, and other. As of December 2020, seventy-six tribal wind and solar projects have been added to the Database since 2010.[72] Notably, only seven grants were issued in 2019, all for solar projects, and no grants have been reported for 2020. DOE grant amounts for the 2019 solar projects range from $384,768 to $2,000,000.

Tribes that do not pursue funding through the Department of Energy are not listed on the DOE's website. No comprehensive sources are known that compile all non-DOE funded projects. If a tribe pursues a wind or solar project independently of the DOE, the types of other funding options that exist for preliminary funding include: partnering with nonprofits, signing land lease agreements with utility companies, and applying for funding via private accelerator funds.

b. Wind Energy Projects

According to the DOE database, wind projects appear to be developing at a slower rate than solar projects in Indian Country.[73] This is likely due in part to the additional financial costs associated with creating, moving, and assembling wind power project infrastructure.[74] In addition, unlike solar panels, which can be placed almost anywhere, wind turbines must be placed in areas that are proven to yield high wind speeds, which is usually determined through a somewhat lengthy data collection process.[75] Therefore, higher startup costs and geographic location restrictions seems to partially explain the slower development of wind projects in Indian Country.

Despite the high costs, there is still movement in the sector. The Spirit Lake Tribe is presently developing a 1.5MW turbine on its reservation. The Northern Cheyenne Tribe is developing a 30MW wind farm on its Reservation. Similarly, the Rosebud Sioux Tribe is developing a 30MW wind farm on its reservation, and the Kaw Nation has completed a wind energy feasibility study to develop a small turbine on its land. This is not meant to be an exhaustive list; much of the information surrounding developing wind and solar projects remains largely private or unpublished so it is difficult to predict how many tribes are engaging in wind project development. However, despite the largely private nature of these transactions, it appears that tribes are frequently partnering with non-tribal entities to develop projects.

For example, Distributed Generation Systems (Disgen) has been an active partner in helping tribes develop wind generation facilities on tribal lands.[76] Disgen has partnered with the Eastern Shoshone and Northern Arapaho on the Wind River Reservation to conduct a feasibility Tribal Wind Assessment.[77] The goal of the Assessment is to provide wind monitoring and to engage in a pre-project planning evaluation to help the Tribes develop a sustainable wind energy plan. Disgen has also partnered with the Northern Cheyenne Tribe and the Rosebud Sioux Tribe to perform a wind assessment, transmission assessment, market evaluation, and environmental assessment for the 30MW wind farms both tribes are developing.[78] Disgen is just one example of a non-tribal entity that is currently partnering with a tribe to bridge common development barriers; other partners include: Apex Clean Energy (Oceti

[71] *Tribal Energy Projects Database*, DEPT. OF ENERGY, www.energy.gov/indianenergy/maps/tribal-energy-projects-database (last visited Dec. 15, 2020).

[72] 56 of the projects are solar projects, and 20 are wind. *Id*.

[73] *Id.*

[74] It costs approximately $1 million per megawatt to install and set up a wind farm. *Wind Energy Fact Sheet*, AM. WIND ENERGY ASS'N, www.agmrc.org/media/cms/10stwf_fs_8EF50C47B61F5.pdf (last visited Dec. 15, 2020).

[75] *Id.*

[76] *Welcome to Disgen*, DISGEN, www.disgenonline.com (last visited Dec. 15, 2020).

[77] *Tribal Wind Assessment by the Eastern Shoshone Tribe of the Wind River Reservation*, UNT DIGITAL LIBRARY, digital.library.unt.edu/ark:/67531/metadc930167 (last visited Dec. 15, 2020).

[78] *Northern Cheyenne Indian Reservation Wind Project*, DISGEN, disgenonline.com/NAPR_NCheyenneIndResWindProject.html (last visited Dec. 15, 2020).

Sakowin Power Project),[79] Infigen Energy (Campo Kumeyaay Project),[80] and NativeEnergy (Rosebud Sioux Project).[81]

c. Solar Projects

The Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Oglala Sioux Tribe, Moapa Band of Paiutes, Big Pine Paiute Tribe, and the Chemehuevi Indian Tribe are just a few of the tribes that are currently developing solar projects on their respective reservations with renewable energy grants from DOE. The southwest United States has some of the best solar resources in the country because of how much average sun the area gets, and several tribes are beginning to take advantage of it.[82] Tribes are developing utility-scale solar, like the Navajo Nation's 27.3MW Kayenta Solar Facility, which came online in 2017.[83] The Navajo Nation is using the solar energy generated by the Kayenta Solar Facility to replace electricity that was once provided by one of its major coal plants, signifying a shift in policy to move toward cleaner sustainable energy.

One of the barriers tribes face in developing solar projects is the political and technical capacity of the tribes themselves, particularly among smaller tribes with limited resources.[84] Tribal councils must spearhead the process and have resources in place to perform operation and maintenance to ensure the longevity of the system. Tribes often address these capacity barriers by partnering with nonprofits and non-tribal entities.

For example, GRID Alternatives (GRID), a 501(c) nonprofit, is a major player in assisting tribes with solar development.[85] GRID is presently dedicated to advancing solar in the Navajo Nation and throughout Indian Country through its National Tribal Program, which helps tribes implement solar projects by educating tribal members on how create and construct solar projects and work with utilities. GRID trains construction workers within the existing tribal governments as well as interested community members, and also works with tribal colleges and high schools via its Solar Futures program.[86] GRID also helps fund tribal development projects through its Tribal Solar Accelerator Fund, which provides infrastructure and funding through a grant process.[87] In the Fund's first year, GRID received 45 applications requesting a total of $7.3 million in solar projects.

In addition to GRID, several other nonprofits and non-tribal entities have been partnering with tribes to develop solar projects. Other partners include: GivePower (501c non-profit),[88] Empowered by Light (501c non-profit),[89] Indigenized Energy,[90] Jinko Solar (solar panel manufacturer corporation),[91] Wallace Global Fund,[92] SunVest Solar,[93]

79 *Projects*, APEX CLEAN ENERGY, www.apexcleanenergy.com/projects (last visited Dec. 15, 2020).

80 *Our Assets*, INFIGEN ENERGY, https://www.infigenenergy.com/our-assets/asset-map/ (last visited Dec. 15, 2020).

81 *Your Projects*, NATIVE ENERGY, native.eco/your-projects (last visited Dec. 15, 2020).

82 Kelsey Misbrener, *Multi-level Solar Policies Can Transform Native American Energy Mix in the Southwest and Beyond*, SOLAR POWER WORLD (Nov. 21, 2019), www.solarpowerworldonline.com/2019/11/multi-level-solar-policies-transform-native-american-energy-southwest.

83 *Id*.

84 Michael Maruca, *From Exploitation To Equity: Building Native-Owned Renewable Energy Generation In Indian Country*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 391 (2019), scholarship.law.wm.edu/wmelpr/vol43/iss2/3.

85 *Renewable Energy Advances Energy Sovereignty in US Tribal Communities*, GRID ALTERNATIVES (Oct. 12, 2020), gridalternatives.org/headquarters/news/new-tribal-solar-accelerator-fund-grantees.

86 Kelsey Misbrener, *Multi-level Solar Policies Can Transform Native American Energy Mix in the Southwest and Beyond*, SOLAR POWER WORLD (Nov. 21, 2019), www.solarpowerworldonline.com/2019/11/multi-level-solar-policies-transform-native-american-energy-southwest.

87 *2020 Tribal Solar Funding*, GRID ALTERNATIVES, tribalsolaraccelerator.org (last visited Dec. 15, 2020).

88 *Our Projects*, GIVEPOWER, givepower.org/projects-2 (last visited Dec. 15, 2020).

