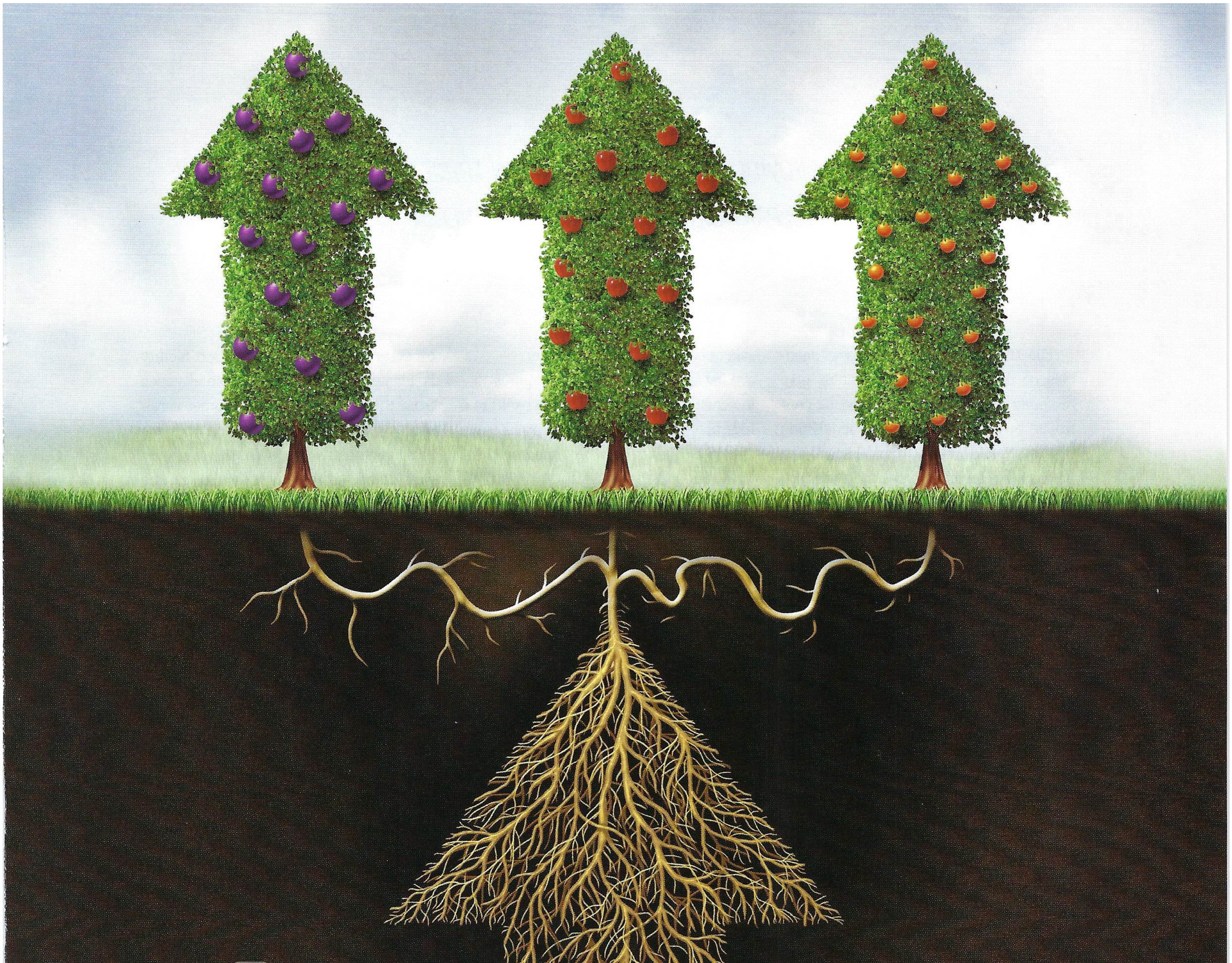

Diversifying Revenue Strategies in 2017

By Derril B. Jordan and Donald Zillioux

As tribes diversify their economic base, many choose to explore energy-related ventures. To this end, a tribal company within that sector can gain a substantial competitive advantage through a little-known and never-used provision of the Indian Tribal Energy Development and Self-Determination Act of 2005. >

