THE STATE OF THE NATIVE NATIONS

CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION

BY THE

THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT

DRAFT MANUSCRIPT JANUARY 2007

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THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT

Founded by Professors Stephen Cornell and Joseph P. Kalt in 1987, the Harvard Project on American Indian Economic Development is housed within the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, Harvard University. The Project is also formally affiliated with the Harvard University Native American Program, an interfaculty initiative at Harvard University. The Harvard Project is now directed by Profs. Cornell and Kalt and Dr. Manley A. Begay, Jr. and collaborates in its research, executive education, and advisory activities with the Native Nations Institute for Leadership, Management, and Policy at the Udall Center for Studies in Public Policy at The University of Arizona. The Native Nations Institute is directed by Dr. Begay.

At the heart of the Harvard Project is the systematic, comparative study of social, economic and political conditions on American Indian reservations. Over the last two decades, the Harvard Project has undertaken hundreds of research studies and advisory projects across hundreds of U.S. reservations. Faculty, research affiliates, and student researchers investigate development and other policy-related issues of concern to tribal nations and policymakers. The Harvard Project's endeavors are undertaken at the request of, and with the consent of, tribal governments, other governments, and organizations working with Native communities. The Harvard Project also administers *Honoring Contributions in the Governance of American Indian Nations*, a national awards program that identifies, documents, and shares outstanding examples of tribal government problem-solving. Core administrative support for the Harvard Project on American Indian Economic Development is graciously funded by the Christian A. Johnson Endeavor Foundation. Further information on the Harvard Project, its publications, and its programs can be found at www.ksg.harvard.edu/hpaied.

The views expressed in this book are those of the authors and do not necessarily reflect those of the Malcolm Weiner Center for Social Policy, the John F. Kennedy School of Government, Harvard University, First Nations Development Institute, the Ford Foundation, or any other participating organizations or individuals. Any errors of omission or commission are solely the responsibility of the authors.

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The research for this project was overseen by a "Sounding Board" of the following individuals who graciously gave their time, energy and insight to guidance of the work. We are grateful for their assistance and willingness to share their extensive knowledge. Several Sounding Board members were also actively engaged in the drafting of various chapters in this book.

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PREFACE AND ACKNOWLEDGEMENTS

The intent of this volume is to survey the state of Native American nations and communities at this early stage of the 21st century. Particularly for the vast proportion of federal, state and local policymakers, the media, scholars, business and nonprofit sector leaders, and the broader public, acquiring accurate understandings and conceptions of the conditions, challenges and trends that constitute the state of Native affairs is a daunting task. It is made so by a complicated jumble of reality, preconceptions, folklore, information, misinformation, iconography, pseudo-iconography, and benevolent and malevolent stereotyping.

Perhaps as much or more than any other group in the United States, Native America is seen by the non-Native world through the lens of *history*. Even if that history is accurately understood, the tendency to see Indian America in the past tense runs the risk of missing the contemporary lives and affairs of the 560+ self-governing Indian nations in the United States, those communities' millions of citizens, and the millions of others who carry forward Native heritage. In so doing, the contemporary humanity of Native America can get disturbingly obscured and trampled.

If there is a "message" to this book it is that Native nations, communities, and peoples are living real lives on the contemporary stage of our increasingly globalized world. History has set that stage, but it is not the play. Rather, like so many other nations and communities, the diverse cultures, communities, and people that comprise Native America today confront the day-to-day challenges of everything from raising children with strong identities, to practicing their respective religions, to providing economic sustenance, to strengthening culture, to managing business and governmental affairs, to protecting public health and safety. This book chronicles the nature of those challenges and Native responses to them.

The initial research for this book was undertaken as part of a broad, multi-year Ford Foundation sponsored project, *The State of Native America* (SONA). SONA was designed to help inform the Foundation's activities in the arena of Native American affairs. The Foundation's Committee on Indigenous Peoples asked the Harvard Project on American Indians, along with its institutional partners First Nations Development Institute and the Native Nations Institute, to assess the current state of Native America and to identify the most pressing short and long-term needs, challenges, and trends both on and off reservations. At the Ford Foundation, Betsy Campbell, Jeff Campbell, Mike Conroy, Larry Cox, Michael Lipsky, Sara Rios, Elizabeth Theobald-Richards, and Ken Wilson provided continuing support and encouragement for our work. The Harvard Project on American Indian Economic Development gratefully acknowledges the Ford Foundation and its Committee on Indigenous Peoples for its financial support of both SONA and this book.

The input of First Nations Development Institute (FNDI) personnel has added invaluable depth to this project. FNDI has supported meaningful economic development in Indian Country in significant and creative ways for over 25 years. Through a three-pronged strategy of education, advocacy and capitalization, FNDI is working to restore Native control and culturally-compatible stewardship of existing Indigenous assets and to establish new assets to ensure long-term vitality. Additionally, FNDI conducts research related to asset-building in Indian Country and is among the largest sources of philanthropic funding to Native American communities. Sherry Salway Black, then

of FNDI, served tirelessly and with wisdom as an overall advisor on the SONA project. Kristyna Bishop and Juliet King of FNDI provided invaluable assistance in the early stages of this project and contributed the initial draft of the section on international relations for the SONA report. Their valuable contributions have now found their way into the corresponding chapter of this volume.

A project of this scope would be impossible without outstanding support and contributions from many individuals. To them all, we are extremely grateful. Christine Allred interviewed each of the essayists in this book. She worked tirelessly to capture each essayist's concerns and expertly chronicle their insights. Ms. Allred also made thoughtful suggestions on the organization of the book and specific text. We are very thankful for her assistance. Dr. Harry Nelson, PhD, Research Associate, Forest Economics Policy Analysis Research Unit, University of British Columbia, provided initial drafts of the sections of the SONA report on the environment and natural resources. His contributions have now found their way into corresponding chapters of this book.

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A Note on Methodology and Terminology

By necessity and design, the coverage of *The State of the Native Nations* cannot be exhaustive. Instead, this book aims to give an informative overview of important themes that structure the political, economic, social, and cultural realities of contemporary Native America. Since the material covered touches on so many topics, it is impossible to fully render the complexities of each. It is our hope that the following chapters will serve as a useful introduction to current issues and concerns, and will serve as a beginning point for further discussion and research.

As the acknowledgments above make clear, this book is the result of a large-scale collaboration of scholars, researchers, and experts organized through the Harvard Project on American Indian Economic Development. We began with brainstorming sessions on the topics relating to American Indians and Alaska Natives that rise to public salience within tribes, in the media, and in policy arenas. An initial draft survey was produced under the direction of Eric Henson and Jonathan Taylor and gathered material from the Harvard Project's prior research and field experience, from numerous other academic researchers, from relevant government agencies, from Indian nations and organizations, from library sources, and from the Internet. This draft was then vetted with the Sounding Board, gathered in session for the purpose of discussing, commenting, criticizing, and improving the work. With the Sounding Board's comments and comments from others, a final draft of our report to the Ford Foundation was brought to the Sounding Board and to the Foundation's experienced staff. The resulting feedback was incorporated into the final SONA report to the Ford Foundation. That final report serves as the starting point of this book.

Myriad sources have yielded the data, statistics, and facts which fill this volume. We have endeavored to search exhaustively for such information, to cite sources used, to cite alternative sources where appropriate, and to note where data and other information is missing or infirm. We draw heavily on data available in the 2000 U.S. Census, as well as information produced by other

federal agencies, states, and tribes. But robust data on American Indians and Alaska Natives, both nationally and by reservation, are hard to come by. The shortage of information applies across a spectrum of issues ranging from economic development to crime rates. As just one example, little comprehensive data exist on economic activity in Indian Country between the decennial censuses, and existing census data are limited in that they tend to focus on individuals rather than economies. There is no "Survey of Current Business" or "Census of Manufactures" covering Indian Country the way there is for the rest of the economy and nation.

When the Bureau of Indian Affairs (BIA) was much more deeply entwined in tribal government, it was able to compel (on occasion) the production of even sensitive data. Now that the BIA has spent 25 years withdrawing and being pushed from that role, a vacuum remains. Some tribes are becoming quite sophisticated at monitoring their own societies.[1] In addition, a number of private sector firms are conducting excellent surveys for tribes and the federal government (for example, Tribal Data Resources and Tiller Research). Nonetheless, difficulties of intertribal coordination, sensitivity about sharing data with other sovereigns, methodological variation, and the like have meant that comprehensive data on Indian Country often are lacking in quantity and quality. Every effort has been made here to compile best available information.

We address our analysis to real-world cases of tribal success and failure, as well as first-person accounts and essays by Sounding Board members. We also spotlight specific initiatives and best practices that are drawn largely from a growing archive of award-winning tribal programs recognized through the *Honoring Contributions in the Governance of American Indian Nations* program. This program is administered by the Harvard Project with Ford Foundation funding.

Through the various programs of the Harvard Project on American Indian Economic Development and our partner, the Native Nations Institute, the authors of this volume have spent many, many days working in Indian Country. From executive education programs for tribal leaders, to academic research, to *pro bono* advising, to field project studies, we have found that "on the ground" presence dramatically increases our knowledge and enhances our perspectives. The results are reflected throughout this study. The lack of footnoting that occurs at various points of summation and overview is the product of the build up of field knowledge that is not realistically attributable to any single source or set of sources.

Finally, a word about terminology. The reader will have noticed already the use of terms such as "Native", "indigenous", "Indian", and "Native America". Our usage of such terms reflects the usage encountered "on the ground" as one works in "Indian Country" (itself, a term of art). At least across Native America, the danger in the use of the referenced terminology is not a risk of political incorrectness. The strength of Native self-confidence and identity prevents that. Rather, the danger in encompassing terms such as "Native American" or "American Indian" is that they can obscure the tremendous variety of distinctive cultures and polities that make up Indian America. Indeed, on the ground, Native self-conceptions and self-reference are often dominated by less encompassing identification as citizens of specific nations, such as "Nez Perce", or "Pomo", or "Ahtna Athabascan", or "Las Vegas Paiute," or "citizen of the Confederated Salish and Kootenai Tribes of the Flathead Reservation." In New Mexico, Indian nations of Puebloan cultures are commonly referred to as "Pueblos" as opposed to "Nation" or Reservation" or "Tribe."

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[1] See, for example, Jimmie C. Fortune, *Demographic Survey 1997* (Philadelphia, MS: Mississippi Band of Choctaw Indians, 1997).

The term “Indian Country” is used throughout this book to refer to Native communities and areas, rather than strictly denoting those areas legally defined as Indian Country by the federal government (i.e., the federally-recognized tribes and tribal areas). “Native America” and “Indian America” are used interchangeably throughout this book, as are the terms “Indian,” “Native American,” and “American Indian” (which are intended to include Alaska Natives, unless otherwise noted).

INTRODUCTION

It is impossible to weave a concise and meaningful summary of the state of the Native Nations of the United States in the new millennium without losing some sense of the cultural and contextual diversity that characterizes Indian Country.[2] The experiences, problems, successes, and concerns of tribes, communities and individuals are as varied as American Indian and Alaska Native people themselves. They are as different as the life and experiences of the subsistence fisherman living in the Native Village of Quinhagak, Alaska is from the life and experiences of the Wall Street-savvy Mohegan Tribal Council member, as the Navajo veteran of World War II is from the Akimel O'Odham teenager skateboarding on the Gila River reservation, and as the parliamentary Flathead democracy is from the traditional Cochiti theocracy.

Indeed, looking across the more than 560 tribes that comprise Indian Country, the picture is one of diversity – of societies and cultures, of governments and leadership, of organizations and activities, of socioeconomic status and prospects, and of trends and concerns. Nonetheless, there are identifiable common threads that tie America's 4.1 million Native Americans together.[3] The task of this book is to highlight patterns and identify themes that are relevant to the state of contemporary Native America.

American Indians today face old problems armed with newfound strengths, and new obstacles braced by deep traditions. The examples of two major issues faced by youth on reservations illustrate this convergence of past and present: education and crime. The need for adequate education continues to challenge tribes, but a recent economic resurgence in Indian Country has given many tribes the wherewithal to, at least, begin to make up for chronic federal shortfalls in curriculum development and school construction funds.

Likewise, while a rapidly growing youth population strains standard non-Indian approaches to gang violence, teen drug use, and youth crime, tribes are tapping deep cultural connections to find solutions. Whether it is the union of Ho-Chunk elders and youth in mentoring programs, the restorative systems of justice for Navajo juveniles, or the training of Ojibwe teens to make music videos in their Native tongue, tribes are finding that traditional intergenerational bonds form a strong foundation for addressing today's issues. Those bonds of family, community, shared history, and shared struggles stretch back through centuries. They undergird what it is to be "Native" in America today. They are the foundation on which Native peoples now strive to define their own futures for themselves.

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[2] See discussion in the Preface and Acknowledgments of use of terminology such as "Native", "Indian", and "Indian Country".

[3] A total of 4.1 million people self-identified in the 2000 Census as American Indian/Alaska Native, either alone or in combination with another race. Of these, 2.5 million identified themselves as American Indian/Alaska Native alone. Stella U. Ogunwole, *The American Indian and Alaska Native Population: 2000*, Census 2000 Brief (Washington, D.C.: U.S. Census Bureau, February 2002).

The Long Road to Self-Determination

A moment's reflection must force acknowledgment of the phenomenal resilience of the Native people of North America. From the moment of European contact, their identity and survival have been under siege. Storms of oppression, racism, disease, and attempted extermination have blown over American Indians as fiercely as over any people in history. Yet, with tenacity in the face of odds stacked so heavily against survival for the last 500 years, America's Native peoples enter the twenty-first century self-defined by their tribal identifications *today*, as Muckleshoot or Hopi or Omaha or Swinomish or Seneca or Lakota or Seminole or Wampanoag or Penobscot or Delaware or Chickasaw or Hualapai, and on and on through each culturally and politically distinct community. To be sure, strains on personal, family, and community identity in often challenging living conditions continue to threaten Native America. But the Indian voice is rising, the population is growing rapidly, economic progress is being made, and the winds of extermination and de-recognition are being weathered.

Now is not a time of hunkering down in Indian Country. As this book documents, notwithstanding the change and diversity that characterize Indian Country, there is one common and unifying theme. The first part of the new millennium is marked by an ever-growing scope and breadth of proactive endeavors by Native Americans, individually and collectively, to establish their own fabrics of life by their own designs. From the arts and religion to politics and economics, from culture and language to education and the environment, the cross-cutting, defining characteristic of Indian America at the beginning of the new millennium is the drive to set the terms, call the shots, make the decisions and run Native affairs in accord with contemporary indigenous conceptions of the right, the proper and the possible. It is a drive for *self*-determination.

Many non-Indian Americans acquire some vague awareness of Indian issues, such as when conflict arises over the proposed location of a new tribal casino or when an insulting school mascot runs across the television screen. And there is general, if distorted, recognition in the broader public of the outlines of the history of initial Indian contact with Europeans, followed by conflicts with the governments of the European colonies, decimation by disease and military engagement, the loss of land and the pushing of Indians onto reservations by the United States Government, and contemporary struggles with poverty and attendant social problems.

The general public's views of the past are now sometimes accompanied by questions about whether all Indians are getting rich on gambling or whether it is "really Indian" to run businesses and governments. But not only does such a simplified history fail to do justice to the experience of being Native in contemporary America;[4] it also misses the drive for self-determination that is at the core of Indian America today. Building a casino is not so much about money from gaming as it is about Native nations striving for economic self-sufficiency and deciding for themselves what kind of economic activity they will pursue. Asserting tribal control over endangered species management on the reservation is not so much about wildlife program administration as it is about safeguarding a tribe's own approach to and authority in protecting the environment on *their* lands. Launching an all-Indian rock band can be as much about saying for oneself what it means to be Indian as it is about making music. Taking over management of the reservation's schools is about gaining local control to address local Navajo or Chippewa or Chickaloon needs. Fighting to protect and recover the artifacts and remains of tribal ancestors is a fight to tell a people's own story in that people's own way.

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[4] See, for example, Dee Brown, *Bury My Heart at Wounded Knee* (New York: Pocket Books, 1981); Fergus Bordewich, *Killing the White Man's Indian* (New York: Doubleday, 1996).

Historically, relations between tribes and outsiders have often been characterized by outright hostility to the very idea of the existence of Indian nations and peoples. The United States federal government has adopted various approaches to dealing with Native America over the past two centuries, most of which had irreversibly deleterious effects on tribes. Early treaties between Indian tribes and the newly established U.S. government recognized a nation-to-nation, government-to-government relationship. Treaties were agreements among sovereign polities. However, conflicts erupted in the 18th and 19th century as settlers moved into new areas and as promising natural resource riches were sought. The Indian Removal Act resulted in huge forced migrations in the 1830s, displacing many tribes and tens of thousands of individuals from the eastern United States. Through numerous destructive and bloody "Indian Wars", as well as countless large and small acts of subterfuge and subjugation, the United States brought lands and resources under its control, leaving depopulation and social and economic deprivation in its wake. In many cases, tribes were fractured and reconstituted, forced onto reservations with little regard for tribal identity or respect for traditional homelands. Economic, social and political systems that had served tribes for so long were lost as individuals, families and communities struggled to adapt to unfamiliar climates, surroundings, neighbors, political regimes and economic conditions.

By the end of the 19th century, the United States effectively exercised an invader's control over the Indian nations, lands, resources, and affairs within its boundaries. Official policy let the federal government hold and manage tribal resources "in trust" for the tribes. With control out of the hands of tribes, U.S. policy turned toward dispersing the remaining tribal populations and lands. In 1887, the Congress passed the *Dawes* (or "Allotment") *Act*. This law of the land undertook the assignment of tribal lands to individual American Indians, with lands determined by the government to be "surplus" to the needs of such individuals then able to fall into non-Indian hands. The preamble of the Act provided that: "the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservations in severalty to any Indian located thereon." [5] Although the stated motivation was to "civilize" Indians by turning them into landowners and farmers, in practice allotment made additional land available to settlers. The allotment process was subject to widespread abuse and led to the massive loss of the Native American land base.

The federal Meriam Report, published in 1928, blamed allotment for the impoverishment of Indian peoples and documented the deplorable living conditions on reservations. Entitled "The Problem of Indian Administration", the Report called for extensive changes in federal Indian policy. Although burdened by the paternalistic misperceptions of its time, the Meriam Report urged "more understanding of and sympathy for the Indian point of view" and acknowledged that "Indians have much to contribute to the dominant civilization."[6]

In response, Congress passed the *Indian Reorganization Act* (IRA) of 1934, which ended allotment.[7] Federal policy now shifted toward creating and recognizing tribal governments so as to facilitate the interface between the federal government as trustee and the tribes. Although the IRA sought to spur tribal economic development and a modicum of self-rule, most of the decision-making

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5 25 USC §331-354.

6 The Institute for Government Research, *The Problem of Indian Administration: Report made at the request of Honorable Hubert Work, Secretary of the Interior, and submitted to him, February 21, 1928*, (Baltimore: John Hopkins University Press, 1928).

7 25 USC §461-479. Also known as the *Wheeler-Howard Act*.

power on reservations was explicitly held by the Secretary of the Interior. Tribes were encouraged or even coerced into adopting a Western-style constitution detailed in the Act. Unfortunately, these IRA constitutions (and their look-alikes adopted on reservations not covered by the IRA) were ill-adapted to the traditions of many reservations, and reservation governments struggled with lack of tribal citizen understanding and support. From the IRA onward, most reservations came to have the feel of branch offices of the federal government, with decision making dominated by the Bureau of Indian Affairs and its managers and with tribal governments typically totally dependent on BIA programs and funds.

By the 1950s, Congress began adopting policies aimed at terminating tribes as distinct political entities.[8] Eventually, under the federal policy of "termination", over 100 tribes and bands were de-recognized and terminated as polities. Without federal recognition, tribal governments lost jurisdiction and became ineligible for federal trusteeship and funding. Thousands of individual American Indians lost their federal designation and no longer qualified for governmental assistance. At the same time, decades of economic and educational deprivation left individuals and tribes without the human capital and accumulated wealth by which they might fend for themselves economically. The result was that terminated tribes faced the real prospect of evaporation of communities and identities, and "termination" came to be viewed by Indians everywhere as code for tribal extermination. The socio-economic, cultural and political dislocations of the termination period set the stage for the dramatic transformations that followed.

The Civil Rights Movement of the 1960s and 1970s found fertile ground in Indian America, and Native activists learned a great deal from the Movement. But activism took on a distinct character as it swept through Indian Country. To be sure, as with other ethnic and racial minorities, the push for civil rights grew out of a long history of demeaning marginalization, racism, political disenfranchisement, brutality, decades of poverty, and social disarray. And the resurgence of Indian people in the context of the Civil Rights Movement tackled the important work of strengthening personal pride, challenging the dominant culture's institutions, stereotypes and practices, and asserting distinctly tribal identities and values. In addition to addressing these challenges, however, the Indian civil rights movement gradually took its own unique path – toward re-establishment of collective *political* rights of self-rule by tribes. The watchwords became "self-determination" and "tribal sovereignty."[9]

The drive for tribal sovereignty that took hold in the 1960s was led by Indian activists, attorneys, elected officials, and rank and file citizens -- with occasional Congressional and judicial support. The foundations from which the struggle for tribal sovereignty were built included the treaties struck between the United States and their own respective tribal nations, key passages of the U.S. constitution, and long-ignored legal underpinnings from high courts. Treaties providing for access to resources and recognizing the self-governing powers of tribes may have been seen by many in the mainstream society as quaint anachronisms, but when faced with formidable legal talent from the Indian side, U.S. courts have upheld them as valid government-to-government contracts and agreements. The U.S. Constitution's Commerce Clause (Article I, Section 8), widely seen as beneficially limiting states' jurisdiction over each other, proscribed states' jurisdiction over tribes and provided recognition of tribes as one of the sovereigns, along with the states, in the U.S. federalist

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8 83 H.C.R. 108, 83 H.R. 444.

9 See, for example, Vine DeLoria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman, OK: Univ. of Oklahoma Press, 1969); Stephen Cornell, *Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988).

system. From this and other principles laid at the founding of the U.S., dusty old U.S. Court decisions enunciated recognition of tribes as sovereigns, albeit if only as "domestic dependent nations."[10]

The drive for Indian self-determination reached a turning point in 1970 when Indian political activists staged a sit-in and takeover of the U.S. Department of Interior's Indian Affairs offices. Portraying oppressive federal policies and officials as legacies of European colonialism, these activists demanded recognition of tribal sovereignty and expansion of the scope of local self-government in Indian Country. These ideas gained support from mainstream liberals, who were warm to Indians' complaints of discrimination and oppression, and from conservatives, for whom the themes of an overbearing federal government and the propriety of local self-rule resonated well. The upshot was an Executive Order by President Richard M. Nixon calling for the end of policies of termination and greater scope for self-determination by tribes on reservations. Codified by Congress in the Indian Self-Determination and Educational Assistance Act (Public Law 93-638) of 1975, tribal self-determination has been the official policy of the United States ever since.[11] Although subject to constant attack, revision, and vacillation, the policy means that, as one noted Native scholar has put it, to understand Indian America today, one must grasp that "Indian Peoples are Nations, not minorities."[12]

Self-determination for Native Americans is not only the preeminent goal of Indian communities; it is a reality in the making for individuals. When the young university graduate makes the decision to go home and devote himself to the reservation schools and says "I'm Ojibwe from Fond du Lac", he expresses not only the roots of his experience and relations; he expresses the collective identity of a self-governing community that defines itself as the community that is fighting to build its own dental clinic, foster care program, and elder housing. When the young Crow woman leaves her home on the reservation and moves to Billings, Montana because that's the only place there are jobs to be had, she joins the majority of American Indians who live off-reservation. But when she tells her co-workers at Deaconess Hospital, "I'm Crow", she expresses not only the identity of her personal upbringing in Lodge Grass; she also expresses the identity of a citizen of a nation that is struggling to revise its constitution to tap into the strength of its clan system, trying to stabilize its court system, and proudly hosting the annual festival of nations that is Crow Fair. To be Indian in the new millennium is to live with one's own and one's community's pursuit of self-determination.

Contemporary Realities

As of 2005, there were 561 federally recognized tribes and communities, 229 of which are located in the State of Alaska.[13] In the lower 48 states, "Indian Country" is comprised of 350 Indian areas that are associated with federally-recognized tribes and tracked by the U.S. Census. These consist of 310 reservations and 40 Indian Statistical Areas, 29 of which are in Oklahoma.[14] Thirty-nine percent of American Indians live on reservations in the lower 48 states. These reservations cover about 110 million acres. The reservations and Indian areas range in size from a few acres to millions of acres. The Cedarville Rancheria in California consists of 20 acres and reports a population of less

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10 *Cherokee Nation v. Georgia* U.S. (5 Pet.) 1 (1831).

11 See "Tribal Governments" chapter.

12 David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2002), 41.

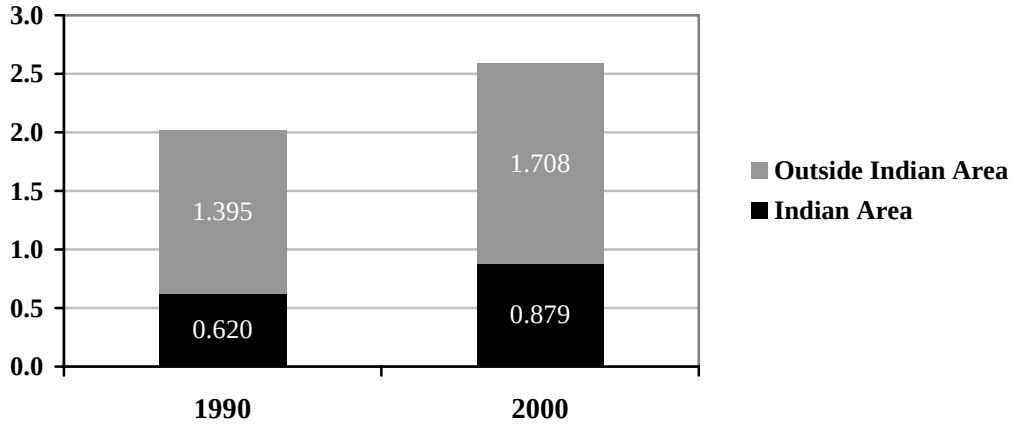
13 Federal Register 70, no. 226, 25 November, 2005, 71194.

14 Ibid.

than a dozen. The Navajo Nation's on-reservation population is more than 175,000, and the reservation itself is approximately the size of West Virginia.

According to the 2000 Census, 4.1 million people in the United States – or about 1.5 percent of the U.S. population – self-identify under the Census' categories as American Indian or Alaska Native. Of these, 2.5 million people claim "single race" Native ethnicity. (Figure 1) Slightly more than 1.7 million of individuals who identify themselves as single race American Indian or Alaska Native live outside Indian Country and Alaska Native villages.[15] The three states with the largest Native populations are California, Oklahoma and Arizona. The three cities with the largest Native populations are New York, Los Angeles, and Phoenix, while the three cities with the highest percentage Native population are Anchorage, Tulsa, and Oklahoma City.[16]

Figure 1
American Indian and Alaska Native Populations
All Indian Areas (including statistical areas); Millions



SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph. P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

The Native population is growing rapidly and getting younger. Over the decade of 1990-2000, the on-reservation population grew by nearly 25 percent and the off-reservation population grew by 21 percent. This growth reflects both on-going "re-identification" in which individuals newly categorized themselves in the U.S. Census as American Indian or Alaska Native and by a high rate of natural population increase. The latter is evident in the relative youth of the population, which has a median age of 28.5 years compared with a U.S. median age of 35.4 years. In fact, a third of the Native population is under the age of 18.[17]

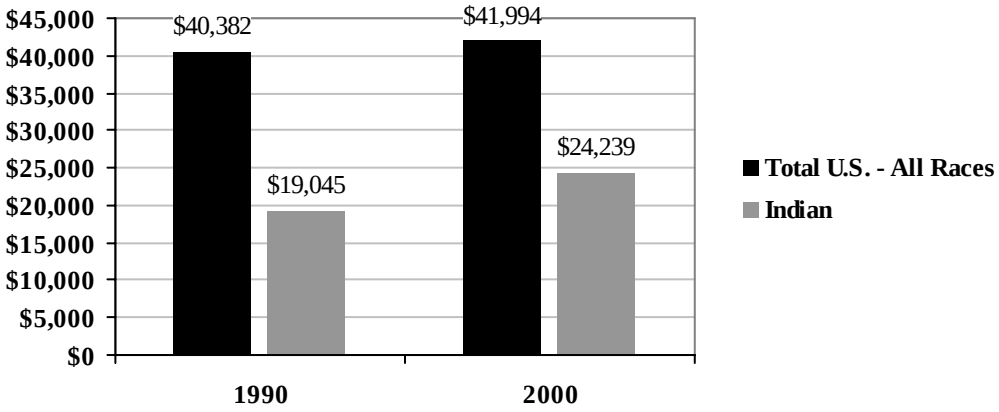
[15] Stella U. Ogunwole, "We the People: American Indians and Alaska Natives in the United States," *Census 2000 Special Reports* (Washington, D.C.: U.S. Census Bureau, February 2006).

[16] Ibid.

[17] Ibid.

In the economic arena, the "story" of Indian America is one of communities with a very long way to go to catch up with the rest of the United States, but which have been growing very rapidly from the 1990s onward. Throughout the 20th century, American Indians on reservations were the poorest identifiable group in the United States, and Indian reservations such as the Pine Ridge Reservation of the Oglala Sioux Tribe year after year were marked as the very poorest communities in the nation. As of 2000, the real (i.e., inflation adjusted) median household income of Native Americans on reservations and in Indian areas of the lower 48 states was only 58% of the average American median household income – $24,239 versus $41,994. (Figure 2)

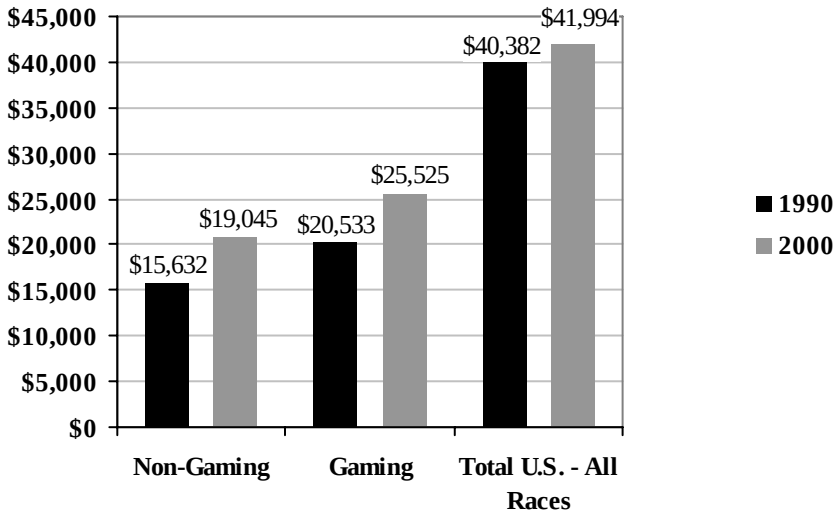
Figure 2
Real Median Household Income
All Indian Areas (including statistical areas; excluding Alaska); Thousands



SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

Mainstream media portrayals of tribal governments' gambling casinos built since the late 1980s commonly show images of easy money and previously unseen riches for tribes. But the long history of poverty and low incomes in Indian Country has not been wiped away by gaming opportunities that have opened up for tribes' governments. Although approximately 200 tribes have undertaken gaming operations, low incomes (as well as the underemployment and unemployment that low incomes signal) are much more the rule than the exception for gaming and non-gaming tribes alike. (Figure 3) Reservations such as Crow Creek, San Carlos Apache, Coushatta and numerous others have pursued gaming, but still have incomes that are forty percent or less of the rest of the United States.

Figure 3
Real Median Household Income
All Indian Areas (including statistical areas; excluding Alaska); Thousands

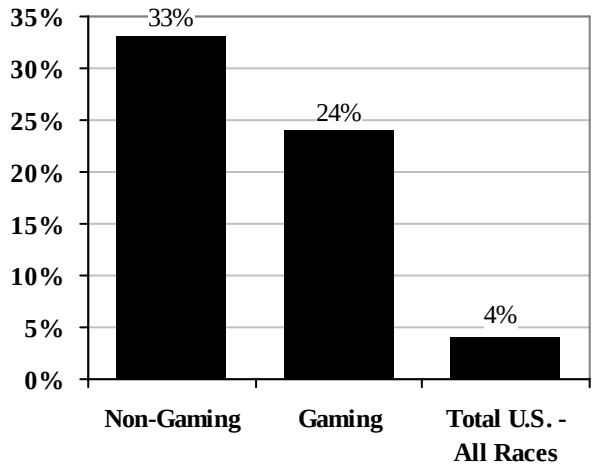


SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

In fact, during the first full decade of Indian gaming, real household incomes on reservations without gaming actually grew more rapidly (33%) than on reservations with gaming (24%) – and both far outstripped the meager 4% growth in the median American household's income during the entire decade of 1990-2000. (Figure 4) And therein lies the other side of the economic story in Indian Country: Indian America is in the midst of an economic boom, with rates of income growth sustained over the 1990s and into the new millennium that match those of virtually any international case of rapidly developing countries. In the American Indian case, this growth comes after decades of infusion of federal monies that yielded only economic stagnation and staggering poverty. The economic growth in Indian Country is not the result of some large influx of federal dollars: The improvement in average incomes in Indian Country incomes since the late 1980s has occurred even though overall federal funding to Indians was not increased. As discussed below in chapters dealing with federal policy and economic development, available research indicates that it is not a coincidence that economic development in Indian Country has finally taken hold across many reservations only after policies of self-determination took hold.[18]

[18] Joseph P. Kalt, "Statement of Professor Joseph P. Kalt before the United States Senate Committee on Indian Affairs", 17 September, 1996.

Figure 4
Percent Change in Real Median Household Income: 1990-2000
All Indian Areas (including statistical areas; excluding Alaska)



SOURCE: U.S. Census, 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, The Harvard Project on American Indian Economic Development, January 2005.

While economic growth is a positive development for Indian Country where it has taken hold, the progress is tenuous. Policies of self-determination are poorly understood and under constant pressure for repeal. Moreover, even at the high rates of income growth seen in recent years, it would take decades for incomes in Indian Country to catch up to U.S. average income levels. And, in some sense, that is not necessarily the goal of Native communities. Income and material well-being are hardly the be all and end all for America's Indian tribes. Matters of cultural identity, quality of life and community cannot be measured in dollars, and count far more heavily as shared goals. However, so long as poverty, unemployment, and underemployment are prevailing economic realities of a reservation, the citizenry struggles. As a result, persistent economic underdevelopment and attendant poverty are pressing concerns across Indian America.

The strains of more than a century of grinding poverty, deficits of basic community infrastructure, emaciated powers of self-rule, and the ups and downs of mainstream society's attitudes toward Native Americans and Indian Country are seen in stubborn and discouraging disparities in socioeconomic indicators across Indian America and U.S. society at large. There are some bright spots where Indians are better off, or at least not substantially worse off, than the average American – for example, in the share of the adult population with at least a high school degree,[19] in HIV deaths,[20]

[19] Ibid.

[20] Indian Health Services, *Regional Differences in Indian Health, 1998-1999* (Washington: U.S. Department of Health and Human Services, 1999), Chart 4.36.

in the incidence of low birth weights,[21] and in childhood immunizations.[22] Nevertheless, the overall picture from indicators of social conditions is negative and sometimes alarmingly so.

By and large, when compared with the average American, not only do Indians suffer from lower incomes, they hold far less personal wealth (as indicated by homeownership and home quality[23]). They are subject to greater unemployment, higher death rates from certain mental health and chronic diseases, and greater family disintegration. Indians who live on or near reservations and other Indian land areas generally tend to do worse in socioeconomic terms than off-reservation Indians do.

At the end of the 1990s, Indians in the service areas of the Indian Health Service were seven times more likely to die from cirrhosis than the average American.[24] The death rate from preventable diabetes is two times greater for on-reservation Indians than for the U.S. population as a whole.[25] The Indian teen rate of use of illicit drugs (at 20.9% in 2002) is approximately twice that of the average U.S. teenager,[26] and cigarette use by Indian teens (27.7% in 2002) is twice that of average American teens.[27] Indian mothers are substantially less likely to receive early prenatal care,[28] and the rate of births to Indian teenage mothers is approximately double that of the U.S. as a whole.[29] Indians on reservations are approximately twice as likely as the general population to be on public assistance.[30] The percentage of Indian adults with college degrees is rising, but is still less than half that of the U.S.-wide percentage.[31]

The stubbornness of distressing socioeconomic and health problems on many, many reservations cannot credibly support a "blame it on the victim" interpretation. Centuries of mistreatment, cultural suppression, disenfranchisement, and policies that, by the middle of the 20th century, had left tribes dependent on a paternalistic federal government meant the victims were not in control. Indeed, the progress that has begun to be made in reversing the long history of back-breaking

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21 Centers for Disease Control and Prevention, Health, United States, *2003 With Chartbook on Trends in the Health of Americans.* (Maryland: U.S. Department of Health and Human Services, 2003), Table 12. Indian Health Services, *Regional Differences in Indian Health, 1998-1999*, Chart 3.2.

22 Centers for Disease Control and Prevention, Table 71. Indian Health Services, *Regional Differences in Indian Health, 1998-1999*, Chart 5.32.

23 Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, Harvard Project on American Indian Economic Development, January 2005.

24 Indian Health Services, *Trends in Indian Health, 1998-1999* (Rockville, MD: 1999), Part 4; available at http://www/ihs.gov/PublicInfo/Publications/trends98/trends98.asp (28 June 2006).

25 Indian Health Services, Regional Differences in Indian Health 1998-1999 (Washington, D.C.: U.S. Department of Health and Human Services, 1999), Chart 4.24.

26 Substance Abuse and Mental Health Services Administration, Results of the 2002 National Survey on Drug Use and Health (Washington D.C.: Department of Health and Human Services, 2003), Figure 2.9.

27 Substance Abuse and Mental Health Services Administration, Table 2.31B.

28 Centers for Disease Control and Prevention, Table 7. Indian Health Services, *Regional Differences in Indian Health, 1998-1999*, Chart 3.4.

29 Centers for Disease Control and Prevention, Table 8.

30 Taylor and Kalt, *American Indians on Reservations.*

31 Ibid.

poverty and associated social ills has finally come as "the victim" has been more empowered to take control of– and be held accountable for – bootstrapping efforts to turn things around in an era of increasing tribal government power.

Across a spectrum of issues, Native nations today are engaged in a process of safeguarding recent progress, while coping with daunting poverty and ongoing challenges to tribal authority. Among other things, they are:

- Working to strengthen their institutions of governance to more effectively assert their sovereignty;
- Diversifying their economic activities to better improve their citizens' well-being;
- Crafting innovative social policies by drawing upon the experience of both the Indian and non-Indian worlds; and
- Tapping and developing their cultural resources – both traditional and emergent.

These four broad themes of tribal activity describe a process of *nation building* that is going on across Indian Country. The tasks of nation building that confront Indian Country reflect the particular history of Native nations and the economic, social, cultural, and political contexts they find themselves in. These tasks fall into four broad areas that serve to organize our discussion in this volume:

1. Tribes as Nations

The "Self-Determination Era" that began over 30 years ago is best characterized as a process by which the tribes began asserting political sovereignty. In the early years, the bulk of tribal self-governance efforts were directed toward staking claim to tribal jurisdiction, resources, and decision-making authority, while reducing the powers of outside decision-makers. Today, tribes are still making new assertions of sovereignty; however, the general emphasis in tribal government has shifted toward strengthening institutions of governance, ranging from reform of tribal constitutions and tribal courts to the creation of enterprise boards and district development authorities. Tribes around the country are investing in their ability to get things done for their citizens, in ways previously rendered impossible by federal paternalism, red tape, off-reservation special interests, and a lack of resources. Importantly, these investments account for a growing number of tribal successes – tribes are overcoming long-standing challenges and creating new opportunities, addressing a wide range of socioeconomic and cultural concerns. Nonetheless, the challenge of increasing both the breadth and the depth of governing effectiveness is paramount to furthering tribal development.

2. Assets and Economy

The emergence of true self-governance in Indian Country has fostered increasingly successful economic ventures that make use of regulatory sovereignty, resource control, and the improved incentives and accountability that have come from devolution of previously-federal functions to tribal governments. Even prior to the advent of casino gaming in the late 1980s, enterprises were taking root in Indian Country among those tribes that were in the vanguard of self-determination. In the early years of the Self-Determination Era, these enterprises derived their strength from regulatory advantages (such as smoke shops), from

tribal jurisdiction over natural resource extraction and use (such as timber operations and ski resorts), and from tribal material culture and amenity resources (such as crafts and tourism).

The current trend underlying the economic development in Indian Country is one of tribes working to create economic environments that will allow them to provide for their citizens' well-being without depending on regulatory advantages that are vulnerable to attacks in Congress and the state legislatures, or on resource extraction, much of which has plateaued. However, success in these areas remains mixed. Economic diversification, the creation of sustained competitive advantages, the development of managerial human capital, and the attraction and retention of dollars in reservation economies remain challenges for virtually all tribes.

In the face of on-reservation unemployment rates that typically exceed Depression-era national averages and legislative uncertainty around gaming and other rights, the work of creating successful economic activity remains one of Native nations' most important priorities. While much has been made of Indian casinos in the media, gaming has not proven to be a panacea: financial benefits are highly concentrated, with a small number of tribes receiving the vast majority of revenues. Moreover, the low base of income, wealth, and human capital from which the recent surge in Indian economic development started means that even where casino and other enterprises have been successful, much still needs to be done to alleviate long-standing deficits of income, wealth, infrastructure, and social well-being.

3. Social Development

As indicated above, across numerous indicators of socioeconomic health on-reservation Indians lag behind U.S.-wide averages by substantial – and sometimes alarming – amounts. Whether it is substance abuse, preventable diabetes rates, or the college graduation rate, these stark indicators bespeak societies under tremendous stress, scarred by poverty, fiscal shortages, failed federal policies of termination and assimilation, off-reservation opportunism, and disempowered tribal governments. As Indian nations continue to strengthen their governments and economies, they are directing resources, time, and attention to tackling these problems by augmenting or replacing federal programs, creating context-appropriate policies, and integrating distinctly indigenous approaches across policy and program areas. Increasingly using their own resources under their own governmental policies, tribes are plowing resources into everything from building first-rate water treatment and sewage systems, to buying ambulances and fire engines, to paying for infusion of Native language programs into their schools, to protecting children, teenagers and adults with homegrown wellness centers.[32]

As in the economic arena, the payoffs to tribes' investments in improving social conditions are marked by the challenge of overcoming the distressful points from which so many tribes have had to begin. There is encouraging, but limited, progress. The obstacles are often daunting. Today, for example, Indian tribes face the federal welfare-to-work mandates under welfare reform that must be implemented in settings where employment opportunities

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[32] See the Harvard Project on American Indian Economic Development, "Honoring Contributions in the Governance of American Indian Nations" http://www.ksg.harvard.edu/hpaied/hn_main.htm (28 June 2006).

are often non-existent,[33] continuing federal fiscal frugality, and a burgeoning youth population. Moreover, as policy and decision makers, Indian nation civic and political leaders and managers are relatively new to the tasks of nation building. They often find there are few proven, robust policy approaches readily at their disposal. Along some dimensions, such as community policing and environmental protection, the tools of mainstream society's approaches are being successfully translated and adapted to the needs of Indian Country. Along others, such as college attainment, self-rule has translated into two decades' worth of experience and experimentation, but with only modest success. In the main, tribes confront profound social problems with often meager resources, relatively thin relevant research and experience to guide their efforts, a litany of failed policies to avoid, and no clear path for alleviating social stress.

4. Culture, Arts, and Media

One of the major taproots of self-determination has been – for better and worse – "Indian culture." To many outsiders, "Indian culture" means iconic, if not stereotyped, symbols and images: beautiful Acoma Pueblo pottery, grass dancers at Crow Fair, or a dispute over ancient human remains covered in the local newspaper. While arts, crafts, powwows, and museum pieces matter a great deal to Native Americans, Indian cultures are broader, and more diverse than what is on display to outsiders. For each tribe, its specific culture encompasses a group sense of identity, more or less shared outlooks on the world, a degree of shared goals and values, and more or less shared modes of organizing community affairs. These cultural ties – whether formed from living uninterrupted for generations in an aboriginal homeland, using an indigenous language, sharing a common religious practice, or adapting traditions to new circumstances – have provided powerful problem-solving tools throughout the Self-Determination Era. Increasingly, Native nations are relying where possible on shared norms as guidelines in developing more effective policies to govern activities as diverse as college preparatory education, natural resource management, health care, and law enforcement.

Indian communities and cultures are far from immune to the forces of cultural strain and change that are affecting societies all around the globe. The linkages of economic globalization and multiculturalism are felt by tribes through multiple pathways: through the influx of non-Indian patrons that are the lifeblood of tribal casinos; through the joint venturing or contracting with Fortune 500 manufacturing firms for creation of an on-reservation electronics company (as at the Flathead reservation); in the development of a joint tribal-city police department (as in Flandreau, South Dakota); in the ready access of children to modern media; and through the mobility of young people that fosters intermarriage and migrate-for-work lifestyles. Couple these forces with the stresses created by poverty and social ills and the results can be sharp fractures along lines of cultural tradition, religion, politics, family structures, haves and have nots, and the sharing of values and community goals.

In the face of these sources of potential community turmoil and disunion, tribes have demonstrated remarkable durability. Indeed, a striking characteristic of Indian Country at the start of the 21st century is the statement made daily by tribe after tribe: "still here." The

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[33] Tribes also operate welfare-to-work programs from a position of significant financial weakness. Federal funding to administer these mandates flowed to states, but not to the tribes, who now find themselves in yet another crisis created by federal policy.

challenge that tribes face is not so much the preservation of a static culture, and it is certainly not the preservation of some non-Indian, Hollywood version of iconic culture. Rather, the challenge is the stewarding of culture and identity during change so that "Apache" and "Lakota" and "Ute" and "Potawatomi" are sources of knowledge and self-conception that serve to support individual, family, and collective lives. From Northern Cheyenne to Qatar, from San Idelfonso to India, from Standing Rock to Russia, all self-determining nations are having to deal with this challenge. Such is the state of the world – and Indian Country – today.

The common pattern in Indian Country at the start of the 21st century is one of remarkable resilience and determination to exist. In this regard, Native nations today are in key respects like other emergent and re-emergent nations in the world. They are trying to do everything at once – self-govern effectively, build economies, improve social conditions, and strengthen culture and identity. They are engaged in nation building. The following sections elaborate on the frontiers of the challenges tribes are facing in the tasks of building and rebuilding their nations.

SECTION I: TRIBES AS NATIONS

TRIBAL GOVERNMENT

- Under the U.S. federal system, both states and federally-recognized tribes have status as sovereigns within the United States. Tribal sovereignty emanates from the U.S. Constitution, treaties, acts of Congress, and presidential executive orders.
- Governments in Indian Country are diverse. Contemporary tribal governmental forms have resulted from the interplay between Native traditions, tribal and U.S. history, and federal Indian policy.
- The reassertion of sovereignty is transforming Native nations. Many tribal governments are reclaiming authority over their territories and taking advantage of opportunities for increased Native control of federally funded programs and services.
- Native nations with sound governing institutions are more effective at exercising and protecting the powers they have and, in some cases, expanding their jurisdiction.
- Working with community organizations and with each other, tribal governments can increase their ability to respond to the varied needs and interests of their citizens.

In the United States, three types of governments have authority that is not delegated by another political entity: the federal government, state governments, and tribal governments. In the case of Indian nations, first British and then American governments entered into the classic form of nation-to-nation agreement – treaties. Prior to the cessation of treaty processes in 1871,[34] the U.S. entered into hundreds of treaties with Indian nations. Many of these have served as the bases of repeated Supreme Court affirmations of tribes as governments. In the creation of the United States as a constitutional federation of sovereigns, it was recognized that the purpose of the Constitution was to structure not only the relationship between the states and the federal government as sovereigns, but

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[34] U.S. Congress, Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566.

also between the states, the federal government and the Indian nations. The original and still-standing Commerce Clause of the U.S. Constitution (Article I, Section 8) provides explicitly that only: "The Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Today, tribal sovereignty is not an anachronistic holdover from "dead treaties" or a forgotten Constitution. Far from it. Just as states in the United States have certain powers of jurisdiction within their boundaries, so tribes have governmental powers within their boundaries. While under U.S. law, tribes (and states) cannot exercise powers such as raising an army or issuing currency, they possess powers to determine their respective forms of government (e.g., craft constitutions), define citizenship, make and enforce laws through their own police forces and courts, collect taxes, regulate the domestic affairs of their citizens (including whether or not to allow gaming and other activities), and regulate property use (e.g., through land use policy, permitting, environmental regulation, and the like).[35]

Much like the long history of debate and dispute regarding the boundaries between state and federal rights, the powers of tribes as governments have been, and remain, subject to contention, conflict, and litigation. As a result, tribal sovereign powers of self-government have waxed and waned over the centuries, and continue to do so in the present era of official federal policies of self-determination. Contemporary jurisdictional battles, many of them highlighted in this volume, commonly focus on disputes between tribes and their neighboring city, county and state governments. As tribal governments push to expand often long-dormant powers into areas ranging from child protective services and trash collection to taxation and law enforcement, they often tread on the toes of these other governments. Conflict seems inevitable; seldom do any governments any where relish relinquishing their powers to other governments.

Students in American schools typically learn a great deal about federal and state government. It is rare that mainstream American schools teach about Indian government. The result is widespread lack of understanding in the general public, which sees "Indian" or "Native American" as only a racial or ethnic identifier. For Native Americans, however, experiencing and conceiving of tribes as *governing* entities with sovereign powers is central. This is not only because they more commonly experience Indian nations' authorities in their day-to-day lives, but because the prospect of "termination" (i.e., eliminating tribes as governments) is seen as a strategy for forcing the disbandonment of Native communities and, with them, Native identity and culture.

Accordingly, at this point in history, the expansion of powers of self-rule and the building of the capacity to govern effectively are defining, if not *the* defining, challenges of the Indian nations. Yet, for decades, tribes' abilities to exercise self-governing power and sovereign jurisdiction have been hampered by ill-adapted governmental institutions encouraged by federal legislation, and by federal policies that have tended to restrict tribal governments' role to program administration on behalf of the federal government. Federal policy changes and efforts to strengthen tribal institutions are helping Native nations regain their ability to function as self-governing entities. But progress is slow.

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[35] For a detailed review of the powers of tribes as governments, and the legal foundations of those powers, see David E. Wilkins, *American Indian Politics and the American Political System* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2002), 41.

The Evolution of Governmental Forms

Tribal governments in Indian Country are as heterogeneous as the tribes themselves. Historically, Native nations had evolved a wide variety of institutions of governance, from relatively informal arrangements to highly differentiated systems with well-articulated checks and balances. To some extent in some tribes, these traditions or derivatives of them have been kept alive. Consequently, town-meeting-style general assemblies, evolving theocracies with roots in ancient times, constitutional federations, and parliamentary democracies can all be found operating in Indian Country today. As an example, the Pueblo de Cochiti has a traditionally-based governing system in which the main officials are appointed by the chief spiritual leader.[36] In contrast, the Miccosukee Tribe is governed by a General Council consisting of every adult member of the tribe, with a quorum requiring at least one member of each of the Miccosukee five clans.[37] The Haudenosaunee bind themselves into the Iroquois confederacy under the traditional Great Law of Peace, "the founding constitution of the Six Nations Iroquois Confederacy."[38]

Notwithstanding examples of continuity through history, the predominant forms of tribal government in Indian Country are governments that have been heavily influenced by U.S. federal policies and funding requirements. Indeed, the federal government has had a significant homogenizing influence on the governmental forms currently in use among Indian tribes. The passage of the *Indian Reorganization Act* of 1934, in particular, ushered in a period during which many tribes adopted constitutions. The typical IRA model established a strong office of the chief executive ("tribal chair"), with the chief executive chairing an elected tribal council of, commonly, 8-15 members. IRA constitutions also rarely provided for a dispute resolution mechanism (such as a system of tribal courts), and delineated no explicit separation of powers.

The IRA reforms have been a two-edged sword for Indian nations. On the one hand, they gave form and status to tribal governmental institutions, ending an era in which many tribes were either effectively powerless and run as wards of the federal government, or they were largely neglected but unable to assert authority that federal and other authorities would recognize. On the other hand, the IRA constitutions and systems commonly proved to be ineffective systems of government for tribes. For many, many tribes, IRA government entailed a fatal flaw: They were boilerplate systems that ignored the wide variety of legitimate governing forms tribes had used to self-rule themselves for innumerable years.[39] Perhaps like trying to impose a monarchy on the United States today, foreign systems of government in Indian Country have generally lacked legitimacy and support – and therefore effectiveness.

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[36] Stephen Cornell and Joseph P. Kalt, Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (Cambridge, MA: Harvard Institute for International Development, 1997), 26.

[37] Communication with Steve Terry, Land Resources Manager, Miccosukee Tribe, September 2005. See also "Miccosukee Resort & Gaming." http://www.miccosukeeresort.com (28 June 2006).

[38] "*What is the Great Law of Peace?,"* http://sixnations.buffnet.net/Great_Law_of_Peace/ (28 June 2006). Also see *Constitution of the Iroquois Nations.* http://www.ntjrc.org/ccfolder/iroquois_const.htm (28 June 2006).

[39] John Fredericks, III, "America's First Nations: The Origins, History and Future of American Indian Sovereignty," *Journal of Law and Policy* 7, no. 2 (1999), 375-376. See also Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, Abridged ed. (Lincoln: University of Nebraska Press, 1986), 338.

Tribes could opt out of accepting the IRA and assuming an IRA constitution, and some did exactly that. But even the institution of voting was alien to many tribes in the 1930s, and IRA acceptance by tribes was subject to questionable results and federal official intervention. In cases such as the Ute Mountain Tribe of Colorado, voter turnout was 5%, and the IRA was accepted by a vote of 9 to 3.[40] In all, 181 tribes adopted IRA constitutions and 77 rejected them.[41] However, the IRA model was a standard to which tribal councils and attorneys often turned after 1934. As a result, many tribes that did not formally accept an IRA constitution have ended up with derivatives that give them similar governmental structures.[42]

The IRA sought to reverse policies that had come to be seen as failures. In particular, the IRA brought a formal end to allotment of reservation lands under the 1887 Dawes Act (see discussion in the Introduction).[43] In so doing, the IRA did alleviate the land loss that tribes were enduring and succeeded in restoring a degree of control to tribal governments. The IRA also established some of the institutional groundwork that would later allow for tribal development and the exercise of tribal sovereignty.[44] However, negative effects of the IRA constitutional template continue to be felt today as many tribes struggle to operate under institutions of governance that are markedly out of step with individual tribes' standards of authority and proper governance.[45]

In fact, some tribes have fared relatively well under IRA-style governing bodies. It would seem almost by luck, the common IRA model of a national government with power centralized in a strong chief executive chairing and running a modest-sized representative council, with little or no provision for independent dispute resolution, seems to have been relatively consonant with indigenous systems of government and conceptions of legitimate authority. Thus, for example, prior to being compelled to adopt U.S.-run reservations as homes, several Apache tribes operated under systems of government that respected and empowered charismatic single leaders who could convince the people of their wisdom and public-mindedness.[46] The traditions of concentrating power, so long as legitimately used, in strong executives resembled the IRA constitutional design. Indian nations with continuing norms of these kinds have tended to fare relatively (albeit, not necessarily absolutely) well under IRA structures compared to those with more deconcentrated and decentralized traditions.

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[40] Theodore H. Hass (Chief Counsel, United States Indian Service), "Ten Years of Tribal Government under I.R.A., United States Indian Service", 1947. http://thorpe.ou.edu/IRA/IRAbook/index.html (28 June 2006).

[41] Robert Porter, "Strengthening Tribal Sovereignty Through Government Reform: What Are The Issues?" *The Kansas Journal of Law and Public Policy* 7, no. 1 (Lawrence, KS: University of Kansas School of Law, Winter 1997).

[42] Eric Lemont, "Developing Effective Processes of American Indian Constitutional And Governmental Reform: Lessons From The Cherokee Nation Of Oklahoma, Hualapai Nation, Navajo Nation, And Northern Cheyenne Tribe," *American Indian Law Review* 26 (2001-2002), 155.

[43] For a discussion of allotment, see the Introduction and the "Native Lands" chapter.

[44] Wilkins, *American Indian Politics*, 14.

[45] See Stephen Cornell and Joseph P. Kalt, "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development," *The Journal of Socio-Economics* 29 (2000).

[46] Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," *Economic Inquiry,* Western Economic Association International 33 (July 1995), 402-426.

For other tribes, the effects of the IRA have been strikingly negative. Thus, for example, nations such as the Oglala Sioux Tribe (OST) of the Pine Ridge (South Dakota) reservation and other Sioux tribes in the Dakotas have been among the very poorest places in the United States for decades. At OST, Lakota traditions of governance provided notably effective systems of parliamentary-type structures in which leaders gathered in council selected multiple executives to carry out administrative functions, and an independent society resolved disputes and provided for law and order. In the decade or so leading up to the IRA, Lakotas at OST put forward multiple models of reservation government built on their decentralized and parliamentary traditions, only to have them rejected by federal authorities. The terms of the IRA were eventually narrowly accepted by voters at the Pine Ridge reservation,[47] but its poor match with Lakota standards of legitimacy and authority in governance underlie many of the problems of political instability and economic deprivation that persist to today.[48] The lesson is quite general across Indian Country; indeed, across the world.[49] Foreign systems of government that do not fit with a people's own standards as to how they should self-rule are prime causes of nations in trouble.

