

American Indian Law Review

Volume 42 | Number 1

2017

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Recommended Citation

Jacob Laughlin, *Foreign-Trade Zones in Indian County: Is a Foreign-Trade Zone Right for Your Tribe?*, 42 AM. INDIAN L. REV. 173 (2017), <https://digitalcommons.law.ou.edu/air/vol42/iss1/4>

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FOREIGN-TRADE ZONES IN INDIAN COUNTY: IS A FOREIGN-TRADE ZONE RIGHT FOR YOUR TRIBE?

*Jacob Laughlin**

Abstract

This Comment focuses on the establishment of Foreign-Trade Zones in Indian Country to create economic growth for tribes. In particular, it will discuss the possible impact Foreign-Trade Zones could have on tribes throughout the United States, provide tribes with information on how Foreign-Trade Zones work, and briefly examine the ways tribes can establish their own Foreign-Trade Zones. Part I of this paper is a primer on the need for Foreign-Trade Zones in Indian Country. Part II explains what a Foreign-Trade Zone is as well as how and why the modern Foreign-Trade Zone was created. Part III describes why Foreign-Trade Zones on tribal lands help attract outside business and surveys the success of a tribe that has already established a Foreign-Trade Zone on its tribal land. Part IV describes how tribes can establish Foreign-Trade Zones on their tribal lands, focusing on what tribes should consider before committing to establish a Foreign-Trade Zone on their tribal lands, the structure and regulations of Foreign-Trade Zones, and what type of Foreign-Trade Zone a tribe should apply for, which includes an outline of the application process.

I. The Need for Foreign Trade Zones

In 1831, John Marshall infamously described the relationship between the United States federal government and Native Americans as “resembl[ing] that of a ward to his guardian.”¹ These words brought about the end of tribal sovereignty and established the federal trust doctrine.² This doctrine empowers the United States government to act as the trustee of Indian affairs, which once included owning and controlling all tribal lands.³ The control of tribal lands by the federal government, along with the bureaucracy that comes along with this control, has kept many corporations

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1. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

2. Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014), <http://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#56b75b426cc6>.

3. *Id.*

from investing in tribal communities and creating jobs within those communities.⁴ This lack of investing infrastructure has in turn left many tribal communities in a constant state of poverty.⁵

The future of tribal lands and their inhabitants, however, is not lost. This is due in part because, as one analysis notes,

In recent years, Native Americans have increased their income and wealth through new and innovative economic development activities. For instance, tribes have increased their control over their natural resources and food systems, they have become players in the country's energy sector, and they have begun trading with Asia.⁶

Despite some creativity in addressing their economic conditions, Native Americans still remain "one of the United States' most economically disadvantaged populations."⁷ According to the United States Census Bureau 28.3% of the 5.4 million people in the United States who identify as American Indian or Alaska Native were living in poverty at the time of the 2014 American Community Survey, compared to the national average of 15.5%.⁸ This discrepancy is largely due to fact that few tribes are taking advantage of "new and innovative economic development activities."⁹

However, a few tribes are taking advantage of new opportunities in the form of Foreign-Trades Zones.¹⁰ While Foreign-Trade Zones are not a new concept in the United States, it is new to have them established and

4. *Id.*

5. *Id.*

6. Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POLICY INST. (Dec. 17, 2013), <http://www.epi.org/publication/bp370-native-americans-jobs/>.

7. *Id.*

8. *Facts for Features: American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), <http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html>.

9. *See* Austin, *supra* note 6.

10. *See* Steve Lackmeyer, *Oklahoma Tribal Industrial Park Designated as Foreign Trade Zone*, OKLAHOMAN (Feb. 8, 2014), <http://newsok.com/oklahoma-tribal-industrial-park-designated-as-foreign-trade-zone/article/3931708>; *Oneida Seven Generations Corporation*, BUREAU OF INDIAN AFFAIRS, https://web.archive.org/web/201704292_23426/http://www.bia.gov/cs/groups/xieed/documents/text/idc011709.pdf (last visited Feb. 26, 2018); *Maximize Your Importing and Exporting Operations*, WASH. STATE DEP'T OF COMMERCE, <http://choosewashingtonstate.com/i-need-help-with/site-selection/foreign-trade-zones/> (last visited Feb. 26, 2018).

operated by Native Americans on tribal lands.¹¹ Foreign-Trade Zones are far from the only solution to the poverty and economic development problems plaguing Native Americans, and are likely not a viable solution for many tribes who are located away from urban areas.¹² Even though establishing Foreign-Trade Zones is not an end-all solution for the poverty problem facing many tribes it is, nonetheless, a step in the right direction.

The feasibility and impact of establishing Foreign-Trade Zones on Native American tribal lands has been researched in detail by The Native American Venture Fund, a for-profit impact investment fund that “provide[s] tribes the education, opportunity, and financing to create, expand, diversify, and sustain a tribal economy” with an ultimate goal of facilitating “a domestic commerce model, which will lay the foundation for global commerce, trade, significant job creation, workforce development, and the rebirth of Native America as a united economic power.”¹³ The Native American Venture Fund believes that establishing Foreign-Trade Zones on tribal lands could revitalize economically and physically distressed Native American economies by:

(A) encouraging the formation of new businesses by eligible entities, and the expansion of existing businesses; and (B) facilitating the movement of goods to and from Indian lands and the provision of services by Indians. [(1)] To promote private investment in the economies of Indian tribes and to encourage the sustainable development of resources of Indian tribes and Indian-owned businesses. [(2)] To promote the long-range sustained growth of the economies of Indian tribes. [(3)] To raise incomes of Indians in order to reduce the number of Indians at poverty levels and provide the means for achieving a higher standard of living on Indian reservations. [(4)] To encourage inter-tribal, regional, and international trade and business development in order to assist in increasing productivity and the standard of living of members of Indian tribes and improving the economic self-sufficiency of the governing bodies of Indian tribes. [(5)] To promote economic self-sufficiency and political

11. *See About NAVF*, NATIVE AM. VENTURE FUND, <http://navf.net/about-us/> (last visited Feb. 26, 2018).

12. *See id.*

13. *Id.*

self-determination for Indian tribes and members of Indian tribes, as expressed in the US Constitution.¹⁴

Tribes throughout the United States have invested in various ventures on tribal lands, such as “casinos, hotels, golf courses, tourism, construction, and green energy, all of which have begun to generate significant revenues,” particularly compared with tribes’ past economic conditions and the “lack of resources, infrastructure, [market] and economic opportunity.”¹⁵ The Native American Venture Fund, with its goal of developing tribal economies, believes that Foreign-Trade Zones could be added to this list.¹⁶ It is estimated that if tribes throughout the United States established Foreign-Trade Zones upon their lands, the “[t]ribal partnership in both tax credits, economic incentives and logistic savings could be valued in excess of \$10 Billion dollars within 5 years.”¹⁷ This would create countless jobs and a seemingly endless source of income for tribes and their dependent communities.¹⁸

II. What Is a Foreign-Trade Zone?

A. An Introduction to Foreign-Trade Zones

Foreign-Trade Zones “are the United States’ version of what is known internationally as a Free Trade Zone.”¹⁹ “Free trade zones are geographic areas which primarily facilitate economic development, and *co-production*—the joint production of a single good through the efforts of workers in two or more countries.”²⁰ Foreign-Trade Zones, like Free Trade Zones, are “geographic areas which are physically *inside* the boundaries of a country, but which are treated as if they were located *outside* the country for customs purposes—that is, zones are declared to be outside the customs territory of a country.”²¹ A Foreign-Trade Zone is a secured geographical

14. John Cataldi, *Investing in Native American Free Trade Zones*, NATIVE AM. VENTURE FUND (July 2, 2015), <http://navf.net/2015/07/02/native-american-foreign-trade/>.

15. *About NAVF*, *supra* note 11.

16. *See* Cataldi, *supra* note 14.

17. *See id.*

18. *See id.*

19. *About Foreign Trade Zones and Contact Info*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about> (last published Jan. 4, 2018).

20. MARY JANE BOLLE, CONG. RESEARCH SERV., RL30268, U.S. FOREIGN-TRADE ZONES: CURRENT ISSUES 1 (1999), <http://congressionalresearch.com/RL30268/document.php?study=U.S.+FOREIGN-TRADE+ZONES+CURRENT+ISSUES>.