89 *Our Projects*, EMPOWERED BY LIGHT, www.empoweredbylight.org/projects (last visited Dec. 15, 2020).

90 *Profile*, INDIGENIZED ENERGY, www.facebook.com/IndigenizedEnergySR (last visited Dec. 15, 2020).

91 *About Us*, JINKO SOLAR, www.jinkosolar.com/en/site/aboutus (last visited Dec. 15, 2020).

92 *About Us*, WALLACE GLOBAL FUND, wgf.org/about-us-2 (last visited Dec. 15, 2020).

93 *About Us*, SUNVEST SOLAR, www.sunvest.com/about-us (last visited Dec. 15, 2020).

EnSync Energy, Namaste Solar,[94] Black Rock Solar,[95] McKnight Foundation,[96] First Solar,[97] NV Energy,[98] and 8minute Solar Energy.[99]

In conclusion, tribes, the federal government, and entities within the solar development sector are making significant progress in developing renewable energy on tribal lands. Between the DOE's grant programs, accelerator investment funds, and nonprofits such as GRID Alternatives, tribes are increasingly able to overcome longstanding barriers to project development. As tribes continue to develop and solidify their policies surrounding renewable energy development, tribal and non-tribal investors will likely be drawn to these enterprises. Additionally, as larger tribes such as the Navajo Nation continue to develop utility-scale projects, more business models will exist for smaller tribes to follow and for investors to draw confidence from.

3. Social Impact Measurement and Management as applied to Indigenous Peoples

The following section explores popular impact measurement and management practices, analyzing the hurdles for mainstream integration and the mechanics of applying the most promising metrics and models for measuring ROI for Indigenous Peoples. This section begins with a broad picture of the impact investing landscape. Then it takes a deeper dive into some of the most promising models provided by industry leaders. Finally, this section analyzes how the most promising models could be applied for Indigenous Peoples.

Impact investing has grown from a virtual novelty to a global industry sector with an influence on mainstream capital markets and financial services.[100] Today's impact investors share core characteristics, including the intention to maximize impact as well as financial returns, the use of impact data to make and evaluate investment decisions, and a commitment to measure and manage impact in a quantified, comparable manner.[101] The modern impact investing process requires sustainability-focused analytics that evaluate the materiality of non-traditional data along ESG vectors.[102] Across the market, impact measurement and management ("IMM") practices have grown increasingly sophisticated as investors shift from building consensus for the importance of IMM to strengthening its integration in the investment process.[103] The maturation of the field has shown that impact investments can yield risk-adjusted, market-rate returns comparable to those of non-impact investments.[104] For focus, this discussion will focus on non-concessionary impact investments, because impact investments with risk-adjusted, bottom-line financial returns are most likely to successfully integrate into the mainstream financial sector.

While there is no shortage of models being used to measure, report, compare, and improve investment impact, there currently is no clear agreement on a coherent set of industry guidelines.[105] The lack of a single, unified

[94] *About Us*, NAMASTE SOLAR, www.namastesolar.com/about-us (last visited Dec. 15, 2020).

[95] *About*, BLACK ROCK SOLAR, www.blackrocksolar.org/about (last visited Dec. 15, 2020).

[96] *About*, MCKNIGHT FOUND., www.mcknight.org/about (last visited Dec. 15, 2020).

[97] *About Us*, FIRST SOLAR, www.firstsolar.com/en/About-Us/Overview (last visited Dec. 15, 2020).

[98] *About NV Energy*, NV ENERGY, www.nvenergy.com/about-nvenergy (last visited Dec. 15, 2020).

[99] *About Us*, 8 MINUTE SOLAR ENERGY, www.8minute.com/about-us (last visited Dec. 15, 2020).

[100] Blaine Townsend, *From SRI To ESG: The Origins of Socially Responsible and Sustainable Investing*, J. OF IMPACT AND INV. 1-1 (Fall 2020), www.bailard.com/wp-content/uploads/2020/09/History-Socially-Responsible-Investing-and-ESG-Investing.pdf [hereinafter From SRI to ESG].

[101] Rachel Bass, Noshin Nova & Sophia Sunderji, *Evaluating Impact Performance: Clean Energy Access Investments*, GIIN (Oct. 2019), thegiin.org/assets/Evaluating%20Impact%20Performance_Clean%20Energy%20Access_webfile.pdf [hereinafter Evaluating Impact Performance].

[102] *From SRI to ESG, supra* note 99, at 3.

[103] *Evaluating Impact Performance, supra* note 100.

[104] Botha, *supra* note 40.

[105] For example, the Impact Management Project is one group attempting to build global consensus. *What is the Impact Management Project?*, IMPACT MGMT. PROJECT, impactmanagementproject.com (last visited Dec. 16, 2020).

measurement standard for impact investment returns makes defining goals and implementing qualitative and quantitative measurements even more complicated. According to impact investment advisor Rachel Browning, "[i]t is difficult to find truly impactful companies that produce positive externalities, help underserved communities, or contribute towards solutions."[106] This is part of why impact investing has the negative reputation of being "a lot of bad deals done by good people."[107] The sector needs coherence to scale with integrity and fully integrate into the mainstream field, and to avoid becoming diluted with "green or rainbow washing."[108]

Historical Overview

Traditionally, using social criteria in investing went against conventional wisdom, and impact investing had many more critics than vehicles. Nonetheless, impact investing pushed forward and continues to attract big mainstream players at larger scales.[109] Each major advancement in impact investing has been preceded by a social catalyst such as apartheid and climate change.[110]

In the 1970s, the SRI industry was established as society reacted to nuclear energy, human trafficking, the gender wage gap, the LGBTQ movement, and a host of other policy and cultural issues.[111] In response to pushback about companies like Dow Chemical and its business practices and role in creating Agent Orange, the Pax World Balanced Fund was launched in 1971 to provide an option for investors looking to avoid direct investments in those supply chains.[112]

In the mid 2000s, three main catalysts increased the demand for ESG analysis: a growing intellectual and legal debate about the relationship between fiduciary duty and issues of sustainability, the awareness of harmful effects of climate change, and wider-scale agreement that poor corporate governance is harmful to markets.[113] Between 2006 and 2009, around $17.5 billion was deployed in impact investing assets towards solar and bioenergy agricultural enterprises.[114]

Modern Approach – Data Driven Analytics

Models for data driven analysis of impact returns involve a process whereby investors identify what measures they need and ask investees to provide comparable aggregate measures of impact. Often, given industry confusion or lack of access, investees do not have the right data and instead share sales or employment figures that the impact investor then converts into approximations of impact based on desk research.[115] When it comes to social impact performance analysis, analysts usually draw data from headline statistics about the number of people reached, and then pair these metrics with individual vignettes about customers or communities.[116] This approach to data driven IMM only provides a soft estimation of impact and burdens the process of mainstream integration for its lack of standardization.

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[106] Botha, *supra* note 40.

[107] Michael McCreless, *Bono Doesn't Know -- All of us Are Still Learning*, STAN. SOC. INNOVATION REV. (Apr. 7, 2017), ssir.org/articles/entry/bono_doesnt_knowand_neither_do_the_rest_of_us.

[108] *Id*.

[109] *Id*.

[110] *From SRI to ESG, supra* note 99, at 5.

[111] *Id*. at 4-5.

[112] *Id*. at 5.

[113] *Id*. at 10.

[114] *Evaluating Impact Performance, supra* note 100.

[115] *A Simpler Way to Measure Impact: It's All About Listening*, 60 DECIBELS 4 (June 2019), sun-connect-news.org/fileadmin/DATEIEN/Dateien/New/60_Decibels_A_Simpler_Way_To_Measure_Impact_June_2019.pdf.