Federal Policy and Self-Governance

Relative to the late 19th century and the first three quarters of the 20th century, the ability of tribal governments to exercise their jurisdiction has been strengthened by *de facto* assertions of sovereign rights, by court decisions, and by explicit legislation by the federal government in the era of self-determination. Tribes have benefited particularly from changes in federal policy over the last 30 years that have redefined the relationship between the federal government and Indian nations and moved that relationship toward one of government-to-government, and away from guardian-to-ward.

Throughout the initial century of locating tribes on reservations, it was the federal government that essentially ran those reservations and the affairs of tribes. First through the War Department and eventually through agents such as the Department of the Interior's Bureau of Indian Affairs and the Department of Health and Human Services' Indian Health Service (IHS), the federal government ran schools, provided health care, provided the law enforcement, administered all manner of welfare programs, leased lands, and managed resources on reservations. Tribal governments and tribal citizens had little, if any, input into the design of these programs.

By the 1960s, with younger Indian leaders fired by the Civil Rights Movement's call to self-determined identity and given backbone by a generation of Native leaders who brought strong personal traits of self-reliance honed in, particularly, honorable military service in World War II and Korea, ward-to-guardian status was put on the run. By the mid-1970s, the first of two particularly significant pieces of federal legislation expanded the scope of tribal governments and bolstered the ability of tribes to exercise their governing powers. The *Indian Self-Determination and Educational Assistance Act* – also known by its legislative title PL 93-638 – was signed into law in 1975. The passage of the "Self-Determination Act" marked a clear shift in federal thinking about tribal

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47 Theodore H. Hass, "Ten Years of Tribal Government".

48 See, for example, coverage of the events of 2000 on the Pine Ridge reservation in "Turmoil at Pine Ridge Could Exact High Price," *Indian Country Today*, 29 March 2000; "Oglala Chief Judge Attacked in His Office," *Indian Country Today*, 19 July 2000; and "Oglala Council Orders Red Cloud Occupiers Out," *Indian Country Today*, 26 July 2000.

49 Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (New York: New York Times Books, 1992).

governments, allowing Native nations to take over and manage programs and services that the federal government had so long controlled on reservations.

In Indian Country, PL 93-638 created a new verb consisting only of Arabic numerals: To "638" your programs meant tribal government assumption of the administration of existing federal government programs. Under this process, known as self-determination contracting, the employees and administrative control of an otherwise federal program are transferred to the tribal government via a "638 contract". This contract operates much like an ordinary contract for service provision in fulfillment of a federal mandate or policy. The tribe agrees to administer a particular program and the associated federal funds are transferred to the tribal government. Tribes can manage federal programs through 638 contracts in areas as diverse as education, tribal law enforcement operations, fire protection, and resource management initiatives. Although no precise count of 638 contracts across all subject federal agencies is available, they appear to be in the thousands and are taken advantage of by virtually every tribe.[50]

Many tribal leaders have embraced PL 93-638 as a mechanism by which to assert Native control over federal government services and resources. However, these contracts have several important limitations. By their nature, these program-specific contracts under PL 93-638 effectively impose the federal government's spending priorities on tribes. Tribes cannot reallocate funds across contracted programs in response to shifting priorities in their communities. In addition, tribal administrations are burdened by having to ensure compliance with federal program guidelines and reporting requirements. Federal programs managed by tribes under 638 contracts thus often end up mirroring the status quo due to both real and perceived constraints.

In response to tribal concerns about these shortcomings, the federal government enacted the *Tribal Self-Governance Demonstration Project* in 1988.[51] The legislation established a five-year pilot program that allowed tribes to "compact" with the federal government under a flexible arrangement similar to block grants distributed in other areas of federal allocations.[52] In contrast to 638 contracts, which occur on a program-by-program basis, compacts allow a tribe to receive a lump sum payment from the federal government for all services that a tribe chooses to manage – which can range from just one program to a combination of several programs. Tribal governments can then reallocate funds across the range of compacted services that they administer. In this way, Native nations are better able to adapt the provision of services in response to tribal priorities, needs, and changing conditions. In 1994, the federal government recognized the success of these compacts by passing the *Tribal Self-Governance Act*, which established compacting as an ongoing program, rather than merely a pilot project.[53]

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[50] A 2004 study by the U.S. Government Accounting Office surveyed 219 tribes' contracting activities and found contracting and its companion of self-governance compacting (see discussion below) to be engaged in by "almost all" of the surveyed tribes. U.S. Government Accounting Office (GAO), *Indian Economic Development*, GAO-04-847 (Washington, D.C.: Government Printing Office, September 2004), "Highlights".

[51] U.S. Public Law 100-472. 100th Cong., 2nd sess, 5 October 1988. *Indian Self-Determination Amendments of 1987.*

[52] The initial pilot program was extended for an additional three years with the passage of Public Law 102-184 in December 1991. See U.S. Public Law 102-184. 102nd Cong., 1st sess., 4 December 1991. *Tribal Self-Governance Demonstration Project Act.*

[53] The *Tribal Self-Governance Act* also extended the number of tribes eligible for inclusion into the program to 50 (from a limit of 20 under the demonstration program) per year. In August 2000, President Clinton signed Public Law 106-260, which authorized permanent self-governance authority for Indian Health

With the passage of the *Tribal Self-Governance Act*, the federal government reaffirmed its commitment to, at least, self-administration by tribal governments. To that point, although the transition of vital government services into Native control had been taking place since the passage of PL 93-638, the pace of transition had been unsatisfactory to many tribes and to Congress. According to the Office of Self-Governance, the office within the Department of the Interior charged with administering compacting, the *Tribal Self-Governance Act* was passed to "expedite the transition away from the federal domination of Indian programs."[54] The federal commitment to ensuring this transition has continued even beyond that act. In 1996, 638 contracts, which had previously applied only to BIA and Indian Health Service (IHS) programs, were extended to all non-BIA Department of Interior programs by Public Law 103-413. As of 2004, there were eighty-eight compacts in existence, covering approximately 230 tribes.[55]

The popularity of these funding mechanisms demonstrates that contracting and compacting have become important tools by which many Native nations expand the effective scope of their sovereignty. Tribes that have contracts and compacts with the federal government have found that success in administrating and managing programs is a result, in part, of tribal government's inherently closer ties and, hence, responsiveness to local conditions. Tribal leaders and officials are more familiar with the needs of their communities and more attuned to changes within these communities than federal administrators. Tribal governments are also better able than the federal government to deliver culturally appropriate services, or to deliver services in more culturally appropriate ways, to their citizens. Thus, for example, surveys of tribal communities find that, from law enforcement to health care, citizens report being better served when programs are under tribal control.[56]

The flip side of tribal governments being in better position to be responsive to their own communities' conditions and needs is the imposition of improved accountability on those administering programs. Not only does contracting and compacting bring decision makers closer to those affected by decisions, but they also bring citizens closer to decision makers in the sense of enabling citizens to voice effectively controlling support or lack thereof for policies, programs, decisions, and decisionmakers. Tellingly, it is commonly the case that the federal employees of

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Service programs and provided for a study of self-governance within the Department of Health and Human Services (HHS). See U.S. Public Law 106-260. 106th Cong., 1st sess., 18 August 2000. *Tribal Self-Governance Amendments of 2000*.

54 U.S. Public Law 103-413. 103rd Cong., 1st sess., 25 October 1994. *Indian Self-Determination Contract Reform Act of 1994.*

55 Telephone interview with Kenneth D. Seinfeld, Office of Self Governance, U.S. Department of the Interior, 21 September 2004. Note that these figures change as tribes drop out of a consortium of tribes with a compact agreement. Consortia of tribes can be funded under a single agreement. In Alaska, for example, the regional corporations provide many of the eligible BIA and IHS services to Alaska Natives under consortia-based arrangements.

56 Alyce Adams, "The Road Not Taken: How Tribes Choose Between Tribal and Indian Health Service Management of Health Care Resources," *Indian Culture and Research Journal* 24, no. 3, (2000); National Indian Health Board, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management*, 1998; Stewart Wakeling, Miriam Jorgensen, Susan Michaelson, and Manley Begay. *Policing on American Indian Reservations: A Report to the National Institute of Justice*. (Washington, D.C.: National Institute of Justice, 2001).

programs remain with the programs and become tribal employees upon transfer of programs to tribal control by contracting or compacting. Nevertheless, program performance tends to improve.

Sometimes the improvements in performance are dramatic. The Citizen Potawatomi Nation reports, for example, that upon taking over the management of its trust funds (i.e., funds from leasing, land settlements, and the like that are routinely managed by the federal government), it has experienced a 300% increase in its trust fund account revenues.[57] Similarly, a detailed study of forestry management by seventy-five tribes, a large portion of which were managing their own resources under 638 contracting and the rest of which were managed by the federal government's BIA, finds that shifting from BIA-employed forestry workers to tribally-employed forestry workers raises labor productivity by tens of thousands of board feet of harvested timber per year. This improvement is achieved without increasing environmental disturbance and without altering the "allowable cut" limit set by conservation and environmental criteria. Similarly, shifting to tribal management from federal management, but selling the same timber in either case, results in tribes receiving as much as 6% higher prices for their timber – amounting to hundreds of thousands of dollars per year in extra income for the typical reservation forestry operation.[58]

Self-determination and self-governance contracting and compacting mechanisms are not without their problems. Severe funding restrictions and shortfalls limit the scale of services that tribes can offer. The costs of supporting contracts burden the budgets of subject federal agencies and are insufficiently funded. Further, many of those operating under a compact are not participating in self-governance in the spirit of the term – some have compacted a single program in a single area, a practice which arguably reduces compacting to merely a funding mechanism that has little bearing on tribal governance *per se*.

The federal self-determination and self-governance programs are particularly problematic for Alaska Natives. For a number of reasons (see further in the chapter on Alaska Natives below), Native communities and organizations in Alaska are unable to fully utilize contracting and compacting. For example, Alaska villages are unable to contract for schools since the educational system is state funded and the state does not have legislation paralleling the applicable federal policies. Native villages in Alaska also cannot contract for health care services if a village is located within an area served by an Alaska Native regional health entity.

Some critics see contracting and compacting as little more than block-grant systems that allow the federal government to transfer the obligation for service provision from itself to the tribes, while making no concomitant durable promise to maintain funding levels. They fear a relinquishment of the safety net previously provided by Washington.[59] Such critics voice the fear that contracting and

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[57] Walter Hillenbrand, Judy Earp, Mack Rhoades, and Nancy Pindus, *Overcoming Challenges to Business and Economic Development in Indian Country*, U.S. Department of Health and Human Services (Washington, D.C.: Government Printing Office, August 2004), Chapter 2. http://aspe.hhs.gov/hsp/wtw-grants-eval98/tribal-dev04/ch2.htm (28 June 2006).

[58] Matthew B. Krepps, "Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry." In Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* (Los Angeles: University of California, American Indian Studies Center, 1992), 179-203.*;* Matthew B. Krepps and Richard E. Caves, "Bureaucrats and Indians: Principal-Agent Relations and Efficient Management of Tribal Forest Resources," *Journal of Economic Behavior and Organization* 24, no. 2 (July 1994) 133-151.

[59] Lyman H. Legters and Fremont J. Lyden, eds., *American Indian Policy: Self Governance and Economic Development* (Westport, CT: Greenwood Press, 1994), 57-59.

compacting diminishes the trust responsibility that the federal government is obliged to maintain on behalf of the Indian nations.[60]

The Importance of Capable Institutions of Governance

The reduction of federal interference in tribal governance has for the most part been a markedly positive development. Tribes find, however, that their increased political powers come with attendant costs. The federal pullback has in many cases left tribes without the institutions and experience required to effectively discharge important governmental functions. In many instances, prolonged federal paternalism has resulted in underdeveloped institutions and in tribal leadership that is only in the early stages of the preparation needed to lead fully sovereign communities.

The "training ground" prior to tribal assumptions of control over government programs largely had tribal governments serving as administrators of federal funds, rather than as decision-makers, program designers, and community mobilizers. With the reduction of federal involvement, tribes now face the challenge of governing themselves while attempting to build the very governing institutions—tribal courts, tribal housing authorities, tribal child welfare agencies, tribal health centers, tribal police departments, tribal treasuries, tribal development agencies, and so on—that self-governance requires.

In their struggle to exert real governmental power, many tribes have recognized the critical importance of capable institutions of tribal governance. Such institutions have proven increasingly crucial as tribes seek to realize the advantages of contracting, compacting, and other federal legislation, as well as increase the scope of their law- and policymaking. Accordingly, tribes today are focusing, sometimes feverishly, on building the basic institutional capacity required to function as politically autonomous entities, rather than as bureaucracies for the administration of federal programs.

A growing body of research points to sound institutions of governance as essential to building strong economies and societies.[61] Tribes with capable institutions of governance—institutions that operate within a set of culturally legitimate checks and balances—realize benefits such as increased employment, rising incomes, and community revitalization. Research from the Harvard Project on American Indian Economic Development demonstrates that carefully crafted institutions of governance are as important for economic and social development as access to markets, natural resources, and human talent.[62] Tribes with good governing infrastructure—such as the Mississippi Band of Choctaw Indians, the Confederated Salish and Kootenai Tribes, and the Winnebago of Nebraska—have successfully assumed the responsibility of self-governance and are meeting the needs of their communities that went unmet under federal paternalism.

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60 For further discussion of the federal trust responsibility, see the chapter on "Federal-Tribal Relations" below-.

61 Representative in this regard in the international arena is the research of Douglass C. North. See, for example, Douglass C. North. *Institutions, Institutional Change and Economic Performance.* (Cambridge: Cambridge University Press, 1990). In the Indian context, the emphasis is on, for example, a well-functioning court system and a civil service or administrative staff that is insulated from the political process. See Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," in Cornell and Kalt, ed., *What Can Tribes Do?*

62 For a more complete discussion of the role of institutions in Native nation building, see Stephen Cornell and Joseph P. Kalt, "Reloading the Dice."

Other tribes are struggling to establish effective governing institutions according to their own standards and structures of legitimacy so that self-government will work for them and their conditions. The challenge is to make the promise of self-governance a practical reality. Although many of these tribes are beginning to build institutional capacity, their struggles to function as nations are ongoing. The Native press is filled with stories of tribal political infighting, continuing economic hardship, and the unraveling of social fabric that once held communities together. Native nations lacking institutions that effectively channel the energy of their elected and appointed officials are particularly prone to abuse and vulnerable to politicians who are backed by strong factions and are able to exploit their offices unchecked. Institutional weakness not only increases conflict within tribal communities, but also among neighboring non-Indian communities who resent and resist newfound tribal political powers. The absence of sound institutions of governance among some tribes increases the risk that all tribes' right to self-governance will be weakened through adverse legislation and court decisions. Interests opposed to tribal sovereignty have at times seized on such difficulties as grounds for challenging the right to self-governance itself.

Tribal Governments and Nation Building

American Indian nations share many of the challenges of emerging nations around the world. They can fight tenaciously to secure rights of self-rule, and then either thrive or fall on their faces in the exercise of those rights. Success in self-government requires not only the powers of sovereignty, but the capacity to self-govern. Building and managing this capacity is a demanding task. Making laws, delivering programs and services, negotiating with other governments, administering justice, managing budgets and departments, and the like all require organization, talent, and operational efficiency. Unstable and dysfunctional government and governors are the surest routes to failing in the running of a tribal or any other nation.

For many tribes, the turnaround begins with constitutional reform. For example, the Mescalero Apache were one of the first tribes to emerge in the era of self-determination with vociferous assertions of sovereignty over political, economic, natural resource, and cultural affairs. And Mescalero is noted for being able to sustain its nation building efforts in these areas through to the present. When the late Wendell Chino, long-time chairman of the Mescalero Apache Tribe, was asked what he saw as the keys to the successful launching in the 1970s of Mescalero's well-known and sustained path of self-determined economic development, he replied matter-of-factly: "Well, we changed our constitution to give us more stability."[63] Similarly long-serving Chief Phillip Martin of the Mississippi Band of Choctaw Indians cites constitutional reform in the 1970s, in the form of longer terms of office for council members and the establishment of an executive branch, as the critical foundation that was laid for the Band's well-documented emergence as an economic and political powerhouse.[64] Struggling against age-old divisions that made it hard for Salish and Kootenai to work together and left the tribes with both poverty and cultural conflicts, constitutional reforms (putting in primary elections and staggered terms for council members) in the early 1980s turned the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana around – to the point where they are now the premier self-governance Indian nation, with dramatically improved

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63 Communication with Chairman Wendell Chino (April 1987).

64 Hon. Phillip Martin, Chief, Mississippi Band of Choctaw Indians, Testimony before the United States Senate, Committee on Indian Affairs, 9 April, 1998. http://indian.senate.gov/1998hrgs/ 0409_pm.htm (28 June 2006); and communication with Chief Phillip Martin (August 2005).

living conditions and strong Salish and Kootenai cultures that are creating a new and shared *Flathead* community.[65]

In the face of these lessons, constitutional reform initiatives are now widespread across Indian Country.[66] This is not surprising, with so many tribal constitutions not being of tribes' own making, and with so many tribal constitutions designed at a time when reservation governments were hardly forecast to become real governments. Yet, now, Indian nations find themselves with their own tax systems, police, courts, jails, business codes, criminal procedures, land use and environmental policies, traffic laws, child welfare systems, and the rest of the panoply of real governmental functions. Indian nations are changing their constitutions because they are finding that foreign and/or outdated systems are not working for them.[67]

The very term "constitution" seems rooted in the civics lessons of Western (Anglo-European) democracies. But systems of self-government – constitutions – are far from alien to Native people. From the confederacy of the Iroquois, to the Lakotas' historic (essentially) parliamentary rule with independent dispute resolution,[68] to the Cherokee's written constitution of 1827, Native nations long governed themselves with effectiveness. Much like contemporary nations that lack central written constitutions (including Israel and Great Britain), these indigenous systems may not have all been written down and codified, but they nonetheless constituted *constitutions* – the basic architecture for designing, implementing, and upholding a community's values and ways of sustaining its social order.

In a very real sense, current Indian constitutional reform is aimed at establishing an *indigenous* rule of law. This does not mean "going back" except in so far as historic values and norms of legitimacy are still operative in a community. It does mean basing governance on values and norms that come indigenously from Indian communities today. For tribes are finding that effective constitutional rule requires that the "rules of the game" – from personnel policies to the tribal court's decisions to the enforceability of business contracts – operate under a rule of law that is legitimate in the eyes of citizens.

Like "constitution", the term "rule of law" has a distinctly Western ring to it. Yet, this is but a cultural conceit. The rule of law is and has always been at the heart of effective self-governance. Stated as eloquently and straightforwardly as "I believe that friend, family, and foe should be treated

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[65] See the Harvard Project on American Indian Economic Development, "Trust Resource Management," *Tribal Governance Success Stories: Honoring Nations 2003* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2003); Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (Cambridge, MA: Harvard Institute for International Development, 1997).

[66] See the Harvard Project on American Indian Economic Development, Initiative on American Indian Constitutional Reform, http://www.ksg.harvard.edu/reform (28 June 2006).

[67] Joseph P. Kalt, "Constitutional Rule and the Effective Governance of Native Nations" in *American Indian Constitutional Reform and the Rebuilding of Native Nations,* ed., Eric D. Lemont, (Austin: University of Texas Press, 2006).

[68] Cornell and Kalt, "Where Does Economic Development Really Come From?"

equally",[69] a rule of law – as opposed to rule according to who your relatives are or how much support you gave an office holder – is deeply ingrained in Native communities as a principle of proper and fair government. When the unwritten contemporary constitution of a Pueblo in New Mexico, provides that a council of *principales* can remove the community's theocratic *Cacique* from governing status for "negligence or wrongdoing"[70] in the form of self-serving "social entanglements,"[71] the rule of the Pueblo's own indigenous law is being enforced. The same principle applies when the self-written 2001 constitution of the Crow Nation goes to great pains to depoliticize its court system,[72] or when Haudenosaunee clan mothers can remove chiefs for self-serving misconduct in office.[73]

Contained in cases such as Cochiti, Crow, and the Haudenosaunee are tribes' use of indigenous separations of powers as guardians of the rule of law. As noted, IRA constitutions and their kin are notably amorphous and unstructured when it comes to the age-old challenges of controlling the use of governmental powers so that those powers stay focused on public, rather than private, interests. For this reason, Native constitutional reform in the era of self-determination has been deeply concerned with establishing workable structures and procedures of self-designed constitutional checks and balances. Thus, for example, Article III, Section 3 of the 1994 *Constitution of the Ho-Chunk Nation* provides for: "Separation of Functions. No branch of the government shall exercise the powers and functions delegated to another branch."[74] The 1992 amendments to the *Constitution and Bylaws of the Turtle Mountain Band of Chippewa Indians* (ND) added an Article XIV "Separation of Powers (Judiciary)" in order "[t]o provide for a separate branch of government free from political interference and conflicts of interest for the development and enhancement of the fair administration of justice."[75] In the case of the *Constitution and By-Laws of the Pawnee Indians of Oklahoma*¸ Article II (amended 1982) enumerates that: "The Pawnee Indian Tribe of Oklahoma is empowered to establish a Law and Order and Judicial System to protect peace, safety, health and welfare of the members of the tribe; provided the concept of separation of the Executive and Judicial powers is maintained."[76]

The fundamental structural reforms that constitute current nation building in Indian Country are seldom easy to achieve. While the governmental forms and institutions in Indian Country are often ill suited to contemporary realities and demands of tribal self-governance, like governmental

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[69] Sam McClelland, Constitutional Reform Committee, Grand Traverse Band of Ottawa and Chippewa Indians, *Initiative on American Indian Constitutional Reform*, Harvard Project on American Indian Economic Development, Executive Session, 13 October, 2001.

[70] Charles H. Lange, "Cochiti Pueblo," in Alfonso Ortiz, ed., *Handbook of North American Indians* (Washington: Smithsonian Institution, 1979), 373.

[71] Dumarest, Fr. Noel, "Notes on Cochiti, New Mexico" in *Memoirs of the American Anthropological Association* 6. (Washington, DC: American Anthropological Association 1919), 197.

[72] *Crow Tribal Constitution* http://www.tribalresourcecenter.org/ccfolder/crow_const.htm (28 June 2006).

[73] Jack McIver Weatherford, *Indian Givers*, Crown Publishers (Random House), 1988.

[74] *Constitution of the Ho-Chunk Nation* http://www.tribalresourcecenter.org/ccfolder1/ hochunk_const.htm (28 June 2006).

[75] *Constitution and Bylaws of the Turtle Mountain Band of Chippewa Indians*, Belcourt, ND http://www.tribalresourcecenter.org/ccfolder1/tmconst.html (28 June 2006).

[76] *Constitution and By-Laws of the Pawnee Indians of Oklahoma* http://www.tribalresourcecenter. org/ccfolder1/pawnee_const.htm (28 June 2006).

systems everywhere, they create vested interests in their own perpetuation. Tribal governance, too, is plagued by the vagaries of federal policy and a persistently complicated tribal legal status. A lack of experience in designing and running tribal government can lead to major mistakes. Entrenched attitudes and habits can be hard to surmount. Some tribes are struggling with internal factionalism and corruption. Accountability mechanisms are often lacking. The impediments are many, but the future of many Indian nations turns on surmounting these challenges.

Civil Society and Community Organizations

Tribal governments assume a wide set of responsibilities in most Native nations, underscoring the need for them to be involved in capacity building even beyond their own administrations. Often, the best, if not the only, people in the nation with substantial administrative experience are employed in running the tribal government. Thus, on many reservations, tribal governments are currently involved in managing tasks which elsewhere might typically be carried out by community organizations. The local non-governmental and non-profit "civil society" organizations that other nations and communities so often rely upon in key areas of community life are relatively underdeveloped in Indian Country. This reflects the disruptive impacts of the long period of intervention by non-Indian charities and federal administrators and the accompanying disempowerment of Native institutions: Traditionally, many Native societies integrated governmental functions and civil society functions as unquestioned ways of life.

Paralleling demands for exertions of tribal governmental capacities, Native peoples have sought to gain greater control over all of the institutions serving their communities. Since the 1960s, Native-led community organizations have become more prominent throughout Indian Country. In many respects, the emerging non-profit structures provide a contemporary mechanism for traditional forms of organization or association.[77] The recent growth is also being driven by the shift occurring in service provision within Native societies. As the federal government reduces its involvement in Indian Country, non-governmental organizations emerge or expand their focus to help address unmet needs within the community. [78]

The relationship between tribal governments and community organizations is changing as the Native civil society sector evolves. Formal links between tribal governments and off-reservation non-profits serving tribal citizens remain rare. The trend is for new on-reservation non-profits to complement or supplement government functions, since many tribes transitioning to self-governance do not have adequate resources to support their contracting and compacting.[79] Tribal governments themselves sometimes establish non-profits to provide particular services to the community. An illustrative example is the Cherokee Nation Education Corporation (CNEC), incorporated by the Cherokee Nation as a 501(c)3 corporation in 1996 to support Cherokee education, culture and history. Among its endeavors, CNEC funds higher education scholarships, an award-winning children's Cherokee language choir, and a veteran's memorial.

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[77] See Kathleen Mantila, *Down But Not Out: The Non-Profit Sector in Native America and the New Federalism* (Native Americans in Philanthropy, 1999), and Sherry Salway Black, *The Emerging Sector: Nonprofits in Indian Country* (Fredericksburg, VA: First Nations Development Institute, 2000).

[78] Ibid.

[79] Where tribal governing institutions are weak, non-governmental organizations sometimes compete directly with tribal governments. While such non-profits ensure that basic services are delivered, conflict between entrenched interests can be detrimental to the interests of citizens.

Increasingly, grassroots non-governmental organizations also play an important watchdog role in many Native nations, providing an outlet for freedom of expression by challenging tribal government policies. One such group is the sustainable development activist group Native Action on the North Cheyenne Reservation, which successfully fought to curb coal strip mining on tribal lands. The growing number and sophistication of non-governmental organizations within Indian Country provides increased opportunities both for service delivery and for reflecting the diversity of opinions within Native nations.

As they move towards greater self-governance, Native nations are increasingly recognizing the advantages of a robust civil society sector and are taking steps to encourage its development. Many tribal governments are establishing tribal codes under which nonprofit entities can be incorporated. This provides an alternative to state and federal incorporation, which imposes those other jurisdictions' regulatory control over Indian non-profit activities. A small but growing number of tribes and tribal enterprises have established foundations, giving non-profits and community groups an alternate source of funds that can reduce reliance on tribal, state, and federal government monies. The White Mountain Apache Heritage Foundation, for example, is wholly owned by the White Mountain Apache Tribe in Arizona. Under an independent board charter, the Foundation now has responsibility for managing the tribe's takeover and restoration of the historic U.S. Army Fort Apache following U.S. Supreme Court rulings that effectively put the BIA in breach of trust for failing to care for the site.

Tribe-to-Tribe Relations

Indian nation governments are also working with one another to further the interests of their nations. As sovereign governments, tribes increasingly interact with each other through a variety of channels, including direct tribe-to-tribe communication and collective participation as members of intertribal organizations.[80] The relations between tribal governments are as unique and complex as the tribes themselves. Their interchanges cover issues ranging from the mundane to the monumental, and likewise range from amiable to antagonistic.

Cooperation between tribes has allowed many Native nations to gain governmental control by taking advantage of greater political clout or economies of scale. The oldest and largest nationally representative tribal government organization, the National Congress of American Indians (NCAI), promotes sovereign and treaty rights on behalf of its approximately 250 member governments. Many tribal governments also participate in smaller intertribal organizations based on geography or traditional tribal ties. Examples include the Affiliated Tribes of Northwest Indians, the Alaska Federation of Natives, and the All-Indian Pueblo Council. In certain cases, intertribal organizations carry out a particular function on behalf of a number of tribal governments. For example, the Columbia River Intertribal Fish Commission is structured as a political subdivision of four tribes and has authority to enforce fishing regulations on the Columbia River. The Intertribal Bison Cooperative, a non-profit organization, manages a herd of over 8000 bison for 42 member tribes.

The growth of intertribal organizations is often constrained by the fact that tribes do not always share the same interests –and it is a mistake to assume they do. The increased accountability imposed on tribal officials by self-determination understandably compels those officials to pay particular attention to concerns at home. This often leaves little time or resources to be allocated toward intertribal efforts. Moreover, the priorities of tribal governments can vary greatly due to

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[80] Here we use *intertribal organizations* to mean those groups whose membership is composed of representatives from the tribal governments.

differences in various nations' geographic locations, their historical relationships with the federal government, the presence or absence of applicable treaties with the federal government, their economic wherewithal, and histories of historic intertribal relations that can range from the friendly to the hostile. Then, too, the allocation of federal funds can create tensions, as programs based upon population numbers pit large tribes against smaller tribes. The growing economic power, and often corresponding political power, of tribal governments with successful gaming operations has created new divisions among the Native nations. In some cases, such tribes have sought to prevent other tribes from initiating or expanding gaming because of hostility to the implied increase in competition in the gaming marketplace.

Tribes choose to work together to expand their sphere of influence by tackling issues of common concern more effectively than they could on their own. The decision to participate in intertribal organizations or otherwise cooperate with other Native nations, however, is appropriately viewed by tribal governments an act of sovereignty. When they comport with nations' goals for themselves, intertribal organizations can provide Native nations with valuable forums for consensus building, promoting common agendas and problem-solving, exploring innovation, sharing and disseminating information, addressing capacity building, building public awareness, and maximizing political clout. Participating in intertribal organizations can thus be an important part of a Native nation's pursuit of self-governance. The intertribal Task Force on Violence Against Women is a case in point. Organized by tribal government members of NCAI, the Task Force has provided participating tribes with the vehicle by which to join a broad coalition of non-Indian organizations united to fight family violence in the United States and successfully press for appropriate federal legislative reforms.[81]

[81] See the Harvard Project on American Indian Economic Development, "Task Force on Violence Against Women," *Tribal Governance Success Stories: Honoring Nations 2006* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2006)

TEXTBOX: Elders Cultural Advisory Council, San Carlos Apache

In 1993, the San Carlos Apache Tribal Council established the San Carlos Elders Cultural Advisory Council (ECAC). Comprised of elders from the nation's four districts, the ECAC is a formal body empowered by the Tribal Council to provide advice on cultural matters, consult with off-reservation entities (especially federal and state agencies) on culture-related concerns, and execute various projects related to cultural preservation.

At the time of ECAC's creation, the San Carlos Apache Tribe was suffering through a period of political instability—manifested in protests, takeovers, and demonstrations—that eroded the tribal government's ability to provide essential governmental services. Individual elders regretted the fact that traditional Apache knowledge and values rarely guided tribal government decisions. With the creation of the ECAC, however, they soon realized that they had a vehicle for expressing these concerns. The ECAC gave traditional Apache perspectives an institutionalized and formal voice that politicians could not ignore—and as a result, made tribal government more responsible and accountable.

Since that time, compelled by its members' belief that the traditional Apache way of life is the most responsible, beautiful, and proper way for Apaches to live, the ECAC has become an important check on tribal government. When, without community consent, the Tribal Council sought to renew a contract with a company that was buying water from a sacred spring, the ECAC vigorously reprimanded the Tribal Council. In 1999, troubled by the tribe's financial mismanagement, the ECAC wrote a letter to the Tribal Council reminding its members of the proper ways San Carlos Apache leaders ought to manage resources. To demonstrate their resolve, the elders agreed that the ECAC would set an example of self-reliance by foregoing tribal monies in favor of operating as a self-sustaining volunteer entity.

Around Indian Country, elders are consulted on repatriation issues, for guidance in tribal policy, for assistance in cultural revitalization, for wisdom in family life, and so on. In many instances, however, these efforts are *ad hoc* and yield only a small portion of the benefit that arises from paying consistent attention to elders' vision and values. The ECAC, however, plays a critical ongoing role in advancing the social, economic, political, and spiritual health of the San Carlos Apache nation.

The ECAC serves the San Carlos Apache Tribe by tapping, discussing, and then articulating its members' understanding of Apache values. The perspectives the San Carlos Apache elders bring to questions of governance are invaluable; the knowledge they possess is essential to the long-term health of the Apache people. /**END TEXTBOX**

We Are a Sovereign Government

W. Ron Allen (Jamestown S'Klallam)
Chairman, Jamestown S'Klallam Tribe
June 2004

Tribal governments are sovereign governments. This means that we have the authority as Indian peoples to control our own destinies. The Tribe controls who are our citizens. We determine what laws will control the interests of our community. Our governments have jurisdiction over our own affairs. This is what sovereignty means. These are key components of exercising sovereignty. Sovereignty is the basis of our very unique relationship to the United States government and it is acknowledged in the Constitution.

When I became involved in tribal governance, the Jamestown S'Klallam Tribe of Washington State was working hard to defend its sovereignty. At that time, the tribe was pursuing the reestablishment of its federal recognition. The fact that the federal government had stopped recognizing our tribe was the result, in part, of our repeated assertions of independence. During the nineteenth and twentieth centuries, the Jamestown S'Klallam Tribe resisted several of the terms of dependence on the federal government. For instance, our tribe chose not to relocate to a reservation. Instead, our leadership orchestrated the purchase of a land base at the Jamestown Village. As a result, our tribe preserved an independent standing. Similarly, when we established our constitution, we patterned it after those of the Indian Reorganization Act, but chose not to be an IRA tribe. The IRA imposed restrictions upon tribal governments that we thought were inappropriate. If we are a sovereign government, we make our own decisions without requiring the Department of the Interior to determine whether or not those decisions results in effective governance.

Our assertions of sovereignty in the 1970s coincided with the emergence of a national policy of empowering tribes to exercise their sovereignty and control their own affairs. With the passage of the Indian Self-Determination Act in 1975, tribal attitudes towards governance began to change. Initially, the act acknowledged our authority to contract with the federal government for the provision of services for our tribes. It established the opportunity for tribes to acquire resources to develop various programs in health care, education, and housing. During this first contracting phase, tribes were still subjected to the criteria and conditions of the federal government. However, when the act was refined as a result of self-governance legislation in the 1990s, tribal governments began to act more like governments than contractors. Tribes assumed greater control over how their federal resources could be used. We negotiated with the federal government for resources, then took those resources and made decisions about their use based on the priorities of our communities.

As a result, tribal governments began to realize the advantages of functioning as sovereign governments. Increasingly, we took charge of our own destinies. The Tribe amended its constitution to remove conditions of federal oversight. We developed more sophisticated governmental structures and expanded our capacity for managing tribal affairs. We are now capable of meeting our communities' needs more effectively than any other government. We know our people and are sensitive to their cultural traditions and realities. Our people take comfort in knowing that their governments--not the state or federal governments--are making decisions on their behalf.

A number of tribal governments refused to assume the management of their service programs under the Indian Self-Determination Act. Although I understand their decision, I disagree with it. These tribes believe that the U.S. government has failed to live up to its treaty obligations. They fear that if they manage their own service programs at the low levels of federal funding available under

the act, they will release the federal government from its obligation to Indian tribes. I believe that the U.S. government has the highest moral obligation to live up to its treaty commitments to Indian communities. As a matter of practical consideration, however, I recognize that this belief alone doesn't enhance the welfare of our communities. Tribes must come to the realization that the federal government will never fully live up to its obligations to our peoples and that we must take control of our destinies through our own resourcefulness.

I believe that that resourcefulness is best harnessed for the benefit of our communities through the effective functioning of mature tribal governments. Mature tribal governments must be led by sophisticated and seasoned leaders. Under the Indian Self-Determination Act, tribes have promoted education. As a result, more and more tribal leaders are educated. They understand the workings of political systems. Now these leaders need to become seasoned, that is, experienced in managing, protecting and representing the tribal affairs and interests. Regrettably, tribes tend to eliminate seasoned leadership. Too often, they distrust leaders who pursue a vision for their communities or who gain the experience needed to fight for their interests in the national trenches. In many tribal governments, leaders tend to move in and out of office so frequently that they fail to become seasoned. Tribes must learn to trust those leaders who are capable of pursuing tribal interests. They must learn to trust those leaders who will generate revenues from a variety of sources including economic ventures, professional and vocational, and build the governmental capacity to care for their communities. They must learn to trust those leaders who are capable of achieving a balance between the day-to-day needs and future aspirations of our communities; between the interests of youth, families, and elders; and between individuals and our communities as a whole.

With this trust, tribal leaders assume an enormous responsibility. Tribal leaders, like governors or like the president of the United States, are responsible for understanding a vast array of very complicated issues such as education, health care, natural resource management, and social service programs. First, we must understand these issues and programs. Then, we must provide diplomatic leadership in discovering and implementing solutions for the problems these issues present. Being a tribal leader means being prepared to provide direction whenever decisions are made that affect Indian interests. Of course, the battles in which Indian interests must be protected occur not just within our tribes, but at the regional and national level. The real challenges arise in these larger forums as we attempt to provide responsible leadership that is respectful of other tribes' interests. I've traveled throughout Indian Country because when decision makers ask for my input, I need to know what the Seminoles in Florida or the Penobscots in Maine think about the problems we confront together.

As indigenous peoples, our communities are tied together through common challenges. It is vital that mature tribal governments make a commitment to the regional and national organizations that serve our intertribal community. We must make the decision to lead with our resources rather than to hoard them for private purposes, particularly if we have been blessed with success in establishing a solid revenue base. We must have an enhanced awareness of the importance of staying unified. Collectively, tribes have the opportunity to work effectively within the political system. Tribes have citizens who vote. Tribes have money to contribute to campaigns that affect our communities. Tribes have formed regional and national intertribal organizations that strengthen our stature. We have high-powered and well-placed lobbyists who advance our agenda in Washington, DC and in state capitols. Currently, the Native American Caucus is the largest special interest caucus in Congress. All of these factors help us influence the political decision-making process and fight efforts to diminish or negatively affect our sovereignty or treaty rights.

Efforts to diminish our sovereignty exist, in part, because the public doesn't understand tribal sovereignty. Our educational system has done a terrible job of representing tribal governments. A

chapter in all civics textbooks should explain that the American political system is made up of multiple political structures within which tribes are a unique set of communities. Instead, many people believe that sovereignty is the right only of the U.S. and state governments, or God. Of course, there isn't room for tribes in this definition. This misunderstanding creates a negative disposition and perspective among those who think that tribal sovereignty encroaches on their rights. They characterize tribes as having special rights or Indians as being super citizens. Nothing could be further from the truth. Too often, tribes fall at the bottom of every economic and social category by which we measure the status of our society.

Tribes must assume the responsibility for educating individuals about our sovereignty. Today, we actively educate leaders within the local, state, and federal governments by creating forums through which they gain a better understanding of the workings of tribal governments. As a result of our efforts, governments are designing policies that support our sovereignty while more and more resources are moving straight from the federal government (and sometimes from the states) to tribes without being channeled through intermediaries. These are benchmarks of success. Still, the process of education is ongoing. High turnover in state and federal governments means that new administrations enter without an understanding of our relationships and rights and without ownership of past policies that support our sovereignty. Our efforts to educate other government leaders must never stop.

During my twenty-nine years in tribal government, the Jamestown S'Klallam Tribe has enhanced its sovereignty. We have reestablished our federal recognition, our land base, and our financial holdings. We have built an effective government to serve our tribal and intertribal communities. On the local, state, and national levels, we do our share in providing leadership and support in these national and regional forums. Over these years, I've seen tribes, including ours, charged with empire building. Our work is not about empire building. It's about building the foundational capacity to serve our community and our children's community and our children's children's community. Within our tribe, and many other tribes, there is a notion of the "seventh generation." This means that we acknowledge that what we do will reach beyond us for seven generations. For me, our work reaches far beyond that concept. Our duty and work is about the belief that our community will exist for generations upon generations.

This vision and purpose is what motivates us as tribal leaders to do what we're doing. This vision, duty, and responsibility of tribal leaders have been embedded in me through the inspiration of leaders like Joe DeLaCruz and Pearl Capoemen-Baller of the Quinault Indian Nation, Wendell Chino of the Mescalero Apache Nation, Roger Jordain of Red Lake Chippewa Nation, and Mel Tonasket of the Confederated Colville Tribes. These are leaders who have dedicated their lives to their tribes, their people, and communities to protect and advance sovereignty and treaty rights. We know that it's critical for our people. We're very proud of it.

TRIBAL JURISDICTION

- Indian tribes are sovereign nations within the United States. However, their jurisdictional rights are under continual dispute.
- Decisions on tribal jurisdiction rendered in the U.S. court system have enormous impact throughout Indian Country. Recent court decisions have eroded Native nations' powers.
- The power to tax is one of the most contentious jurisdictional issues in Indian Country. The U.S. courts' reluctance to recognize a broad definition of tribal taxing authority impedes Native nations' ability to regulate activities on tribal land.
- As tribal legal systems evolve, their achievements will influence Native nations' capacity to effectively exercise their jurisdiction and governing powers.

As we have noted, American Indian tribal governments are recognized as sovereign entities by the federal government pursuant to the U.S. Constitution, treaties, acts of Congress, Presidential orders, and numerous federal Court decisions. Like the federal government and state governments, tribal governments have authority to make laws governing certain geographical areas and certain individuals. Examples of governmental powers that tribes can exercise include determining citizenship, collecting certain taxes, and passing laws regulating domestic affairs, property use and commercial activity. However, many of the governing powers that tribes argue are inherent to them as sovereign nations are contested. Competing claims between federal, state, and tribal entities regarding who should exercise power form the basis of complex problems, fluctuations, and conflicts in Indian law.

Underlying Principles of Tribal Jurisdiction

The legal status of Native nations and their relationships with states and the federal governments have been to subject contentious debate since the founding of the United States. Over time, judicial decisions have affirmed certain principles, some of which are beneficial to Native nations and others harmful. Early in the nineteenth century, the "doctrine of discovery" was used to

justify the U.S. government's assumption of the legal title to lands occupied by Indians.[82] Soon thereafter, the seminal U.S. Supreme Court decision in *Cherokee Nation v. Georgia* (1831) declared tribes to be "domestic dependent nations" and the government-to-government relationship between the federal government and tribes to be one of "guardian" to "ward."[83] In *Worcester v. Georgia* (1832), the Court determined that states' abilities to regulate tribes were limited unless expressly empowered by Congress in specific areas.[84] The Court also held that Congress had "plenary," or complete, power over Native nations.[85]

Although the U.S. Supreme Court has consistently upheld the federal government's almost unlimited power to regulate Indian nations, it has also recognized that the political authority of tribes is inherent since it derives from aboriginal sovereignty (i.e., sovereignty emanating from Native nations' status prior to and notwithstanding the European migrations into Native homelands and the founding of, eventually, the United States). The doctrine of "reserved rights" holds that Indian nations maintain all rights not specifically ceded by treaties or explicitly removed by federal legislation, unless these rights are inconsistent with their status as dependent nations.[86] Under the United States' legal framework, albeit not necessarily under the systems of various tribes, Native nations thus have full jurisdiction over their affairs unless their power has been explicitly restricted by Congress.

The territory that contemporary tribal governments control is designated by the legal term "Indian Country" and has been defined by federal legislation as:

(a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(b) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[87]

Given the varied history of Indian lands across the U.S., whether particular areas are legally part of Indian Country has sometimes been at issue. In *Alaska v. Native Village of Venetie*, the U.S. Supreme Court ruled in 1998 that the Alaska Native Claims Settlement Act lands do not constitute "Indian Country." This has severely restricted the power of Alaska Native communities to carry out governmental functions and regulate economic activity taking place within village boundaries.[88]

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82 *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823). On the "doctrine of discovery", see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

83 *Cherokee Nation v. Georgia* U.S. (5 Pet.) 1 (1831).

84 *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).

85 This includes abrogating treaties.

86 *United States v. Wheeler* 435 U.S. 313 (1978).

87 18 USC § 1151. See also "Native Lands" chapter.

88 Alaska v. Native Village of Venetie Tribal Government (96-1577) 101 F.3d 1286, reversed. See, also, the chapter on "Alaska Natives" below.

The enunciation of legal principles and precedents does not mean that these issues are static or necessarily clear in practice. Much litigation involving Indian nations has centered on the interplay between the limits of the exercise of sovereign tribal power and the incursion into those powers by federal and state governments. Consequently, a recurring issue in cases involving Native nations or their citizens is jurisdiction between federal, state and tribal entities – which one has the power to exercise which rights, and over whom? The decisions rendered in such cases in many ways dictate the degree of political control tribes are – or will be – able to exert.

Adjudicatory Authority

As sovereigns, Native nations are charged with keeping order within their territories and resolving disputes between their citizens. Most Native nations operate some type of tribal court which upholds laws and adjudicates competing claims. However, whether a particular matter falls under the purview of the tribal courts is not always clear. Indeed, the jurisdictional boundaries between tribal adjudicative powers and those of the state and federal governments have evolved over time through customary practice, federal legislation, and jurisprudence.

Outside of Indian land areas, federal law says that tribal courts do not have jurisdiction over tribal citizens in criminal action or civil disputes. For incidents within Indian Country, however, a number of variables determine which legal system will hear a specific case. When a crime takes place on Indian land, jurisdiction is typically split along the lines of who perpetrates the crime and how severe it is. Crimes committed by non-Indians, even if they take place on tribal lands, fall outside the scope of tribal jurisdiction according to federal legal precedent. This was affirmed with considerable durability to date by the U.S. Supreme Court in *Oliphant v Suquamish Indian Tribe* of 1978.[89]

Within Indian Country, most crimes committed by Indians – whether against Indians or non-Indians – fall under the authority of the Indian nations where a crime is committed. However, the federal government has exclusive jurisdiction over offenses in Indian Country if they are classified as "major crimes" by the Major Crimes Act of 1885:

> [M]urder, manslaughter, kidnapping, maiming, … incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 [embezzlement and theft within special maritime and territorial jurisdiction] of this title.[90]

In 1990, the U.S. Supreme Court held in *Duro v. Reina* that tribes had essentially no jurisdictional authority in criminal cases over non-member Indians on the reservations.[91] Since the *Duro* decision overrode common practice and federal statutes which typically use the term "Indians" rather than "tribal members," Congress was prompted to enact what has become known as the "Duro Fix." This legislation reaffirmed the rights of a tribe to exert criminal jurisdiction over all Indians

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89 *Oliphant v Suquamish Indian Tribe* 435 U.S. 191 (1978).

90 *Major Crimes Act* (18 USC § 1153).

91 *Duro v. Reina* 495 U.S. 676 (1990).

committing crimes within its jurisdiction, whether the Indian perpetrator is member of that tribe or not. The Supreme Court affirmed the "Duro Fix" in *United States v Lara* (2004).[92]

In civil matters, tribal courts generally exercise jurisdiction over a suit brought by any person against an Indian for a claim arising on Indian lands. This was affirmed by the U.S. Supreme Court in 1959 in the landmark *Williams v Lee* decision.[93] Thus, proceedings involving opposing Indian parties, or cases where a non-Indian sues an Indian over a claim arising in Indian Country, fall under the jurisdictional purview of the tribal courts. In contrast, however, state courts have typically heard actions brought by Indians against non-Indians, even for matters arising within the boundaries of a reservation.[94]

Questions of judicial authority became particularly complicated after Congress passed Public Law 280 (P.L. 280) in 1953. This Act was part of an effort to reduce federal responsibility for Indian peoples. The law established state jurisdiction over criminal matters on Indian lands in California, Minnesota, Nebraska, Oregon, Wisconsin and (later) Alaska, although certain reservations were granted exceptions. Several additional states have since assumed at least some jurisdiction over Indian lands under Public Law 280. Subject states were also given civil jurisdiction under P.L. 280, although tribal courts retain concurrent jurisdiction over certain matters. The reach and intent of Public Law 280 remains highly contentious and often tested through litigation.

Regulatory Authority

The applicability of civil laws and regulations within Indian Country is another area in which competing jurisdictional claims frequently – and contentiously – arise. Examples include the regulation of employment, health and safety, building standards, zoning, and environmental hazards. Outside of Indian Country, the activities of tribal members and tribes are subject to state law, except in instances where treaties or federal legislation provide otherwise. Within Indian Country, however, the picture becomes more complicated.

State civil laws and regulations can apply on Indian land in some cases. These include situations in which treaties contain specific provisions, jurisdiction is delegated by federal legislation, or prior federal court decisions have held that state regulatory action is valid. As a general principle, however, tribal governments have civil regulatory jurisdiction within Indian Country. Most state civil regulatory laws therefore do not apply to Indians on Indian lands. A prominent example is the U.S. Supreme Court's finding in *California v. Cabazon Band of Mission Indians* (1987), which ruled that the State of California could not regulate tribal gaming enterprises.[95] Indeed, this ruling helped break open the pathway for tribal governments to make the decision, rather than the states, to determine whether Indians (especially in the form of tribal governments) can operate gaming enterprises on lands subject to tribal jurisdiction. In practical effect, *Cabazon* holds that just as the State of Nevada (or any state) can determine whether gaming enterprises are lawful within the State of Nevada (or that other state's jurisdiction), and the State of Massachusetts (and the other states) can choose to own, operate and market its highly successful gaming business (its lottery), so Indian nations can make parallel determinations for their jurisdictions and citizens.

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92 *United States v Lara* 124 S Ct 1628 (2004). See also Matthew L.M. Fletcher, "The Supreme Court and Federal Indian Policy," *Nebraska Law Review* 85 (2006).

93 *Williams v Lee* 358 U.S. 217 (1959).

94 See, for example, *Nevada v. Hicks*, 533 U.S. 353 (2001).

95 *California v Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Some of the most difficult jurisdictional issues surround the question of which government – federal, state, tribal – can regulate the activities of non-members on reservation lands. Many non-Indians live, work, and own property within the boundaries of Indian Country. As one federal Indian law text points out, the presence of non-Indian owned lands on reservations means that "tribal regulatory jurisdiction may extend to an area significantly larger than the lands actually in Indian ownership."[96]

The U.S. Supreme Court's ruling in *Montana v. United States* (1981) restricted tribal authority over non-tribal members on non-Indian land within the reservation. However, the decision also affirmed that a tribe can regulate the activities of non-members in certain instances. The Court specified that tribal regulations can apply to non-members if they enter into relationships such as leases or commercial arrangements with a tribe or tribal members. A tribe can also govern the conduct of non-Indians on the reservation if it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[97] These provisions have come to be known as the "Montana exceptions" and have been used by tribal and federal courts to uphold tribal regulations on a variety of subjects such as employment, health and safety, and land use.[98]

The question of what types of regulatory authority may be exercised by tribes within their territory remains unsettled. Further litigation will thus continue to define the boundaries of tribal authority. In *Brendale v Confederated Tribes and Bands of the Yakima Indian Nation* (1989), for example, the U.S. Supreme Court found that the Yakama Indian Nation could not zone land owned by non-members within the boundaries of the reservation except in one area deemed of particular culture and spiritual significance.[99] As tribal governments continue to reassert their rights to govern Indian lands, jurisdictional conflict is sure to remain a feature of the Indian political landscape for years to come.

Challenges to Tribal Jurisdiction

The erosion of tribal jurisdiction is – and will continue to be – of major concern in Indian Country. Over the last three decades, U.S. Supreme Court and lower court decisions have repeatedly recognized the principle of tribal sovereignty, but increasingly placed limits on the extent of tribal sovereignty. Indeed, the National Congress of American Indians has voiced strong apprehension through its Tribal Sovereignty Protection Initiative that the Supreme Court is "on an accelerating trend toward removing tribal jurisdiction over the conduct of non-Indians within tribal territory."[100]

One scholar points out that limits on tribal jurisdiction historically were meant to be the exception rather than the rule, yet a series of landmark court cases have entrenched a situation where incursion into tribal sovereignty is the rule.[101] In the light of such rulings and recent churn in Court

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96 David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul, MN: West, 2005), 23.

97 *Montana v. United States*, 450 U.S. 544 (1981).

98 However, tribal hunting and fishing regulations on non-members have been struck down by the courts. See, for example, *South Dakota v. Bourland*, 508 U.S. 679 (1993).

99 *Brendale v Confederated Tribes and Bands of the Yakima Indian Nation* 492 U.S. 408 (1989).

100 National Congress of American Indians (NCAI), Tribal Sovereignty Protection Initiative. http://www.ncai.org/Sovereignty_Protection.91.0.html (28 June 2006).

101 See Bryan H. Wildenthal, *Native American Sovereignty on Trial* (Santa Barbara, CA: ABC-CLIO, 2003).

personnel, some observers are beginning to urge tribes to alter their tactics of using the federal courts to uphold tribes' rights as sovereign political entities. Though it has long been the goal of attorneys practicing Indian law to bring cases before the U.S. Supreme Court, this may now be an objective that is, or can be in specific instances, detrimental to the interests of Native nations.

The narrowing of tribal jurisdiction significantly reduces the ability of tribes to exercise legal and political control over their own affairs and resources. Current trends reinforce the importance of tribal governments' attempts to resolve jurisdictional conflicts with other governments in mutually satisfactory ways. Their ability to do so will have an important impact on the continued political, economic, and social development of Indian nations.

Taxing Authority

One of the most important jurisdictional debates being waged in Indian Country at this time concerns taxation. The issues under contention concern the ability of tribal governments to collect taxes from non-Indian businesses operating on the reservations, and the ability of state governments to collect taxes on retail sales that take place within Indian lands. One of the few certainties in the debate is that states cannot tax tribal members who live on tribal land and derive their income from the provision of goods and services to a reservation community.

Until recently tribes operated under the assumption that they could tax non-Indian activity anywhere within a reservation, as confirmed by the Supreme Court in the *Merrion v Jicarilla Apache Tribe* decision of 1982.[102] However, in 2001 the Supreme Court severely curtailed the ability of tribes to tax non-Indian businesses on the reservation in *Atkinson Trading Co. v Shirley*. The Supreme Court held that the Navajo Nation could not impose a hotel occupancy tax on guests of a hotel operated by a nonmember of the Nation on private (i.e., fee simple) land within the reservation. Tribal governments are thus left with an inconsistency between the responsibility to provide governmental services and the ability to raise revenues to pay for these services. In the *Atkinson* case, even though the hotel derived benefit from tribal police and fire department services and was licensed as an Indian trader, the occupancy of non-Indian guests was successfully advanced as the reason for prohibiting the levy of a Navajo Nation tax. The overall effect is to "remove from the reach of tribal taxation much non-member economic activity that takes place on reservations."[103]

The ability of tribes to tax commercial activities taking place in Indian Country is also compromised by state government retail transaction taxes. Although states cannot impose taxes on tribal government activities or on individual tribal members, tribes must collect taxes on behalf of the state within which the Indian nation is located if a state tax is aimed at the non-Indian retail consumer. For example, states can impose taxes on sales of cigarettes to non-Indian and non-member customers of Indian-owned tax-free smoke shops since the tax burden is deemed to fall on the customers rather than on the tribe, itself.[104] The retail tax situation is less than satisfying for tribes, since it forces them

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102 *Merrion v Jicarilla Apache Tribe,* 455 U.S. 130 (1982).

103 William C. Canby, Jr., *American Indian Law in a Nutshell*, 4th ed. (St. Paul, MN: Thomson/West, 2004), 280.

104 See, for example, *Narragansett Indian Tribe v Rhode Island* 296 F. Supp. 2d 153 (2003) and Pam Belluck, "Tribe Loses Suit on Tax Free Tobacco," *New York Times,* 30 December 2003.

to choose between potentially double-taxing certain transactions versus forgoing a tax – and its attendant revenue stream – altogether.[105]

The provision of services is a primary function of any government, and Indian nations are no exception. The difficulties tribes are having in the oversight and imposition of taxes are undermining their ability to establish and enforce "the 'rules of the game' by which citizens trade, interact and cooperate," as well as eroding their capacity to act "as the provider(s) of the social infrastructure and services" that underlie a well-functioning society.[106] The inability of Indian nations to collect adequate tax revenues is currently one of the most inhibiting regulatory developments faced by these nations, frustrating the development of capable Indian governments along a number of dimensions. Indeed, the political, administrative, and legal systems of Indian nations all suffer when the provision of services on the reservations is underfunded.

There is, however, some potential relief in sight for tribes who have thus far been frustrated by uncertainty and litigation over taxation issues. Reflecting the considerable expense and mutually unsatisfying path of litigation, states and tribes are turning to negotiation and agreement to settle their tax disputes and create going-forward mechanisms of jurisdiction sharing and revenue allocation.[107] By 1995, more than 200 state-tribal tax compacts had been entered into in 18 states.[108] Compacts covering motor fuels, tobacco, and sales taxes are especially prevalent.[109]

Tax compacts, when carefully crafted, allow both the tribes and the states to protect their sovereign interests, provide for a better-functioning tax collection mechanism and will prevent some of the contentious litigation that has characterized the controversies over taxation in Indian Country. Illustrative in this regard are the far reaching tribal-state tax compacts, signed in 2002, between the State of Michigan and seven Michigan tribes. These compacts recognize mutual sovereignty, and provide terms for relationship (collection and exemption) and revenue allocation across a wide range of sales, income, vehicle, tobacco, and use taxes.[110]

Nation Building and Tribal Courts

Tribal courts have become central players in the resolution of jurisdictional conflicts under U.S. Supreme Court rulings that cases challenging the scope and existence of tribal authority must

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105 Susan M. Williams, Testimony on Behalf of the National Congress of American Indians, "On the Collection of State Transactions Taxes by Tribal Retail Enterprises," before the United States House of Representatives Committee on Resources, 12 October 1999.