> *TRIBAL ENERGY ACT PROVIDES AN OPPORTUNITY FOR TRIBES THAT LACK THEIR OWN ENERGY RESOURCES TO PARTICIPATE IN THE SALE OF ENERGY TO THE GOVERNMENT.*

The Tribal Energy Act authorizes agencies of the federal government to give preference to companies owned or controlled by tribal nations in the acquisition of energy and energy byproducts. The preference can be granted to American Indian-owned or controlled companies so long as the agency does not pay more than the prevailing market price for an energy product or byproduct, or obtain less than prevailing market terms and conditions. The federal government is the largest consumer of energy in the United States, and a preference within that market, which purchasing generally flows through the General Services Administration (GSA), creates an enormous opportunity for tribal economic development.

Unfortunately, entry into the energy sector can be difficult, and fraught with obstacles, for a tribe. For example, tribes that seek to develop their own reservation-based energy resources may encounter difficulties such as:

- Limited access to capital and tax credits
- Limited access to energy markets
- Inadequate infrastructure for transporting energy products to markets
- A complex regulatory structure
- A lack of tribal entrepreneurial capacity

Moreover, not all tribes own traditional non-renewable sources such as coal, oil, and natural gas, or have reservations capable of generating renewal forms of energy such as wind, solar, geothermal, biomass and wave power.

Nevertheless, the Tribal Energy Act not only provides an opportunity for tribes that have energy resources, renewable and non-renewable alike, to begin to overcome many of these obstacles, it also provides an opportunity for tribes that lack their

sale of energy to the government.

First, nothing in the Act requires that the energy product or byproduct sold to a federal agency be from an energy resource owned by the tribe or generated on tribal lands. Second, the energy acquisition preference requires only majority tribal ownership, rather than complete tribal ownership. Essentially, this allows a tribe with limited or no resources to partner with a non-tribal company to establish a joint venture able to obtain the preference of the Tribal Energy Act.

What incentive is there, one might ask, for a non-Indian energy company to partner with a tribe to sell energy to the federal government if the power is not being generated on-reservation from a tribally owned or reservation-based energy resource? The short answer is that partnering with a tribe creates a significant competitive bidding advantage on a non-tribal energy development company that sets it apart from its otherwise equally-qualified competitors that are also capable of producing and selling the energy product or byproduct at the prevailing market price and at prevailing market terms and conditions.

Government buildings, facilities and installations, whether military and civilian, are located throughout the United States—often within reasonable proximity to tribal reservations. A tribe could partner with a non-Indian energy company to develop a renewable energy source, such as wind or solar power, in an area that, although located off-reservation, is close to both a federal facility and the tribe's reservation.

Thus, through partnering with an experienced and reputable non-Indian energy development company, a tribe can avail itself of the contracting opportunity to earn much needed tribal governmental

off-reservation energy generation facility is located within a reasonable distance from tribal lands, create a source of relatively skilled and high-paying jobs for tribal members. Furthermore, the revenues gained from such a venture can be reinvested in tribal programs or other forms of tribal economic development.

In the long term, successful use of the preference in this manner can also help tribes in developing their on-reservation energy resources. Tribes may gain access to energy markets as population centers change or grow, which in turn would probably lead to the investment in new and expanded energy transportation infrastructure that tribes would be able to take advantage of in marketing and selling their energy products.

The fluctuating costs of various energy alternatives may work to help create future markets for tribal energy resources that do not presently exist.

By using the acquisition preference to secure government energy contracts through partnerships with non-tribal energy development companies, tribal nations can acquire technical capacity and managerial experience and establish a track record within the energy development field that can lead to greater access to the capital tribal governments need to develop their own energy resources and take control of their own destinies, if and when the markets for their on-reservation resources develop or expand. A tribe can also leverage its non-Indian development company partnership to enlist the company in helping the tribe to develop its own energy resources.

However, joint ownership of an energy development entity with a non-tribal company requires careful strategic, organizational, economic and legal planning.