[116] *Id*. at 5.

Impact is highly context specific, which is why the outcomes experienced by a solar panel owner in India are often so different from those experienced by an owner of a nearly identical panel in Tanzania. Because of its limitations, proxy calculations are used primarily for communication purposes, but do not play a material role in how investment decisions are made and do not drive operational choices for entrepreneurs and their teams.[117] In the absence of better data about social impact, entrepreneurs and investors cannot manage for impact. Unfortunately, the lack of uniform benchmarks means that management of social impact often gets overpowered by more rigorous accountability of operational and financial targets.[118]

Themes

The following IMM trends were identified using questionnaires conducted by the Global Impact Investing Network ("GIIN") and published in their 2019 report, *State of Impact Measurement and Management*.[119] The report captured data trends provided by 278 impact investors surveyed between July and September of 2019. Investors were asked about how they measure, manage, and report impact. To be included in the survey, organizations must have contributed at least $10 million to impact investments and/or made at least five impact investments, and actively measured the social and or environmental performance of those investments.

When asked why investors thought gaps still remained in IMM practices, 89% attributed the problem to a lack of transparency, 84% attributed the problem to an inability to compare impact results with market performance, 92% cited challenges in collecting quality data, and 74% said the issue arises from complications in aggregating, analyzing, or interpreting data.[120]

Importantly, there are some identified trends in IMM motivations and targets that help define social impact and indicate a promising potential for a private equity fund for impact-oriented Indigenous businesses. Table 1 contains more trends identified by GIIN organized by category, question, and response percentages.

TABLE 1 - The following organizes two other categories of GIIN's IMM survey[121]

Category	Question	Response
Motivations & Practices	How are companies using/ reporting IMM data?	87% – assess impact performance 74% – report impact performance to key stakeholders 49% – using publicly available information
	Why are investors interested in IMM?	89% – communicating to stakeholders 45% – assessing risk factors 69% – improving impact results 65% – setting or revising impact goals 62% – strengthening data collection

117 *Id*.

118 *Id*.

119 Rachel Bass ET AL., *The State of Impact Measurement and Management Practices - Second Edition*, GIIN (Jan. 2020), thegiin.org/assets/GIIN_State%20of%20Impact%20Measurement%20and%20Management%20Practice_Second%20Edition.pdf [hereinafter *The State of Impact Measurement*].

120 *Id*. at 14.

121 *Id*. at 42 (figure 30); 46 (figure 33); 14 (figure 2); 18; 20 (figure 6); 12; 21 (figure 7).

Motivations & Practices	How are IMM responsibilities being allocated?	68% – investment teams 50% – staff dedicated to IMM 39% – senior leadership
	What stages of investment are IMM being considered?	81% – due diligence 77% – investment screening 75% – identifying social or environmental needs to address through investment
Typical Targets	Where are investors investing?	78% – directly into companies, projects, or real assets 13% – indirectly into funds or other investment intermediaries
	What outcomes are investors targeting?	58% – social and environmental 34% – only social 7% – only environmental Specific to private debt investors: 57% – only social Specific to private equity investors: 38% – only social
	What themes or sectors are investors targeting?	71% – employment 63% – agriculture 62% – financial services
	What stakeholder categories are investors targeting?	82% – socioeconomic bracket 65% – women and girls 47% – unemployed individuals

Impact Reporting as a Corporate Fiduciary Duty

In 2005, the UN Environment Programme ("UNEP") commissioned a landmark report to answer the following question: "is the integration of environmental, social and governance issues into investment policy (including asset allocation, portfolio construction and stock-picking or bond-picking) voluntarily permitted, legally required, or hampered by law and regulation; primarily as regards public and private pension funds, secondarily as regards insurance company reserves and mutual funds?"[122] The report concluded that not only was incorporating ESG consistent with fiduciary duty, but also ignoring ESG risks might be a *breach* of fiduciary duty.[123]

A correlation between financial performance and ESG factors is being increasingly recognized. Accordingly, integrating ESG considerations into an investment analysis to more reliably predict future financial performance

[122] *From SRI to ESG, supra* note 99, at 10.

[123] *Id*.

is clearly permissible and arguably necessary under corporate fiduciary duty of care. Specific to the extractive sector, researchers Rachel Davis and Daniel Frank conducted an analysis in 2014 that found project conflicts, delays, and additional costs often arose from underlying social and economic issues.[124] Those underlying issues affected the quality of the relationship between the company and the community affected by the projects, and in a number of instances led to social conflict resulting in significant financial loss to the business.[125] With one company in particular, the nontechnical risks related to ESG factors equated to a value erosion of more than $6 billion over a two-year period, representing a double-digit percentage of annual profits.[126] Clearly, it costs to not consider negative impact along ESG factors, so it makes sense that it would pay to consider positive ESG impact.

How to Reorient Moving Forward

Although the traditional investment industry has several universally accepted tools, like internal rate of return, no analogue exists for evaluating social and environmental rewards in dollar amounts.[127] Previously, the ESG factors being measured predominately pertained to the functioning of a business in the fulfillment of its ESG goals. ESG measures are confined to information about business commitments and processes (compliance program information, e.g. efficient use of natural resources, hiring policies, and board composition) and rarely score actual impact on society.[128] While internal ESG and external social and environmental impact are distinct concepts with different metrics, in practice there is some overlap between the two.[129]

To create this integration, the field needs clear, actionable impact targets and comparable performance benchmarks that show how investments are doing. The ideal industry guidelines will also provide something that would give a built-in improvement cycle, super-charging our collective ability to create positive change. More useful data should be organized in a way that is of interest to everyone in the impact investing value chain, from investors to fund managers and from entrepreneurs to customers. Furthermore, the data needs to be readily available and dynamic, moving at the pace of entrepreneurial businesses and the speed with which investment decisions are made, along with actionable, driving real-time decisions at the company and investor level.[130]

Overview of Emerging Tools

Over the last few decades, countless groups have emerged to tackle the task of creating and integrating IMM tools into the field. The following list includes an overview of prominent players in the field.

60 Decibels is working on a project called "Lean Data," an approach to data collection seeking to enable a reputable, cross-portfolio collection of quality data using a mobile data network. Lean Data has been helping to develop and test repeatable surveys that yield high-quality, comparable impact data, finding ways to improve response rates, adjusting for unequal mobile phone penetration amongst men and women and different income strata, and building a global network of 150+ researchers in 34 countries.[131]

The World Benchmarking Alliance (WBA), is working with a wide range of allies to develop evidence-based benchmarks for investors to track and compare with its peers a company's impact performance in terms of the UN

[124] Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector*, CORP. SOC. RESP. INITIATIVE REP. NO. 66 (2014), www.csrm.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf.

[125] *Id*.

[126] *Id*. at 24.

[127] Chris Addy ET AL., *Calculating the Value of Impact Investing*, HARV. BUS. REVIEW (Jan. 2019), hbr.org/2019/01/calculating-the-value-of-impact-investing.

[128] *Id*.

[129] *The State of Impact Measurement, supra* note 118.

[130] 60 DECIBELS, *supra* note 114, at 5.

[131] *Id*. at 6.