106 Joseph P. Kalt and David Reishus, *Report Concerning the Crow Tribe Resort Tax*, (Cambridge, MA: The Economics Resource Group, Inc., 27 November 1996), 6.

107 For a discussion of benefits, see Judy Zelio, *Piecing Together the State-Tribal Tax Puzzle* (National Conference of State Legislatures, April 2005), 4-5. http://www.ncsl.org/programs/fiscal/sttribe_tax.htm (28 June 2006).

108 Williams, "On the Collection".

109 See National Congress of American Indians, "Tax Agreements". http://www.ncai.org/Tax_Agreements.97.0.html (28 June 2006).

110 *Tax Agreement between the Bay Mills Indian Community and the State of Michigan* http://www.ncai.org/Tax_Agreements.97.0.html (28 June 2006).

first be heard in tribal court.[111] In *National Farmers Union Insurance Companies v. Crow Tribe of Indians* (1985), the Court noted that the policy of supporting Indian self-government and self-determination normally requires exhaustion of tribal court remedies of matters subject to tribal jurisdiction, and that federal policy "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[112] Tribal courts are therefore in position to play determinative roles in deciding whether tribal laws and regulations are within the tribe's jurisdiction, a situation which represents a fundamental shift in the development of federal Indian law on this subject.[113] But they must do so well.

Notwithstanding federal recognition of the jurisdiction and sovereignty of tribal courts, Indian courts exercise jurisdiction and sovereignty with a threat hanging over them. For, in *National Farmers Union*, the U.S. Supreme Court held that exhaustion of tribal court remedies may not be required "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[114] The pressure is on Native nations to build and operate courts that can meet this test.

A well-designed and operated court system serves a Native nation by clarifying the economic, political and social rules of the community, protecting the rights of members and non-members, maintaining peace and order, and insulating the nation from attacks on its sovereignty from those who otherwise may view Indian nations as poorly governed or lawless. After being excluded from exercising sovereignty for so long, however, Indian tribes face the "paradox of the sovereign" – convincing both internal and external actors to deal voluntarily with a sovereign that has the power to adjudicate and resolve disputes arising following commitment to voluntary interactions.[115] The problem confronted by sovereigns everywhere is that of credibly committing that the power to adjudicate and resolve disputes will not be used in "bad faith" – i.e., turned into the power to adjudicate and resolve disputes in corrupt and self-serving ways that primarily benefit the narrow self-interests of the sovereign. When this paradox cannot be overcome, external and internal actors are pushed toward taking their assets, their knowledge, their energies, and themselves to jurisdictions where they feel more security with the "rules of the game."

The process of building capable tribal judicial systems commonly begins with constitutional reform which enumerates the rights of citizens and the government, and which provides for the political independence of the tribal courts. To defend their sovereignty from attack, many tribes' constitutions contain a Bill of Rights. The 1983 Chickasaw Nation Constitution, for example, provides:

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111 *National Farmers Union Insurance Companies v. Crow Tribe of Indians* 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante* 480 U.S. 9 (1987).

112 *National Farmers Union Insurance Companies v. Crow Tribe of Indians*.

113 Douglas B. L. Enderson, "The Challenges Facing Tribal Courts Today," *Judicature* 79, no. 3 (November-December 1995), 3. http://www.tribal-institute.org/articles/enderson1.htm (28 June 2006).

114 *National Farmers Union Insurance Companies v. Crow Tribe of Indians* (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)).

115 See, for example, David D. Haddock and Robert J. Miller, "Facets of Sovereignty: Institutions that Spur and Institutions that Retard Tribal Development," International Centre for Economic Research, Working Paper, February 2004.

> Nothing in this Constitution shall be interpreted in a way which would change the individual rights and privileges the tribal members have as citizens of the Chickasaw Nation, the State of Oklahoma, and the United States of America… All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the inalienable right to alter, reform or abolish their form of government in such a manner as they may think expedient; provided, such action is taken pursuant to this Constitution… No religious test shall ever be required as a qualification for any office of public trust in this Nation… Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press… The citizens shall have the right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with powers of government; for redress of grievances or other purposes, by address, or remonstrance.[116]

The same constitution also provides for a clear "Division of Powers":

> The powers of the government of the Chickasaw Nation shall be divided into three (3) distinct departments: 1. Legislative 2. Executive 3. Judicial. No person or collection of persons, being one of those departments, shall exercise any power properly attached to either of the others.[117]

Tribes also are taking pains to explicitly restrict the ability of tribal councils to review decisions of their courts. The Constitution of the Cheyenne River Sioux Tribe, for example, now provides that:

> …the Tribal Council shall establish courts for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe or any Indian present on the Cheyenne River Indian Reservation, and for the trial and punishment of Indians charged with the commission of offenses prescribed by ordinances of the Tribal Council. Decisions of tribal courts may be appealed to the tribal appellate courts, but shall not be subject to review by the Tribal Council.[118]

The Citizen Potawatomi Nation is noted for its success in rejuvenating identity and participation in a tribe that was in a state of disarray by the 1970s, rebuilding its land base, building a remarkable economic system that includes banks, resort tourism, agriculture, and retail enterprises, and providing panoply of social services to its citizens. Much of this success in nation building is credited by the Nation to court reforms instituted through constitutional reform.[119] The reforms created a national Supreme Court in 1986, and the Citizen Potawatomi Constitution is explicit in enumerating its powers:

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[116] *Constitution and By-Laws of the Cheyenne River Sioux Tribe* http://www.tribalresourcecenter.org/ccfolder/cheyenne_sioux_const.htm. (28 June 2006).

[117] Ibid.

[118] Ibid.

[119] "Citizen Potawatomi Nation." http://www.eere.energy.gov/tribalenergy/pdfs/potwatomi_tep_nov03.pdf (28 June, 2006).

> The judicial power of the Citizen Potawatomi Nation is hereby vested in one Supreme Court consisting of seven (7) Justices and such inferior courts as may be established by Tribal law…The Courts of the Citizen Potawatomi Nation shall be courts of general jurisdiction and shall further have jurisdiction in all cases arising under the Constitution, Laws and Treaties of the Citizen Potawatomi Nation. The Supreme Court shall have original jurisdiction in such cases as may be provided by law, and shall have appellate jurisdiction in all cases…The Tribal Courts, in any action brought before them, shall have the power of judicial review, in appropriate cases, in order to declare that legislative enactments of the Business Committee or the Council, are unconstitutional under the Constitution or prohibited by federal statutes and void.[120]

These kinds of reforms across Indian Country have led at least one prominent practitioner before tribal courts to conclude that there is "a growing confidence in the tribal judiciary among the different segments of the reservation community, Indian and non-Indian, whose activities generate conflicts that must be resolved."[121]

Tribal court reform and empowerment extend beyond constitutional actions. Indian nations are also finding that their courts need to able to function efficiently as they carry out their tasks. This is driving tribes to invest in improved record keeping, the training of tribal prosecutors, judges, and other court personnel, codifying their laws, and even creating bars and bar exams for practitioners before their courts. Such investments are bolstered by a number of top law schools, organizations such at the National Tribal Justice Resource Center, the Tribal Law and Policy Institute, and the National American Indian Court Judges Association, and a number of federal programs in law enforcement and tribal court development.

In cases such as Salish and Kootenai, the tribal government seems to have consciously taken advantage of the fact that the court system of its neighboring sovereign, the state of Montana, is routinely ranked by American business in the bottom 5%-15% of state court systems in terms of speed, cost, and depoliticization. By investing in the effectiveness, efficiency and stability of its court system, the result is a Native nation that readily holds its own in competing with Montana to sustain member and non-member investment in economic development, attract private and public sector employees, and improve social services.[122]

In reforming their court systems, Indian nations are finding that attributes such as efficiency and political independence are indispensable; such attributes have little respect for cultural boundaries. The same does not apply, however, to the substantive content of tribal law and dispute resolution. Thus, for example, the Navajo Nation fiercely applies the principle of separation of powers to its award-winning Judicial Branch and has embedded the rule of law into the entire Nation government by building an impressive Supreme Court. At the same time, the Navajo Court system

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[120] *Constitution of the Citizen Potawatomi Nation* http://madison.law.ou.edu/constitution/potawatomi/potawatconst.html (28 June 2006).

[121] Enderson, "The Challenges", 6.

[122] Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (Cambridge, MA: Harvard Institute for International Development, 1997).

builds and enforces a distinctly *Navajo* rule of law, invoking and investing in the codification of Navajo common law.[123]

The "peacemaker" courts or similarly-named forums of Seneca, Grand Traverse, Navajo and a good number of other Indian nations employ non-Western procedures and values in the adjudication of civil disputes. The intent is to improve the functioning of tribes' dispute resolution systems by improving the legitimacy of those systems in the eyes of tribal citizens. In the process, Native nations' innovative approaches are providing other nations with valuable lessons. In many US states, for example, family courts and alternative dispute resolution systems are turning to resolution through mutual understanding, shared community values, and wise accommodation. Even if the cultures embedded in these systems differ from Native cultures, the intent and design have familiar indigenous flavors to them.

Much remains to be done in the building of Indian nations' judicial systems. For a number of reasons, many are currently far from establishing complete legitimacy in the eyes of non-Indian governments, individuals, and court systems. First, tribal courts tend to be less specialized than state and federal courts. For example, the court on many reservations does not have a distinct probate division. Second, the capacity of tribal courts is lacking for certain types of litigation – empanelling a jury that is comprised entirely of tribal members who have no connection to a given proceeding is exceedingly difficult on reservations that are sparsely populated and dispersed. By the same token, tribal judges often have had little experience in certain areas of the law; topics such as business law are relative newcomers to their venues. Third, some tribal courts continue to lack independence from the political processes of Native nations.

Each of these shortcomings undermines the validity of tribal court systems and erodes the legitimacy of tribal governments. Moreover, poor decisions in a given Indian court can have adverse effects on Indian Country broadly, as the effectiveness of tribal sovereignty depends upon the acceptance of tribal court rulings when adjudicated matters are subsequently heard or relied upon for precedent in state or federal courts.

Arguably, government is never so "real" as when a government exercises its powers to resolve disputes, compel compliance with adjudications, and arrest, prosecute and incarcerate people. But such are the roles of tribal governments today. Going forward, the continued success of well-functioning Indian courts, and the steady improvement of tribal courts that are less developed, will have significant impacts on the ability of Native nations to capitalize on their hard-fought rights to sovereign jurisdiction, self-determination and self-government.

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[123] See the Harvard Project on American Indian Economic Development, "New Law and Old Law Together," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999).

TEXTBOX: Choctaw Tribal Court System, Mississippi Band of Choctaw Indians

The Mississippi Band of Choctaw Indians has experienced extraordinary economic success within its territory over the last thirty years. The Band owns two full service casino facilities alongside its numerous joint venture operations and tribal enterprises. With several thousand employees, Native and non-Native alike, the smooth operation of these ventures necessitates a robust and capable system of dispute resolution. By 1997, it became apparent that the Court system would need to grow in order to be capable of handling ever increasing caseloads, ranging from minor traffic infractions to complex commercial litigation.

Consistent with the principle of self-determination, the Band wanted ensure that the Choctaw Tribal Courts could hear virtually any dispute arising on the reservation and apply Choctaw law where appropriate. The Band added a Peacemaker Court and a Youth Court to the existing Civil and Criminal Courts. The four separate courts contribute to faster adjudication. From September 2003 to October 2004, the Tribal Court, with a staff of twenty-five, heard almost 9,429 cases in total: 4077 criminal cases, 2831 civil cases, 2201 cases handled through the Youth Court, 306 cases resolved through the Peacemaking Court, and 14 cases heard by the Supreme Court.

The Peacemaker Court addresses disputes in accordance with traditional Choctaw values of cohesion, cooperation, and peace as opposed to the adversarial court setting of modern western courts. The Youth Court uses an innovative peer-to-peer Teen Court sentencing process to move cases out of the "traditional" court setting. This process leads to lower recidivism and builds a sense of community among youth. Indeed, some prior offenders complete their sentences and they themselves join the Teen Court.

The multi-part Court system encompasses tribal traditions, norms, and values while providing fair and unbiased dispute resolution. By providing culturally appropriate forums for the parties appearing before it, the Court increases its legitimacy among the Band's 10,000 citizens as well as non-citizens. The Mississippi Choctaw Court system draws strength from the fact that its operations are respected in both the Native and non-Native community. A State Court recently referred one of its cases to the Choctaw's Peacemaking court, an unprecedented action.

Choctaw Court rulings are providing assurances to business interests, tribal families, individual citizens, and neighboring communities that the Band and its Court system is fair and equitable to all. By operating a sophisticated tribal court system, the Band is demonstrating its ability and authority to oversee its jurisdiction. /**END TEXTBOX**

The Life Way and the Law Way

Robert Yazzie (Navajo)
Chief Justice Emeritus of the Navajo Nation
July 2004

Every Indian nation in the United States has its own legal system—traditional, modern, or mixed. Each benefits those it serves. Some use the American system of adjudication, which I call the "The Law Way," some use traditional law and procedure, "The Life Way," and some, such as my own, have both. I prefer legal systems that use traditional values and traditions to sustain life, but I acknowledge the benefits of the inherited Western system.

The Law Way was used as a tool of assimilation or, according to government officials who began to impose the Courts of Indian Offenses in 1883, it was an instrument of education for the end goal of assimilation. That court was imposed on Navajos in 1892, with punitive social control as a substitute for their conciliatory method of justice. The thinking was that the new Westernized court would supplant our legal traditions.

That did not happen. The historical record shows that the Navajo judges of the Navajo Court of Indian Offenses kept tradition alive, and it operated using our talking out process until the creation of the Courts of the Navajo Nation in 1959. Those courts were created out of a fear of a state takeover of criminal and civil jurisdiction and as a defense. They were designed to look like justice of the peace courts with the hope that, with this appearance of The Law Way, the state would leave us alone. Twenty years later, Navajo Nation leadership said the court had gone too far down The Law Way path, so the court system returned to balance—keeping the best features of The Law Way (these give the Navajo Nation system a reputation of being a sophisticated system) while reviving The Life Way in Navajo common law and the Navajo peacemaking system.

That is appropriate. We could have followed modern law trends and adopted alternative dispute resolution (ADR), but we found it more fitting to keep ODR (original dispute resolution). ADR is recent, and it is still in the process of change and adaptation, but our ODR is ancient. It is our Life Way.

It is important to recognize the differences in the philosophies that drive both. The Law Way is grounded in hierarchy, authority, and confrontation. It assumes that procedures incorporating conflict are the best means to resolve conflict. It is based upon a vertical system of judges, appellate courts, and legislature-made laws. In contrast, The Life Way has relationships as its foundation. When relationships are strained or damaged, and conflict results, people must be put back in good relations with each other. As we say in Navajo, *hozho nahasdlii*—"The good way must be restored. The good way will prevail." When there is harm, the person harmed, the person causing harm, and the relatives of both (in rural residential areas, extended families and clans) talk things out to achieve the good way.

We call the process of talking out for the good way peacemaking. It helps people ask and answer basic relationship questions: "Who was harmed? What was the harm? How can it be addressed? How can we see our relationships and use kinship to assure the harm will not happen again?" In asking those questions, people assume the responsibility to solve their own problems among themselves. They do not have to look to a stranger to command and punish them. The process doesn't simply deal with the surface problem, that harm that brings them together, but allows them to talk out the root causes of the problem. That is done without police or a judge.

What makes that work? When I first became a judge in 1985, an elder stood and asked to speak about a case before me. I cut him off, saying, "I can't let you talk. You're not directly involved in this case. I'm sorry." That is The Law Way. When we go to peacemaking, The Life Way, that grandfather *can* talk, and his insight, wisdom, and recommendations are vital, because of the respect we have for him. In peacemaking, people can speak freely, without fear of punishment. An "offender" can talk without his words being used against him. People who are injured feel free to speak out because they are surrounded by their relatives. Peacemaking is a free forum where the process allows a free flow of positions and feelings. More importantly, it is a space where people use the respect for others our culture teaches, mirroring our kinship and clanship relations. It uses *k'e*, which means that we are all related and because of that, we must respect and honor each other in the way we talk.

I work with law students and they ask me about peacemaking. I answer their questions, but I also say that they must master The Law Way because it will continue to be part of our legal system. It is something that the Navajo Nation Council chose when the courts came into being in 1959. However, we also have the courage to modify our version of The Life Way to meet our circumstances and needs. We now have two legal systems that function side-by-side, with the best features of each suiting the needs of individuals who take their problems to the courts.

That makes our court system unique. It is not simply a copy of a state justice court. The laws we use are not federal or state laws, but our own. We have the flexibility to apply federal law where it is relevant to a dispute, and we have the non-binding option of using state law as a guide where it is relevant and helpful. It can adapt to the needs of all who use the courts, including the expectations of non-Indians who do business in Indian Country. While one might expect that they would insist upon The Law Way, some of the more successful non-Indian businesses acknowledge The Life Way and use it. One respectful business in Gallup, New Mexico, uses peacemaking rather than debt actions to collect debts or repossess financed property.

In sum, the Courts of the Navajo Nation are a fair forum for everyone. That is being called into doubt, with decisions such as *Nevada v. Hicks* and its presumption that Indian nation courts do not have civil jurisdiction over unwilling non-Indian defendants. That is being called into doubt by prominent American jurists who question the fairness of traditional law (without bothering to understand it), political influences on Indian judges, or the general lack of federal judicial review in civil cases. There are some who say that since Indians have been citizens of the United States for a long time now, it is time they gave up their own justice systems—Law Way, Life Way, or mixed—and submit to state courts.

My response is that I live in a sovereign nation. We have a fundamental human right to govern ourselves and be bound by our own laws. We feel that those who come among us and who assume relations with us should be treated like relatives, and that they too should act as if they have relatives by voluntarily submitting themselves to our law and to our institutions. Some have gotten the message and do exactly that.

I have two concluding remarks about The Life Way and The Law Way. The restorative justice movement uses some of the principles of The Life Way and, increasingly, it is being adapted within non-Indian communities and cultures to serve their needs. The Law Way is important to us, and we are learning how to adapt it to our needs. We are a laboratory for change that can benefit American law in general as we show how to use both ways. I feel our courts should have an opportunity to show that they have integrity and intelligence until proven otherwise.

In the end, both The Law Way and The Life Way, for us, are our spirit. They are our heritage

and we use them in a way to promote our distinctiveness, our lives, and our survival as a People. We have taken the best from two worlds and that makes us richer. I have written, “life comes from it” to refer to our traditions, and I have always said that the outside law we adopted has good in it for us. That is how we do things in the good way.

TRIBAL-FEDERAL RELATIONS

- The relationship between American Indian nations and the federal government of the United States has been the dominant intergovernmental relationship for Indian communities for at least two centuries.
- Although the federal government has long recognized the sovereignty of Native nations in law, its historical treatment of tribes can be broadly characterized as paternalistic.
- Since the mid-1970s, the shift in federal policy toward tribal self-determination and self-government has improved the intergovernmental relationship. However, Indian nations remain concerned that federal programs that support tribes are chronically underfunded by Congress.
- Recent economic gains have given more tribes and Native organizations the ability to be effectively represented in Washington, D.C. Indian nations and individuals are making their voices heard at the national level as never before.

The primacy of the federal government of the United States in relations with American Indian nations has been established in treaties, legislation, the federal courts, and the U.S. Constitution. Yet the tribal-federal relationship has changed over the years, and it continues to evolve. At various times, federal policy toward Indian nations has been solicitous, as in early efforts to maintain alliances with powerful indigenous entities; overtly hostile, as in the devastating wars of the nineteenth century; and assimilationist, as during the long period from the end of the Indian wars to the latter part of the twentieth century. Today, as the Indian nations exercise more powers and the federal government has relinquished control over some services, the relationship is again being redefined. By exerting pressure in Washington, tribes are seeking to ensure that the federal government fulfills its obligations to Native peoples while respecting the sovereignty of Native nations.

The Federal Government's Trust Responsibility

Native nations and the U.S. federal government have interacted on a government-to-government basis since the first days of the American republic.[124] While the federal government has quite consistently insisted upon primacy, the U.S. government's relationship with tribes has also long been recognized as carrying with it a trust obligation. This obligation dates back to the treaty-making era when, in exchange for land transfers, the U.S. government agreed to oversee assets in the best interest of tribes.

There is both a narrow legal and broader moral interpretation of the federal government's trust responsibility. As the U.S. Commission on Civil Rights put it in 2003: "The federal obligation to Native Americans is a matter of both moral and legal imperative."[125] Morally, this obligation arises from land, rights, and lives taken by force, oppression, and subjugation.[126] Indeed, the United States, with its own roots in an ideology professing fealty to equality in rights of self-rule and a violent struggle for political sovereignty and self-government has never fully come to grips philosophically or legally with the contradiction inherent in one people overrunning and taking away the rights of self-determination of another people.

Legally, the federal government bears a well-defined and stringent fiduciary duty for the oversight of assets such as tribal trust funds, as well as mineral and other natural resources. Yet the tribal-federal relationship is appropriately viewed as more than resource management on behalf of Indian people. From the broader perspective, the trust relationship encompasses the activities of all branches of the federal government and is a continuing acknowledgement of the land and assets ceded by the tribes to the U.S.[127]

Quite often, U.S. federal practices arising from the trust obligations owed to tribes have been poorly executed. For instance, objectives that are beneficial to tribes include protecting tribal lands from appropriation by unscrupulous individuals, developing natural resources for the benefit of tribes, and preventing state governments from infringing on tribal rights. Upon closer scrutiny, however, it is apparent that these goals have not been met -- as attested by examples found in sources as diverse as academic research[128] to litigation against the federal government.

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[124] There is significant debate today over whether and how the government-to-government relationship applies to corporations and regional nonprofit organizations established under the *Alaska Native Claims Settlement Act* (43 USC 1601-1624), which under 25 CFR, possess the ability to contract for BIA programs. Many Alaska tribes believe that the government-to-government relationship should exist solely between federally recognized tribes and the U.S. government, not with corporations. See the "Alaska Natives" chapter.

[125] U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*. (Washington: Government Printing Office, July 2003), 1.

[126] Ibid., ix.

[127] American Indian Lawyer Training Program, *Indian Tribes as Sovereign Governments* (Third Printing) (Oakland, CA: AIRI Press, 1991), 28-31.

[128] Matthew B. Krepps, "Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry." In Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* (Los Angeles: University of California, American Indian Studies Center, 1992), 179-203.*;* Matthew B. Krepps and Richard E. Caves, "Bureaucrats and Indians: Principal-Agent Relations and Efficient Management of Tribal Forest Resources," *Journal of Economic Behavior and Organization* 24, no. 2 (July 1994) 133-151.

The ongoing class-action lawsuit *Cobell v. Norton* highlights is bringing to light some of the most problematic aspects of the trust relationship between the federal government and American Indians.[129] The plaintiffs in the case are seeking compensation for mismanagement of assets in the Indian trust system. Starting in the 1880s, the federal government took legal title to parcels of land allotted to individual Indians and assumed responsibility for distributing revenues – known as Individual Indian Monies – generated by these lands to the landowners' accounts. However, Congressional investigation and court proceedings have revealed that the federal government has kept grossly inadequate records and cannot determine anything close to the precise number of accounts it should be administering nor the value of these accounts. In early rounds of litigation, the presiding federal judge labeled the discharge of fiduciary duties by the Department of Interior on behalf of the federal government as "nothing short of a travesty."[130] The plaintiffs claim that the federal government owes them $27.5 billion.

Federal Paternalism

The federal trust responsibility is sometimes confused with the "ward" status used to describe the relationship between the federal government and Indians in 1831 by Chief Justice Marshall in the *Cherokee Nation v. Georgia* opinion. In the Supreme Court's opinion, Justice Marshall noted that the relationship is "resembles that of a ward to his guardian."[131] In contrast to the federal trust responsibility, which is based on the assumption of duties to compensate for lost and ceded assets, ward status assumes that Indians are like children, incapable of effective action in an adult world. This view has helped justify intrusive federal paternalism.

Historically, many federal government initiatives reflected a long-standing belief that Indians were unable to conduct the most basic of governmental services without direct federal oversight. For decades, local Bureau of Indian Affairs agents controlled virtually every action taken by tribal governments. To offer but one example, trips by tribal leaders of many tribes to Washington, D.C. were seldom permitted unless the tribal delegation was accompanied by a BIA superintendent. The vestiges of this legacy continue to this day. For example, BIA approval is generally required before tribes can contract with attorneys for legal counsel.[132] This controlling behavior has led most tribal leaders to view the BIA as an obstacle to be overcome, rather than as a helpful organization striving to ensure the self-sufficiency of tribes. A common joke in Indian Country holds that "BIA" means "Boss Indians Around".

Federal policies and actions grounded in the idea of Indians as "wards" have proven to be highly problematic and often counterproductive. Federal programs designed to assist Indian Country through periods of destitution have only provided stopgap assistance and been unable to address the root causes of distress. Indeed, misguided intervention has left many tribes reliant on the continued support of the federal government and forestalled Native nations' development and progress.

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[129] *Cobell v. Norton*, filed June 10, 1996 in U.S. District Court in Washington, D.C. Further detail is available at www.narf.org and on the plaintiffs website at www.indiantrust.org.

[130] U.S. District Court, District of Columbia, Eloise Pepion Cobell, et al. v. Bruce Babbitt et al., Civil Action No. 96-1285, Memorandum Opinion filed 22 February 1999 by Judge Royce C. Lambreth.

[131] *Cherokee Nation v. the State of Georgia* (1831).

[132] 25 USC 1331, 25 USC 476, and 25 CFR 89.

The Evolution of Federal-Tribal Relations

The political activism of Indian nations and organizations during the 1960s and 1970s was directed in part against the paternalistic control exercised by the federal government over Indian lands and resources, social programs, development strategies, and daily life. In these years, a growing number of Indian nations began to test the boundaries of tribal sovereignty, taking what had been largely a legal doctrine and attempting to give it some practical reality, pushing the federal government aside and taking over decision-making for themselves. Some of this development was confrontational; some of it proceeded through quiet, incremental assertions of governing power. In the 1970s, partly in response to these actions and the demands of activist groups, the federal government adopted the policy of tribal self-determination. While there is some question as to how much self-determination the federal government really intended—or intends—to promote,[133] the fact is that Indian nations took the government at its word. In subsequent years, tribes across the country have acted to give real teeth to the concept of self-determination.

A host of formal agreements and contracts are remodeling agencies such as the BIA and IHS, moving them toward partner agencies that can provide technical assistance and consultative services to tribes on an as-needed basis. These formal agreements, used by many tribes across the country, include "477 plans" under the *Indian Employment, Training, and Related Services Demonstration Act*, contracts under the *Indian Self-Determination and Education Assistance Act*, and compacts under the *Tribal Self-Governance Act*.[134] Beyond the agreements provided for in legislation, other innovative contractual arrangements are being negotiated between tribes and federal agencies. Examples include an agreement between the Nez Perce Tribe and the U.S. Fish and Wildlife Service (USFWS) for the monitoring of wolves reintroduced into federal forests, and an agreement between the Louden Tribal Council and the United States Air Force to clean up military waste that has degraded the environment surrounding the village of Galena, Alaska.[135]

In May 1998, former President Clinton issued an Executive Order which, among other things, required each agency of the federal government to "have an effective process" to ensure that tribal representatives are able to provide meaningful input into regulatory policies that "significantly or uniquely affect [Indian] communities."[136] Two years later, another Executive Order strengthened these provisions by restraining federal agencies from proposing legislation that would be harmful to

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[133] See, for example, Russel Lawrence Barsh and Ronald L. Trosper, "Title I of the Indian Self-Determination and Education Assistance Act of 1975," *American Indian Law Review* 3 (1975), 361-95; Robert A. Nelson and Joseph F. Sheley, "Current BIA Influence on Indian Self-Determination: A Criminal Justice Planning Illustration," *Social Science Journal* 19, no. 3 (July 1982).

[134] For further discussion of these agreements, see the "Family Support" and "Tribal Governments" chapters.

[135] Accounts of these arrangements can be found in the Harvard Project on American Indian Economic Development, "Idaho Gray Wolf Recovery Program," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999); And the Harvard Project on American Indian Economic Development, "Yukaana Development Corporation," *Tribal Governance Success Stories: Honoring Nations 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000). http://www.ksg.harvard.edu/hpaied/hn_main.htm (28 June 2006).

[136] William Jefferson Clinton, "Consultation and Coordination with Indian Tribal Governments," Executive Order 13084, 14 May 1998.

tribes, by requiring agencies to consult with tribes in the rulemaking process, and by obliging agencies to designate an official to handle relations with Native nations.[137]

The thrust of recent federal legislation and Executive Orders marks a sea change in the relationship between the federal government and tribes. Although many interactions remain rooted in paternalism, the federal government is showing a new willingness to incorporate recognition of tribal sovereignty into its dealings with tribes and increased respect for the governments, languages and cultures of Indian nations. While the BIA continues to exercise considerable power in tribal affairs, some nations have succeeded in moving it from a decision-making role to a resource role in which it supports Indian nations as they pursue their own agendas. In addition, creative and productive partnerships have emerged as Indian nations and federal agencies have joined efforts, government-to-government, in natural resource management and other activities. As federal paternalism recedes and tribal governing capacities grow, the potential for such win-win partnerships grows as well.

That said, the tribal-federal relationship is still in flux. There are periodic attempts in Congress to rein in tribal powers and return to explicitly assimilationist policies.[138] Recent Supreme Court decisions have undermined some tribal governing powers, increasing tribal dependence on federal and, in some cases, state institutions.[139] Federal support for tribal sovereignty in Alaska is uncertain and has been weakened by the *Venetie* decision.[140] The tribal-federal relationship has always reflected, to some degree, changes in American politics and society at large, and it will continue to do so.

Underfunding by Federal Agencies

One source of consistent frustration in the relationship between tribes and the federal government is the underfunding of Indian programs. Indeed, a 2003 study carried out by the U.S. Commission on Civil Rights found that Native Americans receive a disproportionately low level of federal funding compared with the general U.S. population.[141] The study found that "[t]he government's failure has resulted in services that are of lower quality than those provided to other Americans and inequitable access to much-needed programs."[142] Since many Indian nations are disadvantaged relative to the U.S. mainstream, this lack of funding is a cause for serious concern. And it is far from the case that generous federal funding is the source of rising incomes observed in

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137 William Jefferson Clinton, "Consultation and Coordination with Indian Tribal Governments," Executive Order 13175, 6 November, 2000. Executive Order 13175 also led to the BIA adoption of an official *Government-to-Government Consultation Policy* on December 13, 2000. The BIA's consultation policy can be accessed at http://www.fpa.nifc.gov/Library/Memos/Docs/Bureau_of_Indian_Affairs_Consulatation_Policy.pdf (28 June 2006)

138 For example, in 1997 and 1998 Senator Slade Gorton introduced several measures that would have required tribes to submit to means testing and waive their sovereign immunity to receive federal funds. See Timothy Egan, "Senate Measures Would Deal Blow to Indian Rights," *New York Times*, 27 August 1997; And Timothy Egan, "Backlash Growing as Indians Make a Stand for Sovereignty," *The New York Times*, 9 March 1998.

139 See the "Tribal Jurisdiction" chapter.

140 See the "Alaska Natives" chapter.

141 U.S. Commission on Civil Rights, *A Quiet Crisis*, iii.

142 Ibid., 122.

Indian Country in recent years. As the Civil Rights Commission has documented, relative to need and relative to even the average across all Americans, Indian Country is markedly underfunded.

The Bureau of Indian Affairs, which administers the bulk of non-health federal programs targeted to Indians, had a budget of $2.3 billion in FY2004.[143] Over the last 15 years, the BIA's budget has fluctuated in nominal terms from a low of $1.6 billion to a high of $2.4 billion.[144] These absolute funding levels appear large but are not commensurate with the wide range of responsibilities of the BIA – which include education, law enforcement, social services, resource management, and core government funding, among others. This mismatch between funding and program responsibilities is especially clear on a per capita basis. For instance, the U.S. Commission on Civil Rights study points out that in the 2001-2002 budget year, the BIA spent $3000 per student in its schools in contrast to the $7,524 spent by public schools nationally.[145]

The BIA appears to be unable to make a strong case for increased appropriations even though it is of central importance in providing a wide range of federal services and programs to Indian Country. One report notes that the BIA "is widely perceived as having chronically weak management and administration. This perception makes it difficult for BIA to obtain administration and congressional support for its programs, in spite of the widespread opinion in Indian Country that funding is inadequate to meet the acute needs on many reservations."[146]

Nor is underfunding an issue only for the BIA. The Indian Health Service (IHS) provides federal health services to American Indians and Alaska Natives, but does not have a robust enough budget to meet its needs. In 2003, the national per capita health expenditure benchmark was estimated at $5,065, while appropriations for the IHS stood at $2,533 per capita. This spending record is particularly striking when compared to federal expenditures per recipient on other populations: Medicare ($5,915), Veterans Administration ($5,214), Medicaid ($3,879), and federal prisoners ($3,803).[147]

At the Department of Housing and Urban Development (HUD), funding on Native American programs rose by 8.8% between 1998 and 2004, yet the department's overall discretionary budget increased by 54%.[148] The U.S. Department of Agriculture (USDA) runs a wide range of programs which target the high levels of hunger and the food infrastructure deficiencies in Native American communities, yet its spending on these programs is a miniscule part of its overall budget -- varying between 0.001% and 0.0016% over FY 1999-2004.[149]

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143 Office of Management and Budget, *Budget of the United States Government,* Fiscal Year 2006.

144 Office of Management and Budget, *Budget of the United States Government,* Fiscal Years 1991-2006.

145 U.S. Commission on Civil Rights, *A Quiet Crisis*, 23. National public school spending estimates are from U.S. Department of Education, National Center for Education Statistics, "Early Estimate of Public Elementary and Secondary Education Statistics: School Year 2001-02." (Washington: Government Printing Office, April 2002), 2, 9.

146 National Academy of Public Administration, *A Study of Management and Administration: The Bureau of Indian Affairs* (Washington, DC: The National Academy of Public Administration, 1999), 49.

147 U.S. Department of Health and Human Services, Indian Health Service, Office of Management Support, Division of Financial Management, "IHS Appropriations Per Capita Compared to Other Federal Health Expenditure Benchmarks, March 2003" in U.S. Commission on Civil Rights, *A Quiet Crisis*, 44.

148 U.S. Commission on Civil Rights, *A Quiet Crisis*, 56.

149 Ibid., 103.

The lack of federal support for Indian programs is not a new phenomenon. A 1995 analysis showed that if "one looks not only at overall Indian spending but also at its major components – BIA, IHS, Office of Indian Education in the Education Department, Indian Housing Development program in HUD, ANA, and INAP – one sees … that, in constant dollars, *all* major spending items except IHS have declined during the period FY 1975-1996."[150] The study reveals that until 1985, per capita spending was greater for Indians than for the rest of the U.S. population, but that after 1985 expenditures were less, per capita, for Indians than for the population as a whole.[151]

The absence of sustained funding has in many instances prevented tribes from taking full advantage of the *Indian Self-Determination and Education Assistance Act* and the *Tribal Self-Governance Act*. In contracting and compacting, contract support costs are needed to offset the costs of office management activities that tribal administrators must perform in place of the BIA. However, congressional appropriations have been insufficient to cover the costs of approved self-determination contracts and compacts.[152] In 1998, the U.S. General Accounting Office found that Congress appropriated $280 million to fund almost $375 million in eligible contract support costs. Such funding shortfalls caused significant financial difficulties for contracting tribes, and undermined the "efficiency and productivity of their administrative functions."[153] In response, Congress declared a halt to new or expanded contracts and compacts with both the BIA and the IHS – a measure that, at best, forestalled additional problems at the cost of limiting Native nations' opportunities for increased self-determination. Although the compacting and contracting moratorium was lifted in 2000, the lack of federal funding for contract support costs remains a source of frustration for tribes. In March 2005, in a case brought by the Cherokee Nation and the Duck Valley Shoshone-Paiute Tribes, the U.S. Supreme Court ruled that the federal government must fully fund contract support costs related to self-determination contracts.[154] Tribal leaders worry, however, that with federal budget cutbacks any increase in funding for contract support costs may cause a reduction in the budgets for other federal Indian programs.

The tendency of the federal government to underfund programs targeted at Native Americans represents an ongoing challenge for tribes. The lack of federal funding undermines the progress which has been made in improving the relationship between tribes and the U.S. government. Increasing federal funding will require coordinated and aggressive efforts by tribes and their supporters in Washington. As the U.S. Commission on Civil Rights observes in its study of federal Indian funding, inadequate program spending "renders laws and agreements with Native peoples little more than

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150 Roger Walke, *Indian-Related Federal Spending Trends, FY 1975-1996* (Washington, DC: The Library of Congress, Congressional Research Service, 13 February 1995), 11. Emphasis in the original. This study considered the budgets of six major categories: the BIA; the IHS; the Office of Indian Education within the Department of Education; the Indian Housing Development program for new construction (estimated) within the Department of Housing and Urban Development (HUD); the Administration for Native Americans (ANA); and the Indian and Native American Employment and Training Program (INAP).

151 Ibid., 10.

152 United States General Accounting Office, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed*, GAO/RCED-99-150 (Washington, DC: Government Printing Office, June 1999).

153 Ibid., 2-3.

154 "Tribes win decision in contract support cost case," *Indianz.com*, 2 March ,2005. http://www.indianz.com/News/2005/006761.asp (June 2006).

empty promises" and goes on to conclude that "only through sustained, systemic commitment and action will [the] federal responsibility be realized."[155]

Federal Recognition

A number of tribal groups are not recognized by the federal government and are thus ineligible for programs and benefits reserved for those nations that are officially acknowledged by Washington. Many tribes who are not federally recognized have encountered difficulties providing basic services for their citizenry, and their abilities to exercise self-rule in the U.S. federalist system are stymied. Indeed, some scholars argue that federal recognition is the most important recognition a tribe can obtain.[156]

A number of circumstances have left Native nations without acknowledgement by the U.S. government: some tribes that had the earliest contact with Europeans "vanished" for many years; others were legislatively extinguished as political bodies by the federal policy of termination; and others did not pursue federal recognition. Many unrecognized groups continue to press for federal recognition. Such recognition can come from treaty, acts of Congress, or federal administrative decisions.

Faced with increasing requests from tribes for recognition, the federal government introduced regulations in 1978 that specified criteria based on requiring prove of an applicant's long-standing existence and distinctiveness. A petitioning entity must satisfy that it meets each of the following criteria:

1) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
2) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
3) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
4) (The petitioning entity must provide) a copy of the group's present governing document including its membership criteria;
5) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity;
6) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and
7) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.[157]

The federal recognition process is increasingly controversial. Recognized tribes have been accused of attempting to prevent others from attaining recognition, presumably in an effort to keep

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155 U.S. Commission on Civil Rights, 122.

156 William C. Canby, Jr., *American Indian Law in a Nutshell*, 4th ed. (St. Paul, MN: Thomson/West, 2004), 4.

157 Code of Federal Regulations, Title 25, Indians, Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," 83.7.

the federal funding or the gaming "pies" from being divided into ever-smaller slices.[158] There are concerns both in Indian Country and in Washington that, unless the federal government increases available resources to reflect additional tribal recognitions, many already fiscally burdened federal services will be further undermined. In addition, the gaming successes of a few tribes have thrown suspicion upon applicants that petitions are now predominantly motivated by the desire to "cash in" on the ability of recognized tribes to establish gaming operations.[159] Kevin Gover, Assistant Secretary of Indian Affairs from 1997-2001, urged that the recognition process be reformed, noting that the "more contentious and nasty things become, the less we feel we are able to [reform] it."[160] The U.S. Government Accountability Office investigated the tribal recognition process in 2001 and again in 2005, finding a substantial and persistent backlog of applications for recognition that would take years to address.[161]

The example of the Lumbee Tribe of Cheraw Indians shows the difficulties tribes can face in attempting to establish a relationship with the federal government. The Lumbee have been recognized by the state of North Carolina since the late 1800s, and have attempted to secure federal recognition for a number of years. There are more than 40,000 registered Lumbee citizens. If granted, federal recognition would make the Lumbee the largest tribe east of the Mississippi River and one of the ten largest tribes in the U.S. In 1956, Congress passed the *Lumbee Act*, which affirmed the existence of the Lumbee as Indians, but denied the tribe full federal recognition. The Solicitor General determined in 1989 that while the Act recognized the tribe as Indian, it simultaneously denied federal services to the Lumbee and thus made them ineligible for the regulatory recognition process. Subsequent efforts to end the tribe's "legal limbo" through congressional legislation have not been successful. In 1992, the U.S. Senate Select Committee on Indian Affairs asserted that some of the opposition to federal recognition of the Lumbees was rooted more in concerns over costs to taxpayers than in policy objections or findings of fact. The tribe continues to fight for recognition.[162]

Tribes and Federal Politics

The interplay between Indian Country and Washington takes place in a complex, shifting environment. Tribes find themselves regularly interacting with elected U.S. officials who bring their own conceptions and misconceptions of Indian affairs to Washington, DC. Yet, there also is a growing number of elected officials who are cognizant of Native issues. In some elections -- in places such as Alaska, New Mexico, Arizona, and South Dakota -- a large Native population can give Indians an important voice. Colorado, though not one of the ten states with the largest number of Native residents, was represented in Washington for almost two decades by Benjamin Nighthorse

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158 Fergus Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century. (New York: Anchor Books, 1996)*, 91.

159 Investors have financed the petitions and appeals of several Connecticut tribes who have thus far been unsuccessful at gaining federal recognition, see Rick Green, "Investors Evaluating Bets on Tribal Recognition," *Hartford Courant*, 17 October, 2005.

160 "Congress Considers New Process for Tribal Recognition," *Indian Country Today*, 31 May, 2000.

161 The GAO reported that some petitions had been waiting seven years or more for consideration. United States Government Accountability Office, *Indian Issues: Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions*, Testimony Before the Committee on Resources, House of Representatives, GAO-05-347T (Washington, DC: Government Printing Office, February 2005).

162 For information on the Lumbee and their efforts to gain federal recognition, see "Who are the Lumbee?" http://www.lumbeetribe.com/lumbee/index.htm (28 June 2006).

Campbell, a member of the Northern Cheyenne Tribe. Initially elected to the House of Representatives, Senator Campbell in 1992 became the first American Indian to hold a seat in the Senate in more that 60 years. Senator Campbell co-chaired the Committee on Indian Affairs for several years, and was the first American Indian to do so.

Tribes today are increasingly savvy politically. The past thirty years have seen a steady increase in the number of non-elected native advocates in national politics. Nations such as the Navajo, Saginaw Chippewa, Mashantucket Pequot, and Chickasaw maintain full-time offices in Washington, D.C., complete with an ambassadorial corps of diplomats, paid lobbyists and professional attorneys working to further Native issues. The amount of money being given by Indians in the form of campaign contributions is also growing. In the 1994 election cycle, contributions to political parties and candidates by Indian gaming interests totaled $662,250. By the 2004 election cycle, the amount of contributions exceeded $7 million.[163] Enabled by recent economic gains, tribes view this money as providing access to the corridors of power long considered unreceptive – or overtly hostile – to voices from Indian Country.

A new sense that Indian votes matter coupled with increased resources to support candidates sympathetic to Indian causes are transforming the role of tribes in national politics. In order to spur American Indian voting participation nationally, the National Congress of American Indians (NCAI) coordinates a non-partisan "Native Vote" campaign which focuses on registering Native voters and encouraging voter turnout.[164] As an example of Native voter clout, in 2002, a close Senate race in South Dakota was decided after votes from the Pine Ridge Indian reservation – the last to be counted – overwhelmingly supported the Democratic candidate, Tim Johnson.[165] The Democratic Party had worked aggressively to register new voters on the state's Indian reservations. In 2000, American Indian activists mounted a concerted fundraising, voter registration, and attack advertising effort against the re-election bid of Slade Gorton, the senior Senator from Washington State known for his positions against Indian causes.[166] The Senator was defeated by 2,229 votes.[167]

Even with additional resources and know-how, however, navigating the national political scene remains difficult for many Native nations. Since the number of Indians voters comprises a relatively small percentage of the overall U.S. population and many Native communities are isolated from the mainstream, tribes can find that their influence is limited when faced with experienced and well-financed political opponents. The scandal surrounding the activities of former lobbyist Jack Abramoff has highlighted some of the problems and, perhaps, inexperience faced by tribes seeking to use influence in Washington. Investigators alleged that Mr. Abramoff and an associate, Michael Scanlon, defrauded several tribes, taking advantage of their relative inexperience with lobbyists. Mr.

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163 The 1994 figure includes contributions from individuals, Political Action Committees (PACs), and soft money. The 2004 figure includes contributions from individuals and PACs but does not include Levin Fund donations. See Center for Responsive Politics, "Indian Gaming: Long Term Contribution Trends." http://www.opensecrets.org/industries/indus.asp?Ind=G6550 (28 June 2006).

164 Brenda Norrell, "Tex Hall Urges Noise in Quiet Crisis," *Indian Country Today*, 9 April, 2004. Kevin Gover, "Gover: The American Indian Vote Comes of Age," *Indian Country Today*, 15 November, 2005. See also "Native Vote 2006." www.nativevote.org (28 June 2006).

165 Robert Gehrke, "American Indian Votes Swing Election," *Associated Press*, 9 November, 2002.

166 Cate Montana, "Washington Senate Race a Dead Heat," *Indian Country Today*, October 25, 2000. See also "Preserving the Native Voice in the American Political Process." www.first-americans.net (28 June 2006).

167 David Ammons, "Cantwell Wins Washington Senate Race," *Associated Press*, 2 December, 2000.

Abramoff and Mr. Scanlon subsequently pled guilty to three counts of corruption, including counts related to the defrauding of tribal clients.[168]

The Future of Federal-Tribal Relations

The ability of Indian nations to exercise their sovereignty is tied in many ways to developments in the relationship between tribes and the federal government. As Native Americans increasingly make their voice heard at the national level, the coming decades promise to be times of continued rapid change and experimentation. By consolidating and building on the successes of self-determination and self-governance policies, tribes and the federal government have an opportunity to transform a historically troubled relationship into one which strengthens the ability of Native nations and their citizens to prosper.

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[168] Susan Schmidt and James V. Grimaldi, "Abramoff Pleads Guilty to 3 Counts," w*ashingtonpost.com*,, January 4, 2006; Susan Schmidt, "Abramoff Reportedly Negotiating a Deal in Which He Would Plead Guilty, Testify," w*ashingtonpost.com*, December 21, 2005.

TEXTBOX: Zuni Eagle Sanctuary, Zuni Fish and Wildlife Department, Pueblo of Zuni

Since time immemorial, molted eagle feathers have been used in Zuni rain and prosperity ceremonies, as well as in prayer offerings. Traditionally, Zunis satisfied this need for feathers by practicing eagle husbandry. They would collect eaglets from the wild and "adopt" them into their families. The birds were treated with the utmost respect and tenderness, frequently living with families for over half a century. Therefore, when the Bald and Golden Eagle Protection Act of 1940 and the Endangered Species Act of 1973 made traditional means of obtaining eagle feathers illegal, the Zunis were challenged to identify other possible sources.

For several decades, the only legal way for Zunis and other Indians to obtain eagle feathers was to submit applications to the National Eagle Repository in Colorado. However, the demand for eagle feathers far exceeds the available supply. Applicants frequently wait several years to obtain eagle feathers from the Repository, a delay that compromises tribal citizens' ability to plan and participate in religious and cultural ceremonies.

In 1995, the Zunis began discussions with the U.S. Fish and Wildlife Service (USFWS) to address their dilemma. The discussions revealed that a large number of healthy but non-releasable eagles were euthanized each year because no permanent placement for them could be found. These birds provided Zuni Pueblo with an opportunity: building an eagle sanctuary would not only revive the traditional practice of eagle husbandry and provide a source of molted eagle feathers for ceremonies, but it also would save birds that otherwise would be destroyed.

In January 2000, negotiations with the USFWS culminated in an historic Statement of Relationship that recognized the Pueblo's sovereignty and defined the principles of the Zuni-USFWS partnership. Today, the Zuni Eagle Sanctuary maintains twenty-one eagles, and the Zuni Fish and Wildlife Department has developed its own feather distribution protocol. Requests are now filled in weeks instead of years, and, as of 2004, nearly twenty thousand feathers have been distributed to tribal citizens. The Sanctuary also has strengthened Zuni's ties to dozens of government and non-government agencies by opening community education and raptor care training programs and cultivating relationships with other Indian nations that are receiving eagle feathers for ceremonial purposes or are interested in pursuing similar agreements with the federal government.

The Zuni Eagle Sanctuary is the first eagle sanctuary owned and operated by Native Americans as well as the first aviary constructed for the purpose of cultural preservation. Successfully meeting the Zunis' demand for molted eagle feathers that are used in religious and cultural ceremonies and reinvigorating traditional practices, the Sanctuary is also a model of intergovernmental cooperation between a tribal government and federal agency. The strong, positive, government-to-government relationship between the Pueblo and the USFWS allowed the two parties to effectively address a seemingly intractable problem in which Zuni cultural imperatives clashed with federal policy. In crafting a jointly beneficial solution to the problem, the Zuni transitioned from being recipients of the services of a federal program to partners in and administrators of a program that addresses their cultural needs. **/END TEXTBOX**

Promoting Self-Determination

Benjamin Nuvamsa (Hopi)
Superintendent, Fort Apache Agency
Bureau of Indian Affairs
December 2004

One of the mandates of the Bureau of Indian Affairs is to promote Indian self-determination. This mandate is written into law and is the result of Congressional policy. As a BIA superintendent, it is my individual mandate. I urge tribes to participate more fully in the delivery of services and the administration of traditionally BIA-run programs among their people. I encourage contracting—or the assumption of BIA programs—by tribes. I encourage compacting—or the assumption of general funds from the BIA that may be distributed among programs—by tribes. Whether or not tribes choose to contract or compact, I always urge them to assume a more meaningful role in the administration of programs by participating in the planning, budgeting, and operation of programs. The Indian Self-Determination Act is a two-edged sword: on one hand, it allows tribes to have meaningful participation in the delivery of services, but on the other hand, there are limitations that often inhibit effective delivery of services, such as limited appropriations.

I began my work for the BIA under the individuals who sought to empower tribes by promoting self-determination. Beginning in 1978, I had the good fortune to work with Mr. LaFollette Butler, who crafted presidential Indian policy statements during the Johnson and Nixon eras, and Dr. James Officer, a former Associate Commissioner of Indian Affairs. I learned about the policy of Indian self-determination from the very individuals who designed it, and now I work to enact this policy. I now work to transfer control from the BIA to tribes.

The *Indian Self-Determination Act* actually imposes a dual function on the BIA. First, we have a mandate to provide technical assistance to facilitate tribes' assumption of programs. My most important work occurs when a tribe is planning to contract or compact programs. That is when I help them find answers to vital questions: What is this program about? Which portions of it do they want to contract or assume? Do they have the necessary administrative policies and procedures in place? How will they staff it? Where will they house it? If we decide these issues before the tribe assumes control of the program, then there is a better chance that everything will work properly.

Second, after tribes assume programs, we provide technical assistance to ensure their compliance with the law's demands. It is during the initial years that I work hardest to make sure that everything is working properly. When compliance issues arise, I find that they usually revolve around money. The law allows tribes to withdraw 100 percent of their annual appropriations. Tribes can deposit these funds and earn interest, but if tribes use the money for other purposes, I have to intervene. Many tribes struggle because there is a tendency to expand the programs they contract. Tribes know their peoples' needs and they want to meet these needs, but as they expand their programs, they incur costs for which there may be no funds. They don't necessarily have the knowledge to return to the BIA to negotiate for additional funds, but if they do, usually there is no additional funding to fulfill their needs. At the BIA, we never have sufficient appropriations to allow tribes to deliver additional services. So, tribes end up in a financial bind. We work together to address such issues. I enable tribes, then I monitor tribes' performance under the contract. But even when I'm monitoring, I'm working for the good of the tribes. It is best to correct any problems or deficiencies immediately before they become bigger problems.

For the most part, tribes are succeeding. Tribes are becoming strategic in their contracting and compacting. They understand that when they take over BIA programs they inherit problems and financial burdens as well as authority. Now, they consider their capacity. They consider the costs associated with programs—facilities, equipment—that they will bear. They may choose to let the BIA continue to manage a program, but still participate substantially in its operation. Tribes recognize the choice to contract or not to contract as a form of self-determination. Tribes are also becoming better financial managers. They are employing highly educated and experienced staff and they are accessing federal and non-federal grants to complement existing funds. At the BIA, we don't have that luxury; we're only allowed to operate from congressional appropriations. But tribes have the flexibility to turn to other sources to enhance their success.

As a BIA superintendent, I also work at improving BIA programs and programs assumed by tribes by participating in the policy formulation process in the BIA. I use my on-the-ground knowledge and my years of experience in the area of Indian self-determination in providing advice to the policy makers. There are times when the higher levels of the BIA and the Department of the Interior do not understand the basic tenets of the *Indian Self-Determination Act* and the need for formulating clear policies and procedures to carry out the true intent of the law. My work with tribes gives me this understanding. In 1988, I understood that tribes needed to recover the indirect costs that the BIA normally incurred and for which we received funding. I understood that the contracts between tribes and the BIA were not—and should not be—typical commercial contracts that imposed unnecessary administrative burdens on tribes. I understood that tribes needed the opportunity to take over all the local BIA agency functions under one agreement—a compact—rather than contracting for each program separately. In 1988, I advocated for these amendments to the *Indian Self-Determination and Education Assistance Act* and, after the amendments were made, I represented the Bureau in formulating the rules to implement them. These amendments promote the spirit of Indian self-determination and that is, after all, my (and our) mandate.

This mandate is transforming the BIA. Historically, the relationship between the BIA and tribes has been troubled. At the present, it isn't nearly good enough. However, as the BIA collaborates with tribes in carrying out their self-governance goals, this relationship is improving.

It is improving, in part, because the BIA and tribes are growing to look more and more alike. In the past, BIA agency superintendents—known as Indian Agents—weren't people of American Indian descent. They didn't promote Indian self-determination. Instead, they ruled the reservations. Now, more and more agency superintendents are American Indians or Native Americans (whichever term you prefer). Not only are superintendents Indian, but our staff members are predominately Indian. Our efforts to recruit qualified Indians are succeeding because of the BIA's Indian preference policy. Occasionally, even now, a superintendent who is an Indian will still fail to work well with a tribe, but, increasingly, BIA openings are being filled not only with qualified Indians, but with qualified tribal members. That makes a real difference. The BIA is growing to look more and more like the tribes because it is staffed by the tribal members.

The BIA is also responsive to tribes in the structuring of contracts. Some tribes—those who have historically had a poor working relationship with the Bureau—have eliminated the BIA role by compacting all their services. However, in other situations, where the relationship has been a good one, we enter into cooperative agreements. We allow tribal staff to infiltrate our offices and programs by entering into cooperative working relationships and documenting these agreements through various forms of memoranda of agreements. Tribal staff members work beside BIA staff members to carry out programs. The tribe agrees to do certain things. We agree to do certain things. We both agree to do certain things jointly. In some agencies, the BIA and the tribe even share the same office building. These agreements only promote closer government-to-government relationships.

These structural changes are allowing the BIA to become what I believe it ought to be: a bureau that ensures that the trust responsibility of the federal government is carried out effectively by empowering tribes. At its best, the BIA will be transparent. As tribes assume the direction of their own programs and services, the tribes and BIA will work side-by-side to deliver these services in the most effective and efficient manner. They will work without duplication of services.

While I've identified the structural changes that are bringing us closer to this ideal, for the most part, we're still not there. And, regrettably, there are other structural changes taking us even farther away. To work as effectively as possible, the BIA must work as locally as possible. Our resources and authority should reside at the local level—at the level where the tribes assume or receive services. This means we need to flatten our hierarchy. While the Bureau is currently a three-tiered organization—local, regional, and central—we need to consider eliminating bureaucratic layers in order to give tribes a more immediate role in determining how programs are carried out. Instead, the administration is increasing our hierarchy, duplicating our bureaucracy, and confusing the chains of command. Education services broke away. Law enforcement services broke away. Now, there's talk of breaking away trust programs to establish an Office of the Special Trustee. If this occurs, we'll take money out of the already limited funds we have to run programs—social service programs, human resource programs, range programs, forest programs, trust programs—to create more bureaucracy. We will erode our programs to pay for a duplication of administration. The mandate of the BIA is to promote the spirit of Indian self-determination. We tend to forget that when we're creating various offices here and there.

The trend must be reversed. The administration needs to listen to tribes. And tribes need to become even more aggressive in the defense of their sovereignty. Tribes need to become more politically involved. Already, tribes have come a long way. Tribes have mastered the art of legislative lobbying. In fact, the 1988 amendments to the *Indian Self-Determination and Education Assistance Act* was an effort led by tribes. As bureaucrats, some of us were able to help because we know the workings of our agencies. Still, it is the tribes who pushed the legislation through. As tribes become even more politically involved—at the local, state, and federal levels—then our ability, as bureaucrats, to transform the BIA to serve their needs more exactly will be enhanced. It is an uphill battle, but I see reason for optimism. We need to remind ourselves of our basic mission: to promote the spirit of Indian self-determination and to carry out our trust responsibility to Indian tribes and individual Indians.

TRIBAL-STATE RELATIONS

- Historically, tribes and states have had difficult relationships, and conflict over jurisdiction has been common.
- Interactions between tribes and states are increasing, particularly as a result of the devolution of program responsibilities from the federal government to state and tribal governments. Today, Native nations and states have a renewed need for open channels of communication and cooperation.
- New models of cooperation and dispute resolution, bolstered by some states' explicit recognition of tribes as governments, are helping alleviate tensions without litigation.
- A number of states are beginning to acknowledge that supporting tribal sovereignty is advantageous since sustained economic development on Indian lands benefits all state residents.

