

Basics of Tribal Financial Management



**GETTING STARTED
GUIDE FROM FSA-AG**

A CULTURE OF TRIBAL GOVERNANCE

Tribal Nations overall have a unique responsibility in that they have to manage not only the governance and the people of the nation but also the land and the culture. This is what makes them different than local governments: the government structure is different and tribal leaders have the added responsibility of the land and the culture.

People

Native peoples are the essence of our nations.



Land

Our connection to place is both physical and spiritual and it helps define who we are as peoples.

Culture

Traditions, new and old, sustain our societies, language, family, art, lifeways.

Governance

Social organizing and political structures vary from tribe to tribe, based on unique histories, cultures, and world views.

JUST ONE EXAMPLE

JUSTIN LEPCIER, DIRECTOR

FSA-AG, TRIBAL ADMINISTRATIVE SERVICES

ENROLLED MEMBER OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN

"My own tribe, our reservation is heavily forested and we manage our forest using sustainable yield forestry here at Menominee. And what that means is that we do not go in and take the high value timber based on the value, it's based on how we can maintain our forest for multiple generations in the future.

Due to our forestry practices, we have more standing timber now than we did a hundred years ago. So that's just a testament to the responsibility of our governance and our taking into consideration more than just the money and value of the land that's around us."

**"THERE'S A DEEPER
PHYSICAL AND SPIRITUAL
CONNECTION THAT WE
ALL HAVE TO THE LAND AS
TRIBAL PEOPLE."**



THE ROOTS OF DEMOCRACY



The principles of governance of tribal nations have long had an influence on the government and society of the United States. Tribal nations and tribal governments are mentioned in the U.S. Constitution several times. It's important to understand the fight that tribal nations have had in maintaining that impact of the words that are still in the constitution today.



1100s: Iroquois League of Five Nations formed between Mohawk, Oneida, Cayuga, and Seneca

1751: The League's Constitution was referenced in 1751 by Benjamin Franklin



1754: Benjamin Franklin proposed the "Albany Plan" the initial plan for the U.S. based on the Iroquois Confederacy



1789: "The Congress shall have the power to...regulate commerce with foreign nations, and among the several states, with the Indian tribes."
Article 1, Section 8, US Constitution



INDIAN CLAUSES IN THE U.S. CONSTITUTION



ARTICLE 1, SECTION 8

COMMERCE CLAUSE

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; ...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

ARTICLE 6, PARAGRAPH 2

TREATY CLAUSE

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

FEDERAL INDIAN POLICY PERIODS



HOW DOES THIS AFFECT TRIBAL FINANCIAL MANAGEMENT?

From Colonial status through Removal and Relocation, then the Reservation and Treaty Making Period—which again references the Treaty Clause of the U.S. Constitution and that it is the supreme law of the land in the United States—on to Allotment and Assimilation. These were not good periods for tribal nations, but they built up to the Era of Indian Self-Governance in 1934 through 1953, when tribes took over their own management.

The Termination Era was a terrible period, where there was an attempt to element tribes in general, but it built up to the era of Self-Determination, where tribal financial management came about.

The Indian Self Determination and Education Assistance Act was passed that was able to provide information and the basis for tribal financial management as we know it today.

MARSHALL TRILOGY: GUIDING PRINCIPLES IN INDIAN LAW

The history of federal Indian law in the Supreme Court is dynamic, controversial, and inspiring. Chief Justice John Marshall established federal primacy in Indian affairs that still governs today.



1823

JOHNSON V. MCINTOSH - 21 U.S. 543

Issue: Who owns the land?

Decision: The United States owns the land (reservations) and Indians are tenants.

1831

CHEROKEE NATION V. GEORGIA - 30 U.S. 1

Issue: What is an Indian Nation? A foreign nation? A sovereign nation?

Decision: Trust relationship established. Tribes are under the protection of the federal government, cannot claim political independence.

1832

WORCHESTER V. GEORGIA - 31 U.S. 515

Issue: Competing sovereignty – states vs. Tribes. Who will control westward expansion?

Decision: Affirmed Indian self-government over that of states and affirmed that treaty rights are binding.