Sustainable Development Goals ("SDGs"). Their first set of benchmarks will cover food and agriculture, climate and energy, digital inclusion, and gender equality and empowerment.[132]

In addition to the survey discussed above, GIIN issued a study to assess annualized impact performance results focused on clean energy access and housing, "Evaluating Impact Performance." The study develops an approach to rigorously and transparently aggregate, contextualize, and compare investment impacts.[133] GIIN has also developed an integrated IMM catalog of metrics they call IRIS+. At no cost, IRIS+ provides member investors and companies a credible, comparable "all in one easy-to-navigate" impact data analysis system.[134]

The Impact Management Project ("IMP") consulted over 2,000 impact investment practitioners to create a consensus on measuring social and environmental impact. As part of the IMP project, partners developed a metric called the Impact Multiple of Money that measures impact performance by analyzing the financial value of impact per dollar invested, expressing the social value of an investment as a multiple of the original invested capital.[135] An integral IMP member, The RISE Fund, has also developed a subsidiary group, Y Analytics, that builds on third party research to analyze various IMM methods and metrics.[136]

A variety of industry players such as Root Capital, the MacArthur Foundation, the Omidyar Network, Skopos Impact Fund, Bridges Impact+, the World Economic Forum, and the Rockefeller Foundation have also come together to produce a principles-based method for measuring "extra-financial value" or social return on investment ("SROI"). Root Capital, an agricultural lender in Uganda and the Democratic Republic of Congo, is working on a related toolkit to define and measure Expected Impact Ratings, which integrates data on financial, social, and environmental performance of loans to identify the efficient impact frontier and impact return hurdle rates.[137]

Comparison and Synthesis of Scattered Terms and Tools

One of the biggest hurdles to integrating IMM into the mainstream financial sector is the lack of uniformity and coherence. There is currently not a universally accepted tool for measuring impact or additionality that is analogous to those used in traditional financing, such as "internal rate of return." This makes sense in part because impact is highly contextual. But, there are certainly some promising IMM contenders within those explored above. Given what GIIN, IMP, and Root Capital have developed, there are themes that point towards more standardization in the field.

Honing In – What is a Social Return?

While IMM literature uniformly refers to social impact, there is not one accepted definition. The models and metrics of GIIN, IMP, and Root Capital all combine social and environmental returns, but there are some clear themes in social impact targets to help define social returns and differentiate them from those related to environment and corporate governance; e.g., health measures, measures related to jobs, and economic measures related to access to financials.

According to impact investment consulting agency Pacific Community Ventures, categories of social outcomes commonly targeted by private equity investors include, but are not limited to, job creation in target geographies, job

[132] *E.g., Food and Agriculture Benchmark*, WORLD BENCHMARKING ALL., www.worldbenchmarkingalliance.org/food-and-agriculture-benchmark (last visited Dec. 16. 2020); *Climate and Energy Benchmark*, WORLD BENCHMARKING ALL., www.worldbenchmarkingalliance.org/climate-and-energy-benchmark (last visited Dec. 16. 2020).

[133] *Evaluating Impact Performance, supra* note 100.

[134] *IRIS+*, GIIN, iris.thegiin.org (last visited Dec. 16, 2020).

[135] *What is the Impact Management Project?*, IMPACT MGMT. PROJECT, impactmanagementproject.com (last visited Dec. 16, 2020).

[136] *Our Approach*, Y ANALYTICS, yanalytics.org/our-approach (last visited Dec. 16, 2020).

[137] Michael McCreless, *Toward the Efficient Impact Frontier*, STAN. SOC. INNOVATION REV. (Winter 2017), rootcapital.org/wp-content/uploads/2018/01/Winter_17_Toward_the_Efficient_Impact_Frontier.pdf.

quality and living wages, management and employee diversity, economic development in underserved areas, supply chain impacts and responsible contracting, employee wealth creation through shared ownership, and the delivery of products and services with intentional social or community benefits.[138] The GIIN data produced via surveys indicates some of the more popular social impact targets including sectors within employment, agriculture, and access to financial services.[139] Furthermore, in their report, *Introducing the Impact Investing Benchmark*, GIIN identified the most popular impact themes being targeted by social impact investors, including financial inclusion, employment, economic development, sustainable living, agriculture, and education.[140] Of the 51 funds surveyed in this study, 36 were focused on more than one of the abovementioned themes, while 15 were pursuing a single impact theme. This study found that financial inclusion was the most commonly pursued theme, as it encompasses funds that invest exclusively in financial services companies.[141] Another GIIN study identified popular sectors for social impact targets, including renewable energy, conservation, microfinance, and affordable and accessible basic services like housing, healthcare, and education.[142]

What differentiates social returns from environmental and corporate governance returns is not always clear. There is overlap between social return categories, as recognized by GIIN in their IRIS+ catalog.

> *When it comes to Indigenous Peoples, the overlap between social and environmental return categories may be even more prominent. As discussed in the next section, how environmental and social returns get differentiated and prioritized must be defined by Indigenous stakeholders.*

4. The UNDRIP as a First Priority and Unconditional Parameter in SROI for Indigenous Peoples

Regardless of the impact measurement and management tools to be used, when it comes to Indigenous Peoples, the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) must provide a first priority, unconditional parameter for application. The UNDRIP is the most important international legal framework through which Indigenous communities relate to outside investors.

Special attention should be given to the recurring concept of free, prior, and informed consent (“FPIC”) in Articles 19, 32, and 33.[143] FPIC is often deemed essential to the “rights and risks” approach to decision-making in resource development, but it is equally as applicable to investment deals engineering.[144] Indigenous Peoples’ right to FPIC are related to their rights to self-determination, culture, and the use of their traditional lands, territories, and resources. The concept of FPIC includes two forms of self-determination: 1) autonomous governance and 2) participatory rights.[145] Both these concepts tie into FPIC’s application in the investment context because Indigenous business owners seeking capital through investors often lose autonomy over business decisions. In short, for an investment deal to truly respect Indigenous Peoples’ right to FPIC, it would need to

[138] *Market for Social Impact Investing by Private Equity Funds Stands at $4 Billion in the United States*, PAC. CMTY. VENTURES (July 28, 2015), www.pacificcommunityventures.org/2015/07/28/market-for-social-impact-investing-by-private-equity-funds-stands-at-4-billion-in-the-united-states.

[139] *The State of Impact Measurement, supra* note 118.

[140] *Introducing the Impact Investing Benchmark*, GIIN (2015), thegiin.org/assets/documents/pub/Introducing_the_Impact_Investing_Benchmark.pdf.

[141] *Id*. at 3.

[142] Carla Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429, 438-439 (2016).

[143] *Id*.

[144] *Id*. at 442.

[145] *Id*. at 439.

ensure the retention of their autonomous governance over, and participatory rights in, finance and business decisions and outcomes.

When measuring social returns on impact investments in regard to Indigenous Peoples, alignment with rights enumerated within the UNDRIP and respecting Indigenous Peoples' right to FPIC should be a necessary condition for qualifying impact returns as positive. In other words, if the outcome of an impact investment in Indigenous Peoples does not meet the standards within the UNDRIP or their right to FPIC, then any other social returns ought to be considered null. For example, if an investment produces jobs for Indigenous Peoples but does so in a way that offends the UNDRIP or their right to FPIC, then the social return value should be adjusted to reflect those violations.

As tempting as it would be to develop a uniform procedure for Indigenous Peoples to assure their FPIC for any investment deals, doing so would run contrary to their rights because "ultimately, self-determination is achieved by indigenous communities establishing their own FPIC rules, enabling them to take control of their own business interactions."[146]

FPIC is becoming an international standard for private companies working with Indigenous Peoples.[147] This is largely the result of operational costs and reputational risks that companies face when operating on Indigenous lands without their consent.[148] Two of First Peoples' publications point to the importance of risk assessment and adjustment. The *Indigenous Rights Risk Report* published in 2014 provides an important framework for both financial and impact risk-adjustment purposes.[149] That report quantified risk assessments for 330 oil, gas, and mining projects. The report identified the following five risk factors: 1) country risk (strength of protections for Indigenous Peoples in the country where the project is located), 2) reputation risk (current and former negative attention to the project), 3) community risk (the project's susceptibility to community opposition), 4) legal risk (current and former legal actions taken against the project and other projects in close geographic proximity in the last five years, and 5) risk management (the project's efforts to establish positive relations with impacted Indigenous Peoples and mitigate exposure to rights risks).[150] These same factors ought to be applied to any risk-adjustment calculation for both financial and impact returns.