Tribal governments and state governments exist side-by-side in 37 states, and relations with these states have been some of the most contentious and litigious that Native nations have had to face. Frequently, interactions involve struggles for authority over resources or for the right to exercise governmental control when jurisdictional boundaries are unclear. As tribes experience a "convergence of economic strength, legal muscle and political will,"[169] many states are growing increasingly focused on their troubled associations with Indian neighbors. In some instances, tribes and states are choosing to interact in new ways to mitigate long-standing mutual distrust. This movement towards a new relationship based on cooperation is enabling tribes and states alike to better serve their citizens.

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[169] Timothy Egan, reporter from *The New York Times*, as quoted in "From Wounded Knee to Capitol Hill," *State Legislatures Magazine*, October/November 1998.

Tribal versus State Authority

Regional and local history shapes the relationship between each Native nation and neighboring states. The language of the U.S. Constitution justifies the view that Native nations' primary inter-governmental relationship is with the federal government, rather than with state governments. As noted, Article 1, Section 8 of the U.S. Constitution provides that "Congress shall have the power … to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In other words, states and tribes exist as distinct governments, each dealing directly with the federal government.[170]

Supreme Court rulings in cases such as *Worcester v. State of Georgia* (1832) and *Williams v. Lee* (1959) have protected tribal rights from infringement by the states.[171] In the former, Chief Justice Marshall noted:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[172]

State politicians and officials, however, have tended to act on the belief that they have responsibility for, and attendant regulatory jurisdiction over, all people and activities that occur within their geographic boundaries. Entrenched perceptions held by many state officials are that tribes are simply another constituency within the service population, or that the tribes function merely as local interest groups.[173] These views have led to clashes with tribes over economic development initiatives, resource management, land use, taxes, and numerous other issues. State and tribal governments frequently have been unable to arrive at a non-litigious solution to jurisdictional disputes and struggles commonly have had to be resolved in the federal court system.

In many instances, driven by public opinion and a distrust of the effects of tribal sovereignty, state and local officials have led opposition to the exercise or strengthening of tribal jurisdiction. Typically, their consternation is triggered by fears of differing land-use policies for contiguous land parcels, foregone tax revenues, and unclear jurisdictional questions involving environmental and business laws. As an example, when Governor Pataki of New York wrote a letter to the federal government concerning an Indian land claim in 2000, he accused the Oneida Nation of attempting to "amass large quantities of land upon which it pays no real estate taxes, evades all state and federal

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170 In 2005, approximately 48 tribes were recognized by a state government but not recognized by the federal government. State recognition does not guarantee benefits or funding from either the state or the federal government.

171 There are exceptions to the lack of state authority over tribes, including cases in which federal law specifically grants states jurisdiction over Indians. See the "Tribal Jurisdiction" chapter.

172 *Worcester v. State of Georgia*, 6 Pet. 515, 8 L.Ed. 483, at 561.

173 Sarah Hicks and John Dossett, "Principled Devolution: Protecting Tribal Self-Determination in an Era of Growing State Power," National Congress of American Indians Working Paper, 19 September, 2000.

environmental and land-use regulations, and wages a war of unfair business competition against the law-abiding, taxpaying business owners in central New York." [174]

Increased Interaction between States and Tribes

Even though the federal-tribal relationship remains the primary intergovernmental relationship for Indian nations located within the U.S., trends over the last few decades have increased dealings between tribes and states. The growing number of independent decisions made by Native nations, federal policy that shifts administration of certain programs to local and state governments, economic development, and the growing importance of natural resource management are some of the factors which are influencing the necessity and frequency of these interactions.

The assertion of tribal sovereignty has given Indian nations more decision-making power over issues of concern to states. Starting in the 1970s, this dynamic became ever more pronounced as tribes started to take on the management of programs formerly delivered by the federal government.[175] This has meant that, in many cases, state governments objecting to an activity occurring on Indian land can no longer appeal to the federal government, but must take up the matter directly with the tribal government that has made the relevant decision.

Over time, the federal government also has enacted legislation to devolve control of certain functions to state and local governments.[176] As a result, states have in some instances gained authority over policies and programs that impact tribes. The establishment in the late 1990s of discretionary welfare block grants from the federal government to the states is a recent dramatic example of this phenomenon. While the law allows tribes to apply for "treatment as state" and manage their own welfare programs, many Native nations have not assumed this responsibility and now need to coordinate extensively with states on welfare issues.[177]

Recent growth in the economies of many Indian nations has also generated additional contact – and often conflict – between tribes and states. As growing numbers of businesses flourish on Indian lands, questions around state regulation and the collection of tax revenue become increasingly salient. For example, the spread of reservation-based gaming enterprises has led to complaints and lawsuits by state governments seeking to exert regulatory control and obtain a share of gaming revenues. Federal gaming legislation has acknowledged these concerns by introducing a requirement that tribes negotiate a compact with states before establishing certain types of gaming operations.[178]

In parallel, growing public interest in natural resource management and environmental degradation has focused the attention of both state and tribal governments on land and water use on and near reservations. Seeking to exert more control over what happens on Indian lands, Native nations are passing an array of laws on hazardous waste storage, water quality standards, wildlife management, and land use planning. Non-Indian neighbors have often vocally objected to tribal activities, worrying that Native nations might set higher standards that could scare off development or

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[174] Letter sent to President Clinton by Governor Pataki of New York in April 2000, quoted in "Battle Over Iroquois Land Claims Escalates," *The New York Times*, 16 May, 2000.

[175] See the "Tribal Governments" and "Tribal-Federal Relations" chapters.

[176] In most cases, federal authority can also be devolved to tribes under certain conditions.

[177] See the "Family Support" chapter.

[178] See the "Gaming" chapter.

set lower standards to attract businesses to the reservation. In the Western U.S., disputes between states and tribes over water rights have gained increasing prominence as demand for water resources grows. [179]

New Models of Cooperation

Faced with more frequent and often difficult interactions, states and tribes have been developing new cooperative approaches to issues of mutual concern. The National Conference of State Legislatures observes that "in this increasingly complex landscape of service delivery and funding arrangements, intergovernmental coordination has become paramount to ensuring that the needs of state and tribal citizens are met."[180] Indeed, many compromises, agreements, and working relationships are being established between tribes and states. A movement towards negotiation and arbitration techniques and away from litigation became evident as early as the 1980s.[181] Many states are now formalizing their relationships with tribes, through agreements, statutes, and Executive Orders that dictate a new approach to state-tribal relations and establish mechanisms for regular dialogue and even shared jurisdiction.

In 1989, federally recognized tribes in Washington State and the State of Washington signed the Centennial Accord, "in order to better achieve mutual goals through an improved relationship between their sovereign governments."[182] This groundbreaking agreement established an annual meeting and laid a foundation for more specific agreements. Ten years later, the State and the tribes reaffirmed their commitment to implementing the Centennial Accord goals by signing the New Millennium Agreement, which focuses on measures to institutionalize the tribal-state relationship.[183]

Taking a different approach, the State of Oregon passed a law in 2001 which specifies measures to promote positive government-to-government relations with tribes.[184] The law requires that each state agency develop a specific policy and submit a yearly report on the agency's communications and dealings with tribes. The law stipulates that the state must provide training at least once a year to employees that regularly interact with tribes and mandates a yearly meeting between tribal and state representatives convened by the Governor. In addition, Oregon's state-tribal workgroups, known as "clusters", meet regularly to discuss developments and cooperation in six issue areas: natural resources, cultural resources, education and workforce training, economic development and community services, health and human resources, and public safety and regulation.[185] In 2003,

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179 See the "Natural Resources" chapter.

180 Sia Davis and Aura Kanegis, "Improving State-Tribal Relations: An Introduction," *States and Tribes: Building New Traditions* (Denver: National Conference of State Legislatures, September 2004), 1.

181 Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987), 9.

182 Washington State Governor's Office of Indian Affairs, "Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington," 4 August, 1989, Preamble and Guiding Principles.

183 Washington State Governor's Office of Indian Affairs, "Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium," November 1999.

184 Oregon Revised Statutes 182.162-168 (SB 770-2001 Session).

185 Karen Quigley, "Current Status of State Tribal Relations: Oregon's Approach to State-Tribal Relations," *In Brief* 1, no.1 (Salem, OR: Legislative Commission on Indians Services, April 2004). http://www.leg.state.or.us/cis/newsletter/news_april04.pdf (28 June 2006)

the state of Montana passed similar legislation, deepening its government-to-government relationship with tribes by establishing guiding principles, training for state government employees, mandated reporting by state agencies, and a yearly state-tribal meeting called by the Governor.

New Mexico has taken innovative steps to improve its relations with Indian nations, as well. In 2004, the New Mexico Office of Indian Affairs was formally elevated into a cabinet-level department by statute, giving Indian issues more prominent consideration in state policy development.[186] Governor Richardson also signed statements with the Navajo Nation and with the Pueblos, laying out a protocol for mutual consultation on "issues of interest or concern."[187] These developments follow a decade of advances in the state-tribal relationship. At a summit meeting in Santa Fe in 1996, the Governor and Attorney General of New Mexico, the president of the Navajo Nation, the chairs of the two Apache tribes of New Mexico, and the 19 Governors of the Pueblos located within the state signed a historic *Government-to-Government Policy Agreement*. This agreement affirmed the government-to-government nature of the interactions of the state and the Indian nations, and formalized the understanding that the parties to the agreement will interact "in a spirit of cooperation, coordination, communication and good will."

Governors in several states have also used Executive Orders to help institutionalize state-tribal relationships. As an example, in Wisconsin, Governor Doyle signed an Executive Order in 2004 directing state agencies to work respectfully with tribes and to consult with them "regarding state action or proposed action that is anticipated to directly affect an Indian Tribe or its members."[188] The provisions contained in the Oregon law build on an Executive Order signed five years earlier by Governor John Kitzhaber which recognized that the policy and programs of the state affect tribal interests and that the tribes have a "unique legal status" which requires interaction on a government-to-government basis.[189] In New Mexico, former Governor Gary Johnson issued an Executive Order in 1998 affirming that the state would interact with the tribes as sovereign governments based on the principles agreed to in the *Government-to-Government Policy Agreement*.[190] His successor, Governor Bill Richardson, has followed with Executive Orders requiring state agencies to establish a pilot tribal consultation plan and to develop a statewide consultation plan on the protection of sacred sites and repatriation of sacred objects.[191]

Even when they do not deal with specific issues, the agreements, laws, and Executive Orders that define the state-tribal relationship as one of governmental equals set the tone for productive interactions. Anecdotal evidence suggests that the frameworks that they provide have profound

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[186] New Mexico Indian Affairs Department, "A New Dawn in State-Tribal Relations: Indian Affairs Department Legislation Passes Legislature," Press Release, 19 February 2004. Governor Richardson created the Indian Affairs Department by Executive Order in 2003.

[187] State of New Mexico, Office of the Governor, "Statement of Policy and Process," (January 2003, May 2003).

[188] State of Wisconsin, Office of the Governor, "Relating to an Affirmation of the Government-to-Government Relationship Between the State of Wisconsin and Indian Tribal Governments Located Within the State of Wisconsin," Executive Order #39, 27 February 2004.

[189] State of Oregon, Governor's Office, "State/Tribal Government-to-Government Relations", Executive Order No. EO-96-30, 22 May 1996.

[190] State of New Mexico, Office of the Governor, "State of New Mexico State/Tribal Government Relations Policy", Executive Order 98-10.

[191] State of New Mexico, Office of the Governor, E0-05-003 and EO-05-004.

impacts on the workings of the state bureaucracy, as civil servants become used to considering the impacts that state actions and regulations will have on the tribes. Government-to-government principles lead state representatives toward viewing tribal representatives as delegates of sovereign powers from whom they must proactively seek input when state proposals impact tribes. Further, institutionalizing regular "summit"-type meetings between tribal and state representatives helps ensure that significant, emerging issues are identified and discussed in a timely manner.

Many states also have entered into cooperative agreements with tribes on specific policy matters. In an effort to deal with complex jurisdictional issues, almost every state that coexists with tribal governments has entered into some type of taxation arrangement with tribes.[192] Examples of agreements include cigarette tax contracts that four tribes have signed individually with the state of Washington, thirty-four tobacco tax compacts and thirty motor fuel contracts between various Indian nations and the state of Oklahoma, and tax agreements between individual tribes and the state of Michigan on several types of government revenues including sales, business, and income taxes.

Similarly, tribal-state agreements in law enforcement have helped states and Indian nations maximize the use of their policing resources across jurisdictional boundaries. In one example, the state of Nebraska signed a 2001 cross-deputizing agreement with the Winnebago Tribe of Nebraska which, on Winnebago land, enables designated state patrol officers to enforce federal, state, and tribal laws and tribal officers to enforce state laws over non-Indians.[193] While state-tribal pacts have been especially common in the areas of taxation and law enforcement, they can pertain to a wide variety of topics, including service delivery, land management, and cultural resources. Increasingly, agreements also are being used to settle water right disputes.[194]

The Benefits of Cooperation

At a time when some states are making ground-breaking overtures toward the Native nations within their borders, others remain locked in a mainly competitive or hostile relationship. Within individual states, cooperation sometimes prevails in one policy area, while negotiated solutions remain elusive on other issues. Yet working towards less confrontational relations is in the best interests of both tribes and states. Indeed, studies undertaken in the 1990s corroborated the benefits accruing both to states/counties and to tribes from seeking cooperative solutions, rather than resorting to litigation, to overcome disputes.[195]

Many state leaders and officials are beginning to recognize that that it is advantageous to respect tribal sovereignty. Acknowledging tribes as full governments increases the likelihood that problems and litigation can be avoided and that agreements to partner on issues of mutual concern can be reached. As an example, in a case before the U.S. Supreme Court in 2003, the state of New

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192 Susan Johnson, Jeanne Kaufmann, John Dossett, Sarah Hicks, *Government to Government: Models of Cooperation Between States and Tribes* (National Conference of State Legislatures, 2002), 72.

193 Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol and the Winnebago Tribe of Nebraska, June 2001. http://www.ncai.org/ncai/resource/agreements/ne_tax_motor_fuel_tax_agreement_between_winnebago_tribe_of_nebraska_and_state_of_nebraska_january_2002.pdf (28 June 2006).

194 See the "Natural Resources" chapter.

195 See, for example, James Reed and Judy Zelio, eds., *States and Tribes: Building New Traditions* (Denver, CO: National Conference of State Legislators, November 1995). See also *County Tribal Relations: Six Southwestern Counties and the Navajo Nation* (Tucson, AZ: The University of Arizona, 1997).

Mexico, supported by the states of Montana, Washington and Arizona filed a friend of the court brief disputing the argument that Indian reservations could become havens for criminals if state law enforcement agencies could not execute a warrant for the release of tribal records. Governor Richardson noted, "In New Mexico, we do not use bolt cutters and search warrants against Indian tribes to conduct our criminal investigations…We have had great success using intergovernmental agreements with Indian tribes to ensure that there is adequate law enforcement for all New Mexicans."[196] By working with Native nations, states can ensure that their concerns are met when tribal governments make decisions that have an impact beyond their borders.

Additionally, states derive economic benefits from promoting the governmental capacity of Native nations. The experience of self-determination over the last 30 years shows that by increasing control of their own affairs, tribes are better able to generate real economic growth on reservations. Businesses started on Indian lands contribute, often substantially, to the states' economies. As an example, the Mississippi Choctaw tribe is one of the very largest employers in the state of Mississippi, creating job opportunities for state residents, increasing state revenue from payroll taxes, and generating investment dollars. More broadly, a number of studies report significant positive spillovers for communities which neighbor Indian casinos, including increases in incomes and employment and a reduction in welfare rolls, robberies, and motor vehicle crimes.[197]

Tribal governments are also increasingly recognizing the benefits of collaboration with state counterparts. Tribes have traditionally seen their primary interlocutor as the federal government and have been sometimes resistant to enter into agreements with state governments. A new willingness to acknowledge that state governments have legitimate concerns about tribal government activities has contributed towards improving the state-tribal relationship. Through innovative arrangements with state governments, Native nations have been able to expand services available to their citizens and address off-reservation issues that are important to the community. In just one example, the Navajo Nation and the Zuni Pueblo have partnered with the City of Gallup, McKinley County, and the State of New Mexico to provide substance abuse services in Gallup, New Mexico. This partnership allows the Native nations involved to leverage state and local resources to help address the needs of their off-reservation citizens.

The proliferation of agreements and newly formalized relationships between states and Native nations points to an underlying, hard-won shift towards mutual recognition. Through the efforts of both states and tribes over the last few decades, a relationship long marred by confrontation is in the early stages of being redefined. States and tribes are finding new ways to interact on a government-to-government basis and the resulting dialogue between equals ultimately benefits all state and tribal citizens.

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196 State of New Mexico, Office of the Governor, "Attorney General Madrid and Governor Richardson Join U.S. Supreme Court Legal Battle," press release, 27 February 2003. http://www.governor.state.nm.us/press/2003/feb/022703_1.pdf (8 May 2006).

197 Leigh Gardner, Joseph P. Kalt, and Katherine A. Spilde, *Annotated Bibliography: The Social and Economic Impacts of Indian and Other Gaming*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

TEXTBOX: Honoring Our Ancestors: The Chippewa Flowage Joint Agency Management Plan, Lac Courte Oreilles Band of Lake Superior Chippewa Indians

The Chippewa Flowage is Wisconsin's third largest lake. While the Chippewa Flowage is now regarded as a treasure of natural beauty and recreational opportunity, its creation marked a grim loss for the Lac Courte Oreilles Band of Lake Superior Chippewa. In creating the Flowage in the 1920s—an endeavor motivated by the prospect of power generation—the federal government authorized the flooding of a significant portion of the Lac Courte Oreilles traditional territory. The Chippewa Flowage decimated the tribal economy, forced tribal members to relocate, and covered sacred cultural and ceremonial sites.

The Flowage brought tremendous sadness to the Lac Courte Oreilles people and for years they sought to obtain the rights to manage the acreage bordering it. The tribal government eventually won these rights in the 1970s. Success in the courtroom, while satisfying, was only a partial win, however. The tribal government possessed neither the technical capacity nor sufficient governmental influence to manage the resource.

In 2000, following twelve years of negotiations, the Tribe, the Wisconsin Department of Natural Resources, and the United States Forest Service signed the Joint Agency Management Plan for the Chippewa Flowage. The Plan outlines long-term management goals for the resources of the Chippewa Flowage area. These goals include policies that detail each government's responsibilities regarding the management of land and real estate, flowage area development, recreation, facilities development, water resources, shoreline erosion, fisheries, vegetation, wildlife, fire control, transportation systems, cultural resources, public health and pollution control, and law enforcement. Although there are many issues about which the three governments must make joint decisions, the Plan allows each government to undertake its specified management responsibilities with a great deal of independence.

While the Lac Courte Oreilles were unyielding in their demand that the Plan acknowledge tribal sovereignty, they were cognizant that the state of Wisconsin and the federal government had legitimate jurisdictional claims as well. The Tribe's willingness to acknowledge other governments' authority inspired a similar willingness on the part of those governments. Now, with the full support of the Wisconsin Department of Natural Resources and the U.S. Forest Service, the Plan's preface alerts readers to the injustices suffered by the Lac Courte Oreilles. The Plan states that "all parties recognize the treaty rights of the Chippewa." Representatives of the state and federal governments to the Plan have become staunch defenders of the Tribe's sovereignty.

By making the sovereign choice to work cooperatively with these other governments, the Tribe has been able to achieve goals that it could not have achieved alone. Through the Joint Agency Management Plan of the Chippewa Flowage, the Lac Courte Oreilles Band of Lake Superior Indians exercised their sovereignty to protect their homeland from further degradations. Perhaps the most important lesson to emerge from the Plan's success is that even governments that have every historical reason not to work together may realize win-win solutions through a willingness to cooperate./**END TEXTBOX**

Educate. Educate. Educate.

Marge Anderson (Mille Lacs Band of Ojibwe)
Former Chief Executive, Mille Lacs Band of Ojibwe
August 2004

I was recently invited to speak to a group of educators about tribal governance. Most of their questions were about sovereignty. They wanted to know what tribal sovereignty is. They wanted to know how we exercise it. They genuinely wanted to understand. When I explained that, as tribes, we exercise sovereignty when we actively assume governance over our own communities, they began to understand its importance. These educators began to understand our desire to write our own laws, to work to ensure that these laws are recognized, and to live according to them.

I seek out opportunities to educate others about tribal sovereignty and I hope that those I educate will communicate their understanding to others. During my tenure as chief executive of the Mille Lacs Band of Ojibwe, I came to realize that the misunderstanding of sovereignty is a seed of anti-Indian sentiment throughout the United States. Individuals who don't understand tribal sovereignty feel threatened by it and by those tribes who exercise it. Our only effective defense against such anti-Indian sentiment is education. We must assume the responsibility to educate others about sovereignty. We must educate local governments, state governments, and even the federal government. We must educate on both sides of the aisle. We must educate every new legislator entering office. We must educate every two years. Educate. Educate. Educate.

I have seen persistent efforts at education succeed. During my tenure, our tribe had a good relationship with the state legislature. The legislature invited us to speak to them about tribal, state, and federal relationships. As we took the opportunity to educate them about issues that were important to us, we made progress. We also worked at the regional and national levels. I founded the Midwest Alliance of Sovereign Tribes to make sure that the interests of tribes from Michigan, Minnesota, Wisconsin, and Iowa were heard in Washington. During our annual impact week, we found that by knocking on the doors of those who had voted against our interests, we could change minds. Many of those individuals simply didn't know anything about Indians. They voted against us without knowing anything about us. In this forum, too, education was effective. I also founded the National Unity Caucus. The caucus allows tribes to donate funds to individuals who support our interests. The success of these individuals in public service promotes an understanding of tribal sovereignty.

Our efforts at education are important because our sovereignty is important. Tribes succeed when we control our own resources to meet our own needs. Several years ago, the Mille Lacs studied the funds that the federal government appropriated for tribes. We learned that only fourteen cents of every dollar reached us. That meant that eighty-six cents out of every dollar were lost in the layers of bureaucracy from the central office of the Bureau of Indian Affairs to the area agencies. Not only were administrators taking most of the money that was supposed to be ours, but they were also making the decisions about how the balance of that money should be spent. This wasn't right. We knew our needs better than Washington. We knew that we didn't need another government telling us how to spend our money. We knew that by directing our funds to meet our own needs, we could make improvements in our people's lives.

The Mille Lacs Band of Ojibwe became one of the first tribes to compact for federal dollars and our tribe is still unified in its commitment to self-governance. When we told our people what was happening to the funds that were appropriated for us by Congress, we also told them we could do

better. We became one of seven tribes involved in an early federal project that demonstrated the effectiveness of self-governance. We have taken control of our resources and have provided better services than the federal government ever provided. We have gone around or through the roadblocks the federal government imposed in order to offer these improved services to our people.

We have defended our sovereignty not only in our relationship with the federal government, but also in our interactions with the state. Tribes must work with states when federal funds or federal programs are administered through states. This doesn't mean, however, that we are subordinate to states. Tribes and states must preserve a government-to-government relationship. In Minnesota, Public Law 280 states that tribes and the state have concurrent jurisdiction. However, in the 1970s, Minnesota worded their contracts with us in such a way that required us to waive our sovereign immunity in order to receive funds. We refused. We refused to sign contracts for energy assistance, Head Start, chemical dependency monies, or other state-funded programs. Our people were poor. We needed those funds. It was hard to go without, but we refused to enter into contracts that signed away our sovereignty. Our determination to preserve our sovereignty protected all tribes in Minnesota. Within a few years, the legislature passed a law stating that tribes would not be required to waive their sovereign immunity in order to receive funds.

As I've argued, our sovereignty is worthy of defense because it is the source of our success. Regrettably, that success itself often generates real resistance. When the Mille Lacs were poor, the fact of our sovereignty didn't seem to matter. However, as the exercise of our sovereignty has resulted in increased economic and political influence, those who don't understand our sovereignty have begun to see it as a serious threat. As a result, our relationships with other governments have become troubled. In the 1990s, the state of Minnesota challenged our rights—rights guaranteed through our 1837 Treaty—to fish and gather. Although we worked towards a solution through the Department of Natural Resources and even agreed to a limitation of our rights in order to avoid the confrontations that Wisconsin tribes had experienced during their treaty rights battles, the state legislature rejected our proposal. We had no choice but to take the state to court. We won every step of the way—from the district court, through the Eighth Circuit Court of Appeals, to the Supreme Court—but that success only increased resentments. Soon afterwards, Mille Lacs County began its challenge of our reservation boundaries. Although the Eighth Circuit Court of Appeals has dismissed their case, I find myself wondering what will happen next.

Such battles hurt us; they also hurt the county and state. I hope that these other governments will begin to recognize the benefits that the exercise of our sovereignty offers them. Since we opened our first casino in 1991, we've taken many of our people off the welfare roles. We've also generated nearly three thousand jobs for non-Indians. This deserves celebration. Regrettably, too often our best efforts are not only ignored, but actually thwarted. While I was in office, I secured nearly nine million dollars for a wastewater treatment plan that would have served our reservation and nearby townships while preventing sewage from leaking into Lake Mille Lacs. Our interest—an interest that I know we shared with the county and state—was in cleaning up the lake. However, a few legislators blocked our efforts. I'm not even sure that I understood what their issues were. Too often the issue that thwarts such efforts is fear.

Of course, we can't merely rely on our hope that other governments will begin to recognize the benefits that good tribal governance accrues. I can't stress enough how important it is that we break the cycle of fear ourselves through education. As tribes' economic and political resources increase, we must dedicate some of these resources to educating others. This is already making a difference at a national level. While I was in office, I studied congressional voting patterns and knew that we needed advocates. As a result, we were instrumental in starting the Native American Caucus. When I left office, that caucus had nearly one hundred members from both sides of the aisle. An

understanding of tribal sovereignty was a condition for joining. Tribal leaders across the country must make a difference in their individual communities. Through meetings with state legislators and through their local and regional organizations, they must promote understanding.

Their efforts may be more welcome than they expect. Years ago, when I was attending a meeting of the National Congress of American Indians in California, I was invited to meet a group of new legislators. At the end of our conversation they thanked me. They thanked me for talking to them. They thanked me for telling them about who we are, what we are about, and what we hope for. We must create such opportunities for understanding. It is the source of our hope and it is the antidote to others' fears.

INTERNATIONAL RELATIONS

- Historically, tribes engaged in a wide variety of international relations as sovereign nations. Following the establishment of reservations, however, Native nations were mostly excluded from formal representation within international institutions.
- Recent developments at the international level reflect an increase in Native nations' and individuals' capacities to advocate on their own behalf, a growing need for innovative solutions to domestic concerns, and the continuing impact of globalization on Native American communities.
- International organizations that restrict their membership to nation-states simultaneously restrict Indigenous nations from full participation in their activities and functions.
- Since contemporary Native American policy interests necessitate efforts to voice concerns in both global and regional forums, Native nations and Indigenous organizations are finding novel ways to ensure inclusion in international decisions and protocols.

Given the long history of Native nations entering into alliances, and in light of the worldwide drive by Indigenous peoples[198] for recognition and self-determination, it is not surprising that Native nations are reaching beyond their own territories and beyond the confines of U.S. law into the international arena. Today, Native nations and Indigenous coalitions often feel compelled to express their views and defend their interests at the international level because domestic governments pay

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[198] The term "Indigenous" is used in all international documents and is, therefore employed in this chapter. While its application in certain jurisdictions is the subject of controversy, the term generally refers to communities whose culture and occupation of a particular territory both pre-dated and survived colonization. For more detail on this definition and to access relevant official UN documents see the publications of the UN Permanent Forum on Indigenous Issues. http://www.un.org/esa/socdev/unpfii/ (28 June 2006). As noted in the Preface and Acknowledgements to this volume, Kristyna Bishop and Juliet King of First Nations Development Institute contributed the initial draft of the section on international relations for *The State of Native America* report. This chapter incorporates many of their contributions.

little attention to their issues and offer few solutions to their problems. Indeed, activity of Indigenous peoples in international venues is on the rise. They are playing increasing, if still modest, roles in shaping the policies of international governing and policy bodies.

Historical International Relations

Military alliances, treaties, wars, peace making, trade, and cultural exchanges between tribes are important aspects of the history of Native America. Alliances between sovereign nations are the earliest international relations in Native America. Centuries ago, for instance, the Ojibway, Odawa and Potawatomi nations formed the Council of the Three Fires, a military and political confederacy. According to the Anishnabek Nation, which has its roots in this alliance, in the 17th and 18th century, "the Confederacy held the hub of the Great Lakes and maintained relations with the Iroquois Confederacy, the Sauk, Fox, Menominee, Huron, Winnebago, Sioux, British and French Nations, among others."[199] Such alliances helped maintain peace between Native nations and facilitated trade. While alliances and relationships of these types changed as a result of the shifting political realities in North America with the federal government's establishment of reservations, vestiges remain through the present in the form of grand councils, intertribal political organizations, and shared histories of tribe-to-tribe relations.

In 1922, after failing to resolve issues related to land, self-government, and hunting and fishing rights with the Canadian Department of Indian Affairs, a Mohawk Chief, Deskaheh, traveled from his home in Akwesasne, Mohawk Territory to Geneva, Switzerland to bring the matter before the League of Nations.[200] Since the Haudenosaunee, also known as the Iroquois Confederacy (to which the Mohawk belonged), was not a member of the League and was unrecognized as a nation-state, Deskaheh's attempts to directly address the League were rebuffed.[201] However, Deskaheh mounted a comprehensive advocacy campaign, securing the support of King George V of Great Britain and convincing the Netherlands to sponsor his petition. Although the League eventually decided that the matter was solely within the domestic jurisdiction of the government of Canada, Deskaheh's efforts in Geneva represent one of the first modern entreaties from and interventions by Native Americans in the international community.[202]

Indigenous peoples were not included in the development of the early international human rights conventions and laws. The International Labor Organization (ILO) was the first international body to specifically address Indigenous concerns and attempt to codify their rights in international law. The ILO's 1957 Convention 107 on "Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries"[203] was intended to promote improved social

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199 See "Confederacy of Three Fires: A History of the Anishinabek Nation," www.anishinabek.ca/uoi/threefires.htm (28 June 2006).

200 Richard Veatch, *Canada and the League of Nations* (Toronto: University of Toronto Press, 1975), 91.

201 The Haudenosaunee or Iroquois Confederacy consists of Six Nations: Mohawks, Cayuga, Onondaga, Oneida, Seneca, and Tuscaroras. The territory of the confederacy straddles the border between the United States and Canada. See Ronald Wright, *Stolen Continents: The "New World" through Indian Eyes (*Houghton Mifflin, 1993) 114-142, 222-240, and 313-342.

202 For more information on the lobbying efforts and the involvement of the Netherlands and Canada's response, see Veatch.

203 International Labor Organization, Convention (107) Concerning the Protection and Integration of Indigenous and Tribal Populations, 26 June, 1957 (entered into force 2 June, 1959).

and economic conditions for Indigenous peoples generally, but it was developed entirely without their participation. As its title implies, the Convention had an assimilationist orientation and did not promote a long term place in the ILO for Indigenous and tribal peoples. There was an underlying assumption that protection would be needed for only a short period of time, and that Indigenous people eventually would disappear as politically significant and distinct cultural groups. The Convention was ratified by 27 countries, although not by the United States and Canada.[204]

In the mid-1970s, Native North Americans established the first two international Indigenous advocacy organizations: the World Council of Indigenous Peoples and the International Indian Treaty Council.[205] Representatives of these organizations supported Indigenous advocacy at the United Nations and attended all relevant meetings to make submissions regarding the deplorable state of Native America in areas such as life expectancy, employment, health, income and housing.[206]

The United Nations and Indigenous Peoples

The United Nations has been a focal point of efforts to increase the voice of Indigenous peoples at the international level. In 1971, the United Nations Commission on Human Rights appointed Jose Martinez-Cobo to undertake a study regarding discrimination against Indigenous people. Fifteen years later, Martinez-Cobo issued a comprehensive five-volume report that examined topics such as health, housing, and education as these affected Indigenous peoples worldwide. The report urged governments to develop guidelines for their activities that would respect the human rights of Indigenous peoples.[207] A subsequent effort to assess the global situation for Indigenous peoples began in 2001, when the UN Commission on Human Rights appointed a Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People.[208]

In the early 1980s, the United Nations' Economic, Cultural and Social Committee (ECOSOC) established the Working Group on Indigenous Populations. The Working Group quickly became a key forum for addressing Indigenous issues at the United Nations. The group consists of five experts selected by the governments of the five UN geopolitical regions and is a subsidiary committee of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The annual summer session has become the largest regularly scheduled human rights meeting on the United Nations calendar, attended by nearly 1,000 representatives and observers from nation-states, Indigenous peoples and nations, and non-governmental organizations, as well as by scholars. The Working Group has placed special emphasis on the second of its two formal tasks, which are: 1) To review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous peoples; and 2) To develop international standards concerning

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204 See C.P. Cohen, ed., *The Human Rights of Indigenous Peoples* (Ardsley, New York: Transnational Publishers, 1998).

205 Douglas Sanders, "Indigenous Peoples at the United Nations: An Overview," *C.N.L.R.* 2 (1996), 20.

206 Ibid.

207 U.N. Economic and Social Council, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous People*, E/CN.4/Sub.2/1986/7 + Add. 1-4 (1986). Working Group on Indigenous Peoples established pursuant to UN Resolution 1982/34 of 7 May 1982 of the Economic and Social Council.

208 See "Indigenous Peoples: Information Note on the Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples," (June 2004). http://www.unhchr.ch/indigenous/rapporteur.htm (28 June 2006).

the rights of Indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world.[209]

One of the Working Group's most important achievements has been the development of a Draft Declaration on the Rights of Indigenous Peoples.[210] The text of the draft was developed with the input of Indigenous peoples, including several prominent Native American advocacy organizations. It was the first time that Indigenous people were included in the drafting of a UN instrument. The Draft stresses rights to land and resources, advocates for political autonomy along with Indigenous peoples' rights of political participation in their respective states, and contains provisions protecting cultural rights. The United Nations describes the draft as "break[ing] new ground by addressing collective rights to a degree unprecedented in international human rights law."[211]

The Draft Declaration is viewed and used by Indigenous peoples as a benchmark, but many nation-state governments have voiced significant objections and final adoption has been elusive. The provisions that recognize Indigenous groups as "peoples" have been particularly contentious, since this term implies a right to self-determination. However, some progress has been made. In June 2006, the UN Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples and recommended its adoption by the General Assembly.[212] However, many countries – including the United States – continue to object to the document's recognition of self-determination without additional language affirming the concept of the territorial integrity of nation-states.[213]

In the course of developing the Draft Declaration, Native Americans, Indigenous organizations, and the UN Working Group on Indigenous Peoples pressed successfully for the declaration of a World Decade of Indigenous Peoples. This UN designated Decade began in 1995 and concluded in 2004, with August 9th of each year marking International Indigenous Day. In December 2004, the UN General Assembly adopted a resolution proclaiming a second International Decade of the World's Indigenous Peoples beginning in 2005. A Program of Action has been drafted by the Secretary-General to help the U.N. meet the decade's goal of "strengthening international cooperation for the solution of problems faced by Indigenous people in the areas of culture, education, health, human rights, the environment and social and economic development."[214]

The involvement of Indigenous groups in the UN is injecting a wider range of perspectives into complex debates. An important example is the inclusion of the concept of traditional knowledge in the Convention on Biological Diversity, signed by national governments at the United Nations

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209 See Sarah Pritchard, ed., *Indigenous Peoples, the United Nations and Human Rights* (Sydney: Federation Press, 1998).

210 Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993. Adopted by the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. Resolution 1994/45, 26 August 1994 UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56.

211 United Nations, "United Nations Guide for Indigenous Peoples," Leaflet No. 5 (United Nations, 2001), 1.

212 Office of the United Nations High Commissioner for Human Rights, http://www.ohchr.org/english/issues/indigenous/groups/groups-02.htm (!6 December 2006).

213 American Indian Law Alliance, "Progress". See also http://www.ailanyc.org/ (28 June 2006).

214 United Nations General Assembly, "Second International Decade of the World's Indigenous People," Resolution 59/174, 24 February 2005.

Conference on Environment and Development in 1992.[215] The Convention acknowledges the importance of Indigenous communities in protecting biodiversity and natural resources. Meetings regarding the continued development and implementation of the Convention have been well attended by Indigenous organizations from North America and elsewhere around the globe. Ratified by 188 countries, the Convention supports rights of Indigenous peoples by providing a mechanism to demand access to environmental impact decision-making processes. Although the United States is not a party, the provisions give Native nations a benchmark for negotiations with government and industry. Indeed, the requirements of the Convention have spurred some international private sector alliances, such as the Global Mining Initiative, to include Native American voices in their efforts to modify business policy and practice.[216] The recognition of traditional knowledge in the Convention has also given Indigenous groups a point of reference in the on-going debate over the patentability of biological material under the World Trade Organization's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).

Efforts to further strengthen the representation of Indigenous peoples at the UN culminated in the establishment of the Permanent Forum on Indigenous Issues by the ECOSOC in 2000.[217] The Permanent Forum is an advisory body to ECOSOC and provides a platform from which to support efforts to promote and protect Indigenous rights. General Assembly President Theo-Ben Gurirab noted in 2000 that its establishment "marks a watershed for the representation of Indigenous peoples in the United Nations system. It means that, henceforth, Indigenous representatives, not representatives of Member States, will be able to voice their concerns directly to the Council."[218] The Permanent Forum consists of 16 members, eight of whom are nominated by governments and elected by the Council, with the remaining eight appointed in "consultation with Indigenous organizations and groups." Since its first meeting in May 2002, the Permanent Forum has worked with the various UN agencies to raise awareness and coordination of Indigenous issues.[219] The Permanent Forum has focused, for example, on ensuring the participation of Indigenous peoples in reaching the goals of the Millennium Declaration on international development.[220]

The Permanent Forum for Indigenous Peoples is the highest level body that can be established at the UN, on the same level as the UN Commission on Human Rights. The Permanent Forum is still in its infancy, and there are concerns that it may be duplicating the work of the Working Group on Indigenous Populations.[221] Some critics argue that the Permanent Forum may be another method to take away the hard-won place of Indigenous peoples at the UN by relegating them to

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[215] Convention on Biological Diversity, 5 June 1992, United Nations Environmental Program (entered into force on December 29, 1993). Text available at http://www.biodiv.org/doc/legal/cbd-en.pdf.

[216] See the web site of the Global Mining Initiative, http://www.icmm.com/gmi.php (28 June 2006). The study on Mining, Minerals, and Sustainable Development is available at www.iied.org/mmsd/index.html (28 June 2006).

[217] U.N. General Assembly, Third Committee, A/C.3/55/L.19, 26 October 2000.

[218] General Assembly President Theo-Ben Gurirab, 7 August 2000, Press Release GA/SM/184 OBV/153. See also Missy Ryan, "Will the Ambassador from Navajo yield?" *National Journal* 32, no. 23 (June 2000).

[219] See the website of the UN Permanent Forum on Indigenous Issues, http://www.un.org/esa/socdev/unpfii/ (June 28 2006).

[220] United Nations General Assembly, United Nations Millennium Declaration, Resolution 55/2, 18 September 2000.

[221] See Biko Nagara, "Opening the First Door to the UN", *UN Chronicle* XL no.4 (2003), 20.

consultant or observer status, rather than full participation in decision making. What is clear is that Indigenous peoples and nations will continue speaking for themselves in pressing for the latter.

Other International Institutions

A number of efforts by Native Americans to influence the development of international law and the foreign policy of nation-states are quite issue-specific, addressing international instruments and agreements in particular issue areas such as development, trade, and the environment. In the 1970s and 1980s, Native Americans and other Indigenous peoples brought pressure to bear on the International Labor Organization (ILO) to modify the 1957 Convention regarding Indigenous concerns. Advocacy organizations argued that the 1957 document was paternalistic and unenforceable, and pushed for a new Convention that would more adequately reflect the needs and interests of Indigenous peoples. In response, the ILO began to examine its policies. A 1986 meeting of the ILO's Committee of Experts concluded that "…the integrationist approach of the [1957] Convention was obsolete and that its application was detrimental in the modern world." The ILO then invited the World Council of Indigenous Peoples, the International Indian Treaty Council, and other Indigenous organizations to participate in the creation of a new Convention, entitled "Concerning Indigenous and Tribal Peoples in Independent Countries."[222] This new convention is notable for its greater emphasis on collective rather than individual rights and its commitment to Indigenous land rights. Despite these changes, however, some Indigenous organizations remain critical of the ILO because it recognizes nation-states as primary actors, and of the Convention because it fails to affirm that Indigenous "peoples" possess the right to self-determination as recognized by international law.[223]

Indigenous organizations have also sought to increase their influence on decision-making at the World Bank. While they do not yet have official status in the Bank, Indigenous peoples are recognized in policy, and increasingly, representative organizations are engaged in policy review and formation. For example, since 1982 it has been official Bank policy to protect the rights of "tribal people" in Bank-financed development projects.[224] In 1991, the Bank augmented this policy by issuing an Operational Directive that requires community-level participation in the design and implementation of Bank-sponsored projects.[225]

In the early 2000s, Native American organizations and other representative Indigenous groups participated in a review of the Bank's Operational Directive, and a revised and strengthened document was adopted as an Operational Policy in 2005.[226] In addition, the Bank created an Indigenous Peoples and Cultural Diversity Thematic Team within the Bank's Secretariat, to assist in the implementation of the Operational Policy and to serve as a liaison unit within the Bank. The major objective of the Thematic Team is to promote greater understanding within the Bank and among its borrower countries of the value of cultural diversity in poverty reduction, sustainable development and effective nation building.

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[222] International Labor Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June, 1989. Convention No. 169 entered into force 5 September, 1991.

[223] Article 1.3: "The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

[224] World Bank, Operational Manual Statement (OMS) 2.34 Tribal People in Bank-Financed Projects, 1982.

[225] World Bank, Operational Manual, Operational Directive (OD) 4.20 Indigenous Peoples, 1991.

[226] World Bank, Operational Manual, Operational Policy (OP) and Bank Procedures (BP) 4.10, 2005.

While much of the international advocacy undertaken by Native Americans has been focused on global organizations, significant work also occurs in regional multilateral forums, such as the Organization of American States (OAS).[227] For example, Native Americans have petitioned the OAS using the Articles of the *American Declaration of the Rights and Duties of Man* for relief for violations of human rights by the U.S. Government. In a case brought by Western Shoshone citizens over a land dispute, the OAS Inter-American Commission on Human Rights has found that the United States has been in violation of international human rights law.[228] Efforts to adopt an *American Declaration on the Rights of Indigenous Peoples* have been ongoing since 1997.[229]

Native nations are also active participants in the Arctic Council, an organization established in 1996 to promote environmental protection and sustainable development in the Far North. All eight countries with territory in the Artic – Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States – are represented on the Council. Through the Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Conference, Saami Council and the Russian Association of Indigenous People of the North (RAIPON), Indigenous peoples are included as permanent participants and are supported by the Arctic Council's Indigenous Peoples secretariat in Copenhagen.[230]

Finally, Native Americans nations are also members of many international non-governmental organizations such as the Forest Stewardship Council, the International Union for the Conservation of Nature, and the Unrepresented Peoples Organization. Membership in these international organizations provides Native Americans and nations with additional opportunities to voice their concerns and express the interests of their communities.

The Road Ahead

Although increased activity and the involvement of Indigenous peoples in international debates have brought increased recognition of Indigenous concerns in the international arena, many aspects of Indigenous people's struggles for recognition remain problematic. The current international system offers opportunities for consultation, but little true power. Indeed, Indigenous groups are treated for the most part in the same manner as any non-governmental organization. Many Native American groups resent the idea that formal accreditation is required to access the international system, yet pursue this approach since it offers the best chance for access and a modicum of participation in international institutions. As long as international organizations remain committed to membership comprised exclusively of nation-states, however, Native Americans and their nations will continue to struggle to obtain substantive decision making roles.

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227 See "Organization of American States." http://www.oas.org (28 June 2006).

228 See "Indian Law Resource Center." www.indianlaw.org/western_shoshone.html (28 June 2006).

229 Inter-American Commission on Human Rights Annual Report, Proposed *American Declaration on the Rights of Indigenous Peoples* OEA/Ser.L/V/III.95.doc.7, revised 1997.

230 Further information about the indigenous component of the Arctic Council can be found at "Arctic Council Indigenous Peoples' Secretariat." http://www.arcticpeoples.org (28 June 2006).

Textbox: Iroquois Nationals Lacrosse

The Haudenosaunee—also known as the Iroquois or "People of the Longhouse"—have always taken a firm stance on their sovereignty. The Iroquois Confederacy, which serves as the traditional supra-national governing body of the Haudenosaunee, is composed of six nations—the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations—whose ancestral homelands extend from eastern Canada to the American southeast.

The Haudenosaunee are known as the originators of lacrosse, or "*ga-chee-qua-is*." Throughout the twentieth century, the sport has grown increasingly popular among non-Iroquois. National lacrosse teams exist in Australia, Canada, the Czech Republic, England, Germany, Ireland, Japan, Korea, New Zealand, Scotland, Sweden, the United States, and Wales. These teams are members of the International Lacrosse Federation, the international governing body of lacrosse.

With the sanction of the Haudenosaunee Grand Council of Chiefs, a dedicated group of Iroquois citizens organized the 45-member Iroquois Nationals Lacrosse Team to represent the Confederacy in international competition. Gaining acceptance into the International Lacrosse Federation (ILF) was among the first of the major challenges the Iroquois Nationals encountered. The Iroquois exceeded the ILF's requirements, even demonstrating their ability to organize and host two international competitions to which they invited the Australian, Canadian, English, and U.S. national teams. In 1987 the ILF recognized the Iroquois' status as a nation, and the Team was officially welcomed as a full ILF member. Since that time, the team has won numerous medals and awards.

Members of the Iroquois Nationals also were determined to express their nations' sovereignty through the use of Haudenosaunee passports when traveling outside of the United States. Obtaining passport approvals from the immigration bureaucracies of the United States (as well as every country the team visits) is a daunting task. Prior to every international tournament, the Team must introduce the Haudenosaunee passport anew and arrange travel clearance with the host nation prior to the Team's departure. Even when the tournament's host country willingly extends such recognition, the clearances are not always transmitted to the appropriate functionaries. Although the negotiations are invariably time-consuming and the process is difficult, the Team and the Confederacy have successfully engaged state departments, embassies, and consulates around the world in recognizing the sovereignty of the Iroquois Confederacy and its member nations. Although it would have been much simpler for the Iroquois Nationals to acquiesce to U.S. and foreign pressure to travel under U.S. passports, the Team and the Confederacy firmly believed that doing so would undermine the Haudenosaunee's inherent sovereignty. In fact, the Haudenosaunee passport minces no words: "You may lose your Haudenosaunee nationality by being naturalized in, or taking an oath or making a declaration of allegiance to, a foreign state." **/END TEXTBOX**

SECTION 2: ASSETS AND ECONOMY

NATIVE LANDS

- The geographical areas traditionally used by Native nations have been dramatically reduced by non-Indian settlement and federal policy. The loss of territory has been spiritually and economically devastating to Native nations.
- Approximately 56 million acres of land in the United States are held by the federal government in trust for tribes, individual American Indians, and Alaska Natives. In addition, Alaska Native corporations control 44 million acres.
- Past federal policies have produced a patchwork of land ownership in Indian Country, creating difficult land management burdens and jurisdictional complexity for Native nations.
- Through land purchases and innovative land-use planning, many Native nations are reclaiming lands and increasing control over their territories. This sometimes led to significant conflict with other jurisdictions.

For Native American cultures, land is a hallmark of identity, a barometer of community integrity, and a resource for ongoing cultural and socioeconomic recovery. Land is a repository, among other things, of the remains of ancestors and their artifacts, the cornerstones of worldviews, and moral lessons from the past.[231] Although each individual Native nation has a unique history with respect to land, all have struggled to protect their land base from non-Indian encroachment. Treaties, federal policy, legislation, court cases, and local actions have restricted the ability of Native nations to access and utilize their traditional lands. Tribes today are reclaiming land and increasing their capacity to manage lands both in and outside of Indian Country.

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[231] See, for example, Keith H. Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque, NM: University of New Mexico Press, 1996) for a discussion of how geographic names offer moral lessons.

A History of Dispossession

The complex status of modern Indian lands has deep historical roots. As European settlers began arriving in North America, conflict arose with Native nations over the right to inhabit and use resources in particular areas. A mix of warfare, treaty-making, and colonial laws characterized relations between the native population and the settlers. Occasional attempts to restrict colonist settlement to set boundaries were mostly unsuccessful. After the Revolutionary War, the new government of the United States made treaties with Indian tribes in order to secure peaceful relations and land rights. However, the problem of settlers illegally moving onto Indian lands continued.

Throughout the nineteenth century, the pressure for acquisition of Native lands by non-Natives intensified. Supreme Court decisions upheld the right of "civilized" colonial powers to appropriate ultimate title to Indian lands, diminishing aboriginal property rights to the right of occupancy.[232] Tribal land under treaty became federal trust land, with tribes having continuing use and ownership of the land, but ultimate control resting with the federal government – including the management of resources, leasing, and funds derived from both.[233] The U.S. government continued to make and renegotiate land cessation treaties with tribal nations, who accepted treaty terms under various degrees of duress. Promises of food, tools, shelter, and education were made in return for the restriction of tribes to designated geographical areas. Native nations resisted through both peaceful means and warfare.

During the nineteenth century, many Indians, such as members of the Cherokee and Osage nations, were removed from their traditional territory and placed in the federally-designated "Indian Territory" (located in present-day Oklahoma) or other federally-designated locations. Some of the new placements overlapped the traditional lands of other tribes or forced longstanding enemies to share a land base. And although the federal policy claimed that these new territories would be reserved for Indians, conflict soon resumed as non-Indians expanded into new areas and pursued economic opportunities. Several bands of Lakota and Dakota, for example, had preserved a large land base in North and South Dakota under the Fort Laramie Treaty of 1868, but shortly after found themselves overrun by prospectors and settlers upon the discovery of gold on their lands. Similar stories of displacement or land loss hold across innumerable tribes, from Crow to Navajo, from Passamaquoddy to Potawatomi.

By the end of the nineteenth century, the federal government had abandoned its policy of treaty-making with Native nations. As the railroads made more areas accessible for settlement, many non-Indians asserted that the size of reserved land areas was "disproportionate to the needs of the Indians" and would be more productive as land for homesteaders, railways, and resource development.[234] In addition, it was widely held in the United States that Indian people should be "civilized" by ending communal tribal existence and promoting individual property rights. Acting in response to these pressures, Congress passed the *Indian General Allotment Act* (also known as the Dawes Act) in 1887.

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232 *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia* U.S. (5 Pet.) 1 (1831).

233 David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul, MN: West, 2005), 104-110; And the Indian Land Tenure Foundation, "Glossary". http://www.indianlandtenure.org/ILTFallotment/glossary/terms.htm (28 June 2006).

234 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, Abridged ed. (Lincoln, NE: University of Nebraska Press, 1986), 190.

Along with several acts of tribally-specific legislation, the *Allotment Act* was designed to encourage individual land ownership, both Indian and non-Indian, on reservations. When a reservation was allotted, tribal members were directed to choose a specific parcel of land -- generally between 40 and 160 acres. Remaining land was declared "surplus" and made available to non-Indians for purchase.[235] Allotments were held in trust for a period 25 years, after which the owner could freely sell or use the land as collateral.

The results of this policy were far reaching and catastrophic for affected tribes. A large number of the individual allotments – though meant to establish Indian family farms or ranches– devolved to non-Indian individuals and off-reservation governments through encumbrances, tax liens, bankruptcy, and outright swindles.[236] While the consequences of the Allotment period vary from reservation to reservation, in aggregate, the result was the passing of nearly two-thirds of Indian lands – 90 million of 138 million acres – into non-Indian ownership between 1887 and 1934. In addition, the land remaining in Indian hands typically was of lower quality, with 20 million of the 48 million acres of Indian lands classified as desert or semi-desert.[237]

Allotment lost support of federal policy-makers over time as its negative effects on Indian communities became undeniable. In 1934, federal strategy changed course significantly with the passage of the *Indian Reorganization Act.* Although the IRA did not restore significant amounts of Indian land, it ended allotment and succeeded in halting further serious losses. A decade later the federal government established the Indian Claims Commission as an official venue for certain tribes to seek monetary settlements for land loss and other wrongs dating back to original treaty violations. Over 370 claims were filed by eligible tribes over the thirty-two years of the Commission's existence, mostly concerning land. Although some significant monetary awards were made, Native nations soon learned that filing a claim did not guarantee compensation and that the federal policy did not actually support the reinstatement of lost land to Native title.[238]

In the 1950s, the federal policy of tribal termination presented a further threat to the land base of Native nations, as the federal government attempted to eliminate its trustee role. House Concurrent Resolution No. 108 of 1953 identified tribes deemed immediately capable of doing without federal services. These included the Klamath, Menominee, and those within certain states, such as California, Texas, Florida and New York.[239] Legislation over the next two decades terminated many of these tribes as federally-recognized sovereigns, removing tribal land protections and dividing parcels among tribal members. Much of such land ended up in non-Indian possession. In all, over 1 million acres of tribal land were lost due to termination.[240]

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235 Peter Iverson, We Are Still Here: American Indians in the Twentieth Century (Wheeling, IL: Harlan Davidson, Inc., 1998), 31.

236 Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987), 20.

237 William C. Canby, Jr., *American Indian Law in a Nutshell*, 4th ed. (St. Paul, MN: Thomson/West, 2004), 22.

238 Iverson, 115-119; And June Lorenzo, "Summary of Land Rights in the United States," in collaboration with First Peoples Worldwide (First Peoples Worldwide-First Nations Development Institute), http://www.firstpeoples.org/land_rights/united_states/us_summary.htm (28 June 2006).

239 The resolution declared that Indians should be freed from federal supervision in order to allow them "to assume their full responsibilities as American citizens." Wilkinson, *American Indians,* 166.

240 Iverson, 130.

During the civil rights era, the drive for self-determination extended to renewed Native efforts to regain control of historic tribal lands. Tribes and Native individuals began to take the federal government to court to press for acknowledgement of Native land rights. In 1972, the Passamaquoddy Tribe and the Penobscot Indian Nation sued for $25 billion and 12.5 million acres in Maine and won a landmark ruling from the U.S. District Court. An ensuing monetary settlement was reached in 1980 with the U.S. government. The settlement resulted in no direct return of land, but provided monetary compensation of $81.5 million. More than $54 million of this was set aside as a fund for land acquisition.[241] In the decades following the Maine settlement, numerous Native nations have filed suits to fight for the recognition of their treaties and many have been successful. Yet, the struggle to reinstate tribal lands – and to exercise jurisdiction over these lands – continues today.

Indian Lands Today

The long chaotic history of settlement, federal policy, court cases, and legislation relating to Indian lands has created an exceptionally complicated property rights legacy. Each Native nation has a unique land situation based on the particular circumstances of its past. Some reservations were heavily allotted, others not at all. Some reservations have their roots in treaties, others in acts of Congress and presidential orders, and still others in military occupation and confinement. As a result, some tribal governments have jurisdiction over large and contiguous tracts of land, others contend with reservations heavily divided between Indian and non-Indian interests, and still others have no specific land base.

Certain categories of land tenure on reservations and within off-reservation treaty areas are specific to Native nations and their citizens. *Trust land* is held by the federal government for the benefit of a tribe or of an individual tribal citizen.[242] The use and transferability of trust lands are restricted, and trust lands cannot be sold or used as collateral for a loan without the approval of the Secretary of the Interior. Another type of Indian land tenure, *restricted fee land*, allows tribes or tribal members to hold the legal title to land but with legal limitations on use and transfer.

The term "Indian land" typically refers to both trust land and restricted fee land. In contrast, non-Indian lands in the United States are generally owned by federal, state or municipal governments or held privately in fee simple, meaning the owner of the property can freely use and transfer the land. Figure 5 shows the major Indian Land areas within the United States. In the cases of some Indian nations, the land areas that are recognized as theirs cross international boundaries. Such is the situation, for example, with the Tohono O'Odham Nation on the Arizona/Mexico border and the Akwesasne (Greater Mohawk Nation) on the New York/Canada border.