21. *Id.*

area under “U.S. Customs and Border Protection (CBP) supervision that [is] generally considered outside CBP territory upon activation” of the Foreign-Trade Zone status.²² In most instances a Foreign-Trade Zone is established near a CBP port of entry where “[f]oreign and domestic merchandise may be moved into zones for operations, not otherwise prohibited by law, including storage, exhibition, assembly, manufacturing, and processing.”²³ Foreign-Trade Zones are typically established within a port of entry into the United States, such as a shipping port or an international airport, or located within an industrial park where raw materials and merchandise are manufactured or stored for later exportation or distribution into the stream of commerce.²⁴ These trade zones “level the playing field and improve[] U.S. competitiveness by reducing cost of U.S. operations” as well as encouraging activity and increasing value for products made at “U.S. facilities in competition with foreign alternatives by allowing delayed or reduced duty payments on foreign merchandise.”²⁵ This delay on duty payments is meant to incentivize companies to build and relocate their businesses within these Foreign-Trade Zones so that they may save money that they would otherwise spend on duty payments.²⁶

Foreign-Trade Zones were created by an act of Congress in 1934 when the Foreign-Trade Zones Act was authorized and signed into law.²⁷ Congress created Foreign-Trade Zones in order to promote free trade while allowing the United States’ economy to enjoy the benefits of such trade by attempting to decrease the cost of trade through the Foreign-Trade Zone program.²⁸ The Act decreased the cost of trade by designating “geographical areas, in or adjacent to Customs Ports of Entry, where commercial merchandise receives the same Customs treatment it would if it were outside the commerce of the United States.”²⁹ This relief from duty is meant to lower the cost for companies engaging in trade and manufacturing in the United States.³⁰ This economic incentive aimed at manufacturers and exporters has successfully satisfied the public policy behind the creation of

22. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Foreign Trade Zones*, INT’L TRADE ADMIN., <http://trade.gov/enforcement/ftz/> (last visited Dec. 23, 2016).

26. *See id.*

27. *A Brief History of the U.S. Foreign-Trade Zones Program*, FOREIGN-TRADE ZONE RES. CTR., <http://www.foreign-trade-zone.com/history.htm> (last visited Sept. 21, 2016).

28. *Id.*

29. *Id.*; *see also* 19 U.S.C.A. § 81c(a) (Westlaw through Pub. L. No. 115-45).

30. *A Brief History of the U.S. Foreign-Trade Zones Program*, *supra* note 27.

these Foreign-Trade Zones, which is to create and maintain “employment through the encouragement of operations in the United States which, for customs reasons, might otherwise have been carried on abroad.”³¹

Within a Foreign-Trade Zone, imposition of a duty upon merchandise by CBP is withheld while the product or raw material is being brought in or stored.³² According to 19 U.S.C. § 81(c), once merchandise leaves an established Foreign-Trade Zone the merchandise is “subject to the laws and regulations of United States[,]” which means that the merchandise is then possibly subject to taxation.³³ This duty imposed on products leaving a Foreign-Trade Zone, while not imposed on products and materials entering the zone, is similar to the duty imposed on products manufactured outside of the United States.³⁴ Amounts of duties on products manufactured outside of the United States and imported into the country are determined based upon the finished product and not on each and every part, material, or component.³⁵ Products usually produced in the United States, not in a Foreign-Trade Zone, normally have a duty imposed on each of the raw materials or components that go into producing a product in addition to a final duty on the finished product.³⁶ Eliminating multiple taxation allows domestic manufacturers to compete with foreign manufacturers who produce the same products outside of the United States.³⁷ The use of multiple taxation was designed to yield an increase in the amount of products being produced in the United States as well as an increase domestic manufacturing employment positions once prevalent in this country.³⁸

B. How the Modern Foreign-Trade Zone Program Came to Exist

Foreign-Trade Zones have been in existence since 1934, however, they were not widely implemented until recently.³⁹ In 1970 there were only eight

31. *Foreign Trade Zones*, EXECUTIVE LEGAL SUMMARY No. 296 (Dec. 2017 update), EXECLSUM 296 (Westlaw).

32. 19 U.S.C.A. § 81c(a) (Westlaw through Pub. L. No. 115-45).

33. *Id.* (“[W]hen foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise . . .”).

34. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

35. *Foreign-Trade Zones: A Primer*, INLAND MARINE UNDERWRITERS ASS’N (2010), <http://www.imua.org/Files/reports/999146.html>.

36. *See About Foreign Trade Zones and Contact Info*, *supra* note 19.

37. *See id.*

38. *See A Brief History of the U.S. Foreign-Trade Zones Program*, *supra* note 27.

39. *See id.*

Foreign-Trade Zones and three sub-zones in the United States.⁴⁰ Today there are around 250 Foreign-Trade Zone projects with over 500 approved sub-zones/magnet sites.⁴¹ Growth in the use and establishment of Foreign-Trade Zones is a result of changes to the Foreign-Trade Zones program.⁴² Foreign-Trade Zones were originally created to increase and encourage foreign commerce within the United States by designating distinct geographical areas within or near U.S. Customs Ports of Entry.⁴³ Within these designated geographical zones “commercial merchandise receives the same Customs treatment it would if it were outside the commerce of the United States.”⁴⁴ The merchandise may be held within the zone without being subjected to U.S. Customs duties and ad valorem taxes.⁴⁵ This tax and tariff relief is meant to “lower the costs of U.S.-based operations engaged in international trade and thereby create and retain the employment and capital investment opportunities that result from those operations.”⁴⁶ Historically, Foreign-Trade Zones, by statute and regulation, were sites where merchandise and raw materials could only be held or stored, not manufactured.⁴⁷ Those limitations changed in 1950 when Congress amended the Foreign-Trade Zones Act to allow manufacturing to occur within the zones.⁴⁸ Manufacturing in the zones was already standard practice for Free Trade Zones internationally.⁴⁹ In keeping with international practice of Free Trade Zones, the Foreign-Trade Zone Act was also amended to assess and apply a custom duty based upon the full value of the manufactured goods upon exiting a Foreign-Trade Zone and entering into domestic commerce.⁵⁰ These amendments, however, did little to

40. *Id.*

41. *How Many Zones Exist Now?*, INT’L TRADE ADMIN.: ENF’T & COMPLIANCE, <http://enforcement.trade.gov/ftzpage/info/zonestats.html> (last visited Dec. 21, 2016); PORT MIAMI, FOREIGN TRADE ZONE 281 GUIDEBOOK 5 (1st ed. Aug. 2012), <http://www.miamidade.gov/portmiami/library/brochures/guidebook-ftz-281.pdf> [hereinafter FOREIGN TRADE ZONE 281 GUIDEBOOK] (sub-zone/magnet sites are typically “larger propert[ies], often consisting of multiple warehouses (i.e. industrial park), used on an as-needed basis where users act as renters and do not need to apply for zone status.”).

42. *A Brief History of the U.S. Foreign-Trade Zones Program*, *supra* note 27.

43. *Id.*

44. *Id.*

45. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

46. *A Brief History of the U.S. Foreign-Trade Zones Program*, *supra* note 27.

47. *Id.*

48. 19 U.S.C.A. § 81c (West 1978 & Supp. 1993) (originally enacted at Pub. L. No. 73-397, § 3, 48 Stat. 998, 999 (1934)).

49. *A Brief History of the U.S. Foreign-Trade Zones Program*, *supra* note 27.

50. *Id.*

encourage activities in the zones because of the way that U.S. tariffs are structured. U.S. tariffs benefit domestic production—with the product entering the stream of commerce within the United States—instead of international export, which was the original goal of the Foreign-Trade Zone program.⁵¹

However, by the 1980s production of raw materials and merchandise shifted from domestic production in the United States to importation of finished products from overseas.⁵² This shift in manufacturing was a result of technological advances that allowed companies to produce cheaper products and the development of more efficient means of transportation to bring their products from foreign factories to the United States.⁵³ The shift in manufacturing to imported goods allowed companies to earn a greater profit despite paying an importation tariff on their products.⁵⁴ Manufacturing continued to shift from United States factories to foreign ones after U.S. importation tariff prices decreased, further incentivizing many manufactures to relocate outside of the United States.⁵⁵

This exodus of manufacturing to foreign nations prompted the CBP, on behalf of Congress, to act to mitigate this loss of domestic manufacturing.⁵⁶ CBP, with the aid of the National Association of Foreign Trade Zones, observed that the loss in U.S. manufacturing was caused by the “existing Customs and tariff treatment afforded to domestic parts shipped overseas for value-added activity and then returned to the [United States].”⁵⁷ In 1980, CBP modified its tariff structure to allow for “equivalent tariff treatment of products manufactured in a U.S. Foreign-Trade Zone environment.”⁵⁸ This at last allowed the U.S. Foreign-Trade Zone program, established fifty-six years earlier, to “be of real utility in attracting and retaining U.S.-based economic activity.”⁵⁹ “This economic activity [conducted in U.S. Foreign-Trade Zones] generates investment, labor, and profit, which collectively produce far more tax revenues than do Customs duties” for imported merchandise and raw materials.⁶⁰ With these changes, manufacturers based

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

in the United States are now able to import foreign-sourced parts or materials into U.S. Foreign-Trade Zones, with no import duties or tariffs attached.⁶¹ This allows U.S.-based corporations to “incorporate those parts or materials into a finished product using U.S. parts and labor, and, if the finished product entered the U.S. commerce, pay duty on the value of the foreign non-duty-paid content only.”⁶² This new model has “spurred the growth in the U.S. Foreign-Trade Zones program, and has allowed U.S.-based manufacturers to engage in economical sourcing – from both foreign and domestic suppliers – to displace imports of foreign-produced finished products” within the U.S. domestic market.⁶³ These changes to the structuring of the U.S. Foreign-Trade Zone program, along with the increased expansion of global trade, have led to the increase in the number of Foreign-Trade Zones and subzones/magnet sites within the United States in the last three decades.⁶⁴ Furthermore, these changes to the U.S. Foreign-Trade Zone program allowed the program to act as a “tool by which the United States can practice both the letter and the spirit of its trade laws and policies.”⁶⁵

III. Foreign-Trade Zones in Indian Country

A. What Benefits of Foreign-Trade Zones Would Attract Manufacturers and Other Companies to Operate Within These Zones in Indian Country?