Second, First Peoples found that a lack of adequate human rights protections can have adverse material impacts. First Peoples tested this proposition by conducting a case study on the costs associated with the significant social conflict that stemmed from the Dakota Access Pipeline project.[151] In brief, First Peoples evaluated the losses to the parent company, Energy Transfer Partners (ETP), by comparing ETP's stock prices against a timeline of social pressure exerted by the Standing Rock Sioux Tribe and many other Indigenous Peoples and allies who mobilized to protest the pipeline. The findings showed, in part, that ETP's stock price underperformed relative to market expectations during the study period. And, while the project was projected to cost $3.8 billion at the start, the case study estimated that the costs incurred by ETP and other DAPL-tied firms were not less than $7.5 billion.[152] The case study thus found a correlation between the failure of the companies to respect the rights of Indigenous Peoples, the significant social conflict that was generated from that failure, which resulted in significant material losses.[153]

[146] *Id*. at 447.

[147] *E.g., Indigenous Peoples and Mining – Position Statement*, INT'L COUNCIL ON MINING AND MINERALS (2013), www.icmm.com/position-statements/indigenous-peoples; *Guidance Note 7 – Indigenous Peoples*, INT'L FINANCE CORP. (Jan. 1, 2012), www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=mRQk089; *Indigenous Peoples*, WORLD BANK (Oct. 1, 2020), www.worldbank.org/en/topic/indigenouspeoples.

[148] Fredericks, *supra* note 142, at 442.

[149] *Indigenous Rights Risk Report*, FIRST PEOPLES WORLDWIDE (Nov. 2014), mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf.

[150] *Id*. at 15.

[151] Carla F. Fredericks ET AL., *Social Cost and Material Loss: the Dakota Access Pipeline*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 563 (2020).

[152] *Id*. at 609.

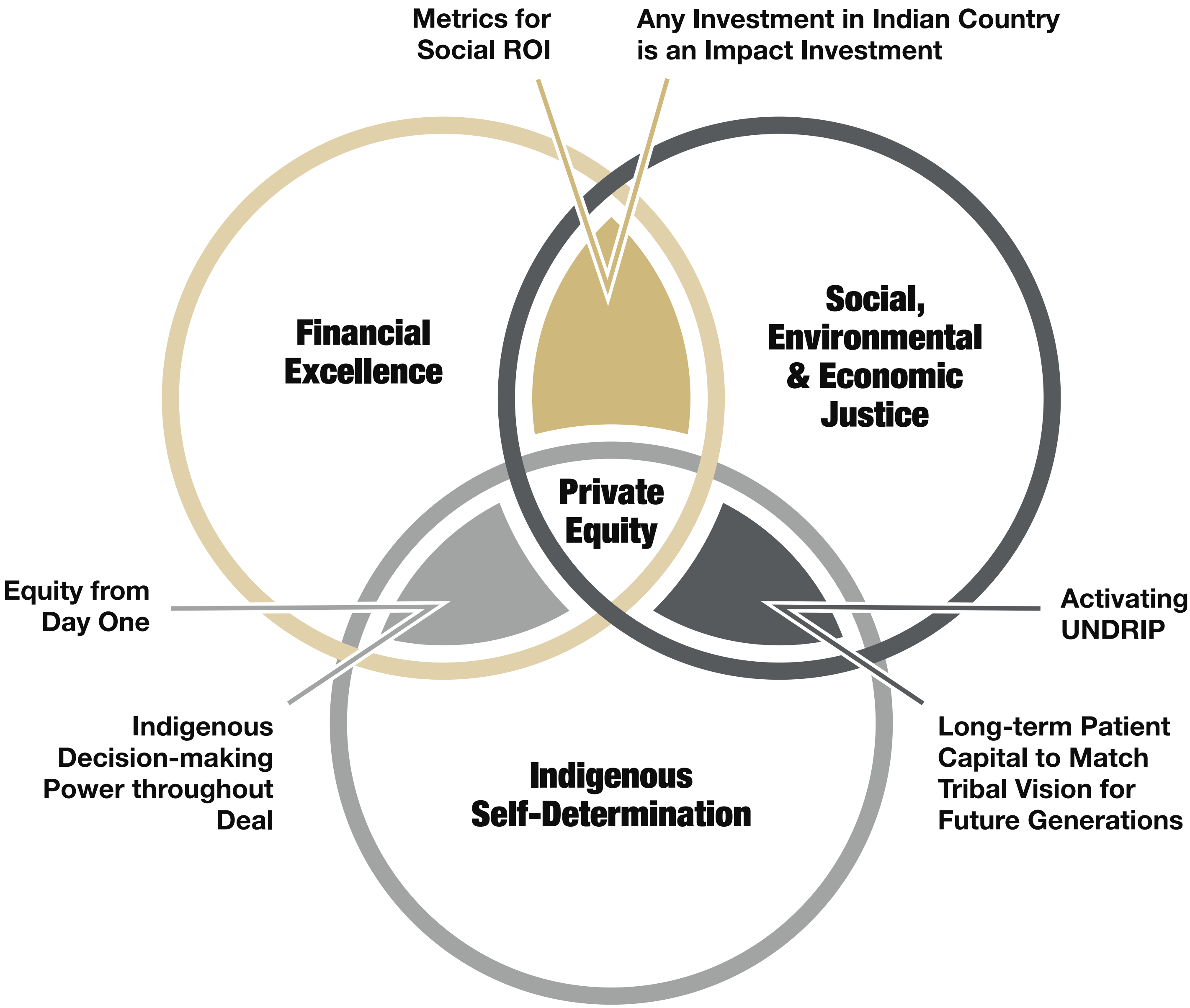
[153] *Id*. at 625.

The findings related to the DAPL case study are important when it comes to adjusting financial returns for risk, and supports the notion that risk-adjusted financial returns will have a correlation with expected social impact for investments that score well along human rights vectors for Indigenous Peoples.

When it comes to SROI as to Indigenous Peoples, there is only some data available with a level of rigor and standardization of collection methods, and further research is needed to collate existing data and understand gaps with the goal of creating standard benchmarks. GIIN identifies four necessary characteristics of impact return data to enable aggregated and comparable impact performance analysis: 1) volume, 2) rigor and standardization of collection methods and calculations, 3) relevance to real impact results, and 4) availability for disclosure.[154]

In conclusion, accessing specialized experts through impact funds enables investors to connect with investment opportunities that are truly impactful opportunities and not “green washed” portfolio pieces. A specialized fund solves the issue of limited access to deals and the lack of time and effort to conduct necessary due diligence. Furthermore, a specialized impact fund can aggregate scattered metrics and build a more coherent IMM application process for the investor. Overlaying metrics focused on the fulfilment of the UNDRIP and FPIC to customize those models would be key, and would also be consistent with other trends in the field, as seen in GIIN’s use of the SDGs in their impact class matrixing methods. This approach is strengthened by the fact that the DAPL case study and similar research indicate a positive correlation between financial loss and human rights risks.

[154] Hannah Schiff, Rachel Bass & Ariela Cohen, *The Business Value of Impact Measurement*, GIIN 4 (Aug. 2016), thegiin.org/assets/GIIN_ImpactMeasurementReport_webfile.pdf.