PLEASE NOTE:

These decisions go back to the clauses in the U.S. Constitution that are the supreme law of the land and the separation of Indian tribes versus States and foreign nations. These are very important decisions and we are only touching the surface of each one.

THE FSA-AG TEAM ENCOURAGES ADDITIONAL INDEPENDENT RESEARCH ON THIS BECAUSE OF THE IMPORTANCE OF THESE DECISIONS AND THE SIGNIFICANT IMPACT THEY HAVE ON HOW THINGS MOVE FORWARD.

It is also important to note that even as the Supreme Court established each of these cases and the decision affirmed Indian self-governance, it doesn't mean that other branches of government follow that.

An example would be President Andrew Jackson's refusal to enforce *Worchester v. Georgia* and subsequently passing the Indian Removal Act.

SOVEREIGNTY VS. SOVEREIGN IMMUNITY

SOVEREIGNTY

- Governments have the right to regulate their own affairs within a geographic region.
- Federally recognized Indian tribes retain their original sovereignty within reservation lands to the extent not expressly limited by acts of Congress or their own voluntary waivers

SOVEREIGN IMMUNITY

- Legal doctrine that prevents lawsuits against government entities.
- Theory: Public rights outweigh private rights.
- Waiver: Sovereign immunity can be waived by statute or “clear and unequivocal intent, narrowly construed.”

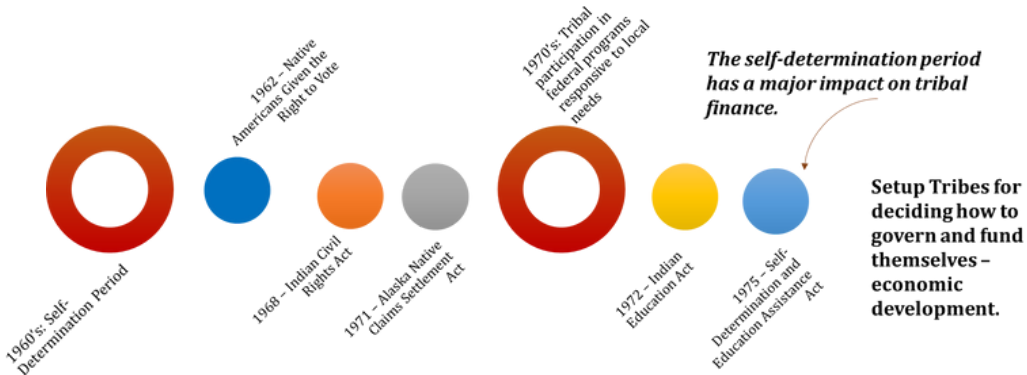
When it comes to tribal finance, it’s important to note that often bank agreements will ask to waive sovereign immunity. Processes for dealing with a waiver of sovereign immunity vary from tribe to tribe, so it is important to read and review the tribal constitution and laws governing the tribe on how this works and how limited waivers of sovereign immunity are. (Also consider tribal limited liability corporations versus state limited liability corporations.)

An example: The American Rescue Plan Act, when it was first released, asked tribes to waive sovereign immunity in order to accept ARPA funds. This was addressed by many tribes and later the requirement was waived for tribes.

“IN ALL CASES, I THINK TRIBES ALWAYS WANT TO TRY AND MAINTAIN, AS MUCH AS POSSIBLE, SOVEREIGN IMMUNITY. HOWEVER, AS WE WORK OUTSIDE OF TRIBAL NATIONS, THERE IS OFTEN A NEED TO PROVIDE A LIMITED WAIVER OF SOVEREIGN IMMUNITY, AS IT COMES TO FINANCIAL MATTERS SPECIFICALLY.”

- JUSTIN LEPSCIER, DIRECTOR OF TRIBAL ADMINISTRATIVE SERVICES

TRIBAL FINANCIAL MANAGEMENT TIMELINE: 1960'S – 1970'S



HOW DOES THIS AFFECT TRIBAL FINANCIAL MANAGEMENT?