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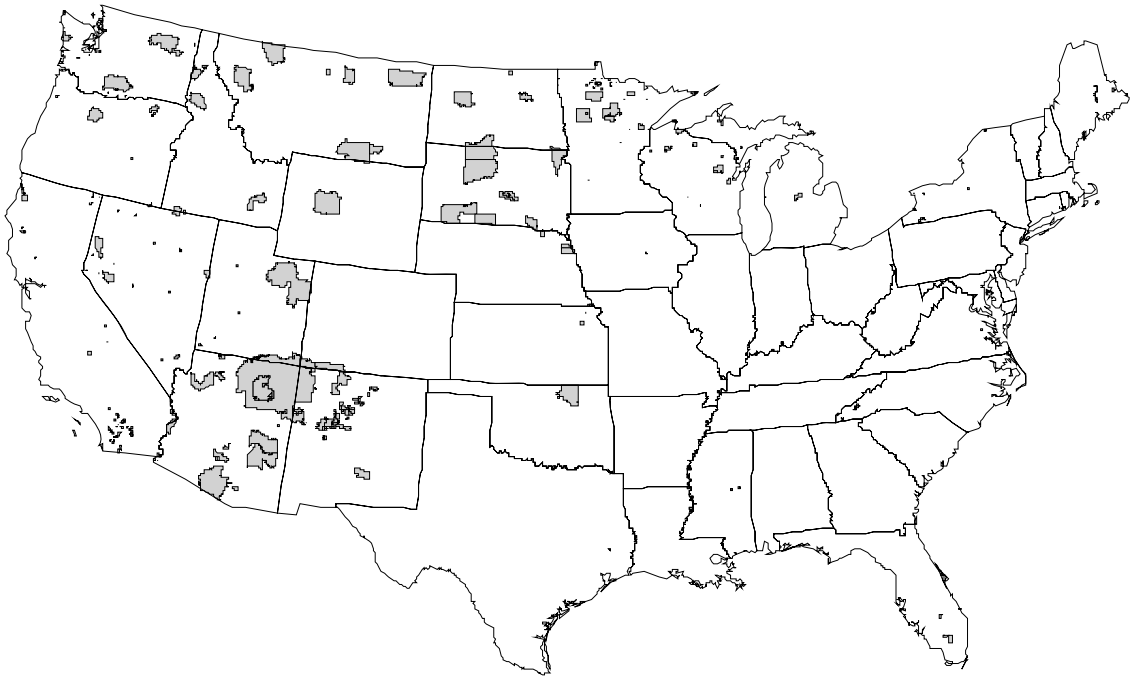
[241] Diane Scully, "Maine Indian Claims Settlement: Concepts, Context, and Perspectives," Maine Indian Tribal-State Commission, 14 February, 1995, at 12-15.

[242] Occasionally, land is held in trust by a state government for a state-recognized tribe.

Figure 5
Indian Land Areas within the Lower 48 States



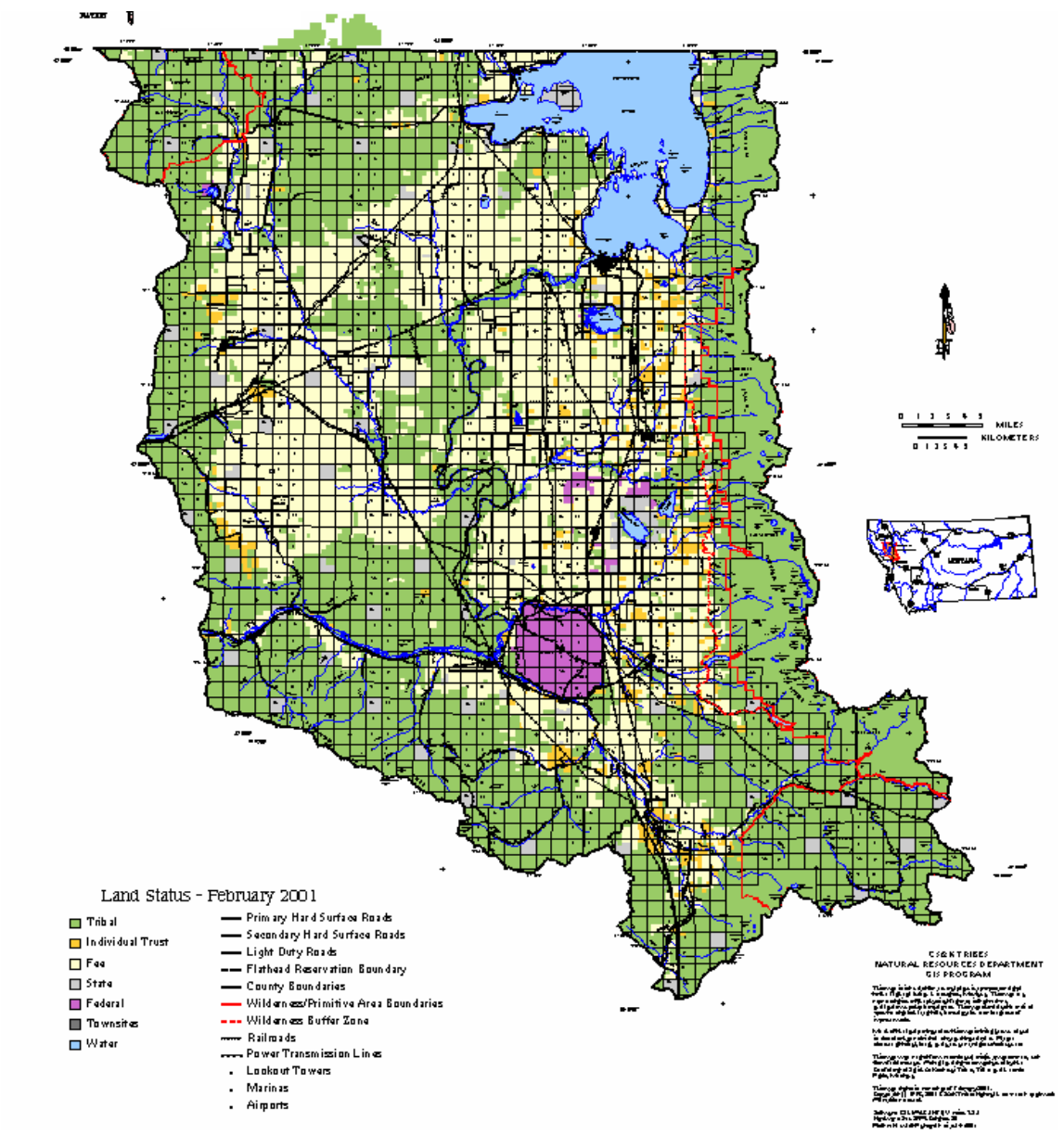
Note: Numerous Indian land areas (e.g., scores of California rancherias) are too small to appear on a national-scale map.
Source: U.S. Bureau of the Census.

Most reservations contain a mix of land tenure within their boundaries. Ownership on a reservation can include tribal trust land, individual trust land, tribal fee simple land, individual tribal member fee simple land, non-Indian fee simple land, and federal, state, and/or county land. Reservations with complex patterns of ownership are commonly referred to as "checkerboarded."

The pattern of land ownership on reservations varies greatly. For example, the White Mountain Apache Tribe's Fort Apache Reservation is primarily composed of trust lands, with only five out of 1.6 million acres in fee simple ownership. In contrast, many reservations are heavily checkerboarded. Examples include the Cheyenne River Sioux, Flathead, and Nez Perce reservations which are 47%, 48%, and 88% owned by non-Indians, respectively.[243] Other reservations have particular land situations, such as the Pine Ridge Reservation which contains within its boundaries a portion of the Badlands National Park. Figure 6 suggests the complications that can arise around land ownership on reservations. It shows the case of the Flathead reservation of the Salish and Kootenai Tribes in Montana.

[243] Veronica E. Velarde Tiller, *American Indian Reservation and Trust Areas* (Washington, DC: U.S. Department of Commerce, Economic Development Administration, 1996), 555, 401, 338.

Figure 6
Land Status of the Flathead Reservation, 1999



Source: GIS Department Confederated Salish and Kootenai Tribes.

Some Indian nations do not have reservations. This is particularly the case in Oklahoma. Although indigenous tribes originally occupied the land area that would be formally designated Indian Territory upon passage of Indian Intercourse Act in 1834, numerous tribes foreign to the area were forced to relocate to Oklahoma. Beginning in the 1820s, the federal government began the relocation of the so-called Five Civilized Tribes (Cherokee, Creek, Seminole, Choctaw, and Chickasaw) to what is now Oklahoma. Over the ensuing decades, Oklahoma also became home to tribes such as the Delaware, Muscogees (Creeks), Apaches, Miamis, Potawatomis, and others.

Today, Oklahoma is home to 38 federally-recognized tribal governments and a large number of American Indian residents, yet most of the state's Indian lands are in the hands of individual tribal members. Only the Osage Nation has a substantial reservation. The term "jurisdictional areas" is sometimes used to demarcate the boundaries of the former tribal territories in Oklahoma. Even without reservations, however, tribal governments in Oklahoma exercise sovereign powers, own enterprises, administer programs, and enforce Indian nation laws, often via complicated agreements, compacts, and legal rulings involving non-Indian governments of the state.

Elsewhere in the country, several Native nations were left landless when they were terminated by the federal government. Though some of these tribes have successfully regained their federal status, they struggle to recover their land base. In one example, the Klamath Tribes were restored as a federally-recognized tribe in 1986, but have so far failed in their attempts to regain any of the 1.8 million acre reservation that was dissolved upon termination in 1954.

In addition to reservations designated in treaties or by Acts of Congress, the land base of Native nations can include off-reservation trust land. As an example, because of its particular history in Wisconsin, the Ho-Chunk Nation today has trust lands that are scattered in 14 different counties, most of which do not have reservation status. Off-reservation trust land is under the jurisdictional control of tribal governments. Some Native nations also have specific rights to use of off-reservation land and/or resources arising out of treaty stipulations, such as the off-reservation traditional and customary hunting and gathering areas around the Chippewa reservations in Minnesota. Rights to certain uses of these off-reservation lands and resources emanate most forcefully from the U.S.-Ojibwe Treaty of 1837, long-ignored by Minnesota and the federal government, but repeatedly affirmed by the federal courts, including the Supreme Court, in the 1990s.[244]

Alaska presents a unique land situation because of the *Alaska Native Claims Settlement Act* (ANCSA) of 1971. Despite its huge size and large native population, technically, only one reservation exists in the State – the Annette Islands Reserve of the Metlakatla Indian Community. To settle ongoing disputes over Native title and compensation for taken title, rather than creating reservations in Alaska, ANSCA created Native regional corporations, and Native village corporations own and administer 44 million acres of land on behalf of Alaska Natives. Unlike Indian lands in the lower 48 states, ANCSA lands are fee simple.[245] As a result of the U.S. Supreme Court's *Venetie* decision noted previously, ANCSA lands and the holdings of Native corporations are not regarded as Indian Country. This has left the jurisdiction of Native communities tenuous, at best. Yet, these communities continue to act as governments in delivering services to hundreds of Native villages and many thousands of Alaska Natives.

The U.S. Census estimates that, overall, American Indian reservation and trust land areas comprise 70 million acres.[246] This total, however, includes non-Indian lands which are located within the boundaries of reservations. Indian lands, proper, total approximately 56 million acres. These can be broken down into two categories: tribal trust land of almost 45 million acres and individual Indian

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[244] Mille Lacs Band of Ojibwe, "The Facts about the Treaty of 1837." http://www.millelacsojibwe.org/facts6.asp (31 May 2006).

[245] For further information on Alaska, see the "Alaska Natives" chapter.

[246] U.S. Census Bureau, Geographic Division, special tabulation of American Indian Reservation and Trust Land Areas as defined in U.S. Census.

trust land of a little more than 10 million acres.[247] When the land holdings of Alaska Native corporations and villages are added, the total land mass of the United States under American Indian and Alaska Native control is approximately 100 million acres. This is equivalent in size to all wilderness areas in the federal National Wilderness Preservation System, but represents only about 4% of the land area of the United States.

Land Challenges

Attempts by tribes to build thriving and prosperous nations are substantially complicated by their nations' land status. The legacy of past federal Indian land policies, the complicated and constrained status of reservation land, and federal duties over Indian lands inhibit tribes as they pursue their contemporary land management and economic objectives. Moreover, most Native nations are finding themselves completely unable to manage numerous areas of spiritual or cultural significance now located outside of the designated territory of the nation. Some Native nations currently control either no land or such small areas that there are few opportunities for economic development and most tribal citizens live off of Indian land, by force of circumstance.

In locations where tribes govern relatively large territories, many non-tribal members typically live and own land within the reservation boundaries. The mix of land ownership on reservations means that various governing entities have jurisdiction, giving rise to considerable uncertainty and conflict. Indeed, several court cases disputing tribal government jurisdiction over non-Indian lands on reservation have resulted in decisions generally unfavorable to Native nations.[248] Tribal governments, thus, are forced either to follow non-Indian laws and policies on the reservation or to expend resources jointly managing with off-reservation governments.

The complexity surrounding jurisdiction on reservations hampers investment decision-making, law enforcement, and resource management. In just one example of the difficulties that result from unclear jurisdiction between governing entities, in certain states both the state and the tribe assert authority to tax pipeline rights-of-way. The resulting threat of double-taxation discourages potential investors.

The trust status of many Indian-owned lands creates further unique barriers to nation building and economic development in Indian Country. It is difficult, if not impossible, to use trust land as collateral for securing a loan. Legally, federal trust obligations create a very high threshold for lands to be alienated from tribes through repossession upon non-performance of loans. Additionally, the experience of individual tribal landowners under the *Allotment Act* has lead to a widely shared unwillingness to put additional Indian lands at risk. As a result, Native nations and their citizens have faced high hurdles accessing capital through securitized lending, one of the basic drivers of economic and community development elsewhere in the United States. This has spurred a movement across Indian Country to find innovative ways to deal with impediments to collateralization that have restricted access to credit. Tribes have found that the traditional method for dealing with collateralization – federal loan guarantees – cannot cover the full scope of public and private investment needs. New approaches include tribal governments picking up loan obligations in lieu of

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[247] U.S. Department of the Interior, "Strengthening the Circle: Interior Indian Affairs Highlights 2001-2004." (Washington: Government Printing Office, 2004), 10. http://www.doi.gov/accomplishments/bia_report.pdf (June 2006).

[248] See the "Jurisdiction" chapter.

putting Indian lands up as collateral, special loan funds, and innovative partnerships with lending institutions.[249]

The management of Indian land is also complicated by the nature of the individual trust lands. The *Allotment Act* gave individual tribal members a specific parcel of land and provided that when the owner died, the allotment would be divided among the heirs. Since the land in question was not itself divided, this inheritance system left Indian individuals with joint ownership interests in trust lands. For example, if one hundred acres passes to four heirs of equal interest, each owns a 25% interest in the 100-acre property, rather than owning 25 acres a piece. As this process of division has proceeded over generations, parcels of individual trust land now can often have hundreds of owners, and in the extreme, the ownership interest can be absolutely miniscule.

Indeed, the U.S. General Accounting Office found that on a sample set of 12 reservations, 83,000 land tracts were associated with 1.1 million records, 60% of which are for "small" ownership interests – as small as one 400,000th of one percent.[250] Known as "fractionation," the problem of multiple owners for individual parcels of land confounds tribal land management initiatives. In order to use fractionated land to build a home or business, majority approval of the owners is needed. In properties where the interests are held among numerous small holders, assembling a controlling interest is burdensome and time-consuming. Development of and on these parcels of land becomes near impossible. And fractionation continues daily as new heirs are created by the passing of owners.

Compounding the difficulties that tribes face in controlling their land base, some uses of Indian lands are subject to BIA approval processes. As trustee, the Secretary of the Interior has a fiduciary duty to oversee land disposition and encumbrance. Thus, individual trust landowners cannot develop lands without what turn out to be lengthy reviews. Procuring a land title certificate from the BIA, a basic prerequisite for obtaining a mortgage, can take up to several years, in contrast to the standard of a few days outside of Indian Country. These delays stymie development and frustrate tribal objectives.

Under pressure from Native nations, Congress has taken steps to address checkerboarding and fractionation. The process of reform began with the *Indian Land Consolidation Act (ILCA)* of 1983, which provided ways to extinguish smaller trust interests, assume greater control over the probate of allotment land, and restrict the right of inheritance of checkerboard land by non-Natives. Portions of the law were struck down by the Supreme Court, leading to amendments in 1984 and 2000. Continuing concerns over the legislation led to the *American Indian Probate Reform Act* amendments in 2004, which expands the definition of who can inherit trust land and increases opportunities for small trust owners and tribes to manage probate.[251] Although the new Act enhances the ability of tribes and individuals to consolidate interests in trust land, it is unlikely to be able to compensate for the rate of on-going fractionation.

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[249] See the "Economic Development" and "Housing" chapters in this volume.

[250] U.S. General Accounting Office, Indian Programs: Profile of Land Ownership at 12 Reservations, Briefing Report to the Chairman, Select Committee on Indian Affairs, U.S. Senate, GAO/RCED-92-96BR (Washington, DC: U.S. General Accounting Office, February 1992), 1-2.

[251] See Tribal Court Clearinghouse, "Understanding the American Indian Probate Reform Act of 2004," project of the Tribal Law and Policy Institute. http://www.tribal-institute.org/lists/understanding.htm (28 June 2006).

Reacquiring and Reinstating Indian Lands

Notwithstanding significant obstacles, tribes have made progress on land issues in recent years. Groups such as the Indian Land Working Group, an intertribal group founded in 1991, and the Indian Land Tenure Foundation have helped to coordinate and promote Indian policy reform efforts at both the federal and tribal levels.[252] Many Native nations are also significantly increasing their ability to use and manage land through innovative local actions, particularly the repurchase of historic tribal lands.

A priority for many Native nations is to increase and restore the size of their land base. Rebuilding reservation land bases has been a priority for decades, and the advent of gaming revenues has recently provided increased financing for reacquisition. Despite being irked at having to "buy back what was stolen from Indians," tribal councils around the country are purchasing both on- and off-reservation lands at an unprecedented pace. The Confederated Tribes of the Warm Springs Reservation, for example, were in possession of only about 60% of their 650,000-acre reservation when they began repurchasing their reservation in the 1960s; today virtually all of it is in Indian hands. The Grand Traverse Band of Ottawa and Chippewa Indians had 12.5 acres to its name shortly after its re-recognition by the federal government in 1980; today it owns more than ten times that much.[253]

In addition to purchase, a number of tribes continue to fight for restoration and recognition of land rights through the courts and through Congress. And while the surge of lawsuits of the late twentieth century has ebbed substantially, a number of high-profile land claims still command substantial media attention. In 2005, for example, the Onondaga Nation filed suit against the State of New York, claiming rights to more than 2 million acres stretching north-south across New York from near the Pennsylvania border to the St. Lawrence River. The Western Shoshone case discussed in the chapter above on International Relations, too, has put a media spotlight on rulings by international tribunals against the United States in support of Native land claims

When Native nations acquire fee-simple lands, they can choose to petition the federal government to add the land to tribal trust holdings. Tribes find it advantageous to designate lands to be taken into trust in order to eliminate double-taxation, to assert undisputed jurisdiction, and to prevent future alienation -- not to mention to rebuild their homelands. Native nations also face incentives to take land into trust in areas not necessarily contiguous with their existing reservations in order to gain access to profitable markets or to serve off-reservation citizens, particularly if their land base is located far from major population centers.

Neighboring non-Indian jurisdictions, however, are often opposed to land-into-trust applications, citing concerns about the loss of regulatory control and property tax revenue. In 1998, for example, the Bureau of Indian Affairs approved putting 31 acres of land into trust for a Narragansett Indian housing project in Rhode Island. With *amicus* support from 10 states, Rhode

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[252] See, for example, Indian Land Working Group, *Land Consolidation Manual* (Fredericksburg, VA: First Nations Development Institute, 1997).

[253] George Weeks, *Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians* (Peshawbestown, MI: Grand Traverse Band of Ottawa and Chippewa Indians, 1992), 18, 21; communication with George Bennett, Chairman, Grand Traverse Band of Ottawa and Chippewa Indians, July 1999.

Island challenged the federal government's very authority to bring such land into trust. In early 2005, however, a federal court of appeals ruled on the issue, affirming the legality of land-into-trust.[254]

An increasingly contentious aspect of tribal land acquisition is the fact that tribes can choose to engage in gaming once land is given trust status. Indeed, several tribal governments – including St. Regis Mohawk in New York, the Pokagon Band of Potawatomi Indians in Michigan, and Snoqualmie in Washington -- have sought and received land-into-trust approval to build casinos on well-located off-reservation sites. This practice, sometimes dubbed "reservation shopping," has generated a deep-seated public mistrust of tribal intentions. The resultant strong non-Indian opposition to land status changes – often culminating in litigation – has produced significant delays in the process by which the Secretary of the Interior makes land-into-trust determinations. Native nations, meanwhile, complain that the lengthy delay in approvals and litigation by opponents is hampering efforts to acquire land for non-gaming purposes, such as building houses or schools.[255]

Land Use Planning

In addition to directly confronting land integration issues through purchases and consolidation, tribes have developed land-use planning approaches that serve to enhance tribal control over lands already in their jurisdiction. Such approaches can take the form of conventional municipal land-use zoning, regulation, or planning. For example, similar to the actions of many other Native nations, the Gila River Indian Community land-use planning department zones, regulates, and manages current and future uses of the reservation (located on the outskirts of Phoenix, Arizona). Similarly, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana employs highly sophisticated technology, married to eminently competent planning and regulation, to manage land use on a reservation that mixes tourism, agriculture, outdoor recreation, and natural resource protection. Tribes' land-use planning approaches can also take more tradition-oriented forms, such as the Navajo Nation's grazing rights arrangements under which long-standing and largely unwritten family grazing areas continue to be recognized.

Increasingly, tribal land management includes cooperative agreements with off-reservation jurisdictions – agreements that simultaneously reduce conflict and litigation, increase government-to-government cooperation, and acknowledge the sovereign powers of the reservation government. The Swinomish Indian Tribal Community, for example, has instituted a Cooperative Land Use Program consisting of a Memorandum of Understanding, a Draft Comprehensive Land Use Plan, and a Memorandum of Agreement negotiated with neighboring Skagit County. The arrangement streamlines the approval of economic activity on the reservation by providing for cross-approval of land use permits under the shared land use plan and shared permitting and dispute resolution mechanisms. The result is reduction in inter-jurisdictional conflict that otherwise thwarts community development in a heavily checkerboarded context. [256]

Tribes are also expanding their influence beyond the boundaries of their reservations. From the Northwest Indian Fisheries Commission to the Great Lakes Indian Fish and Wildlife

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254 Jim Adams, "Land into Trust Is this Year's Hot Issue," *Indian Country Today*, 18 February, 2005.

255 "Gaming Clouds Already Lengthy Land Into Trust Process," *indianz.com*. 15 September 2005.

256 See Nicholas C. Zaferatos, "Cooperative Strategies to Overcome Jurisdictional Conflicts in Tribal Community Planning, a Case Study of the Swinomish Indian Tribal Community," *Planning and Law Division Newsletter* (The American Planning Association, July/August 2000).

Commission,[257] tribes and intertribal organizations are undertaking the cooperative management of off-reservation resources, many of which were promised under treaties yet heretofore not available to the entitled Indians. Similarly, Native nations have been developing their own internal managing capabilities to such an extent that they are filling vacuums left by state and federal land managers off the reservations. Thus, the Nez Perce manage the re-introduction of endangered gray wolves over 13 million acres of federal land in their traditional non-reservation territory in and around Idaho.[258] The Confederated Tribes of Grand Ronde in Oregon manage a watershed that extends onto U.S. Forest Service Land under a cooperative agreement with the Service. The Alaska Native Village of Quinhagak polices non-Indian sportsmen in a critical watershed outside their village lands.[259] On a cultural level, the Elders Cultural Advisory Council of the San Carlos Apache Tribe in Arizona is recording with other Apache tribes their collective knowledge of on- *and* off-reservation Apache place names as a way of preserving not only the Apache heritage, but hopefully the places themselves.[260] The place names are entered into a state-of-the-art geographic information system and used to guide on-reservation forest management policy and to influence developers and governments off the Apache reservations.

The Future of Indian Lands

Land holds a special significance to Native nations that centuries of property takings, treaty violations, dislocation, and federal allotment policy have not altered. The importance of restoring ancestral lands goes much beyond the need to provide areas for tribal housing, community institutions, and business ventures. For instance, many of the Lakota tribes have turned down a 1980 Supreme Court judgment that would provide $106 million for the wrongful alienation of their lands, holding out instead for the prospect of the return of their sacred Black Hills.[261] The funds, untouched and earning interest since 1980, totaled more than $570 million in 2001. Yet, despite high levels of poverty among tribal members, surveys reveal more than 90% support for the tribes' stand.[262] In another case, the Sandia Pueblo is over 30 years into a costly battle over the Sandia Mountains in New Mexico that has its origins the middle of the nineteenth century. Commenting on the ongoing process, the Governor of the Sandia Pueblo, Stuwart Paisano, reflected in 2000, "How ever long it takes to get that mountain protected or get it back, we're willing to continue the fight."[263]

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257 Both of these organizations are multi-tribe membership organizations.

258 The Harvard Project on American Indian Economic Development, "Idaho Gray Wolf Recovery Program," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999).

259 Stephen Cornell, Jonathan Taylor, Kenneth Grant, Victor Fischer, and Thomas Morehouse, *Achieving Alaska Native Self-Governance: Toward Implementation of the Alaska Natives Commission Report Final Report - AFN Version*, (Cambridge, MA: The Economics Resource Group, Inc., May 1999), 40-44.

260 The Harvard Project on American Indian Economic Development, "Elders Cultural Advisory Council," *Tribal Governance Success Stories: Honoring Nations 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000).

261 *United States v. Sioux Nation of* Indians 448 U.S. 371 (1980); Timothy Egan, "Mending a Trail of Broken Treaties," *The New York Times*, 25 June 2000.

262 Frederic J. Frommer, "Spurning Hundreds Of Millions, Sioux Hold Out For Sacred Black Hills Land," *Associated Press* Newswires, 19 August 2001.

263 "Pueblo Continues Sandia Mountain Fight," *Indianz.com*, 13 December 2000.

Reclaiming alienated lands, as well as exercising influence over activities on non-Indian lands, will remain of paramount concern for Native nations across the country. Conflict between Indians and non-Indians surrounding land ownership, use, and management will continue to arise, highlighting differing world views and interests, yet there are also new opportunities for cooperation.

As Native nations find success in reclaiming portions of their traditional lands, they are also reinforcing their decision-making power and competency over important natural and cultural resources. The potential for disagreements over land priorities underscores the need for tribal governments to find ways to facilitate a balance between commercial and other interests. By implementing appropriate tribal land-use planning processes and regulations, Native nations can ensure that community preferences are made clear to those living both within and beyond the boundaries of Indian land. In this way land stewardship will once again be able to provide economic and spiritual sustenance to Indian peoples.

TEXTBOX: Swinomish Cooperative Land Use Program

The Swinomish Indian Tribal Community's 7,000-acre reservation, home to approximately 4,000 Indian and non-Indian residents, is located 80 miles north of Seattle in Skagit County. As a consequence of the General *Allotment Act* of 1887, which transferred lands within the reservation from collective tribal ownership to individual ownership, the Swinomish Reservation today is highly "checkerboarded" (i.e., Indian-held portions within the reservation's boundaries are scattered and non-contiguous). The Swinomish Indian Tribal Community (SITC) owns a mere 4 percent of reservation land, individual tribal members own approximately 50 percent, and non-Indians hold fee simple title to an additional 46 percent.

In the early 1980s, the SITC and Skagit County found themselves in the midst of conflict. Both governments were administering zoning, permitting and regulation enforcement programs that affected non-Indian-owned lands within the reservation's boundaries. SITC began focusing on reservation land use regulation as the vehicle for both exerting sovereignty and improving relationships with the neighboring non-Indian community. They saw that cooperation with other sovereigns actually could be a means of increasing tribal self-determination.

In 1986, with a regional non-profit, the Northwest Renewable Resources Center, serving as a facilitator, representatives from SITC and Skagit County began discussing mutual problems and concerns related to land use. Talks proceeded slowly, but ultimately the governments were able to craft a series of agreements. The Draft Comprehensive Land Use Plan, created in 1990, which was the first comprehensive planning effort attempted by a tribe and a county. The Plan articulates land use goals, establishes policies to guide the stewardship of the land and resources of the reservation, and outlines an implementation strategy. The governments also agreed to a set of procedures for administering the plan.

Individuals or entities seeking a development permit on fee simple land may now submit their application to either the SITC or the County. The receiving government shares the application with the other government, which is then responsible for reviewing and commenting on the application in a timely manner. While all development activities occurring on the reservation are required to possess a SITC permit, this information-sharing process makes it possible for County-approved plans to automatically meet SITC standards and for SITC-approved plans to be immediately acceptable to the County.

Critically, tribal sovereignty is not sacrificed. The SITC has consistently maintained its position of exclusive jurisdiction over all lands on the reservation. The Program creates a well-defined, consensus-oriented process for addressing the complex and ongoing jurisdictional problems surrounding land use, and provides a forum for doing so. As a result, the Swinomish Reservation is today connected to surrounding non-reservation land in a way that maximizes the Community's future development options. **/END TEXTBOX.**

ECONOMIC DEVELOPMENT

- Economic development is taking root in Indian Country, albeit unevenly across tribes and industry sectors. While tribes are making notable progress in pursuing their goals of alleviating poverty and becoming economically self-sustaining, much still needs to be done to develop economies, improve living conditions, and overcome the legacies of decades of economic deprivation.

- Past approaches to development by assimilation, by project-based job creation, or by pursuing federal grants are on the wane, largely because of their repeated failure. Contemporary nation-building approaches are in the ascendancy, with tribes investing in their own capacities to govern, and thereby improving local accountability and encouraging tribal and non-tribal investments in human and other capital.

- Over 1990-2000, for both Indian nations with gaming enterprises and those without such operations, real per capita income in Indian Country grew at two to three times the rate experienced by the general U.S. population. However, with so much ground to make up out of a past of extreme economic deprivation, average individual and household incomes in Indian Country as of 2000 still stood at less than half the U.S.-wide level.

- Numerous barriers to development continue to exist: Individuals and tribes face difficulties in accessing capital and tapping entrepreneurial energies; checkerboarded lands and conflicts of jurisdiction increase uncertainty and raise costs; and Native nations' are hurrying to develop the legal, regulatory, and physical infrastructures that undergird the economic development of any nation.

For most of at least the last century, terrible economic conditions on reservations have been the overriding problem that would not go away. Deplorable economic conditions have lain behind and filtered through a broader array of challenges and problems that have made life difficult for generations of Indian nation citizens. From improving education to investing in language revitalization, from improving health conditions to stabilizing families, from holding onto talented

people to injecting Native values into environmental protection, from having the wherewithal to stand up and fight for control over the nations' own resources to supporting those who cannot support themselves, economic deprivation has stood in the way.

The most commonly self-reported goals of Native nations in the arena of economic development are *not* wealth and capitalistic riches for their own sake. Rather, Native nations are pursuing economic development in order to have the freedom to control their own political, cultural and social destinies, and to have the ability to sustain communities where their citizens can and want to live. This perspective has been expressed by Chief Philip Martin, the long-serving chief executive of the Mississippi Band of Choctaw Indians. Well-documented, sustained economic development at Mississippi Choctaw since the 1970s has been led by automobile sub-assembly, plastics manufacturing, printing, electronics manufacturing, and other sectors. The results – every Mississippi Choctaw citizen who wants to and can work has a job, rising incomes and standards of living – can dazzle observers to the point of blinding them to the investments that economic development has enabled the nation to make in health, language education, public safety, housing, youth leadership, and virtually every aspect of what it takes to be a healthy nation. As if economic development and Indianness were in inherent conflict, Chief Martin was once asked by an audience of non-Indian university students what the phenomenal economic development at Mississippi Choctaw was doing to Choctaw culture. After contemplating the question, Chief Martin replied straightforwardly and with profound insight to the effect that: "Well, it used to be that everyone moved away, but now they're all coming back."[264]

The ties of history, culture, identity, family, and place are strong across Indian Country. Poverty tears at those ties. But there are grounds for optimism. The story today of economic development in Indian Country is one of rapidly growing economies among both gaming and non-gaming tribes. For the first time in a century, the United States seems to have found a policy that works, and Indian nations are taking hold of self-determination and making the most of it. At the same time, Indian country has had such large deficits to make up, such extremes of unemployment, low income, and lack of personal and community wealth accumulation to overcome, that ten to twenty years of economic growth is not going to eliminate poverty and its accompanying social distress.

Past Efforts and Policies

Broadly speaking, one constant has characterized Indian reservations since their creation – poverty. Until hitting on strategies of self-determination, policy attempts to combat economic distress in Indian Country were systematically ineffectual and downright counterproductive. Policy after the Civil War aimed particularly at turning Indians into non-Indians via destruction of Native culture, language, religion and economic practices. Whether in the 19th Century or later, however, assimilationist policies accomplished little except the hegemonic disruption of cultures, the dispossession of land and natural resources, and perpetual impoverishment. Allotment of tribal land to Indian individuals beginning in 1887, for instance, was motivated by the notion that Indians would be

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[264] Chief Philip Martin, Mississippi Choctaw, Address, Harvard University, 29 September, 1998. On the economic and social development efforts at Mississippi Choctaw, see, for example, The Harvard Project on American Indian Economic Development, "Choctaw Community Injury Prevention Program," and "Choctaw Health Center", Tribal Governance Success Stories: Honoring Nations 2003, 1999 (Cambridge, MA: Harvard Project on American Indian Economic Development, 2003, 1999); and Peter J. Ferrara, The Choctaw Revolution: Lessons for Federal Indian Policy (Washington, D.C.: Americans for Tax Reform Foundation, 1998).

better off as self-employed homesteading farmers. That policy was an acknowledged disaster for tribes and individual Indian people, and tribes throughout Indian Country are still struggling to regain control of one of their most critical assets – land.

Despite the lack of demonstrable success in the face of continuing poverty and development challenges, assimilationist views have been remarkably resilient. As recently as 1969, the BIA espoused the belief that Indians would develop in proportion to their willingness to abandon their Indian cultures and assimilate.[265] More recently, employment efforts – creating jobs – became the cart that drove the economic development horse. From the mid-1960s through the mid-1980s, the acute poverty on Indian reservations was the impetus for a federal approach to Indian economic development that focused on "getting the next project going." Congress mandated the Economic Development Administration (EDA) of the U.S. Department of Commerce in the 1960s "to generate jobs, help retain existing jobs, and stimulate industrial and commercial growth in economically distressed areas of the United States."[266] The EDA granted capital for physical investments associated with specific projects, such as a building for a manufacturing facility or the launching of a tribal motel. Other agencies adopted similar project-oriented approaches, with none addressing the fundamental causes of economic underdevelopment.

This "economic-development-by-project-initiation" was prone to fads of one-size-fits-all projects that were applied uniformly across Indian Country. Projects were often unsupported by competent business analyses and market feasibility studies. Investments were usually unaccompanied by the financial accountability for success that is demanded by private capital markets. Less internal capacity was created within tribes than would otherwise have been the case because non-Indian outsiders often managed the projects. And, most importantly, the investments were virtually always unaccompanied by a systematic approach to dealing with the underlying barriers to on-reservation economic development. The federal project approach to development failed in most places and has left Indian Country pockmarked with pride-destroying empty and/or dilapidated buildings that operated as factory or motel or office park only as long as fickle funding lasted.

The approach to reservation economic development not only failed; it also warped the internal tribal machinery of economic development. Tribal economic development "planners" were not in fact planners; they were (and in many cases, still are) grant-seekers whose success was and is measured solely on the basis of how much federal largess they can direct toward their tribes. More insidiously, the federal project approach encouraged tribal elected leaders to focus on federal prerogatives, rules and priorities, rather than on the task of building solid economic policies and sound governments. Internally, this often created a destabilizing electoral dynamic: If the tribal government received grants, political supporters could be hired on resulting projects and tribal politicians could enhance their chances of re-election. If grant seeking by the tribal government came up dry, the elected positions could be expected to completely change hands and a new cycle of the politics of spoils would decimate the institutional memory of the tribal bureaucracy. The result for many tribes has been cycles of institutional dependence on the Federal Government, with tribes

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[265] "Economic development will proceed so far as the process of acculturation allows." U.S. Bureau of Indian Affairs, "Economic Development of Indian Communities," in *Toward Economic Development for Native American Communities*, Joint Economic Committee, U.S. Congress. (Washington: Government Printing Office, 1969).

[266] See, e.g., the *Public Works and Economic Development Act of 1965* (45 U.S.C. 3121) and Economic Development Administration. www.doc.gov/eda/html/mission.htm. (28 June 2006).

encouraged to run their enterprises and their programs as job engines. Too often, this has led to bloating and bankruptcy, created the perception that reservation jobs have been merely make-work replacements for real productive effort, and maximized the politicization of investment and employment decisions.[267]

This pattern is finally being broken. It is being broken by tribes, themselves, as they leverage policies of self-determination into self-selected investments and focus on developing the legal, regulatory, and physical infrastructure that rewards productivity, holds decision makers accountable, and holds down the risks of political instability for individuals and businesses. The clear trend is for Indian nation governments to eschew their long-imposed role as extension agents of federal anti-poverty programs and to engage in the task of genuine self-rule by building institutions and creating favorable conditions for investments.

Contemporary Indian nation development efforts are shifting to development strategies focused on available assets, in which emphasis is placed on good governance, investments, savings and wealth creation. This accords with new thinking on economic development, which argues that such asset-based strategies contribute positively to the development of a community in ways that capture both economic and non-economic benefits.[268] On many reservations, comprehensive and multi-faceted development approaches are supplanting single-strategy interventions that are project-driven or focused on a specific sector such as resource extraction, manufacturing or tourism. In the process, many Indian nations that have taken control of their economic development have been rewarded with remarkable success. As a result, sometime in the late 1980s or early 1990s Indian Country got on a path of more rapid economic growth than the general U.S. economy.

A Tribal Economic Development Snapshot

According to U.S. Census data (Figure 7), real incomes on reservations after adjusting for inflation actually declined during the decade of the 1980s, before taking off on their path of rapid growth since. Notwithstanding the growth in incomes over the 1990s, by the end of the decade the average on-reservation Indian citizen still had per capita income of less than $8000, compared to more than $21,500 for the average U.S. resident (Figure 7). Moreover, on-reservation Native residents remained, on average, the economically poorest identifiable group in America. As Figure 8 indicates, the latest Census reported that 39% of on-reservation American Indians were living below the poverty line, higher than any other group and four times the rate for the average American.

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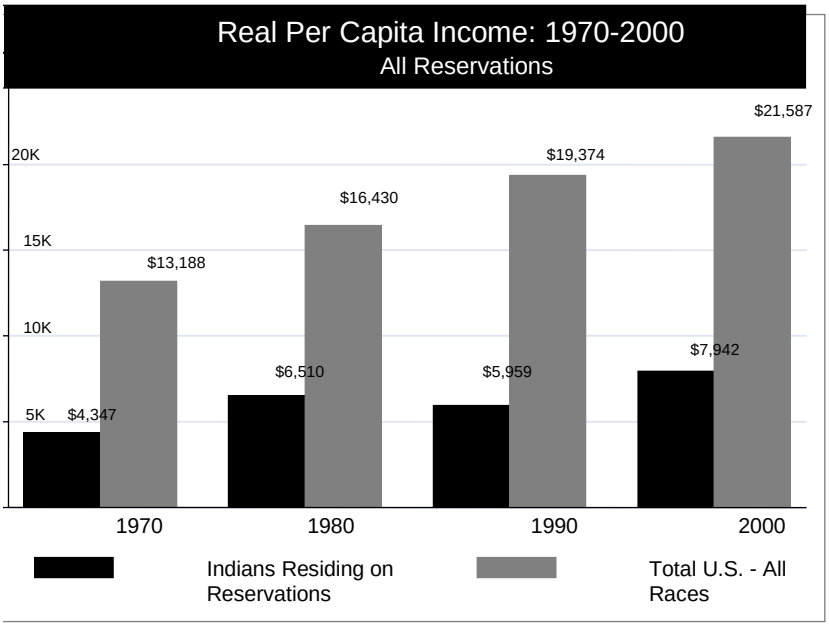
[267] For a microcosmic view of this dynamic, see Miriam Jorgensen, *Nebraska Sioux Lean Beef, Parts A and B, Teaching Cases C-2 and C-3*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, August 1990).

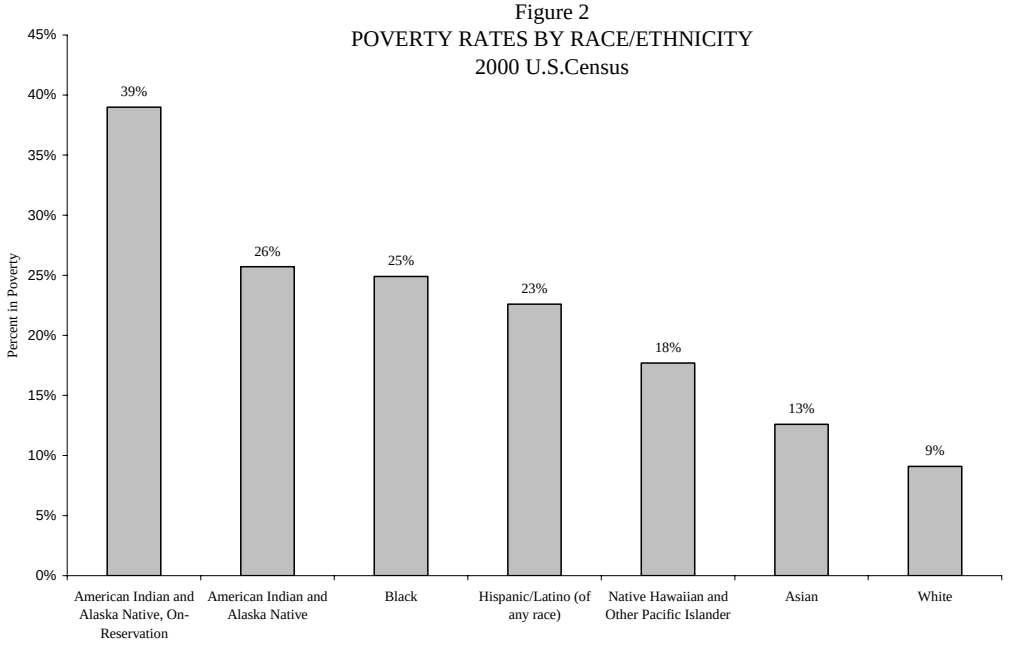
[268] Michael Sherraden, *Assets and the Poor: A New American Welfare Policy*. (Armonk, NY: M.E. Sharp, 1991); and Melvin Oliver and Thomas Shapiro, *Black Wealth, White Wealth*, (New York: Routledge, 1997).

Figure 7
Real Per Capita Income: 1970-2000
All reservations; excluding Oklahoma Tribal Statistical Areas



SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

Figure 8
Poverty Rates by Race/Ethnicity



Source: U.S. Census Bureau, Poverty: 1999 Census 2000 Brief, issued May 2003, single-race identifications. Data for on-reservation AIAN are from Jonathan Taylor and Joseph P. Kalt, American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses, The Harvard Project on American Indian Economic Development, January 2005

High poverty rates and low average incomes across Indian Country reflect generally poor employment conditions. As Figure 3 indicates, there has been clear improvement in employment on reservations since the 1980s. Nevertheless, the 2000 U.S. Census data show unemployment among gaming tribes standing at 21%, and at 23% for non-gaming tribes. The unemployment rate for the U.S. population as a whole was registered at 6%. When the very large influence on the data of the very large Navajo Nation (which did not have gaming at the time of the 2000 Census) is removed, the unemployment rate across non-gaming reservations tribes stood at 16%.[269] Not surprising in the face of relatively poor employment opportunities, labor force participation is significantly lower for American Indians than the U.S. as a whole.[270]

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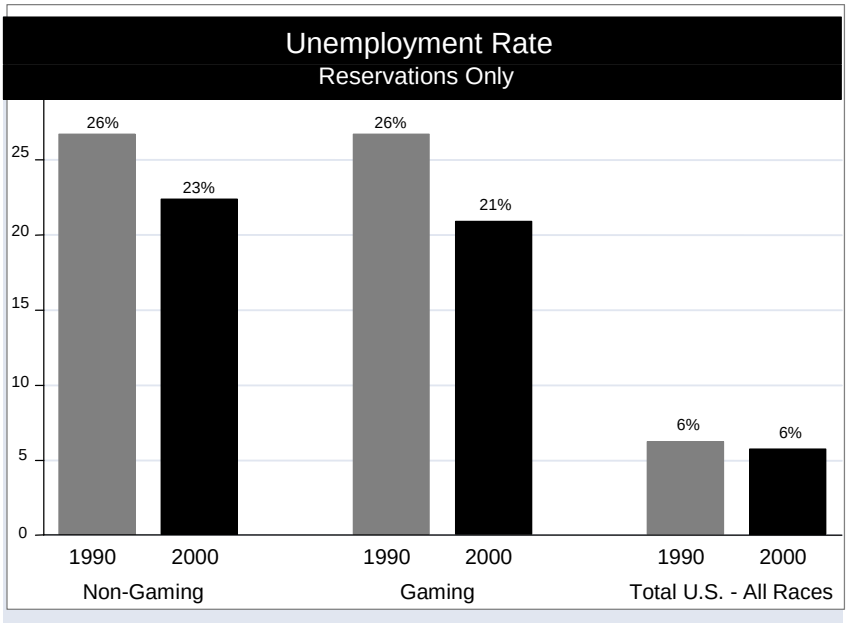
269 *U.S. Census of Population and Housing, 2000*. (Washington: Government Printing Office, 2001). Reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

270 Ibid.

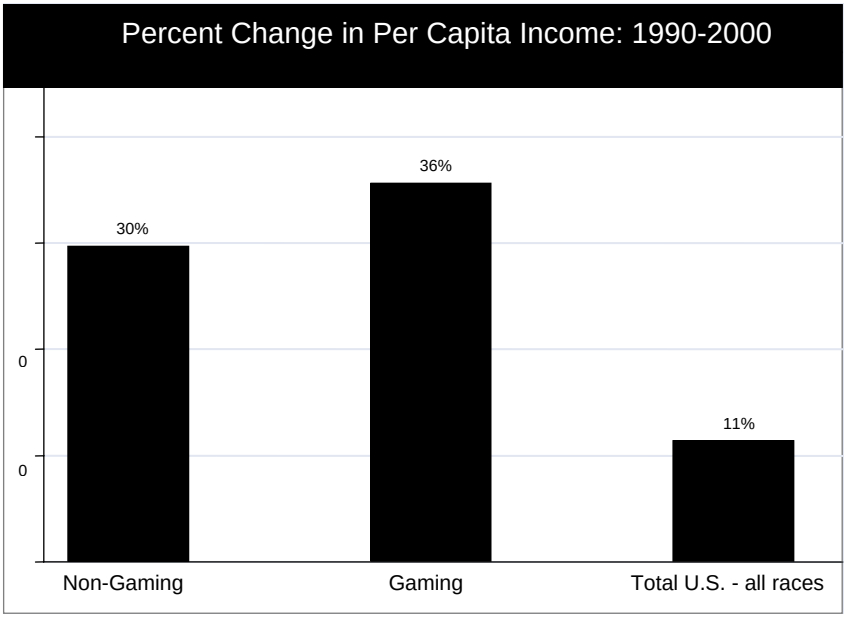
Figure 9
Unemployment Rate
All reservations; excluding Oklahoma Tribal Statistical Areas



SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph P. Kalt, Data Files *for American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005), http://www.ksg.harvard.edu/hpaied/pubs/pub_152.htm (December 17, 2006).

Data such as those in Figure 1, Figure 2, and Figure 3 tell a story of generally low incomes and poor job prospects; but the data also show a clear trend toward improvement. As noted in the Introduction to this book, over 1990-2000 real median household income across gaming and non-gaming tribes rose 33% and 24%, respectively. This far outpaced the meager 4% growth in real median household income for the U.S. population as a whole. Similarly, as indicated in Figure 4 below, real income per Native person on non-gaming and gaming reservations grew 30% and 36%, respectively, over 1990-2000. When the very large influence on the data of the very large Navajo Nation is removed from these data, the growth in per capita income on non-gaming reservations over 1990-2000 was 21%. When Tribal Statistical Areas are included with the reservations, the respective figures shown in Figure 4 for gaming and non-gaming tribes move to 29% and 27%, respectively. No matter how they are measured, the growth rates in per capita Indian incomes are far higher than the national U.S.-wide rate of growth of 11% (Figure 4).

Figure 4
Percent Change in On-Reservation Per Capita Indian Income: 1990-2000
All reservations; excluding Oklahoma Tribal Statistical Areas



SOURCE: U.S. Census, 1990 & 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

While heartening after more than a century of stark economic underdevelopment in Indian Country, the emergence of economic growth in Indian Country starts at low levels of income and employment. Even if the recent high rates of growth can be sustained, it will take decades for Native incomes to catch up to U.S.-wide levels.[271] Moreover, the beginnings of the economic mini-boom that is taking hold in Indian Country are not evenly spread across the Indian nations. This can be seen in Figure 5 and Figure 6. The former focuses on tribes with on-reservation Native populations of at least 1000 and shows the ten reservations with the highest and lowest levels of per capita income in the 2000 U.S. Census. The range is striking, with per capita incomes varying by a factor of four between the highest-income reservation (Isabella) and the lowest-income reservation (Crow Creek).

[271] Taylor and Kalt, *American Indians on Reservations.*

Figure 5
The Extremes of Income –Larger Reservations

Ten Lowest	Population	Per Capita Income
Crow Creek Reservation (SD)	1,856	$4,043
San Carlos Reservation (AZ)	8,769	$4,970
Rosebud Reservation (SD)	8,687	$5,613
Pine Ridge Reservation (SD)	14,255	$5,619
Santo Domingo Pueblo (NM)	3,106	$5,620
Pascua Yaqui Reservation (AZ)	2,928	$5,627
Fort Apache Reservation (AZ)	11,597	$5,724
Gila River Reservation (AZ)	10,317	$5,746
Zuni Reservation (NM)	7,377	$6,029
Lower Brule Reservation (SD)	1,197	$6,129
Ten Highest		
Isabella Reservation (MI)	1,371	$17,436
Oneida Reservation (WI)	2,977	$14,771
Southern Ute Reservation (CO)	1,405	$13,043
Fond du Lac Reservation (MI)	1,262	$12,649
Puyallup Reservation (WA)	1,386	$12,439
Cattaraugus Reservation (NY)	1,936	$12,318
Allegany Reservation (NY)	1,203	$12,298
Osage Reservation (OK)	6,338	$12,203
Umatilla Reservation (OR)	1,373	$12,032
St. Regis Mohawk Reservation (NY)	2,581	$12,016
All U.S., All Races	281,421,920	$21,587

* Reservations with populations greater than 1000; excluding Oklahoma Tribal Statistical Areas.
SOURCE: Jonathan Taylor and Joseph P. Kalt, *Datafiles for American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* , (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005), http://www.ksg.harvard.edu/hpaied/pubs/pub_152.htm.

As Figure 5 indicates, incomes on certain gaming reservations have exploded, yet cases such as the Table Mountain Rancheria in California, Shakopee in Minnesota and Sycuan in California represent tiny populations and are not representative even of gaming tribes. For many Indian nations, particularly those far from large population centers from which to draw customers, gaming has made little dent in the problems of persistent poverty (top panel of Figure).

Figure 6
The Extremes of Income –Gaming Reservations

Ten Lowest	Population	Per Capita Income
Texas Kickapoo Reservation (TX)	423	$3,398
Big Valley Rancheria (CA)	184	$4,029
Crow Creek Reservation (SD)	1,856	$4,043
Middletown Rancheria (CA)	51	$4,631
San Carlos Reservation (AZ)	8,769	$4,970
Cocopah Reservation (AZ)	535	$5,479
Upper Skagit Reservation (WA)	139	$5,523
Rosebud Reservation (SD)	8,687	$5,613
Pine Ridge Reservation (SD)	14,255	$5,619
Pascua Yaqui Reservation (AZ)	2,928	$5,627
Ten Highest		
Table Mountain Rancheria (CA)	7	$146,000
Shakopee Mdewakanton Sioux Community (MN)	245	$113,509
Sycuan Reservation (CA)	26	$107,692
Barona Reservation (CA)	354	$38,647
Mashantucket Pequot Reservation (CT)	217	$32,674
Santa Ynez Reservation (CA)	64	$32,395
Rumsey Rancheria (CA)	25	$29,644
Prairie Island Indian Community (MN)	189	$28,659
Lower Sioux Reservation (MN)	263	$28,584
Viejas Reservation (CA)	232	$28,128
All U.S., All Races	281,421,920	$21,587

SOURCE: Jonathan Taylor and Joseph P. Kalt, *Datafiles for American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* , (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005), http://www.ksg.harvard.edu/hpaied/pubs/pub_152.htm.

The fact that economic growth is taking hold with approximately equal vigor across both gaming and non-gaming tribes means that fixation on gaming as the source of growth misses deeper realities. The gaming revolution in Indian Country is but one manifestation of Indian nations' assertions of self-determination and the development payoff to those assertions. In fact, perhaps the most encouraging aspect of the economic growth that is taking hold in Indian Country is the thickening of the economic fabric of many Native nations. These nations are beginning to develop sustained economies, often generating export-oriented enterprises that seek to build upon tribal comparative advantages based on natural resources, labor costs, regulatory flexibility, human capital, and/or geographic position. They have also sought to diversify their local economic bases by fostering small business creation that supplants off-reservation retail sectors.

Non-gaming enterprises are proliferating rapidly in Indian Country. Some of these are large and visible – the Quil Ceda shopping center of the Tulalip Tribes, the high-volume FireLake Discount Foods Center and First National Bank and Trust of the Citizen Potawatomi, the high tech electronics manufacturing of S&K Technologies at Flathead, and the ski and numerous golf resorts that a number of tribes have developed. But development is also founded on businesses owned by private tribal citizens – from Burger King franchises and Hampton Inns to paving companies, construction firms, automobile repair shops, and cattle ranches. The directory of businesses for the rapidly growing Citizen Potawatomi Nation, for example, list scores and scores of private citizen businesses – and the number is growing.[272]

Historically, the governmental sector (tribal and federal) has been the largest employer in Indian Country. The business sector, however, is growing rapidly. In 1982, roughly 13,000 small businesses generated $500 million in on-reservation revenues. Although not isolating reservation from non-reservation Indian businesses, the Minority Business Development Agency report on *The State of Minority Business* for the U.S. Department of Commerce identified 102,000 Native owned businesses in 1992. By 2002, this figure had more than doubled, to 206,000. This represents expansion that has been far greater than in the U.S. economy as a whole.[273] Similarly, focusing on a single state, the North Dakota Native American Business Development Program reports that 80% of the Indian businesses in the state of North Dakota have been created post-1980.[274]

The aggregate contribution of reservation economic activity to the broader regional and national economies in which they are imbedded is difficult to assess. One 1998 study reported that tribal governments accounted for $1.2 billion in off-reservation spending for goods and services, and that reservation businesses accounted for $4.4 billion in off-reservation spending. The spending by tribal governments, reservation-based businesses and residents created $246 million in tax revenue for state and local governments and $4.1 billion in annual tax revenue for the Federal Government.[275]

At the regional level, nations such as Mississippi Choctaw, Citizen Potawatomi, and Winnebago have become dominant economic forces in otherwise relatively poor and rural settings, often employing large numbers of non-Indians along with tribal citizens. A comprehensive analysis of Indian economic contributions to the State of Washington reported that the 27 tribes (with a combined population of 91,000) contributed $1 billion to the state Washington in 1997. Tribal enterprises in that year purchased $865.8 million in goods and services. Washington-based tribes paid $51.3 million in federal employment and payroll taxes and $5.3 million in State employment and payroll taxes on a total employment of 14,000 (including non-Indians). While Indian casino gross revenues of $440

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[272] Citizen Potawatomi Community Development Corporation, *Buy Potawatomi Business Directory* (Shawnee, OK: Citizen Potawatomi Nation, 2005).

[273] Minority Business Development Agency, U.S. Department of Commerce, *The State of Minority Business Enterprises: A Preliminary Overview of the 2002 Survey of Business Owners*, February 2005.

[274] Native American Business Development Program, "Native American Economic Assessment," North Dakota Department of Economic Development and Finance, undated.

[275] Buffy Naake, "The Economic and Fiscal Importance of Indian Reservations in the U.S. Economy," Center for Applied Research, Inc., Presentation to the Native American Finance Officers Association, 4 June, 1998.

million made it the largest industry among tribes in the State, less than half of the total gross revenues of the tribes' enterprises came from gaming at that time.[276]

A subsequent analysis of the Washington Indian economy found that total tribal enterprise and government revenue had more than doubled between 1997 and 2004, and that the total revenue of the Indian economy including individual owned businesses and non-Indian businesses (e.g., at the Tulalip Nation's Quil Ceda Village) exceeded $3.2 billion.[277] While this is but one state's experience with American Indian economic development, states such as Arizona, New Mexico, California, Minnesota, the Dakotas, and Oklahoma also must count Indian nations' economies among their own economic development engines.

It should also be recognized that the informal or "underground" economy is a vital element of a number of reservation and Native economies.[278] Given the underdeveloped nature of the formal economies of many Native nations, it is through this sector that substantial numbers of individuals and families subsist and survive, exercise creativity and productivity, and maintain many traditional economic activities. One study in the late 1980s of the informal sector on the Pine Ridge Indian Reservation indicates that its citizens were engaged in over 100 different types of productive activity not accounted for by any formal mechanism.[279] And when this activity was quantified, it accounted for more in monetary terms than the total amount of welfare and assistance dollars coming onto the reservation.[280] The Navajo Nation is home to a large informal sector with flea markets that attract not just sellers of used household goods, but vendors of hay, livestock, tires, fruits, vegetables, home-made food-stuffs, arts and crafts. Many other reservations have similarly productive informal sectors.