IV. BUILDING A NEW MODEL FOR INDIAN COUNTRY

The following section draws on the research to create a framework for an impact-oriented private equity fund strategy. To start, there were three cross-cutting themes that surfaced across all areas.

The first was the need to ensure an approach to private equity – and to outside capital infusions generally – that is not extractive. The word “extractive” came up in many different contexts but very strongly during discussions about the history of capitalization of economic ventures in Indian Country through private, outside sources. In discussing “extractive” concepts there were two aspects that stood out. First, that an outside entity would benefit financially in a share many times over the financial benefits received by the tribe. The results of this particular approach often mean the tribe is a passive landlord and does not gain full benefit for the use of the tribe’s resources or, in a slightly better scenario, the tribe owns old equipment that it may not have adequate resources to maintain after a period of time. Or, second, the word “extractive” was used to define the moments whereby engaging with a particular source of capital, the tribe would lose decision-making capacity and would have to implement the project according to specific parameters set forth by the outside entity, which were not necessarily consonant with the tribe’s own priorities.

Both of these manifestations are antithetical to the actualization of sovereignty and self-determination because they do not allow for the tribe’s priorities to be effectuated as the tribe sees fit. Thus, any new strategy must address these two parallel manifestations of the extractive approach to move to a more equitable, sustainable and regenerative approach to all finance in Indian Country that is consonant with sovereignty and self-determination.

Second, research demonstrated that when private equity deals occur in Indian Country, they occur as if every deal is the first. Thus, there is a need to highlight and amplify deal structures that are formed in service to Native partners’ goals as much as funding projects that have a high likelihood of generating successful return for investors. Presenting these options widely as models for other tribes and Indigenous entrepreneurs is, in itself, a valuable undertaking in that it mainstreams these options for wider uptake.

Further, the consultations made clear that, because the focus of economic development policy in Indian Country has been on developing tribal business entities since the 1970s, there are numerous tribes and tribal businesses that are willing and able to participate in a private equity deal from the outset. There are also tribes that have the ability to participate as investors in an investment vehicle. Readiness exists to implement new models as they are developed in real time.

The third theme is that any fund must be recognizable as a mainstream, impact-oriented fund with standardized structures and metrics. This is in addition to its ability to be flexible enough to be accessible by, and relevant to, tribes and Native entrepreneurs and operate true to its impact thesis to catalyze social, environmental and economic justice for Indigenous Peoples. For investors, an Indigenous-specific fund must be known and cognizable operationally but innovative in its approach, due diligence and project selection. For tribes and Native partners, a fund must be flexible enough to account for the variations in tribal law, state law, economic development goals, and risk appetite.

These three findings create the overlay for the more specific design-oriented outcomes detailed as follows.

1. This type of strategy is innovative and desirable because it sits at the center of three major tenets:

Financial Excellence — Social, Environmental and Economic Justice — Indigenous Self-Determination

Each of these is co-equal and must be fully activated. Thus, the design process would need to encompass several distinct tasks to operationalize these three value sets. For example, there would need to be a set of metrics by which to measure success in all directions. A fund would need to import the standardized metrics for measuring success used by traditional private equity funds to provide reasonable assurance to investors of fund stability and potential success, and to be measured within the set of similarly situated mainstream impact vehicles.

A fund would also need to develop standardized metrics by which to measure and create a shared understanding around SROI. One research finding was that there are many ways in which tribal entities are creating social return but aren't measuring it in those terms. For example, many tribal enterprises create additional job positions for the sole reason to increase employment opportunities in their communities. Or, tribal enterprises offer internships and capacity building opportunities that are built into the development of the project to create technical capacity in-house to the enterprise. Other businesses source their inventory from other Native-led businesses to amplify Native business through their supply chain.

> *To activate the core values of a fund, social return metrics specific to Indian Country would need to be developed that not only allow for each Indigenous project developer to define which metrics fit best within their project structure and community needs, but also be cognizable to investors.*

2. There are unique opportunities and advantages to investment in Indian Country and in Native entrepreneurs in the United States.

The overlay of federal Indian law to Indian Country investments can add complexity, however there are also structural and social impact advantages unique to investment in Indian Country.

Working with tribes, in particular, provides a governmental structure for delivering impact on a large-scale that does not necessarily exist in other marginalized communities in the United States. Tribes are able to receive large-scale funds, with accountability for those funds flowing from traditional banking relationships and government and regulatory structures, and they can uniquely disburse the benefits of impact capital over the entire community. Many tribes actuate their business activities via federally-chartered corporations formed under Section 17 of the Indian Reorganization Act (IRA). Section 17 corporations are ubiquitous throughout Indian Country and incorporate governance structures that separate decision-making of the corporation from tribal governance but retain the same tax status as the tribe. Tribal corporations often provide the revenues that tribal governments require to provide basic services and retain a community service orientation. Investments in these enterprises, by nature, effect a social goal and these entities are already subject to standard business accountability processes.

Second, there are particular advantages that can be captured by tax credit investors in large-scale deals with tribes. For example, in the renewable energy sector, investors can gain full benefit of any available renewable energy tax credits on a project since the benefits cannot inure to tribes as they are not taxable entities. The Investment Tax Credit (ITC) has catalyzed the growth of solar energy in the United States since its enactment in 2006.[155] In 2018, the Bipartisan Budget Act of 2018 reinstated the tax credit for other technologies such as qualified geothermal power, fuel cell and small wind energy property.[156] In 2019, the ITC provided a 30% tax credit for applicable commercial solar systems. The ITC is currently 26% and is scheduled to step down to 22% in 2021 and 10% for commercial and utility-scale solar in 2022.[157] The deadline for the ITC is still set to expire in 2022, permanently setting the commercial credit at only 10% thereafter. However, because the ITC has been successful at forwarding the solar energy economy, there is a push to extend the deadline.

The COVID-19 pandemic and subsequent economic effects will change the context for solar development in the United States. The Solar Energy Industries Association, a national trade association for solar energy, has predicted that the pandemic will have strong negative effects on solar market activity, estimating that solar jobs will be down by 38% and solar deployment down by 35%.[158] Currently, extensions to the ITC are included in the Moving Forward Act, which passed the House on July 20, 2020.[159] As of writing, the deadlines for the ITC have not been extended, however the incoming Biden administration has signaled its desire to extend those tax credits and other incentives related to forwarding the renewable energy economy.[160]

Third, many Native-owned small businesses are eligible to receive set-aside or sole source federal contracting preferences via the Minority Small Business and Capital Ownership Development Program or 8(A) program. All of these structures provide unique advantages for impact investors as they provide structural accountability for the financial investment, they directly benefit Indigenous Peoples in the United States, and they represent a strong financial investment in Indian Country as a domestic emerging market.[161]

The availability of tax credits for investment in qualified opportunity zones also presents unique opportunity in Indian Country as their primary goal is to encourage long-term investment in low-income communities in the United States. In brief, opportunity zones were added in 2017 by the Tax Cuts and Jobs Act and the first set of designations was completed in April 2018. A qualified opportunity zone is defined as an economically distressed community where new investments may be eligible for preferential tax treatment.[162] There are several benefits to the investor but most notably that their capital gains are untaxed if they are held in a qualifying fund for ten years. According to one figure, nearly 572 designated opportunity zones overlap with tribal lands.[163] Where available, opportunity zones provide the ability for tribes to access low-cost, patient capital that can be combined with other incentives (i.e. Renewable Energy Tax credits or New Markets tax credits). This incentive, when combined and viewed alongside other incentives, provides new tools that align investor and tribal interests in ways unique to Indian Country.