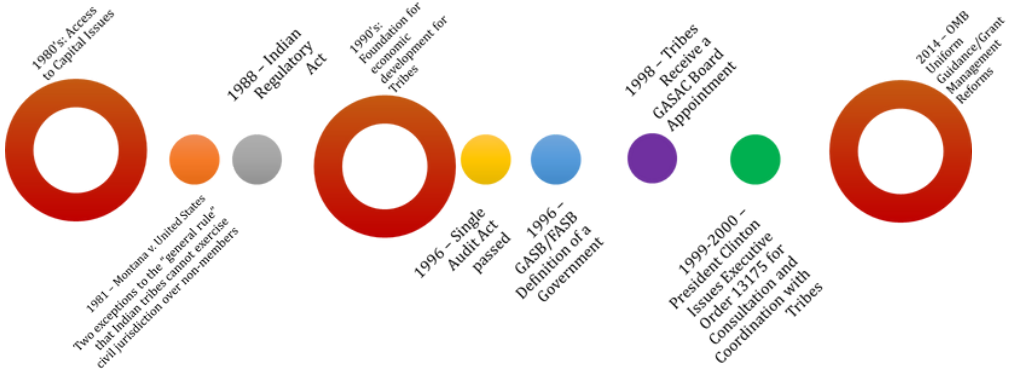
In the 1970s, tribal participation in federal programs that are responsive to the local needs of tribes started and this created the discussion and basis behind the Indian Education Act, which was later renamed the ISDEA. This set up the self-determination period and had a major impact on tribal finance. It set tribes up for how to govern and fund themselves and created the availability of economic development.

The '60s and '70s also saw a lot of upheaval. The American Indian Movement happened, including the takeover of the Bureau of Indian Affairs building. This generated discussion on where the funding was going to be provided and that it be responsive to the local needs of tribes.

Due to the number of tribes across the country, with each one being unique and different, it is critical for tribes to be able to determine how to manage those federal dollars to meet local needs—beyond anything that the BIA would ever be able to do from a central office in DC.

You can see major differences in the work tribes have to do under BIA versus self-governance. Thinking about the time prior to this period and then comparing it to present day, the majority of BIA employees are now tribal when they previously were not. This gives the BIA better understanding of the local needs of tribes in general.

TRIBAL FINANCIAL MANAGEMENT TIMELINE: 1980'S – 2000'S



HOW DOES THIS AFFECT TRIBAL FINANCIAL MANAGEMENT?

In the 1980s, access to capital was an issue. Banks had questions whether tribes were considered a government? An enterprise? An enterprise managed by the government? Then there was the issue of trust land and tribes not having the collateral when it comes to trust land. These issues created an issue in getting tribes access to capital and getting banks to lend to tribes. In 1988, the IRA came from gaming enterprises to make sure that there were gaming commissions. The IRA provided the basis for the expansion of gaming enterprising and making sure that they were regulated appropriately.

The 1990s created the foundation for economic development for tribes and this really was the implementation of accounting for all of these things that were happening during this time period. The Single Audit Act does help strengthen weaknesses and helps tribes improve/maintain internal processes as they manage federal dollars and tribal dollars. The GASB/FASB definitions of a government helped to answer some of the earlier questions that created issues with access to capital.

AN EXAMPLE & A NOTE

JUSTIN LEPCIER, DIRECTOR

FSA-AG, TRIBAL ADMINISTRATIVE SERVICES

ENROLLED MEMBER OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN

An example: EO 13175 has been extremely important for tribal governments to be able to provide their voice with any federal action that was going to impact tribes in general. Consultations with the Interior and Treasury were provided as CARES and ARPA funding was rolled out. It was evident that these consultations were taken into consideration during the ARPA final rule process because the final rule specifically responsibilities mentions all of the verbal and written comments that were received during those consultations and how those comments were addressed in the final rule.