The appearance of economic growth in Indian Country is welcome, but it starts from a low base and is hardly the be all and end all in Native nations' struggles. The citizens of Native nations commonly count political perpetuation, matters of cultural identity, and quality of life and quality of community (which cannot be reliably measured in dollars) as more important shared goals. But as long as poverty, unemployment, and under-employment are a Native nation's prevailing economic reality, its citizenry will struggle to hold everything else together. Families will be forced to undertake extraordinary steps to access even the bare necessities, individuals will tend to face the unwanted choice of looking off-reservation for even modest economic opportunity, and because of these necessary focuses, other progress may be difficult to achieve. As a result, persistent economic underdevelopment and attendant poverty remain pressing concerns across Indian Country.

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276 Veronica Tiller and Robert Chase, *Economic Contributions of Indian Tribes to the Economy of Washington State*, (Albuquerque, NM, undated).

277 Jonathan B. Taylor, *Indian Self-Government in Washington, Vol. II. The Character and Effects of the Indian Economy in Washington State*. (Cambridge, MA & Olympia, WA: Taylor Policy Group, Inc. & Washington Indian Gaming Association, 2006), 20.

278 The informal sector includes both monetized and non-monetized economic activity that goes uncounted and unrecognized in the formal economy. It includes subsistence activities, barter and trade, illegal activities such as drug sales and bootlegging, sweat equity, unpaid work, and the like.

279 Richard T. Sherman, "A Study of Traditional and Informal Sector Micro-Enterprise Activity on the Pine Ridge Indian Reservation," September 1988.

280 Ibid.

The Underpinnings of Contemporary Tribal Economic Development

Recent economic growth in Indian Country is fragile, particularly so because it is founded on powers of self-determination that are under constant attack from certain state and federal quarters and because maintenance of such powers is not under the unilateral control of Native nations. It is not coincidence that economic development has taken root where and when long-standing federal "project" and "grant" approaches to development have been replaced by tribes' assertions of *self*-rule in the economic arena.[281] The result in such cases is not only bringing decisions with local impact under local control, but also bringing decision makers – elected, appointed, and informal tribal leaders – into positions of enhanced responsibility *and* accountability. It should be expected that performance, in terns of actually getting economic development going, would improve.

The quality of Indian nation governments has emerged as the key feature that distinguishes tribes that are able to launch sustained economic development and those that continue to struggle to do so. This does not mean that tribal governments must be owners and operators of enterprises themselves. There are examples where such strategies have worked (e.g., Winnebago and Mississippi Choctaw), and many more where they have failed (e.g., across the Northern Plains).[282] But the pressure is on Indian nation governments to put in place the institutional infrastructure that is needed to channel human and financial resources into productive activities, so that the community is working to add to the economic "pie", rather than squabbling over how to divide the pie.

Recent developments in Indian Country have shown the best predictors of reservation economic success are *not* large natural resource endowments, high levels of educational achievement, favorable market access, or other classically "economic" factors. Comparative research across a spectrum of tribal contexts has found that successful economic development is most likely to occur when tribes effectively assert their sovereignty, and back up such assertions with capable and culturally appropriate institutions of self-government.[283]

It is only when tribes take control of decision making, establish effective and legitimate governing institutions, and embrace strategic use of natural resources, education, location, capital and other assets that successful and sustainable economic development efforts emerge. Where these tribal government-oriented attributes are absent, tribal assets such as an educated citizenry, natural resources, and the like are more often squandered, failing to deliver sustainable economic performance or lasting improvements in community welfare.[284] Thus launching economic

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[281] Walter Hillabrant, Judy Earp, Mack Rhoades, and Nancy Pindus, *Overcoming Challenges to Business and Economic Development in Indian Country*, U.S. Department of Health and Human Services (Washington, D.C.: Government Printing Office, August 2004); Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations," in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* (Los Angeles: University of California, American Indian Studies Center, 1992).

[282] See, for example, Jorgensen, *Nebraska Sioux Lean Beef*, for an archetypical case.

[283] Much of this work has been undertaken by the Harvard Project on American Indian Economic Development and by the Native Nations Institute for Leadership, Management, and Policy (University of Arizona). This research may be accessed at http://www.ksg.harvard.edu/hpaied/ and http://udallcenter.arizona.edu/nativenations/, respectively.

[284] Cornell and Kalt, "Reloading the Dice."

development in Indian Country (and beyond) is first and foremost a challenge of political institutional design.[285]

Institutions Matter

For all human communities, incentives for productive and unproductive activity emanate from *institutions*, both formal and informal. And it is fair to say that the focus on institutions as the key ingredient that must undergird economic development is now the widely shared framework within which development economics and policy is proceeding.[286] Governmental institutions of dispute resolution, business regulation, administrative law, property, taxation, and the like lay down the formal rules of the game that determine rewards and penalties, opportunities and risks.

But governments are not the only "institutions" that matter. Social and cultural institutions – from family structures and religious societies to health care and civil society organizations – also impact individuals' and enterprises' incentives to invest their lives and resources in one community rather than another. Like sound government institutions, healthy and stable social and cultural institutions promote economic development by making it more likely that a recent college graduate will want to come home, by making it meaningfully shameful to be caught with one's hand in the government's till, and by making it gratifying to contribute to stabilizing and building the nation.

Research on international economic development stresses a number of central traits of institutions as being conducive to economic development. In Indian Country, the themes are similar, but the specifics differ in important ways from those found in much of the research on international development. Research consistently finds that economic development in Indian Country does not occur (or is severely impeded) unless a tribe's institutions embody at least three attributes:[287]

- *A Rule of Law*. In any society, one of the key tasks of government is to resolve disputes – disputes over everything from business contracts and who gets hired and fired to whether the nation ought to harvest its forest resources. The critical challenge for governments the world over is how to limit those who constitute the government at any moment, and who thereby have the power to resolve disputes, from using their power to commandeer resources or to otherwise benefit themselves and/or their supporters. From outright corruption under Ferdinand Marcos in the Philippines to land grabs in Zimbabwe to petty patronage politics in Cambridge, Massachusetts or within a Native nation, rule by power and influence rather than law quashes economic development.

  Phrases such as "the rule of law" may sound like they belong in the high school civics textbooks of mainstream America, but the concept is neither new to Native America nor the

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[285] The following discussion of institutions, culture and sovereignty draws heavily from Miriam Jorgensen, Statement, Oversight Hearing on Economic Development, United States Senate Committee on Indian Affairs, May 10, 2006 and Joseph P. Kalt, Statement, Hearings on Lessons in Economic Development Policy (canceled), United States Senate Committee on Indian Affairs, September 12, 2002.

[286] See, for example, Dani Rodrik, "Institutions, Integration, and Geography: In Search of the Deep Determinants of Economic Growth," (Cambridge, MA: Kennedy School of Government, Center for International Development, February 2002).

[287] See note 283 above.

exclusive property of Western European culture. Concepts of respect for one's traditions and one's traditional institutions are, at their core, expressions in support of the rule of law, providing prescriptions for making collective decisions and resolving disputes. Applied to an official or a citizen of a Native nation, the admonitions invoking such respect and legitimacy are invocations of the rule of law – tribal law. The resulting payoff to better performance of tribal government is amply demonstrated by cases like the Diné (Navajo) Nation's court system, where systematic injection of *Dine'* common law serves to resolve disputes legitimately and to constrain would-be self-aggrandizers by putting the weight of culture behind the letter of the law.[288]

- *Separation of Politics from Day-to-Day Administration and Business Affairs*. Closely related to the establishment of a rule of law is the need to separate politics from day-to-day decision making and management in bureaucratic and business affairs. Perhaps because most Native nations are relatively small and "everybody knows everybody else," this problem can be particularly vexing for tribal governments. The pressures to hire a relative, fire a political opponent, not discipline a recalcitrant renter, and so on are often overwhelming. The results, however, are destructive of effective governance and economic development.

  Tellingly, research finds that tribally owned enterprises are about four times more likely to be able to sustain themselves when they are managed by boards of directors that are independent of the tribal council.[289] Similarly, a dominant predictor of whether a tribal housing program is well-run (e.g., as reflected in upkeep of the housing stock, rent payments kept current, etc.) is whether a Native nation has an independent court[290]; this mechanism for the independent resolution of disputes keeps petty politics out of such decisions as whom to hire to run a program and when a renter can be evicted.

  Again, notions such as an "independent board of directors" and an "independent judiciary" should not be taken to imply that such institutions must necessarily be designed after a U.S. or Western European model. For example, the three "branches" of very-much-intact and functioning traditional Puebloan government at Cochiti Pueblo provide demonstrably effective separations of powers and checks and balances that serve to uphold the rule of law and keep politics out of day-to-day administration. Similarly, a number of Native nations are teaching the world new governmental designs. The creation of councils of elders and ethics

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288 The Harvard Project on American Indian Economic Development, "New Law and Old Law Together," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999).

289 Cornell and Kalt, "Reloading the Dice," 27. Also see related evidence in Miriam Jorgensen and Jonathan B. Taylor, "What Determines Indian Economic Success? Evidence from "Tribal and Individual Indian Enterprises," *Red Ink*, Spring 2000, 45-51.

290 Miriam Jorgensen, "Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development," Doctoral Dissertation (Cambridge, MA: Harvard University John F. Kennedy School of Government, June 2000).

boards, for example, put in place fourth branches of government to complement the familiar civics textbook model of executive-legislative-judicial constitutional structures.[291]

Ultimately, instituting policies and practices that support, rather than thwart, economic development requires leadership and knowledge on the part of tribal officials. This is strikingly demonstrated by the case mentioned above of Ho-Chunk, Inc., the wholly-owned business enterprise of the Winnebago Tribe of Nebraska. Winnebago leadership chartered Ho-Chunk, Inc. with the explicit and blunt admonition that: "Ho-Chunk, Inc. was established so that tribal business operations would be free from political influence and outside the bureaucratic process of the government."[292] Since its founding in 1995, Ho-Chunk, Inc. has raised its revenues to close to $150 million annually, and Winnebago unemployment has been cut by more than half. (See text box below.)

- *Efficient Bureaucracy*. A third key element that marks those Native nations that are building and sustaining effective economies and social systems may seem a little mundane: They "push paper" efficiently and effectively. Yet, in a competitive world, with businesses, investors, managers and workers readily able to locate on or off reservations, good record-keeping, clean administration, solid computer networks, and the like count for a lot. Similarly, the building and retaining of institutional knowledge on matters ranging from the last round of negotiations with the tribal citizen who wanted to invest in a restaurant on tribal land to the hydrology of the aquifer under the reservation are assets that enable a tribe to make informed and beneficial decisions.

Thus, the building of "bureaucratic capacity" emphasized by specialists in international development[293] certainly has its counterpart in Indian Country. There is perhaps no better illustration than Kayenta Township, Navajo Nation. Frustrated by the lack of economic activity and high unemployment and encouraged by the Nation's attention to the needs for greater local autonomy in government, Kayenta leadership set about creating in 1997 a Commission of five, staggered-term representatives and implementing a system of Kayenta-specific municipal codes, streamlined business permitting, and expedited infrastructure development – supported by a system of modest local taxes. The result today is a veritable boomtown, as retail businesses from hotels to shopping have flourished. With this development, the Township has been able to invest in improving the quality of life along with

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[291] The Harvard Project on American Indian Economic Development, "Elders Cultural Advisory Council," *Tribal Governance Success Stories: Honoring Nations 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000).

[292] The Harvard Project on American Indian Economic Development, "Economic Development Corporation," *Tribal Governance Success Stories: Honoring Nations 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000).

[293] Rodrik, "Institutions". For interesting illustrations, see Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus and Giroux, 1999).

improving employment opportunities. Its efforts include investments in solid waste control, housing, women's shelter, water supply infrastructure, and recreation facilities.[294]

Culture Matters

Indian Country is teaching the world a paramount lesson in development: precisely because institutions matter, culture matters. International development specialists do occasionally point to the relevance of local conditions and political feasibility as important determinants of *what* kinds of institutions work where in promoting development.[295] Indian Country, however, is demonstrating the critical importance of a broader concept – *cultural match*. There must be a consonance ("match") between the structure of a society's formal institutions of governance and economic development and its underlying norms of political power and authority (culture) for those institutions to function and serve effectively.

Ultimately, for constitutions, laws and institutions to result in effective governance, they must rest on something more compelling than the paper they are written on – a society's more or less shared cultural norms as to how authority ought to be exercised and used. If, on the other hand, institutions are not seen as legitimate (they are not consonant with norms), their actions are less able to command assent and respect, citizens are more likely to rise against them when they are used for purely personal gain, and less likely to invest in their improvement.[296] Put simply, government cannot work well if it is not legitimate in the eyes of the governed. To be legitimate, government must be structured and must exercise powers in ways that more or less accord with a culture's notions where political power is properly located in the community, how it is acquired, and the scope of its reach.

The implications of ignoring this in Indian Country, where there are scores of different tribes and cultural groups, have been devastating. The imposition of one-size-fits-all government on tribes through the *Indian Reorganization Act* and similar measures has meant that many Native nations attempt to govern themselves under culturally mismatched systems. It is small wonder that *self*-determined constitutional reform is a front-burner issue for so many thoughtful tribal leaders today.[297]

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[294] The Harvard Project on American Indian Economic Development, "Tax Initiative Economic Development," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999).

[295] For excellent treatments, see, for example, Daron Acemoglu, Simon Johnson, and James A. Robinson, "An African Success Story: Botswana," working paper, Department of Economics, Massachusetts Institute of Technology, July 2001; and, Yingyi Qian, "How Reform Worked in China", working paper, Department of Economics, University of California, Berkeley, July 2001.

[296] Stephen Cornell and Joseph P. Kalt, "Cultural Evolution and Constitutional Public Choice," in John R. Lott, ed., *Uncertainty and Economic Evolution* (London: Rutledge, 1997), 116-142.

[297] Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," *Economic Inquiry* 33 (July 1995), 402-426.

A frequent theme in international development policy sees Western-style democracy as important, if not absolutely necessary for economic development.[298] As with so many other issues, the rapid growth of China's economy over the last decade and a half represents a challenge to this view. In Indian Country, Western-style democracy has been eschewed by some Indian nations. As noted, Cochiti Pueblo, for example, follows a "constitutional" structure grounded in its traditional theocratic traditions – and successfully operates a world-class golf resort and retirement community.[299] The lesson is that successful development must solve the problem of creating a stable rule of law, but because of the need for cultural match, the solution need not be a U.S.-style judiciary.

Cultural match (legitimate institutions) and the dismissal of one-size-fits-all institutions is not a romantic endorsement for Native nations' "return to" or re-adoption of historical institutions of government. To "work," institutions must meet two tests: legitimacy in the eyes of the citizens and practical efficacy. This does not mean that Native nations that wish to sustain traditional cultural practices and norms can do so only at the expense of economic development. Certainly the cases of pueblos like Cochiti belie such an assertion.

In fact, pathbreaking research shows that, holding the influence of all other factors constant, the economic performance of, for example, tribal logging enterprises improves when tribes take over those enterprises and when such indicators of cultural *non*-acculturation as Native language use are high.[300] That is, enterprise performance is enhanced where measures of Native culture and tradition, such as language retention, are strong. This is not surprising: Any effective organization or community uses its cultural norms as key mechanisms for policing shirking and for channeling efforts toward collectively productive ends. This is easier when those norms are deeply and widely shared as dense community connections.[301] Thus, notwithstanding debate and stereotyping that might see conflicts between "Indianness" and contemporary demands for effective management, the research indicates that Native traditionalism and sound institutional performance are not locked in inherent contradiction.

Sovereignty Matters

The paired primacy of effective institutions and cultural match is a leading reason why policies of tribal sovereignty and self-determination, embarked upon in the mid-1970s and ebbing and flowing since then, have been the only policy strategy that has shown any prospect of breaking the patterns of poverty and dependence that became so familiar in Indian Country in the 20th century. It takes self-rule to be able to change institutions in ways that have maximum chances of matching Native nations' respective cultures.

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[298] For a discussion, see, for example, Marcatan Humphreys and Robert Bates, "Political Institutions and Economic Policies: Lessons from Africa," working paper, Center for International Development, Kennedy School of Government, Harvard University, September 2002.

[299] Stephen Cornell and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sector of Developing Countries* (Cambridge, MA: Harvard Institute for International Development, 1997), 257-296.

[300] Jorgensen, *Bringing the Background Forward.*

[301] On "social capital" and this as a general point across societies, see Robert Putnam, *Making Democracy Work: On Civic Traditions in Modern Italy* (New York: Princeton University Press, 1992).

Sovereignty and self-determination allow local desires, preferences, needs, and ways of doing things to be more accurately perceived and acted upon, so that institutions and government can function in support of economic growth and community change.[302] Sovereignty as an idea and self-determination and self-governance as federal polices place resources squarely in the hands of Native nation officials and citizens. In most cases, this translates to an increased sense of ownership over the resources, a sense which often is augmented still further when a Native nation pools resources garnered through own-revenue generation with federal funds. This sense of ownership then backs up the effectiveness of strategies, plans, and programs put in place for community development.

Closely linked to the idea of ownership is the idea of accountability. Here it is important to recall that contracting and compacting are policies whereby Native nations take over the management and delivery of programs otherwise within the domain of the federal government. In the "direct service" model, where Bureau of Indian Affairs employees or other federal administrators manage programs, accountability runs from the program to Washington – there is little or no accountability to the Native nation government or its citizens about how resources are used or managed. But under a contract or compact, accountability extends to these very important parties. Tribal leaders and tribal citizens feel ownership over the resources and hold their program managers and project leaders accountable for how federal resources – and, indeed, *all* tribal resources – are used.

Importantly, the changes that come with sovereignty and self-determination do not mean that every case of contracting or compacting is successful. As with any other governments, tribal governments can fall on their faces. But that is part of the point that needs to be made. More than one Native nation leader has remarked, in effect: "This self-governance is a two-edged sword. I get more control, but I don't get to blame the feds when my people complain about failure. …and that's the way it should be." Certainly, diverse outcomes are evident across Indian Country. Yet the overall evidence is unequivocal: from wildlife management to health care, enhancing accountability through tribal takeover of programs is working.[303]

There is an additional payoff to policies of self-determination and self-governance. Native control of programs and projects under contracting and compacting programs with the federal

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[302] This is not to say that self-determination as a federal policy is without flaws. PL 93-638 has been criticized as being over-determinative in the way in is implemented on the ground: Native nations may feel forced to simply replicate the federal government's way of doing things; see Russel Barsh and Ronald L. Trosper, "Title I of the Indian Self-Determination and Education Assistance Act of 1975," *American Indian Law Review* 3 (2005), 361-395. We praise the broader concept and empowerment it provides, not PL 93-638's specific implementation in all instances.

[303] Joseph P. Kalt and Stephen Cornell, "The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development" in L. H. Legters and F. J. Lyden, eds., *American Indian Policy: Self-Governance and Economic Development,* Greenwood Press, 1994, 121-50; Matthew B. Krepps, "Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry" in Cornell and Kalt, *What Can Tribes Do?*, 179-203; Alyce Adams, "The Road Not Taken: How Tribes Choose Between Tribal and Indian Health Service Management of Health Care Resources," *Indian Culture and Research Journal* 24, no. 3, (2000); National Indian Health Board, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management*, completed 1998; Jorgensen, "Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development," Doctoral Dissertation (Cambridge, MA: Harvard University John F. Kennedy School of Government, June 2000; and Wakeling, Stewart, Miriam Jorgensen, Susan Michaelson, Manley Begay, *Policing on American Indian Reservations: A Report to the National Institute of Justice* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000.

government has been serving as a fertile training ground for talented leadership. In Native nations where self-government and resultant "good government" (however that is culturally defined) have become a reality, tribal government is viewed as something more than a political boxing ring, and it is attracting high quality tribal citizens. These emerging leaders have the commitment and energy of their predecessors, now backed by on-the-job experience that arms them with critical skills. "Effective bureaucracy" is spreading.

Whether it is the organizing of a new township at Kayenta on the Navajo reservation, the gray wolf recovery efforts of the Nez Perce Tribe, the Navajo Nation Supreme Court, regional sewage treatment management by the Lummi Nation, or policing at the Flandreau Santee Sioux Tribe, excellent tribal programs are marked by a "just do it (ourselves)"[304] approach, capable institutions of self-government, and the implicit and explicit incorporation of Native nation-specific cultural values and management techniques. It is sovereignty and self-determination that have led to creativity and success.

In sum, continued dependence on another government's policies and approaches puts others' norms and desires in charge, misplaces notions of resource ownership, obscures appropriate lines of accountability, and stifles creative leadership. The negative results for Indian Country should not have been surprising – the same ideas led to failing economies in the former Soviet bloc, and in reverse are the argument for devolution in the United States. By contrast, economic development success stories in Indian Country are uniformly marked by a three part pattern of (1) aggressive assertions of sovereignty, resulting in (2) self-governed institutions, which are (3) characterized by cultural match. Time and again, it is the Native nation that takes control of its own institutions and runs them by its own lights that develops economic, social, and political systems that work.

Strategies for Economic Development

Tribes display many variations in their approaches to development. Some tribes supplant federal control with central control by the tribal government; others limit tribal government involvement to the creation of semi-independent or independent tribal enterprises; and yet others facilitate a supportive environment for economic activity to grow outside of the direct control of government. Regardless of the chosen approach, policies of self-determination have expanded opportunities for tribal governments and their citizens to learn what mix of strategies is best for their particular history, culture and circumstance. Like other nations, some Indian nations succeed at this, and others fail.

Certain critical factors appear to influence the capacity to generate on-going reservation economic activity. As tribes begin to exert more control over governmental decision-making, they are responsible for setting up an environment conducive to business within their nations. Their decisions determine the degree to which their communities are attractive to tribal as well as non-tribal investors. Tribal governments across Native America are engaged in a process of decolonization and some are struggling in their attempts to re-establish appropriate control over wealth-producing assets. Years of chasing grants and distributing federal monies have created poorly adapted institutions as well as vested interests that can be resistant to change.

As noted, successful nation-building tribes have taken steps to isolate their enterprise managers from political opportunism by, for example, instituting independent boards of directors.

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[304] Just Do It® is a registered trademark of Nike, Inc.

These boards encourage the use of outside business expertise and an emphasis on profitability over job creation; however, their most important contribution seems to be the isolation of enterprise from political interference.

Yet corporate governance represents only one issue that concerns a growing number of tribes. Another key matter concerns dispute resolution and the development of stable, de-politicized and capable tribal judiciaries. Economists have long noted the existence of fair and genuinely independent judicial systems as being pivotal to sustainable economic activity. Across all forms of tribal government, the presence of a neutral dispute resolution mechanism contributes substantially to economic development. One study, for example, has found that the presence of an independent dispute resolution body is associated with a five percent increase in reservation unemployment, all else equal.[305] The combination of separations of powers and independent dispute resolution raised employment fully 15%.

For many tribes, the importance of tribal judiciaries has been spotlighted through experience: Once tribes begin to contract heavily with non-governmental investors (either Native or non-Native), it quickly becomes apparent that unless they have established mechanisms for settling disputes fairly, investors will go elsewhere. Under past models of economic development, neither the federal government nor many tribal governments saw fit to develop tribal courts beyond their domestic and community dispute role. This attitude was, in many ways, not surprising, as tribal courts did not really have a critical role to play in obtaining grant funding. Now, a growing number of tribes recognize the link between court systems and economic development. They are making investments in these critical institutions by, for example, implementing constitutional protections of courts and judges, creating appeals and supreme courts for purposes of fair review of trial courts, creating specialized commercial courts, and adopting appropriately adapted versions of the Universal Commercial Code. At the same time, however, too many Indian nations possess tribal courts that are directly linked to and controlled by either legislative or executive branches, a situation that clearly discourages internal and external investors. Despite positive advancements among a growing number of tribes, judicial reform and development remains an area ripe for attention and investment.

Many Indian nations also find that effective tribal government agencies are as necessary as good corporate governance and dispute resolution mechanisms. Clear land use and zoning policies, a smoothly functioning personnel grievance system, an efficient leasing office, an expeditious business licensing process all contribute to a healthy commercial sector. Even if a tribe has asserted its sovereignty forcefully and established a capable corporate board, red tape, inefficiency and inexperience can stymie economic development.

As individual Indian entrepreneurs increasingly develop businesses on the reservation, they complement tribal government-owned enterprises in the reservation economy. Much of the Indian-owned private sector has historically grown up off the reservations, because the processes by which entrepreneurs start businesses can be tortuous, political and uncertain. Oftentimes businesses on American Indian reservations have to do everything from scratch because the tribe lacks zoning ordinances, land use plans, physical infrastructure, and streamlined leasing arrangements. More troubling still, small businesses on reservations can fall prey to political opportunism if they operate in an environment where the institutions of governance are weak.

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[305] Stephen Cornell and Joseph P. Kalt, "Where's the Glue? Institutional Bases of American Indian Economic Development," *The Journal of Socio-Economics*, vol. 29, 2000, 16-19.

The Kayenta Township discussed above is the case in point that demonstrates how much talent, productivity and capital can be unleashed when the large and small details of building a sound legal, regulatory and physical infrastructure is put in place in Indian Country. The lesson is also being implemented at the historically extremely poor Pine Ridge Reservation, where a local Indian chamber of commerce is collaborating to foster intra-chamber purchasing and pushing to develop better tribal economic polices. Businesses are sprouting and surviving to an extent not seen since at least the pre-IRA era.

The Mille Lacs Band of Ojibwe, too, is succeeding at fostering business development, dedicated some of its gaming revenue to a Small Business Development Program in 1996. The Program invests in businesses that are at least 60% member-owned and within 50 miles of the reservation. As of 2000, 60% of the 30 businesses that had received assistance were still in operation. In these examples and others like them around Indian Country, entrepreneurs and tribal governments have worked together to lower the cost of starting new businesses and to improve their chances as they grow. Especially in the many reservations where the growth rate of tribally owned enterprises is exceeded by the labor force growth rate, this private sector growth is necessary. Small business growth creates jobs, grows tax revenue, thickens reservation economies, retains tribal talent, and improves the quality of reservation life.[306]

Although some outside observers continue to argue that tribes need to become more "Western" before they can develop economically, in actuality, Indian culture is proving to be the foundation upon which economic development is based. Where institutions of government are inconsistent with widely held conceptions of how authority should be distributed and exercised (a question of culture), government and its decisions are viewed as illegitimate.[307] Without legitimacy, governmental accountability and stability cannot develop and Indian nations find it difficult to create the conditions within which economic activity flourishes. Conversely, where culture and institutions are aligned, the norms of behavior reinforce the functioning of government and a virtuous spiral of effectiveness and legitimacy is established which leads to the desire of individuals and businesses to invest.[308]

The density of community connections – represented by a shared language and culture, for example – also has a reinforcing effect on government performance and a material effect on enterprise and thus economic success. One analysis of tribally owned forestry operations found that tribes that possess high degrees of shared "social capital" reap significantly higher prices for their lumber on the open market than tribes with relatively less social capital.[309] The rationale is that social capital – the norms and relationships by which a community channels collective conduct into productive endeavors – can play an essential role in building accountability among tribal politicians

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306 For more details and analysis of these examples, see Stephen Cornell, Miriam Jorgensen, and Ian Wilson Record, "Tribal Citizen Entrepreneurship: An Untapped Development Resource" in Miriam Jorgensen, ed., *Rebuilding Native Nations: Strategies for Governance and Development*, forthcoming, University of Arizona Press, 2007.

307 Cornell and Kalt, "Where's the Glue?".

308 For a comparison of two tribes with the same basic government form, yet radically different norms of government, see, Cornell and Kalt, "Where Does Economic Development Really Come From?".

309 Jorgensen, "Bringing the Background Forward," 126.

and enterprise managers. In so doing, it curbs "fighting over the pie" rent-seeking behavior that destroys enterprise profitability.

Successful tribes equip themselves with the institutional tools that fit today's problems by building institutions that work for them *and* that match their nation's *contemporary* norms of legitimacy. The necessity of this process in enabling an Indian nation to break long-standing cycles of poverty and dependence suggests why economic development has awaited the exercise of Native self-determination and self-rule before emerging in recent decades: The kinds of strategies, institutions, and decisions that will work in getting economic development going must pass a difficult twin test of practical efficacy and cultural legitimacy. The tribe that honors entrepreneurship and has no traditions or norms supporting tribal ownership of assets, but that nevertheless is dazzled into trying to copy the Mississippi Choctaw's strategy of large tribally-owned manufacturing businesses, cannot be expected to sustain economic development. The tribe with strong norms which support the wielding of judicial authority by the tribal chair (e.g., as a result of living for decades under a typical IRA government) cannot avoid being under pressures of cultural change that can come to support the development of an independent court or other dispute resolution system that contemporary economic realities make all-but indispensable.

Ongoing Challenges in Economic Development

While the nascent reservation business sector is growing, there are a number of obstacles to its expansion and sustainability. As tribes work on envisioning and creating an environment conducive to economic growth, they are forced to address longstanding problems. These include financial underinvestment, a restricted supply of qualified human capital, and a lack of infrastructure.

Financial Capital

Unfair lending practices, the difficulty of collateralizing assets held in trust by the U.S. government, and low penetration of banking facilities continue to limit the supply of capital in Indian Country.[310] Increasing numbers of tribal and individual businesses, a growing need for home-ownership, larger numbers of Indian people in college, and increasing consumer purchases are driving up the demand for particular types of capital. Frequently, none of these is readily available or easily accessible.

The First Nations Development Institute (FNDI) estimates that Indian Country faces between $17.65 and $56.5 billion in annual capital needs for basic infrastructure, community facilities, housing, and enterprise development. FNDI's "missing business analysis" compares actual Indian business sectors in a given state with the average business structure of that state.[311] The thinness of the business structure on many reservations then implies a range of capital that would be needed to bring Indian Country to parity with annual investment levels in surrounding non-Indian societies. Of

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[310] For discussion of these and additional barriers to lending perceived in Indian Country, see First Nations Development Institute, "CRA Research Efforts: A 38-State Study of Financial Services, Banking and Lending Needs in Native Communities," 1998," *CDFI Fund FY 1997 Annual Report. www.treas.gov/press/releases/docs/cdfi97.htm*. (28 June 2006).

[311] First Nations Development Institute, "Scope and Scale of Need for Capital in Indian Country", 1999, 5-6. Citing an *ONABEN: A Native American Business Network* study, the First Nations Development Institute reported 52,600 "missing" Indian businesses whose start-up equity needs were estimated to be $158 million and whose total capital requirements were estimated to be $2.1 billion.

course, the non-Indian business and governmental sectors of surrounding non-Indian communities typically do not face the capital needs of Native societies that have suffered decades, if not centuries, of social underinvestment. Economic development in Indian Country needs capital not simply to bring tribes on par with off-reservation communities' level of annual investment, but to address historic backlogs in areas such as educational attainment, poor health, and crime. Accordingly, FNDI's projections of Indian Country's capital needs are conservative.[312]

Despite the obstacles, Indian nations are increasingly able to work around or overcome impediments to the supply of capital. Tribes engaging in nation-building are making their reservations more receptive to capital by lowering political risk. They are instituting mechanisms for neutral dispute resolution and developing effective bureaucratic capacities. Outside lenders have come under increased tribal scrutiny and accountability, as in the case of banks that have held tribal deposits but not loaned to tribal governments or citizens. Many tribes are also increasingly gaining control over their own assets, including tribal trust accounts historically held and managed by the BIA. Tribes such as Winnebago of Nebraska (see textbox below) have made ploughing profits from initial business success back into the economy an art form, using their assets to generate the capital needed to create new assets.

To assist in capital formation and financing needs at the local and regional level, there has been a growing movement towards creating Native community development financial institutions (CDFIs).[313] There are now dozens of CDFIs, some of which are organized within tribal government and others that are structured as non-profit entities. Their focus is primarily on small business lending and technical assistance, but there is a growing interest in starting CDFIs that focus on housing development and ownership, as well as land purchase. As one example, the Citizen Potawatomi Nation's Community Development Corporation is a CDFI. It is aimed primarily at providing loan capital that can augment a start-up business' credit worthiness so that the business can move onto qualifying for credit from mainstream commercial banks. In its first three years of existence, the Corporation made more than 60 loans to scores of small businesses, experiencing but one default.

First Nations Oweesta Corporation, a subsidiary of the First Nations Development Institute, has worked with more than a dozen such efforts. Non-Native groups such as ACCION, the Rural Development and Finance Corporation, the Neighborhood Reinvestment Corporation and others are also working with tribes and Native communities. The capital for these efforts comes largely through private philanthropic program-related investment loans, religious investors, socially responsible investors, and a growing number of bank investments. The CDFI Fund of the U.S. Treasury

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[312] Furthermore, on reservations with high population densities located in areas of much lower, shrinking population density (e.g., the reservations of the Northern Plains), it may be the case that the equilibrium capital stock per capita might actually be higher than that of immediate surrounding communities. Rural America, in other words, may not be the appropriate benchmark for judging the on-reservation annual capital stock. For these three reasons, parity with off-reservation annual investment levels would mean a protracted recovery from those social investment deficits.

[313] The term community development financial institution is used to describe the type of entity rather than the formal Community Development Financial Institutions funded and certified through the Treasury Department CDFI Fund, although these types of entities may receive this funding and designation.

Department funds and certifies many of these institutions and in early 2005 launched a $1.2 million initiative targeting increased financial education and asset building in Native communities.[314]

More than a dozen tribes or Indian individuals now directly control commercial banks,[315] and there are two credit unions that are "owned" largely by Native shareholders. In 2001, a group of twenty-one tribal nations and Alaska Native Corporations together created a nationally chartered bank, the Native American Bank, which addresses the lending needs of Indian Country by making loans to large enterprises, tribal banks and community development corporations.[316] Tribes and tribal enterprises are also increasingly surmounting barriers to commercial debt via creative securitization of enterprise assets other than lands held in trust by the Federal Government. Some tribes, including the Mohegan Tribe and the Grand Traverse Band, have chosen to issue public debt on Wall Street. In December 2006, the Seminole Tribe of Florida announced that, with the participation of blue chip Wall Street institutions, it was acquiring the worldwide Hard Rock Café restaurant, hotel and entertainment properties – at a purchase price approaching $1 billion.[317]

Human Capital

There is no more significant an asset to tribes than Native people themselves. Tribes can only be as successful and competent as their citizens. It follows that education (recruitment and training), technical training, and hands-on experience (both on and off-reservation) support economic development efforts. These efforts are strengthened when combined with strategies to recognize, learn from and integrate the vast wealth of traditional knowledge from elders and traditional leaders, so that the cultural norms of the community can be tapped to energize commitments and hold decision makers, managers and employees accountable in effective ways.

The need for skilled employees in all aspects of economic activity is critical. Because of high rates of unemployment, "work until the grant runs out" experience, and common incidences of political nepotism, a large segment of the reservation workforce typically has been unable to develop consistent workplace experience and a career path. For years, the U.S. government has underwritten job training skills and education programs for adults and children. But without related economic opportunities, these efforts have either been wasted or led to "brain drains" in which new or newly-trained talent flows off-reservation.

Many notable efforts to address employment needs have taken place in tribal colleges and schools. With degree programs in business, health care, tribal management and other technical fields,

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[314] "New $1.2 Million Initiative to Benefit Native Communities", The Community Development Financial Institutions Fund, United States Department of the Treasury. Press Release, 4 April, 2005.

[315] "When Credit Is Due: The Debate Over the Direction of Indian Banking," *American Indian Report*, November 1999, 18-19.

[316] "Another American Indian Bank," *Indian Country Today*, 26 April, 2000, B2. Tribes and Alaska Native Corporations formed the Native American Bancorporation holding company, which owns the Native American Bank. See "Native People Investing in Native Communities" http://www.nabna.com (28 June 2006).

[317] "Seminole Welcome Hard Rock Café into the Tribe," *Deal Book*, http://dealbook.blogs.nytimes.com/2006/12/07/ seminole-welcome-hard-rock-cafe-into-the-tribe/, December 7, 2006.

tribal colleges and schools have begun to address the need for educating tribal members to work in specific industries with particular relevance to their local communities. Some tribal colleges have even begun to fill the void of Native-based curricula.[318] In addition, both BIA and tribal K-12 schools have initiated economic development and business curricula. Schools have also been the source of unique partnerships with non-profit organizations. The American Indian Science and Engineering Society, for one, has increased the number of Native youth in these related fields and facilitating placements in a variety of large and small off-reservation corporations. Groups such as American Indian Business Leaders (AIBL) are working with K-12 teachers to develop curricula and train other teachers in the unique aspects of reservation economic development and its interaction with tribal cultures. Tribes with gaming and hospitality industries have begun to institute workforce development programs through tribal colleges.

Yet there remains a significant need across industries and sectors for managers with experience and education. As tribes take over the management of enterprises, they are seeking talented managers of their own. The need for managerial talent in tribal colleges, health care institutions, small businesses, community development organizations, and reservation institutions remains pronounced.

Finally, tribal government leaders themselves need significant capacity building to better implement a nation-building approach. Many have lacked educational opportunities, have never held a job, or have only held "work until the grant runs out" jobs. Of those that have substantial work experience, much of this has typically been in government rather than business. With more control of tribal government comes increased responsibility and accountability. While leaders are seeing the consequences of their decisions and actions and learning from these experiences, more effort and opportunity must be directed to the capacity of tribal leadership.

Infrastructure

Around Indian Country, the oft-identified "silver bullet" for economic development is physical infrastructure: "if only we had infrastructure, we'd attract more business." While this notion is intuitively appealing – especially since business developers typically inquire about highway access, electricity rates, telecommunications capacity, fire protection, water and sewer service, paved roads, and the like – it can be misplaced. Whether insufficient infrastructure is a symptom or cause of underdevelopment depends critically on local conditions, competing investment opportunities, and the relative capital investment of competing jurisdictions.

Insufficient infrastructure can stem from several causes. First, it may be symptomatic of deeper economic obstacles, such as geography and income. Telephone penetration rates in Indian Country, for example, reflect the remote location of many reservations and the lack of profitability associated with low numbers of customers per mile of wire deployed. Similarly, low penetration rates for the Internet may well indicate that families do not have the disposable income necessary to afford computers and modems. Second, insufficient infrastructure may indicate a failure of government – tribal, state or federal – to spend in proportion to need. For example, tribes may lack the clear jurisdiction to collect and spend taxes related to infrastructure use. Alternatively, the Federal

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[318] Two instructors at different tribal colleges recently collaborated to develop curriculum based on case studies of Native businesses. Michele Lansdowne and Lisa Little Chief Bryan, "American Indian Entrepreneurship: Curriculum and Case Studies," Salish-Kootenai College, 2000.

Government may fail to meet its trust responsibility by spending less in various tribal programs in proportion to its state infrastructure expenditures.

In places lacking both infrastructure and economic development, there is a very real question of "what comes first, the chicken or the egg?" Did underdevelopment lead to a lack of investment in infrastructure or did a lack of infrastructure preclude the possibility of development? For example, a lack of infrastructure did not forestall the development of the Black Mesa Coal Mine on the Navajo and Hopi reservations in the middle part of the last century. Rather, the potential for development justified an investment in coal slurry pipeline, roads, wells, and other infrastructure. Conversely, few electricity-intensive businesses have expressed interest in developing the Cheyenne River Reservation. A major obstacle has been the imposition of some of the highest federal utility charges in the West, despite the presence of a hydroelectric facility on the Missouri River.

One area of infrastructure development that has captured the attention of tribes and motivated a vigorous policy debate is the "Digital Divide," or the gap between the telecommunication "have" and "have-nots." The penetration of the Internet is quite uneven in Indian Country. There are tribes that have not deployed tribal government e-mail yet, and there are tribes that buy Internet start-ups (e.g., as noted, Ho-Chunk, Inc. of the Winnebago Tribe owns Indianz.com and AllNative.com). Some tribes have even tackled telephone penetration by taking over the telephone utility.[319]

A frontier for many tribes seeking to get around the "chicken and the egg" problem lies in the imposition of taxes and/or business permitting fees. As illustrated by the case of Kayenta Township, modest charges can keep a tribal community competitive with other jurisdictions and provide the seed money for infrastructure development. The symbiotic result can then be further expansions of businesses and employment, further enlarging the revenue base, and so on toward further development. Many Indian nations, however, face the same challenges that other governments face: Imposing and/or raising taxes is seldom popular. When tribes can demonstrate wise use of collected revenues by, for example, expanding necessary infrastructure, opposition wanes.

Land and Jurisdiction

The checkerboarding of reservation lands and the ambiguities of tribal v. state and tribal v. federal jurisdiction emanating from the vacillations of federal court decisions (see above) raise substantial barriers to economic development and business success on affected reservations. Land fractionation caused by heirship dilution, for example, can make leasing for a businesses site wholly infeasible. Conflicts of jurisdiction raise business transaction costs and deter business owners who might just as well take their efforts and resources to a better understood and less contentious non-Indian legal setting.

To address such problems, numerous tribes have launched efforts to acquire land and bring it under trust status – thereby limiting (albeit, not completely removing) ambiguity over the extent of tribal jurisdiction. Nations such as Yakama, Navajo, Salish and Kootenai (Flathead), and many others have aggressively built their own leasing and siting authorities. The results are improvements in the economic environment. Nevertheless, the extent of checkerboarding on many reservations is effectively insurmountable, and jurisdictional conflicts show no sign of abating. In response, tribes

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[319] The Gila River Indian Community bought their local phone distribution company and was able to increase penetration from less than 30% to more than 80%. "Indian Country: Falling into the Digital Divide," *www.indianz.com/SmokeSignals/headlines/showfull.asp?* (15 January, 2001).

are embarking on mechanisms of shared power and cooperative a management. The aforementioned case of the Swinomish nation's cooperative land use planning with Skagit County, Washington addresses the impediments to business development that both the Native community and its neighbor experience in the face of ambiguous and shifting jurisdiction. As stressed in the Native Lands chapter above, agreements of this type can be "win-win" for Native nations and their neighbors, and are the future for Indian nations confronting such obstacles to their jurisdiction and economic development.

As they assert their jurisdiction and attempt to back up those assertions with their own institutional capacities, Indian nations commonly face credibility problems. Decades of tribal governments being subservient to and dependent on overbearing federal agents, inexperience in the business arena, lack of a track record for the tribal court, and the like can understandably leave banks, investors, potential business vendors, and non-Indian governments uncertain, if not outright distrustful of Indian nation's and their citizen's new-found aggressiveness in the economic arena. Yet, to suggest, for example, that an easier route might be for tribes to just give up and subject themselves state or federal courts, or disband themselves so that they can do business under "tried and true" non-Indian jurisdictions hearkens to demonstrably destructive termination-era policies.[320] Such approaches and mindsets miss the point that economic development in Indian Country is not fundamentally about economic welfare; it is about independence and local self-rule – i.e., the freedom to choose one's own path toward building communities where Native citizens can and want to live according to their own values. In holding firmly to such goals, the citizens of Indian nations exhibit the values and choices of citizens of self-determined nations everywhere.

The Future of Economic Development in Native America

The last decade has witnessed a remarkable change in the economic fortunes of some tribes and, thereby, in their abilities to remediate longstanding social ills. Tribal and tribal citizen businesses are involved in activities as diverse as casinos, mining coal, selling big game hunts, operating ski and golf resorts, "e-tailing", marketing olive oil, building military tank motors, and farming. On average, reservation employment and incomes are on the rise. Yet, while successful economic development in Native America has taken root, it is not universal or irreversible.

Recent success in contemporary Indian economic development is underpinned by the ability of tribes to control their most significant asset – sovereignty. Much, if not all, economic development in Indian Country depends on tribes' control over natural resources, their capacity to set their own regulatory standards, their ability to tax, and their capacity to call their own shots when it comes to projects and investments. Non-Indian interests have long threatened the recognition of tribes' inherent sovereignty; and federal legislative proposals and/or the U.S. courts could simply overturn long-established legal principles and more recent policies of Indian self-rule. Consequently, the long-term ability of tribes to compact with states for casino operations, create their own tax incentive policies, choose their own business investments, develop their own infrastructures, and generally exercise their sovereignty as a tool of economic development are potentially vulnerable to future legal and political challenges.

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[320] See, for example, Terry Anderson and Dominic Parker (2006), "The Wealth of Indian Nations: Economics, Performance, and Institutions on Reservations," in Terry Anderson, Bruce Benson, and Thomas E. Flanagan, eds., *Self-Determination: The Other Path For Native Americans* (Stanford University Press), Chapter 6.

Newly empowered tribal governments are identifying and removing internal barriers to investment in order to encourage economic development. The evidence from the non-Indian economy indicates that *new* job creation is highly dependent on small businesses – in fact, the vast majority of new jobs in the U.S. economy are created by small businesses. Native entrepreneurs confronting the opportunities implied by the "missing businesses" on reservations represent a tremendous resource upon which to build small business and some American Indian nations have begun to direct resources to their citizen's private enterprises. Tribes throughout Indian Country are coming to this realization, and have consequently taken concrete steps to encourage private sector development.

In addition, tribes are undertaking broad measures that benefit both tribally owned and private enterprise. Many tribes are revising their constitutions to provide orderly and culturally legitimate processes of government, developing tribal courts that can fairly adjudicate contracts and resolve disputes, and giving tribal corporations high quality management and independent boards of directors. Innovative approaches to creating a supportive business environment show what tribes can accomplish by taking advantage of new opportunities for tribal control under self-determination and by asserting their sovereignty.

This nation-building approach to Indian economic development is beginning to produce results. The 1990s saw substantial improvement in many tribal citizens' material welfare and fiscal health —independent of federal program spending. Maintaining and expanding this rate of growth is clearly critical to the long-term economic health of Native America. Rates of unemployment and poverty remain unacceptably high and suggest that much productive economic potential within Native America continues to be untapped. The primary threat to reversing the economic development that is taking hold is backsliding on federal policies of self-determination for Indian nations. Such backsliding would seem to benefit no one. For the first time in at least a century, a policy has been tried which shows real progress in switching the federal-tribal relationship from one of unjust domination and expensive dependence to one of tribal self-sufficiency and tribal contributions to neighboring jurisdictions. Self-determination for Indian nations is not a solution to every problem for every tribe, but its positive economic role to date has been striking.

TEXTBOX: Ho-Chunk, Inc. Winnebego Tribe of Nebraska

Chartered under the laws of the Winnebago Tribe and wholly owned by the Tribe, Ho-Chunk, Inc. was launched in 1994 to diversify the Tribe's business interests while maintaining a separation between business and tribal government. Roughly translated, Ho-Chunk, Inc. means "The People Incorporated." The general purpose company promotes economic self-sufficiency and creates jobs through its actively managed enterprises, joint ventures and passive investments, which include hotels, convenience stores, websites and an order fulfillment center.

The Winnebago Reservation lies in one of the most economically depressed counties in Nebraska. As recently as the 1980s, the sole source of tribal income was derived from land leases, which amounted to less that $180,000 per year. In the early 1990s, the Tribe established a casino on tribal trust land in Sloan, Iowa. As laws governing gaming near the tribe were liberalized, Tribal leadership saw that it would have to diversify its economy beyond gaming and into long-term self-sustaining endeavors. Simply starting a tribal business – or even several businesses – would not ensure a strong economy over the long term. The Tribe opted to create an environment in which businesses could flourish as sustainable and profitable enterprises, and where the Tribe could maximize the benefits of its sovereign immunity, federal tax immunity and civil regulatory authority.

In 1994, the Tribe wrote and enacted the Winnebago Business Code, which allows for the formation of wholly owned tribal corporations, and chartered Ho-Chunk, Inc., an economic development corporation wholly owned by the Winnebago. The Tribal Council appoints the company's five Board members, formulates the long-term development plan of the Corporation, and approves annual operating plans. A Chief Executive Officer oversees day-to-day management and makes all major strategic decisions for the company based on maximizing its profitability.

Before Ho-Chunk, Inc. was formed, it was common for reservation-based businesses to yield little or no investment return. Lacking appropriate guidance or market access, for example, they frequently faltered or failed. The company initially took advantage of opportunities where the economic conditions were the most favorable, regardless of whether they were on the reservation or not. However, once Ho-Chunk, Inc. created a stable income stream from its off-reservation investments (which include investments in Oregon, Colorado, Minnesota, Utah, Kansas, Oklahoma, Wisconsin, Texas and New Jersey), it was able to leverage its existing businesses to create solid on-reservation development. In other words, the company's off-reservation experience gave it the expertise and resources to better guide on-reservation business concerns. Today, the majority of Chi's development is reservation-based, and most of its off-reservation development directly or indirectly creates employment on the reservation.

HCI developed and operates four hotels in Nebraska and Iowa, plus numerous retail grocery and convenience stores; it created HCI Distribution, a Native American tobacco and gasoline distribution company with over 25 tribes as customers; and it purchased and expanded two Indian websites. In the area of joint ventures, HCI is the majority owner of a temporary labor service provider with six offices in three states, and is also the majority owner of a telecommunications, computer and networking equipment company. As a limited partner, HCI has invested in eleven hotels, apartment complexes, a small business venture capital fund, a now publicly-traded internet news and search company (Indianz.com), an e-commerce company (AllNative.com), and a housing manufacturing company. In 2000, the company's revenue was $25 million, operating cash flow was $1.5 million, and net income was $1.2 million. Ho-Chunk, Inc. now employs 250 employees, and nearly all of the employees in Winnebago, Nebraska are American Indian. **/END TEXTBOX**

Sovereignty Is an Asset

Sherry Salway Black (Oglala Lakota)
Board Member, First Nations Development Institute
June 2005

Successful economic development in Indian Country is occurring as Native nations and individuals assert control over that development. In the past, Native economic development was driven from the outside. Tribes didn't control their economic development; they rarely even controlled their own assets. In the past, strategies of economic development—strategies imposed by outsiders—focused on employment opportunities and income generation. While these strategies have a place, current asset-based strategies are succeeding because they are Native-controlled strategies that generate wealth. As Native nations and individuals control and build their assets, they generate the jobs and incomes that sustain Native economies.

Native nations are increasingly asserting such control. Tribes own many assets—land, natural resources, financial resources, and institutions—and we are controlling these assets. Asserting control over assets, however, can be complicated. Consider land. Many of our reservations are fractionated. Native owned and non-Native owned lands are intermingled within reservation borders. How can we use our land for purposes of economic development or protect it environmentally when our ownership is fractionated? Native nations are discovering solutions to such problems. We are asserting control over land functions previously controlled by the Bureau of Indian Affairs. We are imposing regulations over lands we do own. We are using geographic information systems to track land ownership. Some tribes are even beginning to purchase back lands that have gone out of Native ownership in order to reconsolidate our holdings. These strategies restore this critical asset into our control.

As Native nations assert control over assets, we can utilize those assets to our own benefit. Tribes have always owned but rarely controlled the assets held in trust by the federal government. How poorly these assets have been managed and how little wealth has been created! Now, controlling these assets means controlling our futures. In the 1960s, the Southern Utes assumed management of their vast natural resources. Now, they have close to one billion dollars in a growth fund. And not only can tribes manage the assets they control to their own benefit, but they can leverage these assets to create new assets. In the mid 1980s the Saginaw Chippewa asserted control over their trust money and invested this money in a regional financial institution. Not only did the tribe manage this investment, but they also leveraged their influence with the financial institution to secure mortgages for tribal members. Similarly, in 1985, the Lakota people of Pine Ridge established a community development financial institution, the Lakota Fund. While that institution was in itself an asset to the community, it helped to create new assets: Native-owned businesses. These businesses in turn created jobs and generated income. That is what assets do!

I believe that no discussion of economic development should be a purely economic discussion. By asserting control over existing assets and creating new assets, Native nations realize intangible as well as tangible benefits. Controlling assets fundamentally changes the way we think. When we control our assets effectively, we generate empowerment, social respect, good will in our communities, and, most importantly, control over our cultures. Consider the Tohono O'odham Community Action organization of Arizona. This nonprofit, supported in part by the First Nations Development Institute, enabled the Tohono O'odham to regain control of their Native food system by bringing lands back into the agricultural production of Native food products. This nonprofit was interested not only in economics, but in community health and culture. As a result of their efforts, a traditional ceremony that had not been performed for forty years because of the loss of farming

ground was reestablished. That is an intangible benefit of economic development. Or, as I would argue, it is a very tangible benefit that is difficult to assign a monetary value. By asserting control over their assets, the Tohono O'odham reclaimed and strengthened their culture.

Current economic development in Indian Country demonstrates again and again that sovereignty is an asset. In addition to our cultures, our sovereignty—our ability to control our own destinies—is our greatest asset. While the idea of sovereignty has been ill defined for many years, over the last ten to fifteen years tribes have better understood and exercised their sovereign rights. I know that tribes' efforts to exercise sovereignty effectively will only increase. What it means to truly exercise sovereignty has lacked definition in the modern era. However, in the last ten to fifteen years tribal nations have been exercising their sovereignty in many evolving and exciting ways.

Now, tribes are exercising sovereignty to promote economic development by making that development a priority and by carefully considering how that development ought to be controlled. When I refer to the control of economic development, I don't mean the control of the institutions of tribal governments alone. Native control of government institutions is, of course, critically important, but Native control must extend beyond tribal governments to the nonprofit and business sectors. Native control must extend throughout Native society. We must control our own institutions.

Of course, Native control of economic development raises challenging questions. Should tribal governments control all of the economic development within their communities or should they share that control with the business and nonprofit sectors? Certainly, there are some roles that tribal governments fill best. Tribal governments can establish regulatory frameworks that allow economic development to flourish. Tribal governments can ensure a separation of powers not only between their own executive, legislative, and judicial branches, but also between their political structures and Native businesses. And, of course, tribal governments can effectively direct economic development. This is their sovereign right.

Still, tribal governments have and will continue to find valuable partners for economic development in the business and nonprofit sectors. Many tribal governments are aware of the value that the business sector brings. Many more need to become aware of the value of the nonprofit sector. At their most basic, nonprofits supplement government services—filling voids or making up for inefficiency. At their most vibrant, they work in partnership with both government and businesses to promote Native economic development. This is in addition to their many strengths in other areas

I would argue that this diversification of control is critical to Native economic development. Many tribes who have succeeded as a result of tribally controlled economic development are recognizing the need to diversify. The Southern Utes are diversifying. In addition to diversifying their portfolios beyond energy-related interests (the base of their wealth) they are interested now in encouraging small business development. Similarly, the Mississippi Choctaw are now supporting individual businesses as well as tribal businesses. On the other hand, in many tribes where individual businesses and nonprofits have driven economic growth, tribal governments are now learning to assume their rightful role as supporting this effort and seeking ways to partner and collaborate. I would like to see all tribal governments, businesses, and nonprofits work together to design successful diversification strategies.

Native control of economic development requires not only skilled leadership across the government, business, and nonprofit sectors, but capacity within the broader tribal community. Our people are an asset in which we must invest in order to ensure our survival as peoples and our futures as well as economic development. Tribes and tribal institutions are discovering ways in which to build Native capacity. In this regard, tribal colleges are tremendous assets. More and more tribes are

recognizing tribal colleges as institutions that can promote economic development in many ways. Of course, not every tribe has a tribal college. Tribes are recognizing the importance of other forums for learning. The First Nations Development Institute and other tribal groups have dedicated several years to developing, disseminating and training many Native people in a financial education curriculum. Building financial understanding and capacity is critical to sustaining the economic development of Native communities. Other institutions, such as American Indian Business Leaders, work to enhance the Native workforce by identifying and supporting students interested in pursuing careers in business.

We confront these and other challenges as we work to control our economic futures. In addition to asserting and diversifying control and building capacity, I consider two challenges seriously concerning. First, I am concerned about the economic disparities that make communication between tribes increasingly challenging. There are real divisions between tribes with resources and tribes without; there are tensions in a society that, historically, has been quite equitable. Despite these divisions, tribes need to come together to identify common goals and a common vision. I don't mean that there will be a common plan for economic development or "one size fits all"—the sheer diversity of tribes will prevent this—but we should do better at identifying and disseminating the strategies that are working throughout Indian Country and define our political advocacy and public relations strategies to support this development. Second, we must recognize that as we assert more control, we will confront pushback from the federal and state governments. I am very concerned that as tribes control their economic development, this control will be challenged through legislation, regulation, and judicial decisions. We must not allow our tribal sovereignty to be undermined.

Still, I am confident that we can meet these challenges. I am optimistic about Native economic development and the future of Native nations. Although the day-to-day developments may not seem significant, I can look back over twenty-five years and recognize the dramatic changes that have occurred. As I look towards the twenty-five years ahead, I feel confident that the changes to come will be more dramatic still.

GAMING

- The power of Native nations to set their own gambling regulations flows from their status as sovereign governments. The scope of tribal gaming powers is rooted in court decisions, constrained by federal legislation, regulated by a federal commission, and, in the case of casino-style establishments, negotiated with state governments.
- As of mid-2006, 224 of the 561 federally recognized tribes operated gaming enterprises. A relatively small number of gaming operations account for the majority of the total revenue generated by Indian casinos.
- Gaming has contributed to positive changes in on-reservation social and economic conditions observable in socioeconomic statistics, yet the gap between American Indians on reservations and the broader U.S. population remains large.
- Policy controversies over Indian gaming and potential expansions of competing non-Indian casino gambling threaten the stability of casino-derived tribal government revenues over the long-term.

Arguably, the most significant economic development in Indian Country since the start of the self-determination era has been the assertion by tribal governments of their rights to operate gaming enterprises. Gaming is often referred to as the "new buffalo" for Native nations, with the number of facilities and their revenues, employment, and economic and social impacts rising rapidly since the late 1980s, when landmark legal cases affirmed tribes' rights to choose to undertake gaming.

Not surprisingly, tribal governments' gaming enterprises have proven to be sources of economic development for Native nations, creating jobs and providing tribal governments with the resources needed to rebuild impoverished communities and begin to diversify their economic bases. The reality, however, is that gaming profits are not equally distributed across the United States and cannot hope to meet all of the community needs across Indian Country. Moreover, the impacts of

Indian nation gaming enterprises on neighboring jurisdictions are controversial, as are some of the social impacts within Native communities, themselves.