[155] *The Case of the Solar Investment Tax Credit*, SOLAR ENERGY INDUSTRIES ASS'N, seia.org/case-solar-investment-tax-credit-itc (last visited Dec. 16, 2020).

[156] *Business Energy Investment Tax Credit (ITC)*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, programs.dsireusa.org/system/program/detail/658 (last visited Dec. 16, 2020); 26 U.S.C. § 48(a)(3).

[157] 26 U.S.C. § 48(a)(6)(A)(i).

[158] *COVID-19 & the U.S. Solar Industry*, SOLAR ENERGY INDUSTRIES ASS'N (May 2020), www.seia.org/sites/default/files/2020-06/2020-June-SEIA-COVID-Factsheet.pdf.

[159] Moving Forward Act, H.R. 2, 116th Cong. § 90402 (2020). A summary of the ITC extensions the Act can be found here: H. COMM ON TRANSP. & INFRASTRUCTURE, THE MOVING FORWARD ACT - SECTION BY SECTION SUMMARY 87-88, transportation.house.gov/imo/media/doc/Section%20by%20Section%20HR%202%20The%20Moving%20Forward%20Act%20FINAL.pdf.

[160] Jim Tankersley & Lisa Friedman, *For Biden's Economic Team, an Early Focus on Climate*, N.Y. TIMES (Dec. 11, 2020), www.nytimes.com/2020/12/11/business/biden-global-warming-economic-team.html.

[161] *See generally* Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285 (2009).

[162] *What are Opportunity Zones and how do they work?*, TAX POLICY CTR. (May 2020), www.taxpolicycenter.org/briefing-book/what-are-opportunity-zones-and-how-do-they-work.

[163] *See* Letter from Dante Desidero, Exec. Director, NAFOA, to Scott Dindwiddle, Office of the Assoc. Chief Couns., Internal Revenue Serv. (Dec. 19, 2018).

3. Renewable energy, defined broadly, is a highly valuable and promising sector for economic development within Indian Country.

Renewable Energy development represents a new means by which tribes can diversify their economic development initiatives, achieve energy independence, or generate revenue within a commitment to sustainable energy initiatives. As of 2018, the economic potential for renewable energy development in Indian Country represents over $75 billion in project investment.[164]

In particular to renewable energy projects, solar projects are readier than wind development projects. Solar potential represents nearly 90% of the renewable energy generation potential on tribal lands in the coterminous United States,[165] and it has a lower threshold to implementation than wind energy. There are significant differences in the technical aspects of deploying each type of project, where developing wind energy has a much longer timeline for technical and regulatory reasons. Further, wind energy projects can be controversial due to avian issues, which has a particular cultural nexus in Native communities.[166]

Research also showed that there are pre- and post-development energy projects of equal importance to utility-scale wind or solar farms, such as setting up systems for energy storage, transmission infrastructure, or installing microgrid capabilities that can function when connection with a larger grid system fails or is unavailable. The ability for a microgrid to function either linked with the larger regional energy system or in "island" mode has particular relevance in rural areas of Indian Country, where these communities are often the first to lose power and the last to have it switched back on when there are climate-related or other power disruptions.[167] Each of these projects forwards tribal goals whether they be to deploy green sources of energy, to gain beneficial use of wind and land resources for community use or for sale, or to further energy independence for the tribe.

The Blue Lake Rancheria near Eureka, California has been lauded as an example of how tribal renewable energy projects are beneficial to the tribal community both in terms of energy savings, and also to prepare for climate-related or other events that disrupt power delivery. In October 2019, when the local power utility shut off power to the region in an effort to prevent wildfires, the Blue Lake casino and hotel were able to remain powered through a microgrid that kept electricity flowing even when disconnected from the grid.[168] The casino and hotel became a "power island" that assisted a health center to provide services to patients who needed electricity, and provided power to other regional businesses. Particularly in rural areas of the country, this type of energy independence could be a great asset to the local Native and non-Native community.

Of note, many of the renewable energy projects in Indian Country are being built and deployed as part of a larger project that is not specifically focused on renewable energy. In order to capitalize the project, or to make use of existing resources, the renewable energy projects take place in tandem with construction of an existing administration building, wellness center, clinic or other business endeavor. The renewable projects can be smaller

[164] Anelia Milbrandt, Donna Heimiller & Paul Schwabe, *Techno- Economic Renewable Energy Potential on Tribal Lands*, NAT'l RENEWABLE ENERGY LAB. vii (July 2018), www.nrel.gov/docs/fy18osti/70807.pdf.

[165] *Decision Support for Tribes*, NREL, www.nrel.gov/state-local-tribal/decision-support-tribes.html (last visited Dec. 16, 2020).

[166] *E.g.*, Michael Hutchins, *Wind Energy And Birds FAQ — Part 1: Understanding The Threats*, AMER. BIRD CONSERVANCY (Apr. 8, 2017), abcbirds.org/wind-energy-threatens-birds; Cherylin Wilson, *The Ecological Effects of a Native Wind Energy Project – Navajo Nation*, TRIBAL ENERGY PROGRAM (July 2007), www.energy.gov/sites/prod/files/2016/01/f28/cherilyn_wilson.pdf.

[167] Scott Manson, *Adapting Protection to Island Mode Operation of Microgrids*, MICROGRID KNOWL. (Oct. 2, 2017), microgridknowledge.com/island-mode-operation-of-microgrids.

[168] Erik Neumann, *California Reservation's Solar Microgrid Provides Power During Utility Shutoffs*, NPR (Jan. 11, 2020), www.npr.org/2020/01/11/795248921/california-reservations-solar-microgrid-provides-power-during-utility-shutoffs.

community-level solar projects like retrofitting a building with solar panels, or they may be building a battery storage or large-scale solar installation that are part of a community-wide energy infrastructure plan. This pattern must be noted because, while most private equity firms reserve a percentage of their portfolio for projects that fall outside of their investment focus, many tribal projects don't fit neatly within one sector or focus and must be considered on broader terms.

There are many examples of successful renewable energy projects in Indian Country, and the successes continue to grow as lessons learned with smaller projects begin to mature into larger projects. There is also a high level of interest and readiness in Indian Country for energy innovation and the ability to make deals now that harness the full benefits of sustainable energy into the future for economic, environmental and social gains.

4. Deals in the renewable energy space are being modeled directly on energy deals done with tribes in the oil and gas sector and must be recast without embedded assumptions.

The result of importing typical models is that there will be no change in deal structures moving forward such that developers will continue to hold most of the power and receive a larger share of the financial benefit; and tribes will have *de minimus* decision-making power and be cast as passive landlords to development of their own resources. This pattern emerged clearly during consultation and proved the initial hypothesis that a new model must be inserted into the dialogue in order to catalyze a shift.

A report by the Columbia Center on Sustainable Development recently identified the need for Indigenous Peoples around the world to have access to a range of financial options that allow them ultimate control over their lands and resources without undue influence from donors.[169] The report noted the strength of "basket funds," funds that collect money from multiple private sources into one place, to minimize the funders' actual or perceived influence over the communities. Any private equity strategy must also be built on this premise while it harnesses the strengths of a known private equity structure to provide investors the confidence they need to invest prudently, but sheds the colonial aspects of outsized funder control and influence.

Specific to a private equity strategy, starting with the assumption that tribes get equity from day one can disrupt past deal making structures in beneficial ways.

> *Equity, when included from the start, can be a strong means to amplify Indigenous participation and decision-making and ensure that the tribe's concerns are considered equally throughout the lifecycle of the project.*

Equity in this framework is a key aspect of ensuring that Indigenous Peoples' own economic, social, cultural and environmental priorities are elevated during deal negotiations and private equity, in particular, is a powerful means by which to activate Indigenous power.