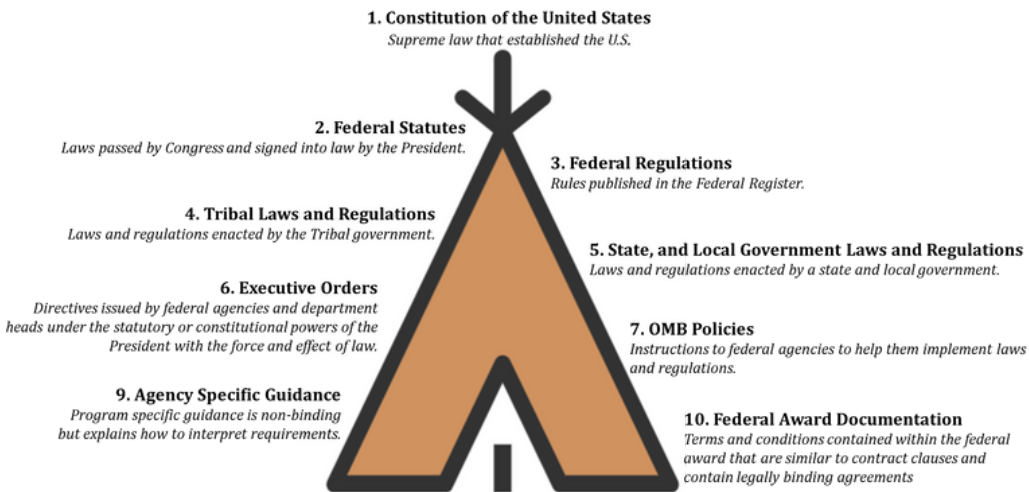
“ANY TIME THERE’S A CONSULTATION THAT IS AVAILABLE FOR TRIBES, WE ALWAYS ENCOURAGE TRIBES TO PROVIDE EITHER VERBAL OR WRITTEN COMMENTS DURING CONSULTATIONS TO MAKE SURE YOUR VOICE IS HEARD AND THAT ANY CONCERNS THAT YOU HAVE WITH ANY PROPOSED RULES OR REGULATIONS ARE CONSIDERED AS THEY’RE ROLLED OUT AND AS THEY IMPACT TRIBES MOVING FORWARD.”

- JUSTIN LEPCIER



GRANTS, GOVERNANCE & COOPERATIVE AGREEMENTS

Making sure we have proper grant compliance and federal tribal financial management in place is important so that we're taking all of this into consideration when we're looking at grants and cooperative agreements with the federal government.



UNIQUE ASPECTS OF TRIBAL GOVERNMENTS

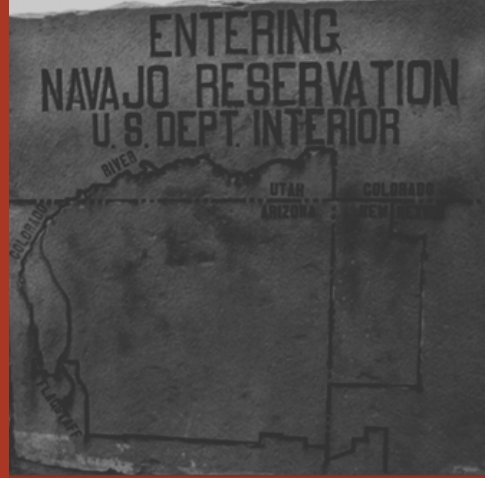


- Sovereign domestic dependent nations
 - Determine their form of government
 - Define citizens/membership in their tribe
 - Administer justice and enforce laws
 - Tax tribal members
 - Regulate the domestic relations of its members
 - Regulate property use
- Not generally subject to the laws of states or local jurisdictions
- Federal laws that apply to state and local governments generally do not apply to tribes
- Depending on the business structure, most revenues are not subject to state or federal taxes
- Generally reservation land is not considered an asset
- Tribal governments receive some exemptions from the OMB Uniform Guidance, such as publishing financial information to the public
- Generally left out of the IRS Tax Code– no tax exempt donations, adoption tax credits, limited tax incentives. Not written in bankruptcy laws either
- Tribal leadership has the added responsibility of preserving culture and language

“IT’S IMPORTANT AS YOU WORK INTERNALLY WITHIN YOUR OWN TRIBE OR WITH TRIBAL GOVERNMENTS TO REALLY HAVE A THOROUGH UNDERSTANDING OF THE CODES AND GOVERNING DOCUMENTS WITHIN EACH TRIBE THAT YOU WORK WITH, BECAUSE EACH CAN BE DIFFERENT. EACH IS UNIQUE. **HAVING THAT UNDERSTANDING IS GOING TO PROVIDE A BETTER INTERACTION AND RELATIONSHIP AS IT COMES TO FINANCIAL MANAGEMENT.**”