The Development of Contemporary Indian Gaming

Decisions as to whether to allow gambling and gaming enterprises in the United States have long been the prerogative of state governments. Thus, states such as Nevada and New Jersey long ago exercised their sovereignty and authorized casino gambling; and, beginning in the mid-1960s, state governments across the U.S. began to own and operate lottery businesses.[321] Bolstered by federal policies of self-determination and court recognition of the limits to states' jurisdiction over tribes, tribal governments began to create, own, and operate gambling operations in the late 1970s. Almost immediately, the tribes at the vanguard of this development came into conflict with their surrounding states over regulatory jurisdiction. In particular, conflicts arose as tribal gaming facilities operated in excess of state limits on stakes, games offered, hours of operation, and other dimensions. The ensuing litigation to shut down Indian casinos and bingo halls came to a head in *California v. Cabazon Band of Mission Indians*, when the U.S. Supreme Court upheld the right of tribes to determine their own gaming regulations unless a state has a criminal ban on the category of games in question.[322]

In the aftermath of the *Cabazon* decision, the states pushed for national legislation giving them a say in the oversight of Indian gaming. Congress subsequently passed the compromise *Indian Gaming Regulatory Act* of 1988 (IGRA). IGRA circumscribes the tribal rights recognized by the Supreme Court in *Cabazon* and establishes a balancing framework under which multiple governments oversee Indian gaming.

IGRA divides gaming into three classes:

- **Class I** gaming means social games or traditional forms of Indian gaming.
- **Class II** gaming means: (i) bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)...including…pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and (ii) card games that are…authorized by the laws of the State…
- **Class III** gaming means all forms of gaming that are not class I gaming or class II gaming.[323]

Each of the classes is subject to different governments' participation in oversight and regulation Figure 10. Tribes must establish their own gambling ordinances and oversight commissions subject to federal approval to regulate Class II or III operations. The federal National Indian Gaming Commission regulates Class II and III facilities, in coordination with several other federal agencies, including the FBI, the Department of Interior, and the Treasury Department's Financial Crimes Enforcement Network. States also participate in Class III (casino-style) oversight under negotiated tribal-state compacts. IGRA stipulates that such compacts can cover the scope of games allowed and regulation. As enterprises of tribal governments, the federal government, states and non-tribal municipalities are prohibited from taxing Indian gaming enterprises' incomes, although regulatory cost reimbursement and payments in lieu of taxes for state and municipal services is permitted and common.

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321 National Association of State and Provincial Lotteries. http://www.naspl.org/history.html (28 June 2006).

322 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 1987.

323 *Indian Gaming Regulatory Act*, 25 USC §2703.

Figure 10
Different Governments Regulate Different Classes of Indian Gaming

		Government		
		Tribal	**Federal**	**State**
Gaming Class	**I**	✓		
	II	✓	✓	
	III	✓	✓	✓

25 USC §2701 *et seq.*

[INSERT TEXTBOX ON "A POLICY PRIMER…" ABOUT HERE]

TEXTBOX: A Policy Primer on American Indian Gaming [*]

The gaming enterprises of Indian nations are operations of American Indian tribal governments. With powers akin to one of the states, these governments are recognized by the U.S. Government pursuant to the U.S. Constitution, centuries-old treaties, numerous Supreme Court decisions, Presidential executive orders, and acts of Congress. Just as states in the United States have certain powers of jurisdiction within their boundaries, so tribes have governmental powers within their boundaries. While tribes (and states) cannot exercise powers such as raising an army or issuing currency, they possess powers to: determine their respective forms of government (e.g., craft constitutions), establish criteria for citizenship, pass and enforce laws through their own police forces and courts, collect taxes, regulate the domestic affairs of their citizens, and regulate property and resource use. And like states, American Indian governments have the power to determine whether they will engage in gaming operations.

American Indian governments' rights to gaming have roots in the U.S. Constitution. Article I, Section 8 of the Constitution provides only the federal government can make laws regulating commerce between the United States and the Indian tribes. Accordingly, when the State of California tried to block the government of the Cabazon Band of Mission Indians from operating a gaming enterprise in the mid-1980s, in 1987 the U.S. Supreme Court upheld Cabazon's rights to determine for itself if and how it would operate gaming enterprises. The Court recognized California and Cabazon as separate sovereigns – just as California and, say, Nevada (which, like Cabazon, shares its border with California) are recognized as separate sovereigns when it comes to Nevada's right to allow gaming.

With tribes' rights of gaming thus affirmed, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA). This Act circumscribes the rights recognized by the Supreme Court in *Cabazon*. Under IGRA, all gambling activities on the reservations are subject to each tribe's own gaming laws, ordinances, and commissions. Class II gambling (e.g., bingo and related games) and Class III gambling (including, e.g., slot machines and casino games) are both subject to the oversight of the federal National Indian Gaming Commission. And Class III gambling may be subject to state regulation and oversight depending on how these are specified and negotiated in intergovernmental tribal-state compacts.

Paralleling the decisions of many states to operate state lottery businesses in order to help fund state governmental activities, more than 200 tribal governments engaged in Class II (e.g., bingo) or Class III (e.g., full-scale casinos) gaming as of mid-2006. As required by IGRA, revenues from tribal governmental gaming must be directed towards: funding tribal government operations and programs; providing for the general welfare of tribal citizens; promoting economic development; supporting charitable organizations; and funding operations for local, non-tribal government agencies. From a tax perspective, tribal government gaming enterprises are treated like state government gaming businesses (e.g., lotteries). That is, state governments are not taxed by neighboring states or the federal government on their gaming earnings, nor are Indian nations./**END TEXTBOX**

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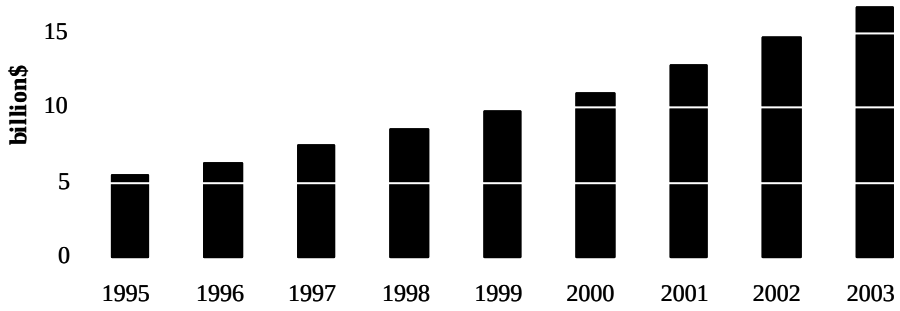
[*] Condensed and updated from Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

The Growth of Indian Gaming

Large-scale Indian gaming operations were not very common in the late 1980s. Nationwide, Indian gaming revenues were estimated at around $100 million at the time of IGRA's passage.[324] The industry grew rapidly, however, in the years after the *Cabazon* decision in 1987 and passage of IGRA 1988. This growth occurred in large measure because legal uncertainty over the tribal right to build casinos was substantially resolved and investors would support tribal efforts. Even so, investment in Indian gaming continued to be dampened in some regions through the 1990s, particularly in California, amid allegations of states negotiating over enabling compacts in "bad-faith".

As of 2006, the National Indian Gaming Association reported that 224 of the 561 federally recognized tribal governments operated one or more gaming facilities in 28 states nationwide.[325] The National Indian Gaming Commission reports that FY 2004 revenues from the 367 tribal gaming facilities in operation totaled $19.4 billion (Figure 11).[326] By comparison, the combined revenues of all gaming enterprises in the United States are reported to be on the order of $75 billion per year.[327]

Figure 11
US Indian Gaming Revenues Have Grown Rapidly



SOURCE: National Indian Gaming Commission, "Growth in Indian Gaming," http://www.nigc.gov/TribalData/GamingRevenues20042000/tabid/549/Default.aspx (30 May 2006).

[324] U.S. Senate Committee on Indian Affairs, Report together with Additional Views, 100th Cong., 2nd sess., 1988, S. Report 446: 2.

[325] National Indian Gaming Association, "Indian Gaming Facts," http://www.indiangaming. org/library/indian-gaming-facts/index.shtml (30 May 2006).

[326] National Indian Gaming Commission, "Gaming Tribes." http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES&REGIONID=0&SORT=1 (20 May 2005); U.S. Department of the Interior, Bureau of Indian Affairs, "Indian Entities Recognized and Eligible to Receive Services From the United State Bureau of Indian Affairs," Federal Register, 68:234, 68180-68184 (2003); National Indian Gaming Commission, "Growth in Indian Gaming, National Indian Gaming Commission: Tribal Gaming Revenues (in thousands) by Region." http://www.nigc.gov/nigc/tribes/tribaldata2003/gamerevenue.jsp (20 May 2005).

[327] First Research, "Gambling Operation Industry Profile Excerpt." http://www.firstresearch.com/Industry-Research/Gambling-Operations.html (30 May 2006).

Despite growing vigorously, Indian gaming has not grown evenly. There are substantial disparities in facilities' sizes and success. The federal General Accounting Office (GAO) was able to assemble a detailed snapshot picture of Indian gaming that shows the variation for 1995. At that time, Indian casinos garnered $4.5 billion in revenue, compared with non-Indian casino industry revenue of $50 billion. Indian casino net income totaled $1.9 billion.[328] The top 13% of the casinos studied by the GAO accounted for 59% of the total revenue and more than half of the net revenue generated by the casinos in the study.[329] The median casino facility brought in $4.9 million in 1995 net income, and the profits transferred to tribes was less than $20 million for more than 80% of the tribes observed.[330]

More recent National Indian Gaming Commission figures show that the Indian gaming sector has continued to demonstrate wide variation. As seen in Figure 12, out of the 367 tribal facilities in operation in 2004, the 15 largest accounted more than 37% of total Indian gaming revenues, and the 55 largest tribal facilities accounted for close to 70% of total sector revenues. Concomitantly, many tribes' gaming operations were relatively small, located in remote areas with low populations. 94 facilities had annual revenues of less than $3 million in 2004, and the smallest 219 operations (60% of the 367 facilities nationwide) accounted for only 8% of total Indian gaming revenues.

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328 U.S. General Accounting Office, *Tax Policy: A Profile of the Indian Gaming Industry* (Washington DC: Government Printing Office, May 1997), 6-15.

329 Ibid., 15, 17-18. The GAO studied the 1995 revenues of 178 of 281 Indian gaming facilities operating in the United States as of December 1996.

330 Ibid., 9.

Figure 12
Revenues of Indian Gaming Operations, 2004

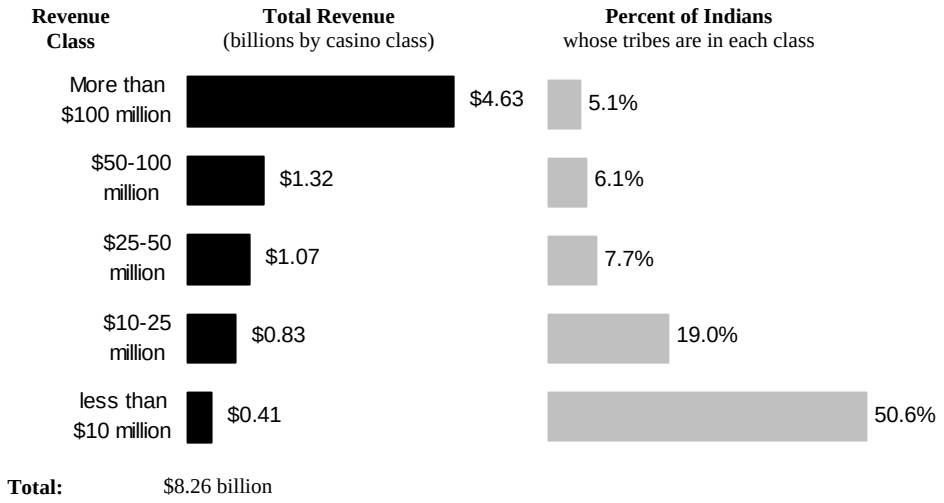
Revenue Size Category	Number of Operations	Revenues (in thousands)	Percentage of Operations	Percentage of Revenues
$250 million and over	15	7,200,911	4.1%	37.1%
$100 million to $250 million	40	6,277,698	10.9%	32.3%
$50 million to $100 million	33	2,240,010	9.0%	11.5%
$25 million to $50 million	60	2,144,497	16.3%	11.0%
$10 million to $25 million	68	1,122,554	18.5%	5.8%
$3 million to $10 million	57	344,352	15.5%	1.8%
Under $3 million	94	77,488	25.6%	0.4%
Total	367	19,407,510		

SOURCE: National Indian Gaming Commission, "Growth in Indian Gaming." http://www.nigc.gov/TribalData/GamingRevenues20042000/tabid/549/Default.aspx (30 May 2006).

The skewed distribution of gaming proceeds extends not just across facilities, but across Indian Country more broadly (Figure 13). A disproportionately large share of the total casino revenue in Indian Country accrues to tribes that represent a small share of the Indian population, giving lie to the widely held notion that Indian gaming is making all Indians wealthy. While gaming has been the "new buffalo" for a number of tribes near population-dense metropolitan areas, gaming is having only a limited effect on the economic fortunes of households among large tribes remote from large customer markets. For example, even though gaming allowed the Standing Rock Sioux Tribe (SRST) of North and South Dakota to *double* its on-reservation employment by adding about 300 jobs through the mid-1990s, the overall effect on its reservation labor pool of 4,000 has been modest.[331]

[331] Stephen Cornell, Joseph Kalt, Matthew Krepps, Jonathan Taylor, *American Indian Gaming Policy and Its Socioeconomic Effects: A Report to the National Gambling Impact Study Commission* (Cambridge, MA: The Economics Resource Group, Inc., July 1998), 54.

Figure 13
Distribution of Indian Casino Revenues and Associated Tribal Populations, 1998



Notes: Approximately 32% of Indians are members of tribes that do not have any gaming operations. Percentages do not sum to 100% because some tribes have gaming operations in more than one category. *Source*: "A Breakdown of Indian Casino Revenues," *Associated Press*, 31 August, 2000, 16:12 EDT.

Socioeconomic Investment and Change

Federal law – IGRA – requires that net revenues from Indian governments' gaming operations be used in five areas: tribal government operations; promotion of the welfare of the tribe and its citizens; economic development; support of charitable organizations; and compensation to local non-Indian governments for support of services provided by those governments. Under these strictures, gaming tribes have been plowing gaming earnings back into their communities. In fact, the combination of the backlog of unmet infrastructure and other needs on reservations and tribal governments' accountability to their citizens has spurred many tribes to undertake investment of gaming earnings in greater magnitude and with broader reach than IGRA would require.

Indian casinos have helped to accelerate the socioeconomic recovery underway in the self-determination era by loosening the constraints on capital investment in tribal economies and by bolstering tribal government budgets. In part, Native nations have invested in casino-related facilities such as hotels, conference centers, entertainment facilities, golf courses, and RV parks. These facilities strengthen the competitive position of original facilities and extend tribes' recreation-related offerings. Typically, later in a casino's life cycle, investment spreads to businesses not related to gambling tourism and to businesses off the reservation. The San Manuel Band of Mission Indians, for example, opened a water bottling plant on its reservation with gaming proceeds and invested in a four-tribe consortium, Four Fires LLC, to develop an upscale hotel near the Smithsonian's National Museum of the American Indian in Washington, DC. The Winnebago Tribe of Nebraska undertook a crash-course in economic diversification and bought, created, or invested in businesses from internet media and home manufacturing to used autos and gas stations. The Winnebago's enterprise locations now span the lower-forty eight states.

Native nations have also made very substantial investments in their government programs, supplementing low federal funding levels and adding programs that are not otherwise available. It is

difficult to overstate the variety of such socioeconomic investments. They range from reducing emergency response times at the Gila River Indian Community from three hours to a matter of minutes, to providing indigenous language training to school children at the Mille Lacs Band of Chippewa Indians. Tribal governments are employing gaming revenues to provide college scholarships, mortgage down payment assistance, endangered species protection, water quality monitoring, elder care, police cruisers, foster care placement, eye clinics, and a host of other public goods and services to their citizens.

The evidence indicates that gaming has contributed to encouraging changes in on-reservation socioeconomic conditions. Looking across a range of Census indicators, individual Indians living on reservations that had a Class II or III facility by 2000 witnessed larger average gains in socioeconomic status than did all U.S. individuals and all individual Indians living in non-gaming areas other than the Navajo reservation (Figure 14).[332] For all but three indicators, the socioeconomic improvement of gaming reservations is greater than both the U.S. average and the non-gaming reservation average. These figures are all the more impressive since the gains displayed here come in the context of low and stagnant federal funding. Self-government generally and, in particular, the exercise of tribal sovereignty over the choice to operate a casino has had a measurably positive effect on overall Indian socioeconomic outcomes.

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[332] These data average the Census indicators for individuals in reservations so that the larger gaming reservations which are generally more remote and poorer are given their due (population-based) weight. In other words, the superlative profits made by the handful of casinos near urban markets are given less weight in these data because their populations are small. The Navajo Nation is excluded because it is disproportionately large—twelve times the next largest reservation in population and three times the total population of the non-gaming tribes. OTSAs are excluded because they are not reservations and tend to reflect Oklahoma living conditions rather than reservation conditions per se. The full complement of geographic comparisons is available in the source document for Figure 14.

Figure 14
Socioeconomic Changes on Reservations,* 1990-2000
(presented in percentage points unless indicated as %)

	Non-Gaming	Gaming	U.S.
Real per capita income	+21%	+36%	+11%
Median household income	+14%	+35%	+4%
Family poverty rate	-6.9	-11.8	-0.8
Child poverty rate	-8.1	-11.6	-1.7
Deep poverty rate	-1.4	-3.4	-0.4
Public assistance rate	+0.7	-1.6	+0.3
Unemployment rate	-1.8	-4.8	-0.5
Labor force participation rate	-1.6	+1.6	-1.3
Overcrowded homes	-1.3	-0.1	+1.1
Homes lacking complete plumbing	-4.6	-3.3	-0.1
Homes lacking complete kitchen	+1.3	-0.6	+0.2
College graduates	+1.7	+2.6	+4.2
High school or equivalency only	-0.3	+1.8	-1.4
Less than 9th grade education	-5.5	-6.3	-2.8

* Excluding the Navajo Nation and Oklahoma Tribal Statistical Areas (OTSAs).
Source: Jonathan Taylor and Joseph Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* Harvard University, 2005. http://www.ksg.harvard.edu/hpaied/pubs/pub_151.htm (23 May, 2005).

These data cannot say that gaming has everywhere brought benefits to everyone. Just as there is heterogeneity among the nation-states of the world, there is variation among Native nations and their abilities to address challenges. In some instances, such as the Mashantucket Pequot and the Mohegan of Connecticut, being located in the middle of one of the most densely populated regions of the United States has yielded truly astounding net income flows for tribes that are small in population. The Mashantucket Pequot's Foxwoods Casino is the world's largest casino, throwing off hundreds of millions of dollars of income per year in a tribe of only about 400 members. At the other end of the spectrum, the Prairie Wind Casino of the Oglala Sioux Tribe, with approximately 15,000 Indian residents citizens living on the Pine Ridge reservation in rural South Dakota, holds no promise of serving as a primary engine of economic growth and social investment.

Gaming Controversies

It goes without saying that gambling in Indian governments' gaming establishments and gambling, in general, engender controversy. The National Research Council, for example, finds that gaming generates net economic benefits in economically depressed areass, but also estimates that 1.5 percent of adults in the U.S. have been pathological gamblers at some time of their lives; and in a given year, .9 percent of U.S. adults are pathological gamblers.[333] By comparison, approximately 9

[333] National Research Council, *Pathological Gambling: A Critical Review*. (Washington, D.C.: National Academy Press, April 1999).

percent of the total U.S. population is reported to suffer substance (alcohol and illicit drugs) dependence or abuse.[334]

In the case of Indian gaming, much of the controversy surrounds the impacts on neighboring, non-Indian jurisdictions and populations. Because tribal gaming enterprises typically represent injection of new economic activity into otherwise relatively poor and depressed areas, they generally tend to reduce unemployment, raise incomes, reduce dependence on welfare programs, and raise tax receipts. Such impacts on surrounding communities are spurred in part because tribal gaming enterprises commonly employ more non-Indians than Indians, and because the enterprises, their employees (Indian and non-Indian) and their patrons tend to spend earnings and incomes in the economies around them.[335] At the same time, however, increased traffic, population concentration, and the like can have adverse impacts by, for example, increasing crime or burdening surrounding communities' budgets for such activities as policing, road maintenance, and waste disposal. The net impacts are subject to wide disagreement.[336]

As noted, although as government-owned enterprises tribal casinos' profits are not taxed by federal, state or local governments, IGRA authorizes gaming tribes to make payments to neighboring jurisdictions to compensate those localities for burdens that tribal gaming may place on them. With this impetus from IGRA, and bolstered by local political realities, tribal-state gaming compacts commonly result in tribes making payments in lieu of taxes to local and state governments. In New Mexico, for example, tribes have been remitting 3% of the first $4 million in annual casino revenues and 8% on revenues in excess of that amount.[337] In Arizona, tribes pay 1% to the State on their first $25 million in Class III revenues, scaling up to a top rate of 8%.[338] In Michigan, gaming compacts result in tribes paying 8% of their electronic video gaming and slot machines profits to the State, with another 2% going to municipalities.[339] The Michigan Gaming Control Board estimates that 9 tribes remitted more than $325 million to the State over 1993-2003.[340]

The rapid growth of Indian gaming has also sparked controversies over who, exactly, is an Indian and who, exactly, qualifies as an Indian nation. Some of this controversy is the result of mainstream society's stereotyping, which often sees "Indian" in terms of media-manufactured images in which indigenous people are not "supposed" to engage in capitalistic business enterprises or thrive economically in contemporary modes. Such perspectives and prospects for abuse by truly non-Indians

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334 *Substance Abuse and Mental Health Services Administration, Overview of Findings from the 2003 National Survey on Drug Use and Health* (Rockville, MD: Office of Applied Studies, 2004), 24.

335 See the summaries of research in Leigh Gardner, Joseph P. Kalt, and Katherine A. Spilde, *Annotated Bibliography: The Social and Economic Impacts of Indian and Other Gaming*, (Cambridge, MA: The Harvard Project on American Indian Economic Development, January 2005).

336 Compare, for example, Earl L. Grinols, *Cutting the Cards and Craps: Right Thinking about Gambling Economics*, (University of Illinois at Urbana-Champaign, College of Business, December 2001) and Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, *The National Evidence on the Socio-Economic Impacts of American Indian Gaming on Non-Indian Communities*, (Cambridge, MA: Harvard Project on American Indian Economic Development, April 2002).

337 "State Receives $8.4 Million in Q2 Tribal Gaming Revenue," *New Mexico Business Weekly*, 7 August, 2003. http://albuquerque.bizjournals.com/albuquerque/stories/2003/08/04/daily16.html (28 June 2006).

338 Arizona Department of Gaming (2003).

339 Michigan Gaming Control Board (2003).

340 Michigan Gaming Control Board (2003).

seeking status as "Indian" for purposes of jumping on the Indian gaming bandwagon have called into question the federal recognition regulations and process adopted in 1978.[341]

As of 2006, fifteen tribes had succeeded in securing federal recognition under these regulations. However, all but one of these had initiated their drives for sovereign status well before the key U.S. Supreme Court rulings in the 1980s upholding tribal gaming rights and before the passage of IGRA in 1988.[342] Similarly, according to the Congressional Research Service, of the four tribes that received *de novo* recognition via acts of the United States Congress between 1973 and 2000, all had begun their pushes for recognition long before the era of contemporary Indian gaming. Meanwhile, at least a dozen tribes had bills of recognition introduced into Congress that failed to pass (multiple times, in some cases); and more sought legislation, but could not even get recognition bills introduced.[343] It is not hard to imagine that access to rights of sovereignty over the decision to allow gaming would be attractive to the unscrupulous. To date, however, the route to that sovereignty through federal recognition has proven to be very tightly policed.

Even within Indian nations, the net impacts of gaming are two-sided. Newly available discretionary cash flows from gaming can raise political pressures and tensions within a Native nation as it come to grips with being much more in the driver's seat when it comes to trying to meet competing community needs and manage growing burgeoning budgets. Then, too, tribes differ culturally with respect to attitudes toward gambling. In some cases, enduring cultural heritage supports gaming as an acceptable activity, often bringing with it traditions that keep negative aspects of gambling in check. In other cases, continuing cultural traditions and/or contemporary Christian or indigenous cultural influences see gambling as anathema.[344]

At times, political and social tensions over gaming have boiled over. In the case of the Wisconsin Winnebago Tribe (now the Ho-Chunk Nation), for example, they precipitated raids of tribal offices by law enforcement, stripping the tribal chair of her powers, and a constitutional crisis that produced a new constitution and the Ho-Chunk Nation in 1994.[345]. On some reservations, revenues have flowed directly to individuals and families, only to exacerbate a latent gang violence

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[341] See "Tribal-Federal Relations" chapter.

[342] Bureau of Indian Affairs, *Federal Acknowledgement Decision Compilation v 2.0.* http://www.indianz.com/adc20/adc20.html (21 July 2006).

[343] Roger Walke, *Memorandum: Federal Recognition of Indian Tribes by Congress*, (Washington, D.C.: Congressional Research Service, January 8, 2001). This memorandum reports that eight tribes successfully received new recognition through Congressional Acts over 1973-2000. However, three of these (Texas Kicakpoo, Lac Vieux Desert Band of Lake Superior Chippewa Indians, and Loyal Shawnee) had been former subdivisions of previously recognized tribes, and one (Pokagon Band of Potawatomi Indians of Michigan) was a restored tribe that had been terminated decades earlier.

[344] See Miriam Jorgensen, "Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development," Doctoral Dissertation (Cambridge, MA: Harvard University John F. Kennedy School of Government, June 2000).

[345] Douglass Steeples, "The Wisconsin Winnebagos, 1963-2000: A Problem in Decolonization," The Economic and Business Historical Society On-Line Proceedings Journal 2005. http://www.business.auburn.edu/~whittdo/EBHS%20Proceedings%202005.htm (31 May 2006).

problem or other sociopathology.[346] In other communities, the casino dollars have precipitated controversies over who is and ought to be a citizen of the nation (and thereby a recipient of the benefits of Indian gaming). The overall net positive impacts of the influx of incomes and employment brought by Indian gaming suggest these are the growing pains of self-determination, and the examples of distress induced by tribal gaming have generally been accompanied by recovery. The Ho-Chunk Nation, for example, has stabilized under its new constitution and operated without a repeat of its prior crisis for more than a decade.

Among the most controversial tribal governmental decisions precipitated by the growth of Indian governments' gaming enterprises is the decision as to whether portions of earnings from tribal casinos should be paid out as per capital payments to individuals and/or families. Such payments are colloquially referred to as "per caps." As of June 2004, 93 Native nations had filed revenue allocation plans with the National Indian Gaming Commission, a precursor to make per capita payments to tribal citizens.[347] The National Indian Gaming Association reports that, as of 2006, only about one-quarter of gaming tribes were paying out per caps.[348]

There are two sides to debates in Indian Country regarding whether and how much tribes should pay in per caps from their gaming (or other) earnings. On the one hand, tribal citizens are effectively the shareholders in any tribal enterprise, and as shareholders, have rights to the income of enterprises they own. And, there is some evidence that at least modest per capita payments have positive social effects. For example, Duke University researchers have reported a connection between per capita distributions and a decreased incidence of "acting out" behaviors among youth.[349] Anecdotally, some tribal council members report a new freedom to decrease personalized constituent service in order to free up their time to devote to governing; per caps can enable them to tell citizens, in essence, "those things are what you received your per capita payment for."

On the other hand, individual payments are not the only way that citizen-owners might enjoy the earnings of tribal enterprises. Dividends also devolve to citizen-shareholders through the services provided, infrastructure built, and programs developed by tribal governments with tribal government enterprise revenues. The Citizen Potawatomi Nation (CPN), for example, does not pay per caps. Instead, there has been stable community support for using earnings from gaming and the numerous other enterprises owned by CPN to fund a much wider and high quality array of services to citizens of the nation. Services and functions range from housing, law enforcement, wellness and health, education, elder care, medial device support, and veterans' affairs.

Importantly, large per caps can have discouraging incentive effects, and these are much debated in Indian Country. Tribal leaders report perceptions of decreased rates of school and college attendance, limited incentives to work, and a transition from dependency on the U.S. federal government to dependency on tribal government. In response to concerns about negative incentive

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[346] A contrasting case is where per capita distribution of gaming revenues has systematically reduced psychopathology in children coming out of poverty. See E.J. Costello et al., "Relationships between Poverty and Psychopathology: A Natural Experiment," *Journal of the American Medical Association* 290, no. 15 (2003), 2023-29.

[347] National Indian Gaming Commission, "Tribal Revenue Allocation Plans as of June 16, 2004".

[348] National Indian Gaming Association, "Indian Gaming Facts."

[349] E. Jane Costello, Scott N. Compton, Gordon Keeler, and Adrian Angold, "Relationships between Poverty and Psychopathology: A Natural Experiment," *Journal of the American Medical Association* 290, no. 15 (15 October, 2003), 2023-2029.

effects of per caps, some Indian nations have become quite creative, tying per caps to school attendance, educational attainment, and other manifestations of "good citizenship." For example, in 2002 the Fort McDowell Yavapai Nation Tribal Council passed an ordinance imposing fines on the families of students who skip class or are chronically tardy, deducting a minimum of $100 per offense (with $50 increments for repeat offenses) from the parents' and teens' distribution accounts. The nation reports that after just three years, graduation rates soared from 40 percent to 70%.[350] The Las Vegas Paiute Nation, which does not have a casino, but does make per capita payments from other enterprise earnings, is a small nation without its own jail or detoxification facility. When tribal citizens break the law and are sentenced to jail or court-ordered substance abuse treatment, the nation garnishes the cost of the jail and detox space it must rent from other governments from the citizen's per capita payment.[351]

The Future of Indian Gaming

The growth in the number of Indian nations undertaking gaming may be plateauing. The number of tribes initiating new gaming ventures began to hold steady by the end of the 1990s, evidenced by the falling rate of new tribal-state gaming compacts.[352] However, the industry continues to evolve as tribes with existing facilities either expand or downsize in response to market conditions.

If the economic attributes of Indian gaming are stabilizing to some degree, the policy contours remain in flux. Controversies continue to roil tribe-state relations in some locales as tribes spar with each other and with states over taxation and revenue sharing, off-reservation gaming, reservations for newly recognized tribes, regulation, campaign contributions and other issues. Although thus far unsuccessful, several bills with the goal of restricting off-reservation gaming have been introduced in Congress. In addition, quite a few states are considering and some have passed legislation to add non-Indian casinos to their economies. In combination, these policy uncertainties and threats of increased competition are leading many tribes to prioritize the diversification of their economies.

An illustrative case in this regard is the small Morongo Band of Mission Indians. Noted for developing a highly successful resort casino on its relatively small California land base, Morongo began to diversify its economic base aggressively in 1997, and has since opened a large Shell gasoline station, an A&W drive-in, a Coco's Restaurant, and a water bottling plant, and Morongo has acquired a fruit orchard retail and mail order operation. Like the cases of the Tulalip Tribes and the Winnebago of Nebraska highlighted elsewhere in this volume, Morongo sees such diversification as critical to long-run self-sufficiency.[353]

Gaming has undeniably brought many advantages to Indian Country, notably much needed capital and business expertise. However, gaming has also created the need to manage a variety of potentially negative consequences. The compacting requirement has led to greater state involvement in tribal issues and opened the door to state oversight of tribal operations. Many Native nations feel that this infringes upon the government-to-government relationship tribes share with the federal

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350 Carol Sowers, "For Yavapai Students, Skipping Class is Fines," *Arizona Republic*, 31 May, 2005.

351 Communication with Ted Quasula, Las Vegas Paiute Chief of Police, 13 April, 2005.

352 Cornell, et al., *American Indian Gaming Policy,* 11-13.

353 Maurice Lyons, Morongo Band of Mission Indians, "The Growing Power of Tribal Economic Diversification," *Indian Country Today*, 9 September, 2003.

government. Tribal gaming has also led to proposals to tax tribal casino revenues or to apply means testing to tribes for purposes of federal programs and appropriations. As these moves suggest, Congressional will regarding Indian gaming raises questions as to whether or not gaming rights are subject to revocation, as many gaming tribes believe. If true, this reinforces the need for diversification, the creation of other assets, and more comprehensive economic development strategies in Indian Country.

Textbox: Quil Ceda Village, The Tulalip Tribes

For much of the twentieth century the Tulalip Tribes had great difficulty developing a robust tribal economy despite their proximity to Seattle and their reservation's location in the extremely busy Interstate 5 corridor. The Tribes confronted 60 to 70 percent unemployment, inadequate housing, high drop out rates, pervasive substance abuse, and severe community health problems. A dearth of profitable enterprises and inadequate infrastructure made it difficult to attract businesses onto their reservation and thus reverse these trends. For decades, the Tribes could see no future but perpetual poverty. The 1988 Indian Gaming Regulatory Act offered the Tulalip Tribes a new opportunity. The Tribes were among the first to sign a gaming compact with the state of Washington and, in 1992, they opened a major casino that almost immediately transformed their tribal economy.

In 1998 they created the institutional and physical blueprints for Quil Ceda Village, a uniquely structured tribal municipality that boasts a business park, several national retailers, a casino, and the infrastructure to sustain further expansion. Quil Ceda Village has been enormously successful in bringing businesses to the reservation. The Village has attracted such notable companies as Home Depot, Best Buy, Michael's, and Bank of America while also providing space for a host of smaller businesses. The Tribes recently began construction of a premium mall with one hundred and twenty stores. Additionally, they are planning for the development of a power retail center, strip mall, water theme park and family center, and RV park within the Village. The Village, its anchor stores, its small businesses, and its casino employ two thousand individuals, many of them Tulalip citizens.

Although the Tulalip Tribes initially conceived of the Village as a business park, their adoption of an organizational form unheard of in Indian Country turned the Village into much more. The Tulalip Tribes enacted legislation designating the Village as a political subdivision of the Tribes. As the first tribal city of its kind, Quil Ceda Village has been remarkably successful in creating an environment that is attractive to businesses. Quil Ceda Village's status as a municipality also has the potential to benefit the Tulalip Tribes far beyond its current economic enhancements by offering a rare opportunity to tax economic development in Indian Country. Moreover, the Tribes have carefully supervised the Village's design so that it would reflect tribal values. During early planning stages, the Tribes adopted a holistic approach to the environment and set aside substantial land within the Village for a park, trails, and a wetland. The Village is also home to the Marysville/Tulalip Chamber of Commerce, the first tribal/non-tribal chamber partnership in the United States. Currently 18 percent of the Chamber's membership is Indian.

Successful gaming enterprises enabled the Tulalip Tribes to begin their journey from entrenched poverty to economic stability. Quil Ceda Village demonstrates that the use of a special-purpose municipality, with significant investment in infrastructure, can create an environment extremely attractive to investors as well as its tribal citizens. Quil Ceda Village now attracts over eleven thousand visitors daily and offers the Tribes and surrounding communities a promise of economic growth on which their citizens can depend. **/END TEXTBOX**

NATURAL RESOURCES

- Natural resources are an important asset for Native nations. As brought out by recent mega-litigation, in the past, the federal government's management of these resources did not allow Native nations or Native individuals to derive their full economic benefit.
- Tribes' ability to utilize their natural resources is constrained by many factors, including the legacy of past federal policies, a lack of capital, and underdeveloped management capacity in Indian governments and businesses.
- Despite the difficulties, many Native nations are finding new ways to exert control over the development of their natural resources. Tribal operations in energy, agriculture, forestry, and water projects are making important contributions to tribal economies at the same time they support Native cultural values.

For historic, cultural, and economic reasons, natural resources are valuable assets for Native nations. In the past, the development of natural resources was controlled – and often mismanaged – by the BIA. Today, Native nations and individuals are litigating to collect past due returns on their resources, and the Native nations across the country are increasingly asserting management control over tribal resources. With rapidly growing populations and acute needs for generating income, many Native nations see the judicious development of their natural resources as a prime economic opportunity. Tribal efforts in this area are hampered both by jurisdictional complexity and, often, a lack of capital and expertise available to develop and manage large resource projects.[354]

[354] As noted in the Preface and Acknowledgements to this volume, Dr. Harry Nelson, Research Associate at the University of British Columbia's Forest Economics Policy Analysis Research Unit, University of British Columbia, provided initial drafts of the sections of *The State of Native America* report on natural resources and on the environment. This and the following chapter incorporate many of his contributions.

Historical Context

Historically, of course, the Native peoples of North America derived the core of their livelihoods from the natural resources of their environments. At the same time, their economic systems were generally sustainable, as tribes managed their use of resources – from fish to forest – in ways that left intact the vast flora, fauna, minerals, water courses, and other natural resources which so attracted Europeans to the continent. Moreover, Native interactions with and conceptions of the environment and its resources underlay the pre-contact world views and cosmologies of most Native peoples.

European, and then American, desire for access to and control of the natural resources of North America arguably was the driving force behind colonization, annexation, and the subjugation of the Native nations they encountered. Treaty after treaty, and broken treaty after broken treaty, are marked by non-Native interests in acquiring the natural resources of Native lands and waters. And tribes relinquished and had taken untold natural resource wealth. Yet, the expropriation was not complete. Today, many Native nations hold timber, water, agricultural grounds, energy deposits, minerals, scenic wonders and other natural resources in substantial quantities. Their challenge is to put them to use in rebuilding and strengthening their economic and cultural foundations with a commitment to sustaining themselves for generations to come.

Despite the past and present importance of natural resources to tribes, their ability to utilize and/or protect those resources has been severely restricted by federal policies. As part of its trust relationship with Native nations, the federal government took control of most aspects of the development and management of Indian land as it confined tribes to reservations and Indian areas. Historically, the Secretary of the Interior (i.e., the Secretary's designee – the BIA) has negotiated, reviewed and approved all leases and sales of energy, mineral, agricultural, forest, rights-of-way, and water resources held in trust for tribes and individuals. Since the federal government had little accountability to the tribes involved, many resource leases were set far below market value and other potential resources were not developed.

Federal control of natural resources also gave rise to feelings of ill will when tribes disagreed with federal government actions. One scholar points out that the emphasis in federal policy has been on providing access to public resources at low cost, and questions whether under such an arrangement tribes can expect to receive fair compensation for their resources.[355] Alan Balaran, the special master appointed in the *Cobell v. Norton* Indian trust lawsuit, found evidence that the federal government "routinely allowed energy companies to shortchange Indians on royalties from oil, gas, timber, and other leases on Indian land."[356] Indeed, even today many decry the federal government's conflict of interest since the agency that is responsible for protecting the interests of the tribes -- the Department

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[355] Russel Barsh, "Indian Resources and the National Economy: Business Cycles and Policy Cycles," in Lyden and Legters, eds., *Native Americans and Public Policy* (Pittsburgh, PA: University of Pittsburgh Press, 1992), 193-221. See also, Matthew B. Krepps, "Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry" in Stephen Cornell and Joseph P. Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development.* (Los Angeles: University of California, American Indian Studies Center, 1992), 179-203.

[356] John Files, "Indian Fund Investigator Angrily Quits", *The New York Times*, 7 April, 2004, 15.

of the Interior -- is also the agency that promotes non-Native development interests, often on the same land.[357]

Past federal policies with regard to Indian lands have profound implications for natural resource development.[358] Allotment created a complex patchwork of land ownership on reservations, resulting in intense jurisdictional conflicts. The rights to assets – say sub-surface coal deposits – may be held by a tribe and by individuals in the tribe, if they are found on both tribal trust lands and on an individual Indian's fee-simple lands. In other cases, multiple owners hold title to a given parcel under federally-devised Indian inheritance laws that have resulted in fractionation of holdings. In terms of mineral deposits, the tribe may own the rights to underground deposits but none of the land, as is the case for the oil reserves of the Osage in Oklahoma. In other cases, the tribe may hold the land but not the underlying deposits, as is the case in parts of the Southern Ute reservation. In Alaska, a village corporation may own the surface rights, while a regional corporation owns the sub-surface rights. The variety and complexity of land and resource rights arrangements are difficult to exaggerate.

Historical circumstances also gave some Native nations rights to resources beyond their reservation or Alaska village boundaries, creating additional jurisdictional conflict. These additional rights are affirmed through adjudication of land and other claims or through original treaties. Indeed, there are 60 treaties that contain some form of rights to off-reservation resources. Thus, for example, many treaties in the Pacific Northwest specifically guaranteed tribes the right to hunt and fish in their "usual and accustomed places." In other cases, tribes have retained their rights to hunt and fish over lands removed from the initial reservation.[359] Although these rights have been affirmed in numerous court decisions, the affected Native nations have generally needed to negotiate with third parties for access to resources which lie completely or partially outside the reservation.

Natural Resources in Indian Country

The 56 million acres of American Indian reservations in the continental United States, and the 44 million acres of Native-controlled lands in Alaska, give tribes control over a variety of natural resources. These include grazing lands, timber and non-timber forest products, fish and game, coal, oil and gas, hard rock minerals, and water. Although much of the land base held as reservations in the lower forty-eight states is of marginal productive benefit, significant natural resources are under Native control. (Figure 15) The Alaska Native lands are similarly rich in the aggregate.

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[357] See, for example, Valerie Guardia, "Saving Endangered Species on Indian Lands", *Endangered Species Bulletin*, July 1999.

[358] See the "Native Lands" chapter for more discussion on land ownership in Indian Country.

[359] See, for example, *U.S. v. Winans, 198 U.S. 371. 43 (S.Ct. 662* (1905). See also *Menominee Tribe v. United States*, 391 U.S. 404 (S.Ct. 1968).

Figure 15
Natural Resources in Indian Country (excluding Alaska)

• Acres of Grazing Range	44,298,390
• Number of natural lakes and ponds	5,770
• Acres of developed oil, gas, and mineral resources	765,706
• Percentage of United States Coal Reserve	30%
• Percentage of United States uranium deposits	40%
• Percentage of United States oil and natural gas deposits	4%

Source: Patrick Durham, "Snapshot of Indian Country," Native American Fish and Wildlife Society, 18 June 1999.

In terms of area covered, agriculture is the most important use of trust land. Of the 56 million acres of trust land in the continental U.S., approximately 47 million acres are used for grazing and growing crops. More specifically, estimates indicate that Indian agricultural land falls into the categories of rangeland (approximately 34 million acres), dry farmland (approximately 3.3 million acres), irrigable farmland (approximately 1.4 million acres), and potentially irrigable farmland (1.1 million acres).[360]

Indian lands also have significant energy resources. In 2004, Indian oil and gas production generated over $254 million in royalty revenues.[361] At a typical royalty rate of 12.5% of the market value of the resources, this suggests that Indian owned oil and gas resources yielded output worth more than $2 billion. Although existing energy developments are economically important for tribes and those who produce energy resources from tribal holdings, analysts indicate that as-yet-undeveloped prospective resources could be even more valuable. Over 2 million acres of Indian lands have been actively developed for oil, gas, and coal resources, while another 15 million acres hold potential.[362] Approximately 30% of the U.S.'s known coal reserves and 10% of the onshore natural gas deposits are in Indian Country. Estimates vary as to how much undeveloped and undiscovered potential exists, but about 10% to 30% of the U.S. energy resources may be located in tribally-controlled holdings. Opportunities also exist on Indian lands for renewable energy sources. Just under

[360] Communication with Ross Racine, Intertribal Agricultural Council, 14 August, 2000. The difference in estimates and total used for grazing likely reflects forestlands that are also used as grazing areas for livestock but are not considered rangeland.

[361] Robert W. Middleton, "Statement of Dr. Robert W. Middleton, Director, Office of Indian Energy and Economic Development, Office of the Assistant Secretary-Indian Affairs at the Oversight Hearing Before the Committee on Indian Affairs U.S. Senate Concerning Economic Development in Indian Country", 10 May 2006, 9.

[362] Department of the Interior, "Strengthening the Circle: Interior Indian Affairs Highlights 2001-2004." (Washington: Government Printing Office, 2004), 18.

one-third of reservations have high potential for wind energy generation, particularly in the West and parts of the Midwest. Over 100 reservations have high biomass potential.[363]

Forestry is also a significant economic activity on Indian lands. Approximately 18 million acres of reservation land in the U.S. is forest, with almost 10 million acres classified as either commercial timberland or commercial woodland. The timber harvest of the Indian forestry program generated $85.9 million in revenues in 2001, primarily in the Northwest.[364] From 2001-2004, Indian forest lands produced an average of 2.4 billion board-feet a year – enough to build over 120,000 residential homes. This output contributed nearly $290 million in revenues to Native nations and individual Indian landowners.[365]

Though occurring on a smaller scale, other commercial uses of natural resource development also make economic contributions in Indian Country. Mining for resources other than coal, such as uranium and sand/gravel, contributed more than $25 million to Indian nations between 2001 and early 2004.[366] In addition, a number of Native nations have utilized the tribal landscape to provide outdoor-based recreational opportunities, such as the Ski Apache operation run by the Mescalero Apache, the White Mountain Apache's Sunrise Ski Resort, and the rapidly growing number of reservation golf courses across Indian America. The Hualapai Nation in Arizona borders Grand Canyon National Park and the Grand Canyon retains its grandeur as it reaches into the Hualapai reservation. This has provided opportunities for Hualapai to offer scenic rafting trips on the Colorado River, and to develop its Grand Canyon West resort.

Several Indian nations are especially well-known for world class wildlife management that supports some of the most desirable sport hunting and fishing opportunities in North America. Examples include trophy elk hunts selling for tens of thousands of dollars by the White Mountain, Mescalero, and San Carlos Apache, trophy mule deer hunts by the Jicarilla Apache Tribe, and mountain sheep hunts offered by such Native nations as Hualapai and Navajo. There is also tribal interest in other forms of eco-tourism, including nature education excursions and birding, although it is not clear how much economic benefit this may bring. Such business tends to be seasonal in nature and workers in the industry are generally poorly paid. Other fast-growing industries, such as the harvesting of non-timber forest products, are also providing tribes with new economic opportunities.

Native nations' interests in natural resources are not purely economic. In many instances, natural resource holdings are repositories of immeasurable cultural value. Thus, we find Zuni protecting and caring for eagles for purposes and in ways that allow the nation to perpetuate long-standing cultural traditions that undergird Zuni values and culture. The Salish and Kootenai Tribes of the Flathead reservation, the White Mountain Apache, and other Native nations have set aside self-designated wilderness areas to protect wildlife, scenic beauty, vegetation, and associated cultural practices. Nations such as Nez Perce, Salish and Kootenai, the Columbia River tribes, Ojibwe bands in the Great Lakes Region, and Alaska Native entities along the Yukon River play major roles in intergovernmental (federal-state-tribal) species protection and resource protection initiatives.

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[363] Ibid., 19, 20.

[364] Second Indian Forest Management Assessment Team for the Intertribal Timber Council, *An Assessment of Indian Forests and Forest Management in the United States* (December 2003), 5.

[365] Department of the Interior, "Strengthening the Circle", 22.

[366] Ibid.

Tribal Management of Natural Resources

Much of Native nations' recent efforts in natural resource management have focused on exercising governmental powers and directly engaging in project development. These endeavors are often frustrated, however, by barriers that either serve to limit or question tribal authority to regulate resources. Taking advantage of resource development opportunities also requires that Native nations develop the capacity to attract and manage the capital and expertise required for sustaining projects located on the reservations.

Consistent with tribal control of economic development efforts and, more broadly, with the trend towards self-government, Native nations have been taking a more proactive role in natural resource management. Many Native nations have developed long-range land management and resource development plans, and Native nations are increasingly negotiating leases and lease renewals directly with private parties.

Various jurisdictional factors, however, make it problematic for Native nations to exert full governmental control over their natural resources. The mix of Indian and non-Indian land in tribal territories makes it difficult for Native nations to develop integral land use and resource management plans, particularly on heavily checkerboarded reservations. In just one example of these difficulties, federally-recognized tribes have the legal authority to regulate hunting and fishing activities on tribal lands, but cannot regulate these activities by non-Indians on non-Indian land within the reservation boundaries.[367]

Similarly, the potential for double taxation prevents Native nations from maximizing revenue from resource development. Since states have the ability to tax mineral development on Indian land in certain settings, tribes are reluctant to impose additional costs on such projects for fear of discouraging investors. Projects on Indian land are also subject to federal environmental legislation such as the *National Environmental Policy Act*, the *Endangered Species Act*, and the *Clean Air Act* which can introduce uncertainty, added expense, and delays.

Indeed, the expansion of federal environmental legislation is an important challenge facing tribes in their management of natural resources. As just one example, the settlement of reserved water rights claims of the Colorado Ute tribes involved the development of a large irrigation project named Animas-La Plata. Shortly before construction commenced, however, and without meaningful tribal consultation, the USFWS issued an opinion reducing the amount of water the project could use to one-third of the settlement because any more water withdrawn from the river would impact the endangered squawfish.[368]

Compounding the difficulties tribes face in exerting control over the use of their lands, the funding available to tribes for managing natural resources is substantially less than what is needed. Although there is no survey of financial shortfalls for tribal resource management, a 1999 BIA report

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[367] In *Montana v. United States* (1981), the Supreme Court stated that the Crow Tribe could not regulate hunting and fishing by non-members over non-Indian lands within the Crow reservation. The Supreme Court affirmed the right of tribes to regulate hunting and fishing by non-members on tribal lands in *New Mexico v. Mescalero Apache Tribe* (1983).

[368] See Susan Williams and Rachel Montoya-Lewis, "Federal Indian Water Rights: Fundamentals and New Developments in Federal Indian Water Law," *Native Americas*, Summer 2000, 20-27. Congress approved amendments to the settlement act in 2000, but the delay cost millions of dollars.

that analyzed the funds provided under the Tribal Priority Allocation placed the aggregate annual shortfall at approximately $350 million.[369] Natural resource projects are often capital-intensive, putting tribes without access to financing at a significant disadvantage compared to non-Indian commercial interests.

The supervisory, jurisdictional, and financial hurdles surrounding the development of tribal natural resources play out in various ways, depending upon the resource in question. Of the natural resources that contribute most to tribal economies, energy projects are garnering widespread interest, but also raise issues about tribal management capacity. Successful tribal forestry programs underscore the advantage of tribal control over resources, but point to the need for increased financing. The lack of Indian-operated farms making use of tribal agricultural resources highlights the devastating effect of checkerboarded land and restricted access to capital. Finally, the development of tribal water rights in the west holds the prospect of making Native nation management of tribal resources increasingly important to non-tribal citizens.

Energy

The extraction of coal, oil and natural gas for energy has long been an important source of income for certain Native nations. Federal control over development approval and royalty agreements, however, often led to intense tribal dissatisfaction with the benefits of these projects. Several tribes have sued the federal government over low royalty rates set for resource extraction from their lands.[370] Strikingly, tribal energy resources have repeatedly been developed without ensuring that tribal needs were met. In 1999, over 50,000 members of the Navajo Nation had no regular electricity service, while local energy resources, particularly Navajo coal helped supply 20% of Southern California's electricity needs.[371]

Native Nations are increasingly pursuing the control of energy projects as part of their economic and community development plans. The Southern Ute Indian Tribe in Colorado has been a leader in tribal energy development, creating its own Red Willow Production Company in 1992 to capitalize on natural gas drilling on the reservation. Ten years later, the company was valued at $325 million and was a world-leader in extracting coal-bed methane gas deposits. The tribe's energy business success led to the founding of a private equity fund, Southern Ute Growth Fund, with 2005 investments valued at almost $2 billion in energy, real estate, and construction materials.

Native nations are also taking advantage of new opportunities from the deregulation of electricity markets in the US to build or control power plants on tribal lands. For example, a 540-megawatt natural gas-fueled facility opened in 2001 on the Fort Mojave reservation in Arizona. Calpine Corporation, an independent power plant developer and operator which owns the plant, pays rent and water fees to the Tribe. In Oregon, the Confederated Tribes of the Umatilla Indian

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[369] The bulk of this shortfall, over $292 million, was in forestry. Tribal Workgroup on Tribal Needs Assessments, *Final Workgroup Report*, (May 1999), 52. See, also, US Department of Interior, Bureau of Indian Affairs, *Report on Tribal Priority Allocations*, (July 1999).

[370] For example, the Navajo Nation launched a suit over the terms the federal government set and approved when the royalty rate for its long-term coal contract with Peabody Coal was readjusted in 1984. See Clark, Nancy, "The 600 Million Dollar Mine," *RedEarth Magazine*, Spring 2000, 28.

[371] CERT, *National Tribal Energy Vision*, Workshop Report (Denver, CO: Council of Energy Resource Tribes, 1999).

Reservation are constructing the Wánapa Energy Center, a 1,200-megawatt gas-fired power plant on industrial land acquired by the Tribes. The power plant, which will provide the Confederated Tribes with revenue and a share of the electricity generated, is a joint project with the City of Hermiston, Eugene Water and Electric Board, Diamond Generating Corporation (a subsidiary of Mitsubishi Corporation), and the Port of Umatilla.

The Warm Springs Tribe secured an ownership interest in the Pelton and Round Butte dams on its reservation during the 2004 re-licensing of the hydroelectric project, partnering with Portland General Electric. The dams provide two to four times the net revenues of the Tribe's casino earnings, depending on the year.[372] Similarly, the Confederated Salish and Kootenai Tribes now own the dam found on their reservation in Montana, and it has leased the facility to the local power company.

As tribal participation in the energy sector has expanded, the Council of Energy Resource Tribes (CERT) and others have pressured the federal government to streamline federal approval procedures. In 2005, the *Indian Tribal Energy Development and Self-Determination Act* was passed by Congress, establishing a new relationship between the Native nations and the federal government in the field of energy development.[373] The Act gives tribes the option of entering into a "Tribal Energy Resource Agreement" (TERA) with the Secretary of the Interior to self-regulate energy resources on tribal lands. Once its TERA is approved, a tribe is able to undertake certain types of leases, business agreements, and rights-of-way on tribal lands without further federal review. In essence, the TERA constitutes a type of "pre-approval" by the Department of Interior for tribal energy developments. This holds hope of reducing the bureaucratic reviews and delays that are a common by-product of the federal government's discharge of its trust obligation over energy resources. The Act also creates an Office of Indian Energy Policy and Programs within the Department of Energy, provides access to technical capacity building, and makes tribes eligible for Department of Energy grants previously only available to states.

Some critics question whether many tribes have the governing capacity to negotiate fair deals and to manage resources responsibly. For example, the Indigenous Environmental Network expresses concern that many tribes lack the institutional and enforcement mechanisms, as well as the lawyers and scientists, it takes to avoid being exploited by experienced energy developers.[374] A consultant in the field of tribal power generation observes: "The thing that amazes me most is that opportunities are so ripe for tribes. And the tribal capacities at this point do not match with the tribal opportunities."[375]

Federal government actions in the coming years will also determine whether Indian nations can fully realize the promising developments in the *Indian Tribal Energy Development and Self-Determination Act*. Most of the provisions of the bill are dependent on appropriations, and implementing regulations are still evolving. Many also question the intent of provisions in the proposed *National Energy Policy Act* which call for an assessment of energy rights-of-way on Indian

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372 Lynda V. Mapes, "Tribes Powering Up Sources of Revenue", *The Seattle Times*, 15 July 2002, B1.

373 U.S. Public Law 109-58, Title V, 109th cong, 1st sess., 8 August 2005. *Indian Tribal Energy Development and Self-Determination Act* of 2005.

374 April Reese, "New Federal Law Encourages Tapping of Indian Resources", *Land Letter: The Natural Resources Weekly Report*, 1 December 2005.

375 Gerry Vurciaga, as quoted in Nancy Clark, "Perfect Vision," *RedEarth Magazine*, Summer 2000, 17.

land. Observers fear that the study may lead to legislative constraints on Native nations' ability to negotiate compensation for pipeline and transmission rights-of-way on their lands.[376]

Forestry

Early federal law held that tribes were only allowed to cut dead timber on reservation land. Over time, however, through court cases and acts of Congress, Native nations have gained increased control of their forest resources. By 2003, almost 50% of the BIA's forestry appropriation was managed by tribes under self-determination contracts or self-governance compacts. The number of tribes providing management services for their forests rose to 121 in 2001 from 64 in 1991.[377] Still, as part of trust oversight provisions, tribes must seek approval of their timber harvest plans from the Secretary of the Interior (i.e., the BIA).

Tribal forest management is diverse. Some Native nations choose to harvest timber only for ceremonial purposes or to promote forest health. Others run sophisticated logging operations which are an important part of the tribal economy. Menominee Tribal Enterprises, a tribal corporation, for example, operates a well-established and very successful timber operation that employs 300 people to manage 220,000 acres of forest and operate a sawmill. The Confederated Tribes of the Colville Reservation harvest approximately 78 million board-feet of timber a year. The Tribes also own two lumber mills and a power co-generation facility which participates in a federally-funded biomass pilot project. The Tribes have received numerous awards for forest management, including the Forest Stewardship Award of the National Hardwood Lumber Association. As of 2005, three nations -- Confederated Tribes of the Warm Springs Reservation, Fort Bidwell Indian Reservation, Hoopa Valley Tribe -- had forests certified by the Forest Stewardship Council, perhaps the best-known sustainable forest product certification system.