ENERGY DEVELOPMENT PROJECTS, JUST LIKE ALL TRIBAL ECONOMIC DEVELOPMENT, SHOULD BE IMPLEMENTED AS PART OF A COMPREHENSIVE STRATEGY.

required, the tribe must have a real ownership interest, meaning that it must have something at risk if the company loses money, and not be merely an owner on paper. Also, the tribe must actually control the joint entity, which means that the tribe, as the majority owner, must have the authority to make important decisions for the company without the permission or concurrence of the non-tribal partner. The failure to meet these requirements means that the jointly-owned company would not be eligible for the preference. It is also worth keeping in mind that federal contract awards are always subject to review by the awarding agency or the GAO and can be challenged by an unsuccessful bidder even after being awarded. Absent careful organizational and legal planning, the joint venture, as well as its owners, could face severe penalties—including criminal prosecution—if actual tribal ownership and control cannot be substantiated upon such a review or challenge.

The GSA has not yet published regulations for implementing the contracting preference created by the Tribal Energy Act, including rules for determining whether a joint entity is really owned and controlled by the tribal partner. It is not clear when or whether the GSA will issue such guidance. Nonetheless, there are other federal laws providing Indian and minority preferences in contracting that provide guidance to ensure that the joint company meets these qualifications.

Tribes that want to take advantage of this contracting opportunity should not wait for the GSA to issue this guidance; instead they should forge ahead in identifying federal energy purchase opportunities and finding reputable energy development partners with whom they can bid on these federal contracts. By using the other federal preference laws and regulations for guidance, tribes and their would-be partners can create joint ventures that fully qualify for the preference and thereby force the GSA to fulfill this aspect of the Tribal Energy Act's promise to enable tribes to be meaningful players in meeting the United States' energy needs.

Energy development projects, just like all tribal economic development, should be implemented as part of a comprehensive strategy that stems from an effective strategic planning, operational design, managerial and negotiating maturity within its ranks and goal-setting process.

For example, tribal citizens may not understand the wisdom of partnering to develop off-reservation energy resources if they don't understand the obstacles to developing on-reservation resources and how, over a longer term, the off-reservation development is intended to build the capacity to develop on-reservation resources. Similarly, the identification of job creation as a high priority for economic development will help to establish parameters for selecting projects that will build capacity for the tribe and employ tribal citizens.

Capacity development within employable members is a must if projects like this are to be effectively and productively managed.

The tribe's identified need to build managerial and technical capacity also will help in the selection of the proper development partner and work to ensure that the tribe truly owns and is not merely an owner on paper, and actually controls the joint entity.

In other words, a tribe will gain little, if any, managerial experience and develop almost no technical expertise if it is being used as a rent-a-tribe that is merely window dressing and along for the ride in a venture that is actually controlled by the non-Indian partner. Likewise, the joint company will not meet any objective test for tribal ownership and control if the tribe is being used as a front by a non-Indian company to gain the benefit of the contracting preference.

Excluding the tribe from meaningful participation in the management and operation of the business should be avoided at all costs. By choosing a partner that is willing to help the tribe build its capacity, a tribe ensures both the opportunity to build that capacity, and that the joint company will in fact be qualified for the federal contracting preference.

The Indian Energy Act preference provides a valuable economic development opportunity to all tribes, even those tribes that do not own or cannot produce substantial energy resources on their reservations. Partnering with non-tribal energy development companies can allow tribes to take advantage of the preference in selling energy products to federal agencies, but tribes must be mindful to ensure that they have a genuine ownership interest, that their management team is skilled and experienced, and, that they actually control the jointly-owned entity.

As in all things, careful planning, assurance that moving in this direction serves the long term strategy of the tribe and skillful negotiating and drafting, must be used to protect tribal interests and ensure the greatest possible benefit to the tribe. ♦

DERRIL JORDAN, WHO HAS BEEN REPRESENTING TRIBAL GOVERNMENT FOR NEARLY 30 YEAR IS THE DIRECTOR OF NATIVE AMERICAN TRAINING AND ECONOMIC DEVELOPMENT AT STRATEGIC DEVELOPMENT WORLDWIDE AND CAN BE REACHED AT DERRILJ@SDWNET.COM.

DON ZILLIOUX, PH.D. IS THE CEO AND FOUNDER FOR STRATEGIC DEVELOPMENT WORLDWIDE AND HAS BEEN SERVING NATIVE AMERICAN ENTERPRISES FOR 30 YEARS. HE CAN BE REACHED AT DONZ@SDWNET.COM.