-JUSTIN LEPSCIER

TRIBAL GOVERNMENTS TODAY



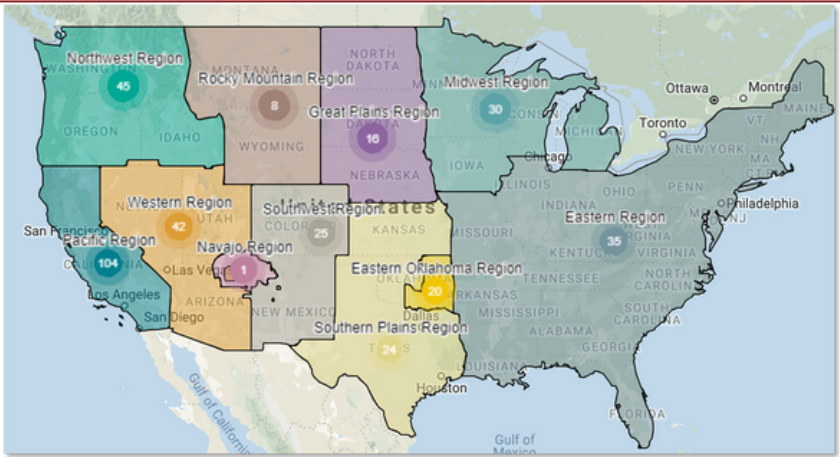
1. CONSTITUTION

- Impacts how they govern internally
- How they work with the U.S. Government
- Some have three branches of government
- Some provide decision-making power to the General Council (tribal members)
- "IRA" constitutions that often impact tribal economic development
 - Lack a separation of power and provide all decision-making to the tribal council
 - "Secretarial election" provisions requires changes to the constitution to be approved by the BIA

2. CODES/GOVERNING DOCUMENTS

- Unique to each tribe
 - "I cannot stress enough the fact that there are things at the U.S. level that govern tribal governments and the interaction between the U.S. Government and the tribes. But each tribe, individually, has the ability to govern themselves and the uniqueness of that. So that's 574 separate tribal governments and the unique aspects that they have individually within each." -Justin Lepscier
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TRIBAL FINANCIAL MANAGEMENT TIMELINE: 1980'S – 2000'S



There are 574 federally recognized tribal governments in the U.S. 229 of these tribes are in Alaska, the other 344 tribes are spread across 33 other states. 100 million acres of total land mass is currently under American Indian or Alaska Native control. This would make Indian Country the 4th largest state in the United States.



To further illustrate, the Navajo Nation would be the 42nd largest state in the Union. There are 19 Tribal Nations each larger than the state of Rhode Island and 12 Tribal Nations have a land base larger than the state of Delaware.

OTHER (UNOFFICIAL) INFORMATION



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- Each of the 574 federally recognized and 63 state recognized tribes have their own unique language, culture, and traditions.
 - While most Native Americans remain connected to their communities, 75% live in urban and suburban areas.
 - Contrary to stereotypes, Native Americans are required to pay federal taxes like other Americans.
 - Of the 574 federally recognized Tribes, only 39% have casinos and only 8% of the total Native population profits from gaming.
 - 1 in 3 Native Americans live in poverty with a median income of \$23,000
 - A lack of affordable housing means people often live in overcrowded situations.
 - In Navajo Nation, approximately 18,000 homes or roughly 40% of housing stock lack reliable electricity and running water.
 - COVID-19 has amplified health inequities in tribal communities.

MEET THE TEAM

THIS RESOURCE IS BROUGHT TO YOU BY THE FSA-AG
TRIBAL ADMINISTRATIVE SERVICES TEAM



JUSTIN LEPCIER

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MEET THE REST OF THE TAS TEAM

fsa-ag.com/team



READY FOR PART TWO? WATCH TODAY!



The FSA difference is centered around the way we serve and execute for our clients.

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