Foreign-Trade Zones incentivize and attract many manufacturers and import/export companies based upon the economic savings that corporations receive by operating within these zones.⁶⁶ Some benefits for corporations specifically include: inverted tariff relief; duty exemption on re-exports; duty elimination on waste, scrap, and yield loss; weekly entry savings; and duty deferral.⁶⁷ These economic benefits do not make up an exhaustive list, but are the most common benefits to many companies using

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. CUSTOMS & BORDER PROT. OFFICE OF FIELD OPERATIONS, U.S. DEP'T OF HOMELAND SECURITY, OMB NO. 1651-0051, FOREIGN-TRADE ZONES MANUAL 16 (2011), <https://www.cbp.gov/sites/default/files/documents/FTZmanual2011.pdf> [hereinafter FOREIGN-TRADE ZONES MANUAL].

67. *Why Companies Use Foreign Trade Zones*, FOREIGN TRADE ZONE RES. CTR., <http://www.foreign-trade-zone.com/benefits.htm> (last visited Dec. 22, 2016).

Foreign-Trade Zones.⁶⁸ These benefits allow companies to actively compete with foreign manufacturers and importers while remaining within the United States.⁶⁹

One major benefit for businesses operating in Foreign-Trade Zones is that they receive relief from inverted tariffs. In practice, United States import tariffs can penalize companies who make their products within the United States.⁷⁰ Inverted tariffs refer “to the effective penalty that US manufacturers are subject to when importing parts for manufacturing of products in the US, specifically when these products will be exported and sold overseas.”⁷¹ Inverted tariffs are seen as penalties because many of the components or raw materials needed to manufacture a product carry a higher duty rate than the actual finished product.⁷² An inverted tariff essentially makes it cheaper to manufacture most products outside of the United States and simply ship the finished product into the country to sell by giving an “importer an unfair and unintended advantage over the domestic manufacturer.”⁷³ Foreign-Trade Zones, in an attempt to level the playing field for U.S.-based manufacturers and exporters, allow manufacturers operating in the Foreign-Trade Zone to pay the less expensive of either the import tariff on the components, or raw materials, that go into a finished product or to pay the tariff on the finished product.⁷⁴ In most cases, the “tariff of the manufactured good is zero, eliminating any costs associated with importing raw materials and goods.”⁷⁵ A company operating in a Foreign-Trade Zone in the United States would have an advantage over a domestic manufacturer not operating in a zone and would be in a better position to compete with foreign manufacturers importing its products into the United States.

68. *See id.*

69. *Id.*

70. *Id.*

71. *5 Benefits of Using a Foreign Trade Zone (FTZ)*, LEGACY SUPPLY CHAIN SERVS., <https://legacyscs.com/5-benefits-using-foreign-trade-zone-ftz/> (last visited Aug. 27, 2017).

72. *Id.*

73. *Relief from Inverted Tariff when Manufacturing in a Foreign-Trade Zone or SubZone*, FOREIGN-TRADE ZONE CORP., <http://www.ftzcorp.com/foreign-trade-zone-benefits/relief-from-inverted-tariffs.aspx> (last visited Dec. 18, 2016).

74. Ty Bordner, *The Benefit of Using a Foreign Trade Zone*, INBOUND LOGISTICS (Mar. 17, 2014), <http://www.inboundlogistics.com/cms/article/the-benefits-of-using-a-foreign-trade-zone/>; Justine Brown, *FTZ Basics & Benefits*, INBOUND LOGISTICS (Jan. 20, 2014), <http://www.inboundlogistics.com/cms/article/ftz-basics-and-benefits/>.

75. Bordner, *supra* note 74.

Foreign-Trade Zones also exempt manufacturers and import/export companies from duties on merchandise or materials that is then re-exported to foreign markets.⁷⁶ Foreign-Trade Zones allow importers to bring products and raw materials into the zone without imposing a duty on them; importers are only required to pay a duty on products or materials that leave the Foreign-Trade Zone and enter the United States' domestic stream of commerce.⁷⁷ However, products that leave the zone bound for a foreign market avoid U.S. duties entirely.⁷⁸ This allows companies to establish factories within a Foreign-Trade Zone in the United States to manufacture products for foreign markets while employing American workers and avoiding U.S. duties on those products.⁷⁹ Companies can then better compete in the international market, which is built on cheap labor.⁸⁰

Importers who operate within a Foreign-Trade Zone may also benefit from an elimination of duties on waste, scrap, and yield losses.⁸¹ When a manufacturer imports raw materials into the United States, typically a duty is owed upon the import; however, a duty is not applied to a product or material in an Foreign-Trade Zone until after it leaves the zone.⁸² Operating in this way is beneficial for many manufacturers because raw materials are wasted, lost, or scrapped in the manufacturing process of some products.⁸³ Manufacturers benefit from the Foreign-Trade Zone status because a duty is not imposed on the raw materials that are imported for manufacturing, so manufacturers do not have to pay a duty on materials that are wasted, scraped, or lost.⁸⁴ A duty is only owed on the finished product, and only if that product is placed within the stream of U.S. domestic commerce.⁸⁵ These savings, created by the Foreign-Trade Zone status, would allow companies operating within the United States to directly compete with companies overseas who already receive this benefit.⁸⁶

Businesses operating in Foreign-Trade Zones in Indian Country, in addition to receiving all the standard benefits of operating within a zone, would also receive benefits that are exclusive to businesses located on tribal

76. *Id.*

77. *Id.*

78. *See id.*

79. *See id.*

80. *Why Companies Use Foreign Trade Zones*, *supra* note 67.

81. Bordner, *supra* note 74.

82. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

83. *Id.*

84. *Id.*

85. *Why Companies Use Foreign Trade Zones*, *supra* note 67.

86. *Id.*

lands.⁸⁷ Generally, certain personal property, such as business inventory, is exempt from state and local ad valorem taxes.⁸⁸ However, not all business inventory is exempt from such taxes in a typical Foreign-Trade Zone.⁸⁹ “[A]s a matter of federal law, state and local ad valorem taxes cannot be imposed” upon imported business inventory that is “stored or processed” within a zone located in Indian Country.⁹⁰ This is also true for inventory that is produced in the United States and held in a zone within Indian Country for “exportation in its original or processed form.”⁹¹ Non-Indian investors who want to explore relocating their business to an Indian Country Foreign-Trade Zone would also benefit from being exempt from state and county zoning and land use restrictions.⁹² Tribes have jurisdiction over land use because tribal sovereignty preempts state and municipal government zoning and land use restrictions on federal trust land.⁹³ Businesses located on tribal land and operating in a Foreign-Trade Zone can save a tremendous amount of time and money by avoiding state permitting requirements.⁹⁴

Foreign-Trade Zones, with their restructured tariff system and numerous cost saving benefits, allow companies to once again manufacture and export merchandise and materials from the United States.⁹⁵ These cost saving benefits allow manufacturing and exporting corporations to be competitive in foreign markets that already allow companies to receive these benefits.⁹⁶ It is the competitive advantage created by Foreign-Trade Zones that attracts businesses to either remain or relocate to the United States and operate

87. See G. Debra Juarez & Gabriel S. Galanda, *Leveraging Tribal Sovereign Economic Advantages to Attract Private Investment in Indian Country*, MONDAQ (June 27, 2005), <http://www.mondaq.com/unitedstates/x/33365/Federal+Law/Leveraging+Tribal+Sovereign+Economic+Advantages+to+Attract+Private+Investment+in+Indian+Country> (highlighting several advantages of having Foreign-Trade Zones within Indian Country that are not available outside of Indian Country).

88. *Strategic Advantages*, MCALLEN FOREIGN TRADE ZONE, <http://www.mcallenftz.org/advantages.php> (last visited Dec. 21, 2016).

89. *Id.*

90. Juarez & Galanda, *supra* note 87, at 3.

91. *Id.*

92. See *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003) (determining that the Tulalip Tribes, not Snohomish County, possessed the land use jurisdiction over land within the exterior boundaries of the Tulalip Reservation).

93. *Id.*

94. Juarez & Galanda, *supra* note 87, at 4.

95. *Why Companies Use Foreign Trade Zones*, *supra* note 67.