Because tribes and tribal entities vary significantly across the United States in their business acumen, sophistication, needs and abilities, the deal structures will vary as to the best ways to consider equity in that particular project. Any private equity strategy or fund design must consider flexibility around how tribal equity is captured, understood, and baked into the deal. For instance, for some tribal entities the project would not get off the ground but for an early

[169] *Innovative Financing Solutions for Community Support in the Context of Land Investments*, COLUM. CTR. ON SUSTAINABLE INVESTMENT (Mar. 2020), ccsi.columbia.edu/files/2019/03/CCSI-Innovative-Financing-report-Mar-2019.pdf.

infusion of financial capital to jumpstart feasibility studies. There are some tribal entities, however, whose earliest and most significant contribution are the land or personnel resources that begin project development. Equity at these early points must be considered on equal footing as financial contributions since, but for these resources, the project could not be developed.

Equity from day one adequately recognizes and remunerates the tribe for use of their resources. Thus, the tribe or Native entrepreneur is most able to receive an equal or better share of the benefits from use of their land, resources, power, or intellectual property.

5. There is high demand for patient capital and private equity in Indian Country.

The high demand for patient capital came up in many contexts, but especially by Native partners seeking a reliable source of long-term funding to complete a project's capital stack. The lack of this type of funding for Native projects is for similar reasons as the lack of access to capital generally, but also because many Native partners signaled their distrust of working with traditional private equity. To be successful, a private equity strategy must be able meet the financial needs and the core-values concerns of Indigenous entrepreneurs.

First, large-scale projects require a longer timeline to create return for investors, and renewable energy projects can take anywhere from seven to ten years to get through pre-development. For solar projects, even once they are operational, returns for investors can take another seven to ten years. A private equity fund is a critical piece of a capital stack for a renewable energy project, and the deployment of a fund with the ability to leverage large-scale funding would be a novel innovation in Indian Country.

Second, the term *patient capital* was also used in reference to the technical assistance needs of tribes and Native entrepreneurs to move a project from design to implementation. Often Native entrepreneurs are working to develop a project at the same time as they are developing the requisite expertise. There are many resources available to entrepreneurs to garner the skills they need to deploy a successful project, but it takes time and money to import those skills, or to hire accordingly. To date, there is a dearth of capital that sits reliably for the long term alongside this capacity building aspect. Many entrepreneurs can find expertise- or phase-specific funding, but the "one-off" nature of these funding pools creates difficulty when they begin putting together a long-term, phased project.

Finally, and most broadly, patient capital aligns with the strategic, long-term thinking that is required of tribal governments. Tribal leaders must balance the economic benefits with the overall social and cultural community wellbeing in the long term. Taken together, many tribal governments and decision-makers may prefer economic development options that take years to generate revenue, and a long-term commitment from one capital source can create the stability tribal leaders need to actualize those priorities and commitments. Again, to date there has not been a trusted partner who can provide that financial commitment without expectation of an extractive exit. Partnership from impact investors with an aligned private equity strategy could catalyze new, better resource development that seeds economic growth and tribal sovereignty in new ways moving forward.

The emphasis on patient capital underscores the need for enhanced access for tribes and Native entrepreneurs to the private markets. In general, developing any type of large-scale project requires multiple sources of capital. Where blended capital is necessary for any large-scale project to pencil out, it is still difficult to find access to those different forms of capital 1) for a project in Indian Country, and 2) where each aspect of the capital stack fully serves the goals of the project or Native decision-maker.

As an example, Native partners noted that one of the consistent challenges in project pre-development was to secure matching funds to take advantage of federal grant opportunities. However, this could be addressed by working together with foundations and other interested investors to create early entry points for varied sources of capital that are vetted such that they do not diminish the tribal entity's equity stake in the deal. This modeling also addresses the fact that many of these federal programs are underfunded even to respond to existing requests within Indian Country.[170] For example, in FY2016 the High Energy Cost Grants Program of the U.S. Department of Agriculture had $16.9 million for grants, but entities within Indian Country submitted $48 million in eligible requests.[171]

Barriers to access exist for each layer in a capital stack, but increase as the financing needs grow or become more complex. And, in many cases, smaller investors need to see that there are large-scale commitments. Thus, private equity and large-scale financing is the final puzzle piece necessary to seed economic growth in Indian Country, and there are tribes and Native entrepreneurs who are able to participate now.

6. To advance new models of financing and to connect interests, there is a need for a clearinghouse to bring together investor and Native interests and build capacity for values-aligned financing.

First, as noted in earlier sections, impact investors and tribal and Indigenous leaders pointed out that both sides have little understanding of the needs of the other. The primary form that this takes is that there are particular intricacies involved in working with tribal government, or in conforming with the taxation, regulatory and legal regime within Indian Country. Issues such as alienability of lands, managing relationships with local and state energy regulators, and understanding waivers of sovereign immunity stand out as common challenges that have ended otherwise beneficial deals in the past. These issues also manifest at the deal stage when considering to whom tax credits inure, and how equity is formulated.

On another level, these issues and the legal regime particular to Indian Country reinforce the notion that investment in Indian Country is an inherently high-risk investment, which deters many investors from participating in otherwise viable projects. It also results in developers and investors having more power and decision-making to control for the perceived risk.

In fact, Native champions often spend an outsized amount of time educating potential partners about business in Indian Country both to seed a particular project and also to de-risk the investment as one in Indian Country. Where project champions around Indian Country had the same experience, there is an opportunity for learning on both sides to build capacity around what investment in Indian Country looks like and the myriad viable opportunities that exist therein. To provide this information for investors in one place would, in effect, lift this burden from Native project champions so they could spend more time vetting capital sources in service to their project.

Also, where some Native entities are wary of partnering with traditional sources of capital because of the extractive nature of financing in the past, there is a need to amplify deal structures that are built from the core values of the tribe, and to connect with investor partners who have a values-aligned orientation.

Similarly, impact and institutional investors have particular requirements around how their money is invested and how they need to report and see returns on that investment. They also have basic due diligence and regulatory reporting requirements that must be met. There is an opportunity here to assist Native entities to understand what those requirements are, and to reach out to potential investors to create a capital stack unique to their project.

[170] *Tribal Infrastructure: Investing in Indian Country for a Stronger America*, NAT'L CONG. OF AMER. INDIANS (2017), www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf.

[171] *Id*. at 10.

V. CONCLUSION

In short, there are projects across a spectrum of readiness, and Indian Country is ready and waiting for an impact-oriented private equity strategy. Some projects are in the early phases of feasibility and development, and many were looking for the missing piece of private capital to make their project pencil out. These opportunities are both community scale and utility scale renewable energy projects; behind the meter projects and transmission infrastructure builds that feed into the grid; and Native enterprises ready to scale.

The ecosystem is growing but a private equity fund does not currently exist to the exclusive benefit of Indigenous Peoples, representing an enormous opportunity as tribes seek to diversify their economic development portfolios and, given the impacts of the global pandemic, provide jobs and economic opportunities to their citizens in the short term. Where projects are ready to capitalize now and prior to the global pandemic, the time is ripe to provide significant financing that will activate social, economic and environmental values now and long into the future.

First Peoples Worldwide works from a foundation of Indigenous values to achieve a sustainable future for all.

First Peoples addresses the unique social and environmental impacts of development in Indigenous communities. Through capacity building sessions between institutions and Indigenous Peoples, community-based advocacy and major research projects, First Peoples increases corporate accountability, furthers human rights-based engagement and drives sustainable approaches for people and planet.

colorado.edu/program/fpw
fpw@colorado.edu

Facebook: @firstpeoplesworldwide
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