96. *Id.*

within these zones.⁹⁷ These advantages, combined with the unique advantages that only Foreign-Trade Zones in Indian Country offer, have the potential to attract businesses to operate within a zone located on tribal land.⁹⁸ The unique time and cost saving benefits that come with operating a business within a zone on tribal lands make the Foreign-Trade Zone program even more beneficial for businesses operating in a competitive market.⁹⁹ This competitive edge could lead to many businesses choosing to operate within zones located in Indian Country.

B. Foreign-Trade Zones In Indian Country: A Success Story

One Oklahoma tribe, the Citizen Potawatomi Nation, has recently established and opened a Foreign-Trade Zone, the Iron Horse Industrial Park, on its tribal land.¹⁰⁰ Since 2014, the Tribe's industrial park been has designated as a Foreign-Trade Zone "magnet site of the Port of Greater Oklahoma City's Foreign-Trade Zone #106," located just thirty-five miles away.¹⁰¹ The Alliance for the Economic Development of Oklahoma City, located at the port authority of Will Rogers World Airport in Oklahoma City, Oklahoma, as a Foreign-Trade Zone Grantee, is able to designate subzones and magnet sites if they are within a ninety mile radius of the granting port authority.¹⁰²

The Citizen Potawatomi Nation (CPN) believes that the Iron Horse Industrial Park "has the potential to become one of the drivers of economic development and jobs" for the Nation and the surrounding community.¹⁰³ According to the CPN, the Tribe's vision for Iron Horse Industrial Park is to "provide a prime industrial location for both tribally-owned businesses and private companies."¹⁰⁴ The CPN has been very proactive in creating

97. *See id.*

98. *Id.*; Juarez & Galanda, *supra* note 87, at 3-4.

99. *See* Juarez & Galanda, *supra* note 87, at 3-4.

100. Lackmeyer, *supra* note 10.

101. *Foreign-Trade Zone*, IRON HORSE INDUS. PARK, <http://www.ironhorsecpn.com/foreign-trade-zone> (last visited Oct. 23, 2016); *FTZ Board Acts on Zone Expansions, Considers Auto Facility Request*, SANDLER, TRAVIS & ROSENBERG TRADE REP. (Apr. 14, 2015), <http://www.strtrade.com/news-publications-FTZ-expansions-vehicle-accessories041415.html>.

102. *See* Lackmeyer, *supra* note 10.

103. *Iron Horse on Track with Rail Agreement*, CITIZEN POTAWATOMI NATION (Feb. 29, 2016), <http://www.potawatomi.org/iron-horse-on-track-with-rail-agreement/>.

104. *A-OK Railroad, Citizen Potawatomi Nation Dedicate Iron Horse Bridge*, CITIZEN POTAWATOMI NATION (Aug. 21, 2013), <http://www.potawatomi.org/a-ok-railroad-citizen-potawatomi-nation-dedicate-iron-horse-bridge/> [hereinafter *A-OK Railroad*].

and planning the Iron Horse Industrial Park's success.¹⁰⁵ The idea to create an industrial park with Foreign-Trade Zone status, which would ultimately become the Iron Horse Industrial Park, was the brain child of Jim Collard, who is the Director of Planning and Economic Development for the CPN.¹⁰⁶ Dr. Collard believes that this project is likely to have a positive impact on the local economy, tribal or otherwise.¹⁰⁷

In the initial planning phase, the Tribe had no idea if a project of this magnitude and type would be successful or even worth pursuing.¹⁰⁸ That all changed in 2008 when an independent feasibility study illustrated that the industrial park was worth pursuing by the Tribe.¹⁰⁹ The study was followed by "a detailed econometric analysis by Professor Joseph Kalt of Harvard University, which revealed an industrial park would have a significant economic impact on the region."¹¹⁰ The feasibility study and the detailed econometric analysis served as the backbone for a successful application for an Economic Development Administration grant for \$1 million in 2011.¹¹¹ The grant money was then used to construct infrastructure to support development of the industrial park.¹¹² The initial infrastructure under Phase I of the development of the industrial park, "consisted of the installation of water and wastewater lines, the main concrete road, the telecommunications lines, and the initial rail lines" that would transport merchandise and materials in and out of the Foreign-Trade Zone.¹¹³

Iron Horse Industrial Park's location, with a direct connection to the Union Pacific Railroad, will allow businesses located within the park to easily and efficiently receive and ship their products or materials.¹¹⁴ In order to provide clients with this rail service, the CPN has partnered with a local company, the Arkansas-Oklahoma Railroad (A-OK), in updating and reopening a rail line that once went through its tribal lands near Iron Horse

105. *Id.*

106. Interview with James C. Collard, Ph.D., Dir. of Planning & Econ. Dev., Citizen Potawatomi Nation, in Shawnee, Okla. (Dec. 22, 2016).

107. *Id.*

108. *A-OK Railroad*, *supra* note 104.

109. *Id.*

110. *Id.*

111. *Id.*

112. Interview with James C. Collard, *supra* note 106.

113. *U.S. Commerce Department Invests \$4.6 Million to Build Infrastructure and Support Investment in Oklahoma*, U.S. ECON. DEV. ADMIN. (Sept. 29, 2014), <https://www.eda.gov/archives/2016/news/press-releases/2014/09/19/ok.htm> [hereinafter *U.S. Commerce Dep't*].

114. *Iron Horse on Track with Rail Agreement*, *supra* note 103.

Industrial Park. Reopening this rail line will allow the Tribe and any tenants of the Iron Horse Industrial Park to access rail systems to-and-from McAlester, Oklahoma, where products can be easily and quickly transferred to Union Pacific trains heading to-and-from Houston, Texas, a major seaport.¹¹⁵ The reopening of this rail line was critical for the development and success of the Iron Horse Industrial Park.¹¹⁶ The rail line will “provide an east-west connection of four major north-south rail corridors,” significantly increasing regional commerce and improving the safety of the Nation’s roadways by providing means of transportation beyond interstate highways.¹¹⁷ Dr. Collard, further, believes that the Iron Horse Industrial Park, through the partnership with A-OK Railroad, “will create more jobs for the community of Shawnee[, Oklahoma,] and other communities along the rail line.”¹¹⁸ The infrastructure that is being created for the Iron Horse Industrial Park benefits not only the Tribe but also the entire surrounding community.¹¹⁹

The CPN received another grant in 2014 of \$1.2 million from the Economic Development Administration.¹²⁰ The Nation used this grant to fund Phase II of its plan to develop the Iron Horse Industrial Park. Phase II called for additional tracks to be laid within the industrial park to “further develop the park to attract more businesses and manufacturers and better take advantage of the park’s Foreign Trade Zone status.”¹²¹ These new tracks would allow the park to be fully connected to the recently reopened A-OK Railroad and the port of Houston.¹²² The opening of the park is expected to bring 400 new jobs to the community with a goal of more than 1200 jobs for the Citizen Potawatomi Nation.¹²³

The CPN was not the first tribe to attempt to take advantage of the Foreign-Trade Zone program.¹²⁴ Several tribes throughout the United States have previously done so with varying results. The Lummi Nation in Washington successfully created the first Foreign-Trade Zone on a tribal

115. Interview with James C. Collard, *supra* note 106.

116. *A-OK Railroad*, *supra* note 104.

117. *Id.*

118. *Id.*

119. Interview with James C. Collard, *supra* note 106.

120. *U.S. Commerce Dep’t*, *supra* note 113.

121. *Id.*; *Iron Horse Industrial Park Moves Forward with Grant Funding Assistance*, IRON HORSE INDUS. PARK, <http://www.ironhorsecpn.com/iron-horse-industrial-park-moves-forward-with-grant-funding-assistance> (last visited Nov. 24, 2016).

122. Interview with James C. Collard, *supra* note 106.

123. *Id.*

124. *Id.*

reservation in 1986.¹²⁵ Since then, several tribes have followed suit, such as the Puyallup Tribe in Washington¹²⁶ and the Oneida Tribe of Wisconsin.¹²⁷ The Choctaw Nation of Oklahoma has considered the possibility of applying for Foreign-Trade Zone status, and even offered to activate its zone status if investing corporations desire it to do so.¹²⁸ These tribes, with active Foreign-Trade Zones or zones capable of being active, have one thing in common: they recognize the potential impact a Foreign-Trade Zone can have on tribal lands. A zone on tribal lands will likely bring much needed jobs, income, and infrastructure to tribes throughout the county.

IV. How to Establish a Foreign Trade Zone in Indian Country

A. What Should Tribes Consider Before Applying for a Foreign-Trade Zone?

Tribes considering applying to create a Foreign-Trade Zone on their tribal lands should do so with caution. There are countless considerations and decisions a tribe must make before applying for a Foreign-Trade Zone in order for it to be economically successful.¹²⁹ Without considering and planning for all possibilities, a tribe could be wasting its time, and even worse, capital on a plan that is doomed to fail.¹³⁰ A tribe, before even considering how to establish an zone on its tribal lands, should research and determine if it can raise the capital needed to undertake such a project.¹³¹ The upfront costs of establishing a zone may number in the millions of dollars to plan, improve infrastructure, and build an industrial park.¹³² Only after securing the necessary funds should a tribe proceed.¹³³

One of the first aspects of establishing a Foreign-Trade Zone should be considering whether the tribe possesses, or can ascertain, the required

125. *See* Resolution and Order, 51 Fed. Reg. 32,237 (Sept. 10, 1986), 1986 WL 107140.

126. Grant of Authority for the Establishment of a Foreign-Trade Zone, Puyallup Tribal FTZ Corporation, 61 Fed. Reg. 20,791 (May 8, 1996), 1996 WL 229030.

127. *Advantages We Offer*, ONEIDA SEVEN GENERATIONS CORP., <http://www.osgc.net/advantages.php> (last visited Dec. 27, 2016); Application and Public Hearing for a Proposed-Foreign Trade Zone, Brown County, WI, 54 Fed. Reg. 17,801 (Apr. 25, 1989), 1989 WL 299739.

128. *Location Services*, CHOCTAW BUS. DEV. CTR., <http://www.choctawmeansbusiness.com/service/location-services/> (last visited Dec. 29, 2016).

129. Interview with James C. Collard, *supra* note 106.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

conditions to create a successful industrial park, which is a usual component of a zone.¹³⁴ Without an industrial park in which manufacturing and import/export firms can operate, there is no need for a Foreign-Trade Zone.¹³⁵ There are three required conditions that must be present in order to create and operate a successful industrial park: “(i) location; (ii) infrastructure service; and (iii) management capability.”¹³⁶

The success of an industrial park, like other forms of real estate, is its “*location, location, location.*”¹³⁷ Without the correct location, an industrial park will be unable to attract manufacturing and import/export firms to locate their operations within the park.¹³⁸ The industrial park must be located within close-proximity to a port, such as an international airport, a river, or railroad tracks. This is paramount for companies who receive and send shipments of parts, materials, or merchandise.¹³⁹ Without access to these efficient and affordable means of transportation, businesses will be unwilling to relocate because of the high cost of transporting materials for their operations.¹⁴⁰ Location is also important to the tenants of the industrial park in terms of the “[a]vailability of a large supply of professionals and workers at reasonable cost.”¹⁴¹ Location plays a key role in the availability of workers in that “[w]ages are high in urban centers while qualified workers are scarce in remote areas.”¹⁴² Location is also critical because an industrial park must be located within easy commuting distance from food, shopping locations, and entertainment in order to attract and maintain workers.¹⁴³

Besides location, tribes wanting to build and create successful industrial parks for their Foreign-Trade Zones must make sure they have the requisite

134. *Id.*

135. *See id.*

136. *Vietnam's Industrialization Strategy in the Age of Globalization: Industrial Parks and FDI Attraction*, GRIPS DEV. F. (2003), <http://www.grips.ac.jp/forum/module/vietnam/indparks.html> [hereinafter *Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*].

137. Interview with James C. Collard, *supra* note 106.

138. *Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*, *supra* note 136.

139. *Id.*

140. Interview with James C. Collard, *supra* note 106; *see Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*, *supra* note 136.

141. *Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*, *supra* note 136.

142. *Id.*

143. *Id.*

infrastructure for such parks.¹⁴⁴ Manufacturers and importers that will use the industrial park will “require various inputs including electricity, telephone, internet, water, sewage treatment, transportation, [and] residence.”¹⁴⁵ The “relative importance of each input depends on each firm, [however], the industrial park must offer all of them” in order to guarantee that it will be able to meet the needs of any interested businesses.¹⁴⁶ In order for an industrial park to be successful, it must not simply offer these services, but offer them with a stable supply, at a consistently good quality, and at a low cost.¹⁴⁷ The location, as mentioned earlier, is important in regards to infrastructure. Large-scale infrastructure, which includes ports (such as airports), highways, railroads, and national power grids, is necessary and very difficult to create from scratch if it is not pre-existing within the immediate vicinity of the proposed industrial park.¹⁴⁸

Finally, tribes wanting to create industrial parks must possess the management capability to operate a successful park.¹⁴⁹ All industrial parks require efficient and responsive management.¹⁵⁰ This is because investors, especially foreign ones, “encounter a large number of problems in setting up and running their factories,” and rely on each industrial park manager to “guide and support them so that their business plan goes smoothly.”¹⁵¹ This guidance and support includes “marketing, information, procedural support, and all kinds of trouble-shooting.”¹⁵² A successful industrial park will provide its clients with a quick and competent service. Without a proper service system in place, “even industrial parks with good location and superb physical infrastructure will fail to attract investors.”¹⁵³

These elements are necessary to build and operate an industrial park—a crucial part of establishing a Foreign-Trade Zone—in Indian Country but are often not available on tribal lands.¹⁵⁴ Rural reservations in particular

144. Interview with James C. Collard, *supra* note 106.

145. *Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*, *supra* note 136.

146. *Id.*

147. *Id.*

148. *Id.*; see Interview with James C. Collard, *supra* note 106.

149. See *Vietnam's Industrialization Strategy: Industrial Parks and FDI Attraction*, *supra* note 136.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. See Interview with James C. Collard, *supra* note 106.

suffer from a variety of business development barriers.¹⁵⁵ Many reservations and tribal lands are located in rural areas of the United States, which lack trade routes, such as navigable rivers, interstates, airports, and rail lines that carry consumer goods.¹⁵⁶ In addition to location issues, many rural tribes also have poor infrastructure, especially regarding communication, which is a necessary component of a successful industrial park.¹⁵⁷ Rural tribes also often lack trained and skilled laborers, which many manufacturers require in order open a factory.¹⁵⁸ Attracting such workers is difficult, too, as rural tribes are generally far from cities and towns that provide the amenities that workers and professionals desire.¹⁵⁹ Banks are often reluctant to finance this type of project because of these geographical difficulties and the poverty that tends to accompany them.¹⁶⁰ Along with these other daunting challenges that a rural tribe would face trying to create a Foreign-Trade Zone with an industrial park complex is the challenge of managing and planning the whole project.¹⁶¹ Many rural tribes have never overseen a project like this and would likely be unable to provide the planning and management capability that is required without seeking help from an industry professional.¹⁶² Tribes that lack these requisite conditions should reconsider investing in such a project, as alternative means of creating economic growth may be more well-suited for their tribe.

However, many tribes either possess or are capable of creating the requisite elements that are needed in order to create a successful industrial park and Foreign-Trade Zone.¹⁶³ Not all tribes are geographically segregated from cities and transportation.¹⁶⁴ Tribes, however, before investing in planning and building an industrial park, should determine if they are geographically capable of receiving Foreign-Trade Zone status.¹⁶⁵

155. Mark Anthony Rolo, *New Economies for Native Nations*, PROGRESSIVE (July 25, 2016), <http://www.progressive.org/news/2016/07/188814/new-economies-native-nations>.

156. *Id.*; Interview with James C. Collard, *supra* note 106.

157. *See* Interview with James C. Collard, *supra* note 106.

158. *See id.*

159. *See id.*

160. *See* Rolo, *supra* note 155.

161. Interview with James C. Collard, *supra* note 106.

162. *Id.*

163. *Id.*; *see* Cataldi, *supra* note 14.

164. *See Indian Reservations in the Continental United States*, NAT'L PARK SERV., <https://web.archive.org/web/20170924091447/https://www.nps.gov/nagpra/documents/resap.htm> (last visited Dec. 24, 2016).

165. *See* 15 C.F.R. § 400.11(b) (2012).

Zones are limited to geographical areas of sixty miles from the boundary line of a U.S. port of entry.¹⁶⁶ Tribes who fall within this geographical boundary and are capable of creating an industrial park should strongly consider creating such an industrial park and pursuing Foreign-Trade Zone status.¹⁶⁷

B. Background Information for Establishing a Foreign-Trade Zone: The Foreign-Trade Zones Board and the Structure of How Foreign-Trade Zones Are Administered and Regulated

Prior to applying for Foreign-Trade Zone status, tribes must understand how Foreign-Trade Zones are administrated and regulated. Under the Foreign-Trade Zones Act of 1934, the authority to establish and designate a zone was solely granted to the Foreign-Trade Zones Board.¹⁶⁸ The Board is “located within the U.S. Department of Commerce . . . within the office of the Foreign-Trade Zones staff.”¹⁶⁹ The Board is comprised of two members, the Secretary of Commerce and the Secretary of the Treasury with the Secretary of Commerce chairing the board.¹⁷⁰ “The Commissioner of the U.S. [CBP] also plays a key role” on the Foreign-Trade Zones Board.¹⁷¹ The Commissioner of the CBP during the Foreign-Trade Zones Board voting process provides the board with information with “respect to customs security, control, and resource matters” of the proposed zone as well as providing the CBP’s position on whether the zone status should be granted.¹⁷² The role of Commissioner remained the same after the CBP was transferred from the Department of the Treasury to the Department of Homeland Security.¹⁷³ On most matters, the Board delegates action authority “to a Committee of Alternates, which is composed of the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury for Tax, Trade, and Tariff Policy.”¹⁷⁴ The Board’s main duty is to “approve any zone or [subzone/magnet site] which it deems necessary to serve adequately ‘the

166. *Id.*; 19 C.F.R. § 101.3(b) (2013).

167. See Interview with James C. Collard, *supra* note 106.

168. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

169. 15 C.F.R. § 400.6 (2012).

170. *Who Is on the Foreign-Trade Zones Board?*, INT’L TRADE ADMIN.: ENF’T & COMPLIANCE, <http://enforcement.trade.gov/ftzpage/info/board.html> (last visited Dec. 21, 2016).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

public interest.”¹⁷⁵ The Board also has a duty to regulate the administration of all U.S.-based Foreign-Trade Zones and the rates charged by the zone “grantees” to companies buying or leasing manufacturing or storage space within the zone.¹⁷⁶

U.S. Foreign-Trade Zones, as well as the Foreign-Trade Zones Board, are controlled and regulated by Code of Federal Regulation, specifically 15 C.F.R. § 400.¹⁷⁷ The Foreign-Trade Zones Board’s duties are set forth in 15 C.F.R. § 400.3(a) which grants the Board the specific Authority to:

- (1) Prescribe rules and regulations concerning zones;
- (2) Issue grants of authority for zones, and approve subzones and modifications to the original zone;
- (3) Authorize production activity in zones and subzones as described in this part;
- (4) Make determinations on matters requiring Board decisions under this part;
- (5) Decide appeals in regard to certain decisions of the Commerce Department's Assistant Secretary for Enforcement and Compliance or the Executive Secretary;
- (6) Inspect the premises, operations and accounts of zone grantees, operators and users (and persons undertaking zone-related functions on behalf of grantees, where applicable);
- (7) Require zone grantees and operators to report on zone operations;
- (8) Report annually to the Congress on zone operations;
- (9) Restrict or prohibit zone operations;
- (10) Terminate reviews of applications under certain circumstances pursuant to § 400.36(g);
- (11) Authorize under certain circumstances the entry of “zone-restricted merchandise” (19 CFR 146.44) into the customs territory pursuant to § 400.48;
- (12) Impose fines for violations of the Act and this part;

175. *About Foreign Trade Zones and Contact Info*, *supra* note 19.

176. *See id.*

177. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 16.

(13) Instruct CBP to suspend activated status pursuant to § 400.62(h);

(14) Revoke grants of authority for cause;

(15) Determine, as appropriate, whether zone activity is or would be in the public interest or detrimental to the public interest, health or safety; and

(16) Issue and discontinue waivers pursuant to § 400.43(f).¹⁷⁸

The Secretary of Commerce, the Secretary of the Treasury, and the Foreign-Trade Zones Board members rarely convene in person to conduct Board business.¹⁷⁹ Instead, they often appoint alternates to act on behalf of the Secretaries in their official capacity.¹⁸⁰ The Board is authorized to appoint these alternates by 15 C.F.R. § 400.3(c).¹⁸¹ The Board is administered by the Executive Secretary, appointed by the Chairman of the Foreign-Trade Zones Board, to serve as the “chief operating official of the Board.”¹⁸² The Executive Secretary’s main duties include acting as a representative of the Board, maintaining records and reports, and advising the Board on matters concerning Foreign-Trade Zones.¹⁸³

Working under the Foreign-Trade Zones Board is the CBP.¹⁸⁴ CBP is a division of the U.S. Department of Homeland Security, which authorizes all activity within the zones as well as all zone-to-zone transfers and exports.¹⁸⁵ Furthermore, the CBP “carries out most of the duties and responsibilities of the Secretary of the Treasury.”¹⁸⁶ These duties include “the preparation and implementation of the rules and regulations approved by the Secretary of the Treasury under 19 U.S.C. §81c, e, and o(b) of the [Foreign-Trade Zones

178. 15 C.F.R. § 400.3(a) (2013).

179. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 22.

180. *Id.* The U.S. Customs and Border Protection in the *Foreign-Trade Zones Manual* incorrectly states that the Secretaries of Commerce “are authorized to appoint alternates authorized to act in an official capacity for them (15 CFR 400.11(c)).” *Id.* The Code of Federal Regulations now reflects that 15 C.F.R. § 400.3(c) grants the Foreign-Trade Zones Board members this authority. 15 C.F.R. § 400.3(c) (2013) (“Alternates. Each member of the Board shall designate an alternate with authority to act in an official capacity for that member.”).

181. 15 C.F.R. § 400.3(c).

182. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 22.

183. 15 C.F.R. § 400.4 (2012); FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 5.

184. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 5.

185. *Id.*

186. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 22.

Act of 1934] and the assignment of the necessary CBP personnel to perform zone related work under 19 U.S.C. §81d.”¹⁸⁷ A Foreign-Trade Zone may not be used for any zone activity “until the site, or a section of it, has been separately approved for [Foreign-Trade Zone] activation by local CBP officials.”¹⁸⁸ CBP is also responsible for assigning officers to a “zone as necessary to maintain appropriate supervision of merchandise and records pertaining to the zone, and to protect the revenue.”¹⁸⁹ In order to successfully fulfill this duty, CBP officials are permitted to be within and inspect any area within a zone.¹⁹⁰ CBP officials are also allowed to retain any merchandise found within the zone for examination as determined by the port director for that particular zone.¹⁹¹ “At the request of a port director, or acting on their own discretion, CBP officials can supervise any activity or transaction within the zone. This may include a quantity count of goods in a zone, spot check of specific procedures, and inspection of storage facilities.”¹⁹² CBP, upon request, may also inquire “into the qualifications, character, and experience of an operator, as well as the security and suitability of their facilities to receive merchandise.”¹⁹³ In order for CBP to fulfill its role, all records that concern or relate to a Foreign-Trade Zone are available for its review. In this role, CBP “does not represent the Secretary of the Treasury in any matter pertaining to zones which is (1) of a policy making nature; or (2) within the authority of another agency of the Department of the Treasury, for which authority has not been delegated to CBP.”¹⁹⁴

The Foreign-Trade Zones Board neither owns nor operates any zones, but rather grants applicants the authority “to establish, operate, and maintain [these] zones.”¹⁹⁵ The responsibilities of Grantees require them to:

- (1) Provide and maintain facilities in connection with a zone according to the provisions of 19 U.S.C. §81(b);
- (2) Operate the zone as a public utility with fair and reasonable rates and charges for all zone services and privileges, and afford

187. *Id.*

188. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 13.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 22.

195. *Id.* at 23.

to all who apply for the use of the zone and its facilities and provide uniform treatment under like conditions, in accordance with 19 U.S.C. §81n and 15 CFR 400.42(b);

(3) Make annual reports (and at other such time as it may prescribe) to the FTZ Board containing such information as the FTZ Board may require (19 U.S.C. §81p (b) and 15 CFR 400.46(d));

(4) Maintain books, records, and accounts in accordance with the provisions of 15 CFR 400.46(a), (b);

(5) Apply to the FTZ Board for a grant of authority to establish a subzone or to expand or otherwise modify its zone project (15 CFR 400.22(d), 400.26(a)(1));

(6) Permit the erection of buildings necessary to carry out approved zone projects in accordance with 19 U.S.C. §81m and 15 CFR 400.28(a)(6);

(7) Operate, maintain, and administer the zone project under the FTZ Act, and laws and regulations administered by CBP for other agencies or administered directly by other agencies, and the schedules of rates and charges made and fixed by the Grantee, in accordance with 15 CFR 400.41 and 15 CFR 400.42(b)(1);

(8) Make written application to the Port Director for approval of a new Operator, pursuant to 19 CFR 146.7(e), (f);

(9) If acting as the Operator makes application or must provide concurrence to a request for activation, de-activation or reactivation.¹⁹⁶

Typically, Grantees of a Foreign-Trade Zone are a “public government entity, or a private not-for-profit entity organized for the purpose of establishing a zone project and chartered under State law and must be authorized by enabling legislation.”¹⁹⁷

Operators of Foreign-Trade Zones are next on the rung of the zone operating ladder.¹⁹⁸ A zone Operator is a “person that operates within a zone or subzone under the terms of an agreement with the zone grantee (or

196. *Id.* at 24.

197. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 5.

198. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 24.

third party on behalf of the [G]rantee), with the concurrence of CBP.”¹⁹⁹ The Operator, in many cases, “may be the Grantee, a user firm, or a third-party private corporation that is in the warehousing [or] consulting business.”²⁰⁰ In order for an Operator to activate the Foreign-Trade Zone status, the Operator must execute an Operator’s bond on a CBPF 301 form, which contains the requisite bond conditions as by 19 C.F.R. §113.73.²⁰¹ This “bond insures the principal’s agreement to comply with the pertinent laws and CBP regulations and delineates the particular responsibilities of the Operator.”²⁰²

Finally, there is the User. The User is a corporation, firm, partnership or a person that uses a Foreign-Trade Zone or space within it under an agreement with the zone Grantee or Operator.²⁰³ The User uses space within the zone “for storage, handling, processing of merchandise.”²⁰⁴ Users, while taking advantage of the zones financial benefits, “are responsible for understanding and following local, state, and Federal regulations regarding their intended activities, entering into a signed agreement with the Operator, and maintaining proper documentation and inventory.”²⁰⁵

C. Applying for Foreign-Trade Zone Status and Determining What Type of Foreign-Trade Zone to Place upon Tribal Land

Tribes wishing to establish a Foreign-Trade Zone on their tribal lands can apply for zone status in two ways.²⁰⁶ One way is applying as a Grantee, who creates and establishes a zone from scratch; the other way is as an Operator, which uses the zone status of an already established Foreign-Trade Zone.²⁰⁷ Both methods, if completed correctly, would allow tribes to take advantage of the Foreign-Trade Zone program for use on their lands.²⁰⁸ However, the two methods are not equal, and each have their advantages

199. 15 C.F.R. § 400.2(w) (2012).

200. *See, e.g.*, 19 C.F.R. § 146.1(b) (2016); FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 5.

201. 19 C.F.R. § 146.6(b) (2016).

202. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 24.

203. 15 C.F.R. § 400.2(a) (2012); 19 C.F.R. § 146.1(b).

204. 19 C.F.R. § 146.1(b).

205. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 5.

206. Brown, *supra* note 74.

207. *See Apply to Become an Foreign Trade Zone Subzone or Magnet Site*, PORT MIAMI, <http://www.miamidade.gov/portmiami/foreign-trade-zone-how-to-apply.asp> (last visited Dec. 27, 2016).

208. Brown, *supra* note 74.

and disadvantages.²⁰⁹ Tribes, depending on their location, may be better off using one method over the other.²¹⁰

The first way tribes can apply for Foreign-Trade Zone status is by applying to create a new zone as a Grantee.²¹¹ This is a “two-stage process.”²¹² “The first stage is gaining approval of the [Foreign-Trade Zone] Board for a grant to establish, operate, and maintain the zone.”²¹³ The second stage is seeking CBP activation “to allow merchandise to be admitted to the zone in zone status.”²¹⁴ Grantees, only after the “approval of activation will . . . gain the benefits conferred under the [Foreign-Trade Zone] Act.”²¹⁵ In order to gain the approval of the Board for establishing a zone as a Grantee, a tremendous amount of work is required on the part of the applicant. Before beginning the application process, tribes wishing to apply as a Grantee should make sure that they are geographically capable of applying. All Foreign-Trade Zones must be “located in or adjacent to a port of entry,”²¹⁶ which can be determined by referencing 19 C.F.R. §101.3(b).²¹⁷ The Board considers a zone to be “adjacent” to a port of entry if it is “located within 60 statute miles or 90 minutes’ driving time (as determined or concurred upon by CBP) from the outer limits of a port of entry boundary as defined in 19 CFR 101.3.”²¹⁸ If a tribe is located within the sixty miles or ninety minutes range of the port of entry, or is capable of acquiring tribal land within that range, it can proceed to the application section of the process.²¹⁹

The actual application for zone approval consists of an “application letter and detailed contents” which allows the Board to evaluate and determine if the economic, financial, and physical requirements that are needed for zone approval and activation are present in the applicants proposed site.²²⁰ The exact requirements and documentation that are needed for submission to the

209. Interview with James C. Collard, *supra* note 106.

210. *See* 19 C.F.R. § 101.1 (2017).

211. *See Apply to Become an Foreign Trade Zone Subzone or Magnet Site*, *supra* note 207.

212. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*; *see also* 19 U.S.C.A. § 81b(a) (West, Westlaw through Pub. L. No. 114-254).

217. 19 C.F.R. § 101.3(b) (2013).

218. 15 C.F.R. § 400.11(b)(2)(i) (2012).

219. *See* FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39.

220. 15 C.F.R. § 400.21(a) (2012).

Board are set forth in 15 C.F.R. § 400.21.²²¹ The requirements and documentation needed by the Board for zone approval also change from year-to-year. Because of this frequent change of required documents, applicants are “advised to consult with the Board early in the planning stage to determine the specific filing and exhibit requirements” needed for their zone.²²² Currently the application letter requires the applicant to describe:

- (1) The relationship of the proposal to the state enabling legislation and the grantee's charter;
- (2) The specific authority requested from the Board;
- (3) The proposed zone site(s) and facility(ies) and any larger project of which the zone is a part;
- (4) The project background;
- (5) The relationship of the project to the community's and state's international trade-related goals and objectives;
- (6) Any production authority requested; and
- (7) Any additional pertinent information needed for a complete summary description of the proposal.²²³

To fully describe these seven required parts of the application letter, the Board requires the Grantee applicant to provide the following “detailed content”:

- (1) Legal authority for the application shall be documented with:
 - (i) A current copy of the state enabling legislation described in §§ 400.12(b) and (c);
 - (ii) A copy of the relevant sections of the applicant's charter or organization papers; and
 - (iii) A certified copy of a resolution of the applicant's governing body specific to the application authorizing the official signing the application letter. The resolution must be

221. *Id.* § 400.21.

222. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39; *see* Interview with James C. Collard, *supra* note 106.

223. 15 C.F.R. § 400.21(c) (2012).

dated no more than six months prior to the submission of the application.

(2) Site descriptions (including a table with site designations when more than one site is involved) shall be documented with:

(i) A detailed description of the zone site, including size, location, and address (and legal description or its equivalent in instances where the Executive Secretary determines it is needed to supplement the maps in the application), as well as dimensions and types of existing and proposed structures, master planning, and timelines for construction of roads, utilities and planned buildings;

(ii) Where applicable, a summary description of the larger project of which the site is a part, including type, size, location and address;

(iii) A statement as to whether the site is within or adjacent to a CBP port of entry (including distance from the limits of the port of entry and, if the distance exceeds 60 miles, driving time from the limits of the port of entry);

(iv) A description of existing or proposed site qualifications, including appropriate land-use zoning (with environmentally sensitive areas avoided) and physical security;

(v) A description of current and planned activities associated with the site;

(vi) A summary description of transportation systems, facilities, and services, including connections from local and regional transportation hubs to the zone;

(vii) A statement regarding the environmental aspects of the proposal;

(viii) The estimated time schedules for construction and activation; and

(ix) A statement as to the possibilities and plans for future expansion of the site.

(3) Operation and financing shall be documented with:

(i) A statement as to site ownership (if not owned by the applicant or proposed operator, evidence as to their legal right to use the site);

(ii) A discussion of plans for operations at the site;

(iii) A commitment to satisfy the requirements for CBP automated systems; and

(iv) A summary of the plans for financing the project.

(4) Economic justification shall be documented with:

(i) A statement of the community's overall economic and trade-related goals and strategies in relation to those of the region and state, including a reference to the plan or plans on which the goals are based and how they relate to the zone project;

(ii) An economic profile of the community including discussion of:

(A) Dominant sectors in terms of employment or income;

(B) Area strengths and weaknesses;

(C) Unemployment rates; and

(D) Area foreign trade statistics;

(iii) A statement as to the role and objective of the zone project and a discussion of the anticipated economic impact, direct and indirect, of the zone project, including references to public costs and benefits, employment, and U.S. international trade;

(iv) A separate justification for each proposed site, including a specific explanation addressing the degree to which the site may duplicate types of facilities at other proposed or existing sites in the zone;

(v) A statement as to the need for zone services in the community, with specific expressions of interest from proposed zone users and letters of intent from those firms that are considered prime prospects for each specific proposed site; and

(vi) For any production activity to be conducted at a proposed site, the separate requirements of § 400.14(a) must also be met.

(5) Maps and site plans shall include the following documents:

(i) State and county maps showing the general location of the proposed site(s) in terms of the area's transportation network;

(ii) For any proposed site, a legible, detailed site plan of the zone area showing zone boundaries in red, with street name(s), and showing existing and proposed structures; and

(iii) For proposals involving a change in existing zones, one or more maps showing the relationship between existing zone sites and the proposed changes.²²⁴

An applicant, after submitting their application letter, must submit a \$3,200 application fee if the applicant is applying to create an additional zone project adjacent to a port of entry.²²⁵ If the application is for the first and only zone project at a port of entry, there is no required fee.²²⁶

In addition to the application fee, the application letter itself requires a large investment on the part of the applicant.²²⁷ The application is very expensive to complete because it requires the applicant to invest large sums of money and time into researching, documenting, and compiling all the information that is required for the letter by the Board.²²⁸ On top of the cost to prepare the letter, the applicant also must wait for the Board to review the application letter and approve or deny their application.²²⁹ It usually takes the Board over a year to approve or deny an applicant's request to create and activate a Foreign-Trade Zone project.²³⁰ The Grantee must then separately have its site approved by the CBP to completely activate their zone status.²³¹ In light of the complexity of the process, as well as the time and expense required to create a Foreign-Trade Zone as a Grantee, this

224. *Id.* § 400.21(d).

225. 15 C.F.R. § 400.29(b)(1) (2012).

226. *The Application Process*, FOREIGN-TRADE ZONE RES. CTR., http://www.foreign-trade-zone.com/pg_appprocess.htm (last visited Dec. 25, 2016).

227. Interview with James C. Collard, *supra* note 106.

228. *Id.*; Brown, *supra* note 74.

229. *The Application Process*, *supra* note 226.

230. *Id.*

231. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39.

route is not right for every tribe seeking zone status.²³² Tribes wishing to proceed on this route should only do so after determining that they are capable of undertaking such a large, expensive, time-consuming, and tedious project.²³³

Alternatively, tribes can apply for Foreign-Trade Zone status as an Operator instead of applying as a Grantee. Applying for zone status as an Operator is an easier and often cheaper method for tribes.²³⁴ By applying for zone status as an Operator, tribes use and simply expand on already existing zones without having the cost and hassle of creating a zone from scratch.²³⁵ Applying for zone status as an Operator rather than a Grantee would also benefit tribes in ways other than the ease, expense, and time it takes to apply as an Operator.²³⁶ A Grantee has more duties and responsibilities that they are required to undertake by the Foreign-Trade Zones Board and the CBP.²³⁷ These extra responsibilities will cost tribes time and money in order to properly execute and maintain compliance with these expectations.²³⁸

Tribes wishing to apply for zone designation status as an Operator are able to do this under the Foreign-Trade Zone Alternative Site Framework (ASF) model which was recently created by the Foreign-Trade Zones Board.²³⁹ The ASF is an “optional approach to designation and management of zone sites allowing greater flexibility and responsiveness to serve single-operator/user locations.”²⁴⁰ Since 2008, companies and government entities have been able to apply under the ASF to create magnet zone sites,²⁴¹ which are sites that are “intended to serve or attract multiple operators or users under the ASF.”²⁴² Magnet sites are typically “larger propert[ies], often consisting of multiple warehouses (i.e. industrial park), used on an as-needed basis where users act as renters and do not need to apply for zone status.”²⁴³

232. See Interview with James C. Collard, *supra* note 106.

233. See *id.*

234. Brown, *supra* note 74.

235. *Id.*

236. See *id.*

237. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 22, 24.

238. *Id.*

239. Brown, *supra* note 74.

240. 15 C.F.R. § 400.2(c) (2012).

241. *Id.*

242. *Id.* § 400.2(j).

243. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 7.

Receiving zone designation and status as a magnet site through the ASF is easier, quicker, and cheaper for tribes than applying to create a traditional zone from scratch as a Grantee.²⁴⁴ This is because a magnet site under the ASF is not a new zone, but rather a modification of a preexisting zone's boundary to include the new location as part of the preexisting zone's service area.²⁴⁵ This means that Operators do not have to apply through a lengthy and expensive application for zone status from the Foreign-Trade Zones Board as a Grantee would be required to do.²⁴⁶

Tribes wishing to establish zone status for an industrial park need only apply as a magnet site under the ASF with the port where the zone Grantee is based, activate CBP services, and seek approval of the zone Grantee.²⁴⁷ Tribes wishing to do this should first make sure that the site that they wish to designate as a magnet site is adjacent to a port of entry.²⁴⁸ This means that the site must be located "within 60 statute miles or 90 minutes' driving time . . . from the outer limits of a port of entry boundary" where the Grantee's zone is based.²⁴⁹ With this requirement satisfied, a tribe can then complete an application to seek zone magnet site designation from the port where the zone Grantee is located and pay the requisite application fee as charged by the port.²⁵⁰ This application typically inquires into the logistics, goals, and finances of the applicant.²⁵¹ The application is followed by a background check and a premise inspection by the port to ensure Foreign-Trade Zone compliance.²⁵² If this application and inspection is successful, the port will apply to the Board for approval of the magnet site. This process generally takes thirty days.²⁵³ If the Board approves the magnet site plan, the port will then provide the Grantee with the Board's approval along with an Operator's agreement for the tribe to sign.²⁵⁴ After this, CBP begins

244. See Brown, *supra* note 74.

245. Cornelia Steinert, *An Overview of Foreign-Trade Zones*, POINTTRADE SERVS., INC., <http://www.tjco.org/Data/Sites/1/media/regional-planning/ftz/overview-of-ftzs.pdf> (last visited Dec. 27, 2016).

246. See Brown, *supra* note 74.

247. FOREIGN TRADE ZONE 281 GUIDEBOOK, *supra* note 41, at 8.

248. FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39; 19 U.S.C.A. § 81b(a) (West, Westlaw through Pub. L. No. 114-254).

249. 15 C.F.R. § 400.11(b)(2)(i) (2012).

250. *FTZ 281: How to Apply*, PORTMIAMI, <http://www.miamidade.gov/portmiami/library/instructions/complete-application-instructions-ftz-281.pdf> (last visited Jan. 2, 2017).

251. See *id.*; Interview with James C. Collard, *supra* note 106.

252. *FTZ 281: How to Apply*, *supra* note 250.

253. Brown, *supra* note 74.

254. *FTZ 281: How to Apply*, *supra* note 250.

its activation process by inspecting the premises, conducting an U.S. Immigration and Customs Enforcement (ICE) background check, and planning for security.²⁵⁵ After the CBP has completed its preliminary work, it will contact the Grantee to advise the Grantee on the activation of the site.²⁵⁶ Once this is completed, the Grantee will contact the tribe and collect payment of an annual fee, at which point the Operator agreement with the tribe becomes binding and the Foreign-Trade Zone magnet site status is activated.²⁵⁷

Tribes seeking zone status may do so under either the traditional method or the new ASF magnet site method to gain zone status and benefits from their industrial park.²⁵⁸ The decision on which method to use to apply for zone status depends mainly on the location of the tribe, and whether there is already an active zone within sixty miles of the proposed site.²⁵⁹ Without an already active Foreign-Trade Zone nearby, a tribe would need to apply as a Grantee to create and activate a zone for that port of entry.²⁶⁰ However, if there is already an active zone, a tribe would likely be best served by applying as an Operator under the ASF to create a magnet site.²⁶¹ Typically applying to create a magnet site under the ASF has less red tape through which a tribe must navigate, which makes magnet sites considerably cheaper and faster for a tribe to activate compared to the typical zone activation for a Grantee.²⁶² After activation of zone status the tribe, as an Operator, can begin finding and attracting businesses to operate within this zone.²⁶³

V. Conclusion

Establishing Foreign-Trade Zones on tribal lands could be one viable solution to ending the debilitating poverty that exists on many tribal lands and reservations. Establishing Foreign-Trade Zones is not an outright solution, but is a promising avenue that some Native American tribes may pursue to curtail the issue within their communities. Foreign-Trade Zones are not a new economic concept. Recent changes in the Foreign-Trade

255. *Id.*

256. *Id.*

257. *Id.*

258. Interview with James C. Collard, *supra* note 106.

259. See FOREIGN-TRADE ZONES MANUAL, *supra* note 66, at 39.

260. *See id.*

261. *See* Brown, *supra* note 74.

262. *See id.*

263. *See* Interview with James C. Collard, *supra* note 106.

Zones program now offer users with more benefits which ultimately can be used to create more U.S.-based jobs. These changes allow manufacturing and import/export companies to locate their operations within these zones to take advantage of duty elimination and other advantages from which other companies operating in foreign countries already benefit. This allows companies to operate within the United States and employ American workers while remaining competitive with foreign-based corporations. Native American tribes, taking advantage of the Foreign-Trade Zone program could establish zones and build industrial parks within those zones to attract business to their tribal lands. This would bring both jobs and income to tribal communities.

An undertaking of this kind is not right for every tribe. Many tribes lack the requisite infrastructure, capital, and are geographically too far away from cities and U.S. ports of entry. However, some tribes are capable of undertaking such a project and, with the proper research and planning, could create successful industrial parks for zones within their tribal territories. With successfully planned and executed industrial parks, tribes can then focus on gaining and establishing Foreign-Trade Zones to encompass parks, which will incentivize businesses to relocate to these tribes' land. Before applying to establish and activate zones on tribal lands, tribes must first research and fully understand the Foreign-Trade Zone structure and regulations. Using this knowledge, tribes can begin the application process to create zones in one of two ways. The first option is to apply in the traditional way, as a Grantee, and create a zone from scratch. This method involves quite a bit of time, money, and research. However, if a zone is already active near a tribe's proposed industrial park, a tribe would then be better served by applying for zone status as an Operator under the relatively new ASF to create a magnet site. A magnet site allows a tribe to take advantage of the zone status without having to invest as much time, money, research, and responsibility as it would as a Grantee. After activation of a zone, the tribe, as Operator, can begin attracting businesses to operate within this zone and bring much needed jobs and income to its community.