In managing their forests, Native nations face many of the same difficulties confronting managers of non-Indian forestlands. Tribal governments, like state and federal governments, oversee forests characterized by outbreaks of disease and pests, and with the potential for catastrophic wildfires. Native nations with forest resources are attempting to address these problems by restoring forest types that were originally found in their areas, developing comprehensive forest health plans, and thinning fire-prone areas. However, these types of activities are costly and require increased management and technical expertise. Some Native nations are also concerned about the additional burden of meeting certification criteria, which can involve creating detailed harvesting and management plans that are typically extremely data-intensive.

Critically, investments in tribal forests and woodlands are lower than other U.S. forests. A comprehensive 2003 report on Indian forests found that tribal forest management programs received $2.58 per acre in federal funding while National Forests received $9.51 per acre. While tribes received a higher amount of funding per acre for fire management, this money is tied to specific programs and cannot be used for tribally-determined forest management purposes. Overall, an

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[376] Ben Nighthorse Campbell, "Commentary for the Section 1813 Tribal Energy Right-Of-Way Study", Denver, Colorado, 19 April 2006; Tweedie Doe, *Assessing Rights-of-Way on Tribal Lands* (Council of Energy Resource Tribes, 2005), 8.

[377] Expectmore.gov, "Detailed Information on the Bureau of Indian Affairs – Forestry Management Assessment," http://www.whitehouse.gov/OMB/expectmore/detail.10001079.2005.html (December 17, 2006).

additional $119.6 million in federal spending is required to put tribal funding for forest and fire management on par with that of the National Forests. When compared to investments in states and private lands managed for timber production, under-investment in tribal forests is even more pronounced. [378] Tribal forest managers struggle with the burden of unfunded mandates, particularly the lack of funding for the development of management plans that are called for by regulations.[379] As of 2003, only 28 tribes had current Integrated Resource Management Plans.[380]

Even with significant challenges, however, the tribal forestry industry is well-positioned to build upon its success. The market for tribal timber benefits from declining harvests on competing U.S. National Forests, which are reducing the overall U.S. supply. While public consultation requirements and environmental litigation are complicating management decisions on federal and states lands, tribes are accountable primarily to their own citizens for the management of reservation lands. A Yakama Nation forester notes that Indian nations are also more able to adapt to changing forestry conditions since "the people who make the decisions for the land are accountable. It's all local. With the federal lands, policy is made inside the Beltway, 2,000 miles away."[381] Under the *Tribal Forest Protection Act* of 2004, tribes are now able to enter into agreements to manage federal lands adjacent to Indian forests, affirming the capability and achievements of tribal forestry programs.

Agriculture

Although it is the most common use of Indian land and a traditional economic pursuit for numerous Native nations, agriculture has frequently not been a tribally-controlled activity. The most recent Census of Agriculture shows an increase in both the number of Indian operators and the total acreage farmed by them. The number of farms operated by American Indians and Alaska Natives increased by 20% over 1997 to 2002 -- from 12,911 to 15,494 farms.[382] Indian agricultural operations range from large tribal farming enterprises, such as the Oneida Nation Farms, to individual Indian ranchers running small cattle herds in South Dakota.

Much of the agricultural land owned by Native nations and individuals, however, is farmed by non-Indian, non-owners under lease arrangements with Native nations or Native individual land owners. Estimates suggest that approximately 20% of grazing land is leased to non-Indians, while

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[378] Second Indian Forest Management Assessment Team, 8-9.

[379] Ibid.,16.

[380] Ibid., 4.

[381] James Hagengruber, "Tribes Say Forest Programs Flourishing," *The Spokesman-Review*, 26 December 2004, A1.

[382] U.S. Department of Agriculture, National Agricultural Statistics Service, *US Census of Agriculture 2002*. (Washington: Government Printing Office, 2004), Table 47; And U.S. Department of Agriculture, National Agricultural Statistics Service, "Counting Diversity in American Agriculture 2002." Note that these data are for American Indian and Alaska Native single race operators. These figures undercount the number of American Indian and Alaska Native farm operators since they do not include individuals who identify with more than one race nor all farms on reservations. See *U.S. Census of Agriculture 2002*, Appendix B. http://www.nass.usda.gov/Census_of_Agriculture/index.asp (28 June 2006).

70% of Natives' cropland is leased to non-Indians.[383] A General Accounting Office (GAO) study of 16 BIA irrigation projects found that 61% of the trust land was leased, yet only 1% of the non-trust land was leased.[384] Indian landowners typically lack ready access to capital, in part because of the difficulty of using trust land as collateral. This forces many Indian landowners to forgo direct operations in favor of leasing to operators who can mobilize the equipment and seed capital. The orientation of Indian agriculture toward leasing also stems from the difficulty of coordinating multiple-interest owners where land is heavily fractionated. Fractionated owners may find it easier to agree on lease terms than to agree on operational strategies and tactics as long-term joint operators of farms.

While payments from agriculture leases to tribes and Indian individuals are significant, leasing appears to provide diminished economic opportunity relative to self-operation. First, lessors forgo employment opportunities for their family members or tribal members, as the case may be. Second, while lessors shed some commodity market price risk, they also do not participate in associated capital accumulation or in higher returns when risks turn out to be high-paying. Third, there is always the potential that Indian lessors do not receive fair market value for their land. Finally, leased farmland can be expected to generally be less productive than owner-operated land, all other things being equal, since time-limited lessees do not face the full incentives to undertake investments in the long-run productivity of the land.

Not only is Indian agricultural land leased more often, it appears to be disproportionately idled. Again, it is difficult to quantitatively estimate how much of idle land may exist; nonetheless, recent information from several investigations of Indian irrigation projects operated by the BIA conducted by the General Accounting Office indicates substantial idle agricultural land on reservations. In a detailed investigation of the Wapato irrigation project on the Yakama Reservation, for example, the GAO found in 1996 that approximately 20% of the acreage within the irrigation project was not being farmed, and the majority of this idle acreage was owned by American Indians.[385]

According to BIA officials, most non-Indian farm owners farm their lands rather than renting them out, yet trust land is generally not farmed unless it is leased.[386] In certain contexts, however, leasing may be rendered impossible by fractionation. Lease requirements in Oklahoma, for example, require 100% owners' approval before any land can be leased, which is a practical impossibility when

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383 Robert Dismukes, Joy Harwood, and Susan Bentley, *Characteristics and Risk Management Needs of Limited-Resource and Socially Disadvantaged Farmers,* Agriculture Information Bulletin No. 733 (Washington, DC: Commercial Agriculture Division, Economic Research Services, and Risk Management Agency, US Department of Agriculture, April 1997).

384 General Accounting Office, *BIA Should Streamline Its Processes for Estimating Land Rental Values,* Report to the Subcommittee on Interior and Related Agencies, Committee on Appropriations, US Senate, GAO/RCED-99-165 (Washington, DC: US General Accounting Office, June 1999), 33.

385 General Accounting Office, *BIA's Management of the Wapato Irrigation Project,* Report to Congressional Requesters, GAO/RCED-97-124 (Washington, DC: US General Accounting Office, May 1997).

386 GAO, *BIA Should Streamline Its Processes,* 33.

many dozens, scores, and even hundreds of owners are involved. Consequently, one million acres of Indian agricultural land in Oklahoma lie fallow each year.[387]

Compounding the problem of access to capital, the development of Indian agriculture is under-funded by the federal government. To take just one example, starting in the late 1800s, the BIA built a series of irrigation projects on and near reservations. Yet by the year 2000, only 62 of the 160 federally initiated projects were considered operable. This poor performance is largely due to lack of funds. What little monies Congress appropriates for the projects are typically consumed by the needs of just one or two projects.[388]

Department of Agriculture funding fluctuates and is too small to meet the development needs of Indian agriculture. In 2003, the approximately $165 million that the Department of Agriculture spent on programs targeting Native Americans amounted to only 0.0016 percent of the Department's overall budget.[389] In addition, regulations of the USDA make it difficult for Indian operators to access many USDA programs. For example, many USDA programs require a farm operator to have a lease of a minimum length, such as seven years. This requirement is incompatible with some tribal lease terms such as in the Anadarko region where BIA regulations forbid leases longer than three years.[390]

Notwithstanding the aforementioned obstacles, Indian agriculture remains a promising area for economic development. Because so much Indian land is used in agriculture and because such a significant proportion of it is leased, idle or undercapitalized, the economic gains for Indian families, individuals and nations from reform are likely to be substantial. Furthermore, the renewable nature of farming and ranching can subject agriculture to less political resistance than other forms of natural resource use, both from within Indian communities and without.[391]

Water

Water is crucial to the social and economic development of communities and may be one of the most important natural resources controlled by Indian nations, particularly in fast-growing arid regions of the country. In the Western U.S., water rights are determined by prior appropriation, meaning that water rights are considered property rights and are generally allocated according to the order of first continuous use. The older the appropriation, the more senior the right. In federal law, the *Winters* doctrine holds that in establishing reservations, the federal government reserved water rights and that these rights have not vanished even if tribes have not utilized them.[392] Tribes therefore have the most senior right to water in much of the West.

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387 Communication with Ross Racine, 14 August, 2000.

388 Ibid.

389 U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*. (Washington: Government Printing Office, July 2003, 103.

390 Communication with Ross Racine, 14 August, 2000.

391 Ibid.

392 *U.S. v. Winters,* 207 U.S. 564. (S.Ct. 1908).

Until recently, however, the Native nations were unable to derive much economic benefit from their water rights. The precise nature of their rights was undefined and, in many cases, tribes did not have the infrastructure necessary to develop their water resources. Some have also noted that the inherent conflict-of-interest within the Department of Interior – charged with providing water for national economic development objectives as well as protecting tribal rights – favored non-Indian interests.[393]

Water rights have taken on particular importance with the rapid growth of population centers in the West and the depletion of many water resources. In order to plan for long-term growth, users require reasonable certainty surrounding the rights of various water claimants. Quantifying tribal water rights, however, is a time-consuming, expensive and litigious process. Negotiated water settlements and water compacts involving Native nations – which typically can also include federal, state, county, municipal, and private parties – are increasingly being used to resolve questions surrounding tribal water ownership. As of 2004, Congress had approved 18 water rights settlements concerning Indian tribes.[394]

With their control of water resources defined in these agreements, affected Native nations have been able to expand water-intensive business opportunities, such as agriculture and industry, on reservation. In addition, water rights seem to be a very promising new source of revenue if tribal allocations can be marketed to other potential users. Most water settlements specifically allow leasing of at least a portion of the tribal water allocation. Indeed, several Indian nations have already established long-term leases with surrounding communities, such as the Jicarilla Apache Nation's arrangement with the City of Santa Fe, and Ak-Chin's, Fort McDowell's, and Salt River Pima-Maricopa's arrangements with cities in the metropolitan Phoenix area.

Given the growing scarcity of water in certain parts of the country, Indian nations may be able to lease their surplus capacity for sizeable payments. One non-Indian water manager in the Tucson area notes that Native nations are "sitting on a gold mine for the future…they will determine the marketplace."[395] As prices rise, however, Native nations will be faced with increasingly difficult decisions over the management of their water resources. Leasing water to non-Indian cities may be significantly more profitable than providing water to tribal enterprises and homes. Tribal governments will thus need to find an acceptable balance between maximizing the economic potential of their water rights and meeting tribal needs.

The Outlook for Natural Resources on Indian Lands

Market opportunity is clearly a crucial factor in determining the long-term economic viability of tribally-controlled natural resource development. Commodity prices are notoriously volatile. Successful strategies for the management of natural resources will enable Native nations to weather market downturns and capitalize on periods of high prices. Particular potential exists for those nations that are able to realize additional value out of existing resources by moving to higher value-added levels of the production chain or by utilizing better production technologies. Such development,

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[393] Nathan Brooks, *Indian Reserved Water Rights: An Overview* (Washington, DC: Congressional Research Service, 24 January 2005), 3.

[394] Brooks, 15.

[395] Brad Poole, "Liquid Gold for O'odham", *The Tucson Citizen*, 16 June 2005, 1A.

however, requires scarce investment capital and significant efforts in product differentiation and branding.

Tribal initiatives to develop technical and management expertise will enable them to better manage their natural resources development efforts. Indeed, some Native nations with successful natural resource operations are advising other tribes seeking to develop potential projects. For example, the Blackfeet Indian Nation is being advised by the Southern Ute Indian Tribe on opening some of its reservation to gas exploration and production. The experience of numerous Native nations in controlling major business enterprises is a promising trend. Native nations' growing financial and business acumen creates new opportunities for generating much-needed income and managing increasingly sophisticated natural resource development.

It is worth noting, however, that norms about the use of different resources vary significantly between tribes. For example, while many Native nations operate large-scale timber operations, the Taos Pueblo has elected not to harvest its timber resources for commercial purposes. While several tribes in the Southwest operate extremely successful big-game trophy hunting operations marketed to affluent non-Indian hunters, many Native nations do not allowed non-Indians to hunt on their reservation.

Differences often exist, as well, *within* tribes on the management and utilization of tribal natural resources. For some tribes, younger generations advocate for the potential economic development opportunities that come with the commercial exploitation of the resources, while elders believe that the cultural significance of those resources is paramount. Resource development can be shaped by political considerations as tribal leaders are pressured to push for immediate economic gains at the expense of responsible stewardship. Balancing often conflicting viewpoints requires strong governing institutions and community leaders that can resolve differences and produce management plans that reflect community objectives.

As Native nations gain more control over their natural resources, the type and pace of development on Indian land is increasingly determined by community objectives. Tribal land use reflects choices that are matters of culture, economic values, and the operation of community decision-making and management mechanisms. For some Native nations, particularly those located in geographically remote areas, the development of natural resources may represent one of the only means of economic development. For others it represents a promising avenue of diversification from casino revenues. Managed responsibly, the tribally-driven development of natural resources will remain a key element in the building of sustainable Native economies and societies.

TEXTBOX: Oneida Nation Farms and Agriculture Center, Oneida Nation of Wisconsin

In the 18th century, the Oneida Nation of Wisconsin was located in the region that is now New York State. Its fields and orchards were vast and productive. A long history of land loss, forced migration, and division of people during forced migration diminished the Nation's ability to maintain its agricultural traditions; tribal citizens were becoming disconnected to their customary practices and to the land. Radical changes in diet gave rise to health-related issues such as diabetes, heart failure, blood pressure problems, and obesity as tribal citizens began eating more processed, packaged foods in supermarkets, and government commodities.

In the 1970s, the Nation began restoring tribal land holdings, acquiring new lands, and seeking to reestablish cultural practices including agriculture. Starting with a small farm purchased in 1978, the Nation began to expand its land base and grow what would eventually become the Oneida Nations Farms and Agriculture Center (ONFAC)—an economic development venture that also provides for the health and wellbeing of the Oneida Nation's citizens.

Today Oneida Nations Farm consists of 8,000 acres and produces over 4,000 acres of cash crops, including yellow and white corn, soybeans, hay, and wheat. In addition, the operation owns approximately 400 Black Angus steers and 115 buffalo. The ONFAC also manages an Apple Orchard with approximately 4,900 trees and a wide variety of produce such as strawberries, raspberries, blackberries, squash, and pumpkins. Another part of ONFAC is the demonstration farm and cannery, the Tsyunhehkwa, translated as "provides life for us". It focuses on sharing sustainable agriculture practices and promotes the preservation, marketing, and retail of ONFAC products. While the Farm complex operates much like a for-profit enterprise, all profits are returned to the Nation's General Fund and used for the benefit of all tribal citizens. In 2004, the ONFAC generated gross revenues over two million dollars, with around $500,000 in gross profits.

ONFAC provides revenue and economic resources for the Nation by successfully competing with other, similar non-Native farms in the region. More importantly, it also has prioritized the health of future generations by controlling every aspect of the quality of food production, processing, marketing, and distribution in a way that first meets needs of its own people in a sustainable, culturally significant way. By finding ways to merge the goals of land acquisition and sustainable land development in micro-enterprise, ONFAC has been successful in sustaining healthy food production and generating revenue.

People, land, and culture are inextricably linked for tribal nations, and land is holistically important to the wellbeing of tribal citizens. By returning to traditional agricultural practices, the Oneida Nation has once again connected its citizens with tribal land while providing for their health and wellbeing. **/END TEXTBOX**

Meeting the Natural Resource Challenges in Indian Country

Arthur "Butch" Blazer (Mescalero Apache)
New Mexico State Forester
November 2004

I have always stated and continue to believe that the most effective managers of tribal natural resources are the people that grew up on that land – the Indians! For centuries, the respectful understanding of our mother earth has been captured in many ways—in songs, through stories and in prayer. These teachings and knowledge were handed down from parents to children, from family to family and, in some cases, from tribe to tribe, thus securing an important and vital link to the survival of our Indian people.

As a member of the Mescalero Apache Tribe and having grown up on my reservation in south-central New Mexico, I was fortunate to have experienced many of the learning opportunities mentioned above. During my early years, my family and many of the tribal elders instilled within me a great respect for the land and all that was within it. This eventually led to my obtaining a degree in natural resources management and returning to the reservation to do the work that I loved to do.

Having returned to the reservation upon the attainment of my college degree, I was armed with the traditional knowledge of my people and the academic knowledge of the non-Indian world. With this in hand, I began to tackle the natural resources issues that were facing my tribe. Little did I realize the resistance to change that I would face from my tribal leaders. To illustrate this point, let me share with you a true story regarding a "Hunting and Fishing Regulations" issue on my reservation.

Up through the mid-1970, there were very few regulations regarding the harvesting of game on the reservation. The tribal members, who were charged with the care of the game animals on the reservation, had expressed concerns for several years about the declining deer population. They assumed that the problem centered on the growing population of the tribe, but didn't realize that the issue was much deeper than that. What was happening at Mescalero, and, as I found out later, around much of Indian Country, was the erosion of the ability to pass on the traditional wisdom of our elders. What our leaders had not realized was that our Indian people, like much of America, had been caught up in achieving the "American Dream." In many cases, both parents and grandparents were now working outside the home, providing for their families the necessities and luxuries of the times: cars, trucks, televisions, etc. I'm not saying that this was bad; what I'm saying is that there's only so much time in the day. If that time is spent working to earn the types of things mentioned above, there is little time to spend in teaching and passing down to the children the important traditional values of the elders. Needless to say, this issue was successfully conveyed to tribal leadership, game regulations were passed, and the deer populations on the reservation were stabilized. It was my first, on-the-job realization of how difficult change can be.

But what remains today are the continued challenges in the acquisition of traditional knowledge by our people. It is very encouraging to see the gains being made to preserve and enhance those values within the tribe through the development of cultural enrichment programs, but it is definitely going to be a continued struggle for years to come. So, what is the answer? How do we, as Indian people, meet the challenges before us and position ourselves to take full advantage of the tremendous opportunities that lie ahead? How do we "raise the bar" in Indian Country that will not only ensure the survival of our people, but will allow all to prosper and thrive?

The answer lies in education. The attainment and application of formal education, coupled with the traditional knowledge of our people is a dynamite combination! The attainment of formal education is, by no means, a new concept. Many of our tribes figured out, years ago, the value of formal education, but they were limited in their abilities to enhance the educational opportunities of their people (i.e. distance, funding, lack of political support, etc.) Regardless of these limitations, the numbers of our formally educated tribal members has grown and continues to grow, with many of these individuals returning to the reservation to help deal with the many issues facing their people. Herein lies the next challenge: the application of that attained knowledge.

Many of our college graduates returning to the reservation are not always met with the best of conditions. Reductions in federal funding have had negative impacts on the federally and tribally contracted jobs that, traditionally, have been available. The lack of business infrastructure development on many of our reservations has kept us from providing on-reservation employment. One exception to this has been the development of the Indian gaming industry. For some, this industry has created employment opportunities and has allowed for the business infrastructure development mentioned above. Unfortunately, successful gaming tribes in this country only represent a small percentage of the total. It is imperative that that we, as Indian people, figure out how to prevent losing our successfully educated young people to off-reservation job opportunities by creating the opportunities that will keep them on reservation to do the work that is needed.

Over the years, in looking at those tribes that have been able to successfully meet the challenges that we have been discussing, the one common link that appears over and over again is the presence of effective leadership. The application of both traditional and formal education, through effective leadership, has resulted time and time again with stories of success. I was fortunate to have grown up under the leadership of the late Wendell Chino. President Chino led the Mescalero Apache people for over forty years. Wendell was one of the first tribal members to obtain a college degree and was brought up in a very traditional sense. During his tenure, our tribe experienced tremendous growth. Homes were built, businesses were developed and successfully operated, and wise investments were made. Wendell became a spokesman at the national level, advocating strongly on behalf of Indian people. He was a true example of what a well educated and experienced tribal leader can do in “raising the bar” in Indian Country.

So, how can this tribal leadership concept be enhanced and supported? Many times, upon returning to the reservation, our young graduates become frustrated with the challenges set before them. They have not been given the opportunity to develop and enhance their interpersonal skills and, most importantly, develop their knowledge base of tribal government operations. Out of total frustration, they make the decision to become involved in tribal politics and end up running for office, hoping to place themselves in a position to affect the changes they feel are needed. Although admirable, without the proper skills, they are, in many cases, unable to affect the change that they are after. It is essential that our young, potential leaders be given the opportunity to develop these leadership skills.

The creation of a tribal executive leadership academy has been a dream of mine for years. Providing the opportunity for our tribal managers to gain the knowledge and understanding of what it takes to be a successful and productive tribal leader would pay huge dividends in the Indian Country. Such an academy could be structured in such a way as to instill within our young potential tribal executives what it takes to a successful decision maker. Included could be mentorship programs, specialized executive management training, effective on-the-job details, attendance of specialized guest lectures, and so on. These types of opportunities would result in the development of strong

tribal executives that, in turn, would provide the leadership that it is going to take to successfully move our tribes into the future.

I will continue to pursue my dream and, hopefully, with the help of people like you, I will one day be successful.

ENVIRONMENT

- Tribes face a multitude of environmental risks and damages that are the result of federal policy, mismanagement, and the operation of market and other forces upon tribes.
- Tribes must manage their environmental problems in a complex multi-jurisdictional policy context with federal, state, and local partners. In some areas, tribal authority is strong, relatively well-funded and well-defined, while in other areas tribal authority is weak, under-funded, and ill-defined.
- The federal government and tribes are increasingly working together to address environmental concerns.
- Despite the challenges presented by history and jurisdictional complexity, tribes are building the internal capacities to develop, implement, monitor, and enforce their own environmental standards in much the same way states do, yet on Indian terms.

Native nations face a host of environmental issues unique to their own contexts. They variously cope with non-point source water pollution, decaying waste handling facilities, noxious exotic species, wildlife habitat loss, mine tailings, military waste, and even Superfund sites. Beyond the specific challenges tribes face individually, they confront a number of common challenges. Native nations struggle with the legacy of federal mismanagement of environmental problems and confront uneven legal treatment of tribal powers across different environmental issues. Until recently, Indian nations had little authority or capacity to deal with environmental problems. At the same time, the Native nations share a deeply held perception that environmental problems are not of their making, but "grew up around them.” during the prior eras in which they controlled so little of their own affairs and resources.

The Historic Context

A variety of federal policies have contributed to the environmental challenges tribes currently face. The *Allotment Act* resulted in dispossession, checkerboarding, and fractionation that today hobbles tribal efforts to establish coherent environmental jurisdiction.[396] Historically, federal policies demonstrated little regard for traditional Indian uses of and relationships to the land, and have thereby resulted in activities that have permanently altered tribal landscapes and traditional practices. For example, the creation of the National Park system in the late nineteenth century led to the exclusion, or in some cases the removal, of Indian tribes from their traditional hunting and gathering areas and pushed them toward unfamiliar and, ultimately, destructive land uses.[397]

Similarly, the division of land into individual allotments under the *Allotment Act* encouraged the onset of European-style agriculture into Indian Country with deleterious consequences. Over-cropping and the lack of crop rotation and fertilization in the early 1900s dramatically reduced land productivity in the American West. Tens of thousands of acres were made sterile due to improper irrigation that brought alkali to the surface of thin western soils.[398] One scholar notes that:

> …under the direction of agency farmers, intensive farming replaced shifting cultivation, row agriculture replaced variable mound planting, monoculture replaced intercropping, and leveled fields replaced flood plane farming. In the Northeast, Great Lakes, and Northwest, forests gave way to Indian and settler fields. In Oklahoma and on the High Plains, Indians and agents cleared, plowed, and planted large areas in a succession of monoculture crops. Well drilling, irrigation, dry land farming techniques, and unbounded optimism helped government officials and Indians expand cultivation into the arid zones of the basin and range country. Fences, pest and weed controls, and introduced cultigens flattened once-diverse field biotas. Where Indians would not take up farming, whites bought or leased the fields.[399]

Domesticated European livestock further depleted Indian lands. Native animal species such as bison were unable to compete with the livestock and were eventually pushed off reservation lands. Poor federal management of introduced animals led to overgrazing problems. During the latter half of the 1930s, federal officials were forced to institute drastic livestock reduction programs on many reservations to stop the degradation that was occurring due to overgrazing. Notwithstanding subsequent federal restoration efforts, some ravaged areas such as on the Navajo and Tohono O'Odham reservations have never recovered. Today, Native nations are faced with tough decisions about how best to use the land in light of historic high rates of erosion, depletion, soil degradation, and introduction of invasive noxious plant species.[400]

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396 See the "Native Lands" chapter.

397 Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (New York: Oxford University Press, 1999).

398 David Rich Lewis, "Native Americans and the Environment: A Survey of Twentieth-Century Issues," *American Indian Quarterly* 19, no. 3 (Summer 1995).

399 Ibid.

400 Ibid.

More recently, sources of environmental degradation confronted on or near Indian lands have been shifting from agricultural practices to deposition of contemporary pollutants and waste. Some reservations are located in areas that have experienced high levels of chemical contamination and related environmental degradation. In many cases, neighboring governments have failed to control upstream water pollution or have agreed to allow heavily polluting industries to site near Indian lands without consulting tribes. The effects have sometimes been dire. In 1979, a United Nuclear uranium mill tailings pond gave way spilling 100 million gallons of sludge into the Rio Puerco River, which traverses the Navajo Nation. Navajos are still not able to use the water.[401]

In another very well-known and extensively documented case, the St. Regis (Akwesasne) Mohawk Tribe of New York abuts one major Superfund site (a former General Motors facility) and is immediately downriver from two others (former Alcoa Aluminum facilities). These sites are notorious as sources of contamination from polychlorinated biphenyls (PCBs), and extensive research into health effects (including thyroid function, social adjustment, and school functioning) is underway at Akwesasne Mohawk. Researchers report that the Nation has followed tribal and state advisories issued in the 1980s and 1990s concerning, particularly, local fish consumption and there has been some improvement in indicators such as PCB presence in mothers' breast milk. However, the same researchers note that use of fishery resources is intimately connected to Mohawk identity, and, demonstrably, "being asked to avoid activities that reaffirm Mohawk identity is not a solution…but a bigger problem in and of itself."[402]

Across the country, but particularly in the Arctic, Department of Defense operations spanning a quarter century have left tribes and Alaska Villages to contend with scores of toxic dumps. In fact, the Louden Tribal Council of Galena, Alaska created the first tribally-owned corporation in the State, the Yukaana Development Corporation (YDC), to lead a successful effort to clean up chemical contamination in the Louden community caused by a local military base. Having tackled the problem of military residue at home, YDC then branched out to perform similar work around the State of Alaska and, in the process, built a successful business and provided training and employment opportunities to over 100 tribal and community members.[403]

The Environmental State of Indian Country

The range of environmental issues in Indian Country is as broad for the Native nations as it is for any other class of governments in the United States. Obtaining a comprehensive picture of the environmental health of tribal lands is difficult since no one organization is responsible for gathering information and precise data are lacking. An idea of the scope of the challenges, however, can be gleaned from a number of sources which have explored specific tribal environmental needs.

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401 Ibid.

402 Lawrence M. Schell, Julia Ravenscroft, Maxine Cole, Agnes Jacobs, Joan Newman, and Akwesasne Task force on the Environment, "Health disparities and Toxicant Exposure of Akwesasne Mohawk Young Adults: A Partnership Approach to Research," *Environmental Health Perspectives* 113 (2005), 1827 (citing M. Arquette, M. Cole, K. Cook, B. LaFrance, M. Peters, J. Ransom, et al., "Holistic risk-based environmental decision making: A Native perspective," Environmental Health Perspectives 110 (2002), 259-64.

403 The Harvard Project on American Indian Economic Development, "Yukaana Development Corporation," *Tribal Governance Success Stories: Honoring Nations 2000* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000).

In the mid-1980s, several tribal organizations sounded the alarm about poor environmental conditions on tribal lands. The Council of Energy Resource Tribes (CERT) surveyed 25 reservations and discovered 65 hazardous waste disposal sites within their small sample. Around the same time, Americans for Indian Opportunity (AIO) conducted a survey of environmental needs in Indian Country. Of the forty-eight Native nations that responded, many cited water quality as their main concern, with seventeen nations reporting violations of U.S. Environmental Protection Agency (EPA) drinking water standards and nine reporting outbreaks of waterborne disease. The report notes that a majority of the Indian nations who responded are dependent on groundwater as their drinking water source.

One of the basic governmental functions performed by American Indian tribal governments is the provision of water and sewer service. According to the EPA, Native nations own approximately 750 community water systems serving over 500,000 people. In 1998, the Agency determined that seven percent of public water systems serving tribal populations did not comply with federal drinking water standards.[404] A study by University of Arkansas scientists found that the water quality of reservation drinking-water wells in Nebraska compared poorly to the regional average, and in many cases the level of contaminants greatly exceeded national water quality standards.[405] The Indian Health Service reports that, as of FY 2004, Indian Country's inventory of drinking water and sewage treatment facility deficiencies totaled more than 2,885 projects and carried a price tag of $1.86 billion for unmet needs.[406]

Many Indian nations are struggling to solve substantial solid waste problems in their communities. A 1998 Report to Congress by the IHS found that there were over 1,100 open dumpsites on Indian lands that were not in compliance with federal regulations. Of these, 142 were considered "high threat" sites. The IHS estimated that the cost to clean or upgrade all of these sites would reach $126 million dollars.[407] Tribes also face the problem of illegal dumping, which can be a particular problem where waste transfer stations are few and far between and tipping fees may discourage proper disposal by poor citizens. On the Navajo reservation, the Navajo Environmental Protection Agency uncovered 465 illegal dumps in the course of an investigation in 1999. The Agency estimates that it will cost over $30 million to clean them up.[408]

As suggested by the case of PCB contamination affecting Akwesasne Mohawk, another indicator of severe environmental concerns on some Indian lands comes from the federal Superfund program. The federal EPA administers the Superfund program, which addresses the clean-up of what are considered to be the most seriously contaminated sites in the United States. Of the 1,212 sites that are listed on the National Priority List, nine are on or immediately adjacent to Indian lands. The EPA is working with an additional 21 Native nations who are indirectly being affected by Superfund sites

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404 United States Environmental Protection Agency, Office of Water, *Drinking Water Quality in Indian Country: Protecting Your Sources* (Washington: Government Printing Office, April 2000) http://www.epa.gov/safewater/protect/pdfs/fs_swp_tribalsourcewater.pdf (28 June 2006).

405 "Researchers Find Low Water Quality on Nebraska Reservations," University of Arkansas Daily Headlines, 4 April 2000.

406 U.S. Department of Health and Human Services, Indian Health Service, "The Sanitation Facilities Construction Program of the Indian Health Service," Annual Report 2004, (Washington: Government Printing Office), 25.

407 U.S. Department of Health and Human Services, Indian Health Service, "Status of Open Dumps on Indian Lands," (Washington: Government Printing Office, December 1998).

408 Michelle Rushlo, "Navajo Rangers Combat Illegal Dumps," *The Tucson Citizen*, 25 October 1999, 2C.

not located on their reservations.[409] The United States Department of Defense also maintains a list of Formerly Used Defense Sites (FUDS) on tribal lands, many of which are contaminated with hazardous substances such as dioxins and PCBs. About 100 Indian nations have reported over 200 FUDS on their reservations. Two-thirds of these sites are in the State of Alaska.[410]

Challenges of Tribal Environmental Protection

The Native nations throughout the U.S. find themselves confronting environmental problems which are often of someone else's making with limited financial and human resources to address them. Because many tribes are struggling just to meet the basic needs of their citizens, environmental protection may be given a lower priority than other issues. Insufficient technical resources and inadequate managerial experience have also hampered enforcement efforts for Native nations that do have regulations in place.

Funding for environmental programs remains a top concern. Notwithstanding recent increases in federal funding, tribes often continue to operate with inadequate funding in specific areas of environmental policy. For instance, the Tribal Solid Waste Interagency Workgroup was established in 1999 to bring open dumps into environmental compliance or to close them.[411] As of 2005, of the $126 million that the Indian Health Service estimates it would take to clean up open dumps on reservations (see above), only somewhat more than $10 million had been spent on clean-up.[412] In another example, the National Tribal Environmental Council Superfund Working Group notes with concern that funding for the Tribal Superfund Program decreased 66% from 2000 to 2003, while the non-tribal superfund dollar amount remained roughly constant. The Working Group concludes that this funding can only be seen as "token support."[413]

Native nations are also confronted with uncertainty about their ability to legislate and enforce environmental laws and regulations. As noted, tribal government jurisdiction over environmental issues is made complicated by land status and uneven consideration in federal law, and in areas where there is significant "checkerboarding," tribal jurisdiction over non-Indian activities and lands is unclear.[414] The legal record has led some observers to remark that every attempt to exercise tribal jurisdiction over environmental protection may need to be evaluated in the context of the specific situation.[415] This is a recipe for litigation, delay, and hefty expenses.

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409 Lauren Wenzel, "Environmental Risk in Indian Country." (Washington: U.S. Environmental Protection Agency, 1992).

410 Patrick Durham, "Snapshot of Indian Country," Native American Fish and Wildlife Society (18 June 1999).

411 The funds are being sourced from a cooperative arrangement of several different federal agencies. See Barbara Bad Wound, "Waste Cleanup Planned for Indian Country," *Indian Country Today*, 23 August, 2000.

412 National Congress of American Indians, "FY 2006 Tribal Budget Request." http://www.ncai.org/ncai/advocacy/otherissue/docs/fy2006_budget-request.pdf (28 June 2006).

413 See National Tribal Environmental Council, "A Tribal Vision for Environmentalists." http://www.ntec.org/Programs/Superfund/current_topics.htm (28 June 2006).

414 See the "Native Lands" chapter.

415 Lynn H. Slade and Walter E. Stern, "Environmental Regulations on Indian Lands: A Question of Jurisdiction", American Bar Association (ABAnet). http://www.abanet.org/_genpractice/f95regs.html (1 June 2006).

Tribal-Federal Cooperation in Addressing Current Problems

Both the federal government and Native nations are working to overcome the legacy of past policies and to address the pressing environmental challenges on reservations. In various ways, the federal EPA has institutionalized recognition of tribal sovereignty and acknowledged the importance and value of involving tribes in all stages of the development and implementation of national environmental policy. In part, the EPA's approach stems from its commitment to environmental justice, as expressed in the following definition:

> Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[416]

The pursuit of environmental justice in Indian Country is rendered complex by tribes' status as sovereigns within the American constitutional system. Environmental justice in Indian Country reasonably entails the "fair treatment and meaningful involvement" of Indian *governments* in policymaking, and indeed, the EPA has been at the forefront of embracing the government-to-government relationship the federal government has with the Native nations. In addition, environmental justice in Indian Country entails addressing the legacy of federal policies and mismanagement that leave many Indian communities bearing a "disproportionate share of the negative environmental consequences" of industrial, municipal, and commercial operations. Thus, to the extent that Indian communities suffer disproportionate environmental harms, they are appropriately concerned that environmental *injustice* needs to be redressed by federal and other policy.

Integral to Native nations' drives to both assert their jurisdiction and protect the environments of their communities has been the growth of "treatment as state" status under many aspects of federal environmental law and regulation. Amendments added to the federal *Clean Water Act* (CWA) in 1987 authorize the Environmental Protection Agency to transfer regulatory powers to Indian tribal governments upon demonstration of regulatory capacity by a Native nation. Such authorization had previously only been transferable to states. The CWA amendments enable qualifying Indian nations to regulate discharge permitting and dredging permitting, and to set water quality standards. Importantly, tribal water quality standards adopted under the CWA can affect upstream, off-reservation polluters.[417]

The "treatment as state" precedent set under the CWA has now become routine, expanding tribal governments' reach into regulation of air quality, drinking water safety, toxic waste, and Superfund matters. By 2003, the EPA had authorized more than 200 "treatment as state"

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[416] U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, "Environmental Justice." http://www.epa.gov/compliance/environmentaljustice/index.html (28 June 2006).

[417] Slade and Stern, "Environmental Regulations".

arrangements with Native nations.[418] In fact, the basic principle now extends well beyond environmental regulation, with "treatment as state" policy accepted at federal departments such as Energy, Defense, and the National Park Service, and applying to programs ranging from Temporary Assistance for Needy Families to certain elements of homeland security.

The ability of Indian governments to assert powers to take over programs and policies otherwise the province of state and federal authorities has sparked innovation by tribes. The Pueblo of Sandia in New Mexico, for example, applied for "treatment as state" in 1988 and gained U.S. Environmental Protection Agency (EPA) approval in 1990. The Pueblo then set to work and, in 1991, became the first Indian nation in the United State to file its water quality standards under the Clean Water Act, with the specific intention of protecting traditional uses of surface waters of the Rio Grande. In 1993, the EPA approved the Pueblo's standards.

"Treatment as state" policies bring increased certainty to the power of Indian nations to determine specific environmental protection measures. The sovereignty is constrained, however. In order to qualify for "treatment as state" status, however, Indian governments need to meet the EPA's requirements and to implement programs designed by the EPA. Nevertheless, the increased willingness of the federal government to recognize the rights of tribes as sovereign nations has greatly contributed to the development of environmental programs throughout Indian Country. Indian nations still must contend with numerous legislative and court threats to their sovereign rights, but both the federal government and the Native nations are working to overcome these impediments..

The effort of the federal government and Indian nations to work more closely together has resulted not only in a shift of practice, but a drastic change in mindset. The federal government has realized the importance and value of involving Indian nations in all stages of policy development and implementation, and the tribes are recognizing the value of combining traditional knowledge with western-based science. And while the overall need for federal resources remains great, funding for at least some environmental programs has improved substantially in the last decade.

Over the past decade, the EPA has responded to Native concerns both by creating institutional structures that incorporate those concerns into policy-making, and by substantially increasing funding for a number of tribal programs. Funding for tribal programs in the EPA increased from $37 million in 1994 to $180 million in 2000 – all the more striking given downward budget trends for Indian programs in other areas.[419] Among other initiatives, the Agency has created the American Indian Environmental Office to work directly with tribes on EPA issues.[420] The National Environmental Justice Advisory Council (NEJAC), an advisory committee to the EPA, has created an Indigenous Peoples Subcommittee. In addition to its role advising NEJAC, the subcommittee plays a role in advocating for tribal involvement in federal environmental decision-making. In 2000, the subcommittee developed a *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision-Making.* The *Guide* was developed to address concerns raised about the lack of effective consultation

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[418] University of Washington Office of News and Information, "Indian tribes gained power by exploiting ambiguities in federal policies," 14 August, 2004. http://www.uwnews.org/article. asp?articleID=5270 (28 June 2006).

[419] Communication with Rodges Ankrah of the American Indian Environmental Office, May 2001.

[420] The American Indian Environmental Office website can be accessed at http://www.epa.gov/indian/ (26 June 2006).

and collaboration by all federal agencies with tribes.[421] The impact of the *Guide* on other federal agencies has yet to be determined, but it is an important step in the education of federal agencies on how best to work with Native nations and highlights the importance of tribal input into federal agency policies.

Steps are also being taken to address some of the environmental contamination problems on Indian reservations. The U.S. Department of Defense (DOD) is required by law to identify and remediate those sites on Indian lands where it DOD has caused environmental damage.[422] In 2000, six federal agencies – the Environmental Protection Agency, the Bureau of Indian Affairs, the U.S. Department of Agriculture Rural Utilities Service, the Department of Defense, the Indian Health Service, and the Department of Housing and Urban Development – signed an agreement to assist Indian tribes and Alaska Native villages improve or close solid waste dumps on their lands.

Following President Clinton's *Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments* in April 1994, a series of specific policies for dealing with Indian nations was established within the respective agencies of the federal government.[423] The President also signed a subsequent Executive Order to address environmental and health concerns for low-income and minority communities that made explicit provisions for American Indians and Alaska Natives.[424] Federal land agencies such as the National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service have created tribal liaison posts to deal with tribes and their issues more directly.

In 1997, then Secretary of the Interior, Bruce Babbitt signed a Secretarial Order[425] addressing the application of the *Endangered Species Act* on tribal lands. Drawing from an agreement signed in 1994 between the White Mountain Apache Tribe of Arizona and the United States Fish and Wildlife Service,[426] tribes and the federal government were able to strike a compromise aimed at allowing Native nations to take greater managerial control over administration of the ESA. All parties involved recognized the common interest in maintaining healthy ecosystems, while acknowledging the unique status of Indian lands and the federal interest in protecting endangered species.[427] The Secretarial

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421 National Environmental Justice Advisory Council, "Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision-Making." http://www.epa.gov/compliance/environmentaljustice/nejac/index.html (28 June 2006).

422 U.S. Public Law 103-335. 103rd Cong., 2nd sess., 30 September 2004. *Department of Defense Appropriations Act of 1995.*

423 This was supplanted by Executive Order 13084 in 1998. See the "Tribal-Federal Relations" chapter.

424 William J. Clinton, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Executive Order 12898, 11 February 1994. The specific provisions for American Indians and Alaska Natives are found in section 6-606 of the Order.

425 Bruce Babbitt, "American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act," Secretarial Order 3206, 5 June, 1997.

426 Prof. Joseph P. Kalt of the Harvard Project on American Indian Economic Development and one of the principal authors of this book served as principal mediator in the dispute.

427 More information on the process and compromises made during the formation of this agreement can be found in Charles F. Wilkinson, "Indian Tribal Rights-Endangerment Species Secretarial Order," *Washington Law Review* (October 1997).

Order is illustrative of both the growing sophistication of tribal leaders and the willingness of Indian nations and the federal government to recognize a common concern and draw upon tribal expertise to proactively address a contentious issue involving tribal sovereignty.

Native nations, for their part, are building their own bases of expertise, enhancing their regulatory capacities, and addressing complex multi-jurisdictional pollution problems in cooperation with off-reservation governments. A large number of tribal governments have established their own departments and regulatory agencies responsible for environmental protection and management on their lands. For example, in 1995 the Navajo Nation Council passed the resolution creating the Navajo Nation Environmental Protection Agency. The Agency is tasked with implementing and enforcing the Nation's environmental laws in accordance with Diné values, as well as with fostering public awareness and cooperation.[428]

Showing similar initiative, as discussed above, the St. Regis (Akwesasne) Mohawk Tribe has been plagued with the environmental problems associated with Superfund sites upstream on the St. Lawrence River. On its part, the St. Regis proactively stepped in to build the institutional capacity to develop and implement an aggressive program to press for clean-up of contaminated sites. In the words of one staff member from the St. Regis' Mohawk Tribe's Environment Division:

> With initiation of the air and water quality programs, the Tribe's Environment Division steam-rolled itself into a position so that no one would be able to ignore it. Finally, government agencies and industries alike would have to deal with the Tribe on a government-to-government basis. As meetings progressed between the Tribe and EPA, it became clearer in which direction the Tribe was going. Jim Ransom, the first Director of the Environment Division said, 'We are looking to create our own water and air quality standards. And we want a water-monitoring system in the St. Lawrence River, as it is our drinking source.' Soon after, the Tribe was busy formulating its own standards. These standards known as ARARS, or Applicable or Relevant and Appropriate Standards, were developed for the specific needs of the reservation. By 1990, the Division had gained much ground in the fight to clean up the water, soil and air of the Mohawk Territory. The community was awakened to the real risks associated with toxic waste and the deteriorating effect it was having on the culture as a whole. Eventually self-reliant, the Division was able to do its own environmental sampling, monitoring and assessing. It also developed a multimedia program that helped assess and examine the community's environmental needs and concerns. [429]

Federal courts have generally upheld tribal environmental quality standards, particularly with regards to water. In a precedent-setting case, the Isleta Pueblo in New Mexico, located on the Rio Grande, set water quality standards that are more stringent than those set by the State of New Mexico. These were approved under "treatment as state" policies by the EPA. The City of Albuquerque, located 13 miles upstream from the Pueblo, held a permit for a wastewater treatment facility that did not meet the Isleta standards. The City objected to the Pueblo's actions and sued the EPA, arguing that the Pueblo did not have the authority to set more stringent standards than the state. The 10th

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[428] See www.navajo.org and www.epa.gov/owm/mab/indian/navajo.htm.

[429] Lawrence Swamp, "Tribe Driven by Necessity: The St. Regis Mohawk Tribe Develops Environmental Expertise," *Winds of Change* 11, no. 3 (Summer 1996). http://www.srmtenv.org/index.php?spec=driven. (27 May 2006)

Circuit Court of Appeal in 1997 rejected the City's arguments and upheld the Pueblo's right to set such standards when EPA issues the permits that cities such as Albuquerque must have.

In another precedent-setting case, the 9th Circuit Court of Appeals in Montana in 1998 upheld the right of the Confederated Salish and Kootenai Tribes to set water quality standards that non-members living on private lands within the reservation would have to meet. The result of this and similar rulings is to provide Indian governments with capacities to reach beyond the citizens and beyond their national boundaries in their efforts to protect their nations' environments.

Indian nations are also finding innovative ways to increase their capacities to deal with environmental issues. The White Mountain Apache are mentoring youth for future careers in environmental management. The tribe instituted a sales tax on fishing and hunting permits, and a portion of the tax revenue is used to provide scholarships to youth that are pursuing environmental degrees in college. In a similar vein, the Pueblo of Sandia in New Mexico involves students all the way down to elementary school levels in learning to test water quality in support of the Pueblo's noted Water Quality Standards Program.

Off-reservation developments under the primary jurisdiction of other governments are also facing more scrutiny and intervention from Indian governments. Native nations are becoming increasingly sophisticated in their demands for decision making input and vocal in their opposition to off- reservation developments that portend negative impacts on Indian lands. For instance, tribes located near the federal Waste Isolation Pilot Project site in Carlsbad, New Mexico are concerned about the shipment of radioactive waste across 14 tribal homelands and the potential environmental impact of a spill. Their concerns are further compounded by outstanding questions of responsibility in the case of an accident.[430]

Similarly, the Penobscot and Passamaquoddy tribes have been fighting to keep federal oversight of water quality in Maine, arguing that Maine is incapable of regulating heavily polluting paper companies because of their important role in the state's economy. The paper mills, along with several other key industries are responsible for polluting the rivers that the tribes rely on for fish and other culturally significant products. Both Penobscot and Passamaquoddy face proportionally higher rates of cancer compared to the rest of Maine, a state that already has among the highest cancer rates in the United States.[431]

In many cases, Indian governments are partnering with surrounding communities to address environmental issues. Several tribes in Southern California are located in high pollution, "non-attainment" areas under the federal *Clear Air Act*.[432] In those areas, tribes are required to purchase permits if they hope to attract industry that could potentially emit emissions. With pressure from Indian governments, some regions are incorporating local Native nations into partnerships for

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[430] "Environment, Safety, and Risk Associates Corporation, Survey Results of Environmental Representatives of all New Mexico Native American Pueblos and Reservations on the Risks Associated with the Waste Isolation Pilot Plant (WIPP) and its Transuranic Nuclear Waste Transportation Routes", Report to the Office of the Governor, State of Nevada, April 2003.

[431] Castine Verrill (Maine Cancer Registry), *Cancer Incidence & Mortality in Maine 1997-1998*, Maine Department of Health and Human Services (undated), http://www.maine.gov/dhhs/bohdcfh/mcr/reports/MCRAnnualReport97_98.doc, December 17, 2006.

[432] The Clean Air Act requires firms that create new emissions in a non-attainment area to purchase sufficient credits from other firms in the same area.

undertaking promoting air quality management. The Western Regional Air Partnership (WRAP), which addresses visibility concerns for the Colorado Plateau, is involving tribes in the planning process and attempting to ensure that they receive allocations of air permits as such a policy is pursued.[433]

Some Indian nations are even finding economic opportunities in dealing with their environmental concerns. Faced with a costly upgrade of their landfill, the Eastern Band of Cherokee, instead of treating higher standards as an obstacle, decided to capitalize on the situation. The Cherokee closed their existing landfill, which would have been prohibitively expensive to upgrade, and created a waste transfer station. This enterprise handles solid waste not only from the reservation, but also from surrounding non-Indian communities. The result is that the Band not only reaps environmental benefits from proper waste disposal, but also generates employment and attracts new revenues.

Other examples of Native nations pursing the economic opportunities of waste disposal include the Skull Valley Goshutes, who are currently pursuing a nuclear waste storage facility on tribal land in Utah; and the Campo Band of Kumeyaay Indians in California, who have explored plans to build a 400-acre commercial landfill.[434] Both efforts have been hampered by lawsuits brought in non-tribal courts, including action by several environmental groups. In the case of Campo, although still in the planning and development stages, the prospective waste site has generated funds sufficient to start several tribal environmental management programs.[435]

The Future of Tribal Environmental Management

Much remains to be done by Indian governments as they pursue environmental protection of their lands and resources. For instance, in 2000 the EPA estimated that over 340 tribes were clearly eligible for federal funding to help develop their own environmental programs to confront groundwater pollution, but only 14 had developed their own drinking water quality standards.[436] Even fewer have the institutional capacity to enforce standards once they are developed. Many tribes will spend the coming years developing appropriate policies, as well as the institutional capacity, to manage comprehensive environmental regimes.

As Indian nations focus on diversifying their economies, questions about the impact of tribal policies on the environment will become more prominent. As an example, attempts to site landfills and hazardous waste facilities, including nuclear waste dumps, on Indian land have created controversies across Native America. Some applaud the potential economic opportunity these ventures offer and the exercise of sovereignty that they imply, while others decry the prospective

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433 As of mid-2006, participating tribes included: Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall. Western Regional Air Partnership http://www.wrapair.org (28 June 2006).

434 The Skull Valley Goshutes lack significant natural resources and reside in a remote location that offers few economic opportunities. Information about the proposed facility can be found at "The Skull Valley Goshutes." http://www.skullvalleygoshutes.org/ (28 June 2006).

435 Chet Barfield, "Campo tribe plans third try for landfill," *San Diego Union-Tribune*, 15 December, 2004.

436 Felicia Marcus, Region IX EPA Administrator, "Remarks," National Tribal Environmental Conference, May 2000.

long-term environmental consequences of these plans. Developing a community consensus around environmental management issues will need to be a priority if orderly and environmentally sound development is to occur. Indian nations will also increasingly have to work with other jurisdictions to address concerns and mediate the n- and off-reservation impacts of tribes' activities.

At the same time, Native nations see it as vital that off-reservation governments continue to recognize the inherent value of incorporating tribes and their knowledge of their own environments in decisions that reach across jurisdictions. In conjunction with the efforts of federal agencies to work more closely with Indian communities, the noted shift towards more sophisticated and integrated land-use planning that is currently underway will likely continue. For example, the Clean Water Action Plan, an initiative by the EPA, is addressing water quality issues by restoring watershed habitat.[437] This is a significant shift in emphasis from the *Clean Water Act*, which has tended to focus on large scale fixed discharges such as factories and municipal sewage treatment plants. Moreover, this integrated approach parallels the traditional perspective of tribes who have long believed in "…seeing wholes, recognizing patterns and interrelationships, and learning how to structure human actions accordingly."[438] Ecosystem management does not stop at reservation borders, and Native nations and their environmental managers are playing an increasingly critical role in the success of multi-jurisdictional environmental remediation projects. The potential success of these integrated approaches relies on the continued involvement of tribes at all stages of development, implementation, and evaluation.

The protection of the environment in harmony with tribal values and in support of tribal lifestyles is poised to become one of the defining issues of the upcoming years. As Indian nations exert more decision-making power, they are incurring greater responsibility on environmental issues. Since ecosystems are by their very nature interconnected, caring for the environment, more than any other policy area, requires productive partnerships with neighboring communities and other jurisdictions. By approaching these relations with well-thought out tribal policies, regulations and administrative capacity, Native nations will ensure that their environmental objectives are met and continue to make a meaningful contribution to environmental protection within and beyond Indian Country.

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[437] Catherine Wandermoer, "Remarks on the Clean Water Action Plan," before the 4th Annual Intertribal Environmental Council, Tulsa, Oklahoma (1 June 1999).

[438] Columbia River Inter-Tribal Fish Commission, "A Tribal Tradition of Sound Fisheries Management, Wy-Kan-Ush-Mi Wa-Kish-Wit, Spirit of the Salmon: The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes," (1995), Vol. I, 2-4.

Textbox: Water Quality Standards, Environmental Department, Pueblo of Sandia

The Rio Grande River has always played a crucial role in daily life at the Pueblo of Sandia. For centuries, members relied on the river for agricultural, recreational, and traditional uses. Over the past several decades, however, rapid industrial growth and lax state and federal environmental enforcement have resulted in the River's deterioration – making it one of the most polluted and endangered rivers in the United States. During the 1970s and 1980s, the appearance of fish mutations, foul smells, discolored water and the erosion of nearby native vegetation forced tribal members to cease using the River entirely.

At that time, the Pueblo had no mechanisms for protecting the quality of its surface water. An opportunity for change arose in 1987 when the United States Congress passed amendments to the Clean Water Act allowing American Indian nations to apply for "treatment as state" status. This status allows Indian nations to promulgate their own water quality standards. The Pueblo of Sandia applied in 1988 and gained U.S. Environmental Protection Agency (EPA) approval in 1990. In 1991, the Pueblo became the first tribe in the United State to apply for water quality standards under the Clean Water Act with the specific intention of protecting traditional uses of surface waters. In 1993, the EPA approved the Pueblo's standards.

Sandia's water quality standards, which are more stringent than those of the State of New Mexico, prescribe acceptable levels of contaminants and establish existing uses of the reservation that must be protected. The Pueblo's Water Quality Control Officer monitors the water quality for conformance to the standards, advises prospective dischargers of Sandia's discharge requirements, and coordinates pollution control activities with other local, state, and federal agencies.

The Water Quality Standards Program has been successful on several fronts. Program-generated data regarding river pollution levels have given the Pueblo a voice at the table in discussions regarding local water matters and have served as a counterweight to pollution claims made by local dischargers. After years of silence, the Program also has led to increased communication and information-sharing between the Pueblo and the State of New Mexico.

The Program requires that Sandia's water quality standards be incorporated into all future permits EPA grants to upstream dischargers. The new permits also will require dischargers to report the nature of their effluent to the Pueblo and provide special notification of accidental contamination. Sandia's "treatment as state" status and the Water Quality Standards Program that emerged from it are important steps in the nation's autonomy over its waters. By seizing the opportunity offered by a change in federal law, the Pueblo has been able to reverse its long-standing powerlessness in water quality issues. The Water Quality Standards Program has given the Pueblo of Sandia standing to defend its health, economy, and traditional practices – a position the Pueblo has used to benefit the environment, current members and non-members, and the generations to come. **/END TEXTBOX**

Preservation of Life: Guiding Principles of Indian Tribal Governments

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Indian tribal governments have survived for thousands of years by adjusting to the political and natural climates surrounding them. In this sense, Indian tribal governments are some of the most long-standing and durable institutions in the history of the world.

Despite weathering repeated efforts by the United States military since the inception of this country to destroy traditional Indian governments and erase Indian culture from the American landscape, Indian tribal governments have endured, and have emerged as important players in the American federal system of government, with a unique status and a powerful voice. In large part, this unique status under federal law matches the unique obligations and responsibilities Indian tribal governments embrace to protect the well-being of their tribal members, and the well-being of the planet for generations to come.

As we move forward into the next millennium, it is important to keep in mind the guiding principles that have established Indian tribal governments in their current form. By understanding these principles, it is possible to see the motivation that drives tribal government activities as they endure the current political, social, and economic climate, act to carry out their duties in accordance with their traditional obligations and responsibilities to protect the cultural identity and well-being of Indian people, and to protect and preserve the environment that provides life for us all.

On Indian reservations, as elsewhere, protection of the environment and other resource requires sound governance. The tribal, federal and state governments must work together and respect each other to protect the environment and natural resources throughout the United States.

1. The American Federal System Includes Three Types of Governments – Not Two.

Though often ignored in basic teachings about the American federal system of government, Indian tribal governments hold a place in the American system that is similar to the status of state governments. Indian tribal governments are sovereign entities that generally are subject to federal law, but independent with regard to the basic governance of communities within Indian Reservations. Rather than thinking of American federalism as a relationship between State and federal governments, then, American federalism is best understood as a three-part system consisting of the federal government, the State governments, and the Indian tribal governments.

Federal law long has affirmed for Indian tribal governments within the American federal system, and has repeatedly made clear that tribal governments are not, generally speaking, subject to State laws. Opponents however simply wish to ignore this sovereign status when criticizing the need of Indian tribal governments to assess taxes to fund governmental services, or when criticizing the need of Indian tribal governments to assert police powers within reservation communities in which non-Indians live. These concerns threaten the stability and safety of Indian communities when, for example, non-Indian businesses accept the benefits of governmental services yet refuse to pay their fair share of tribal taxes, or when non-Indian abusers challenge the authority of tribal governments to hold them responsible for domestic violence against tribal members within Indian reservations.

Unfortunately, federal law has not fully adjusted to close these loopholes that are all too often celebrated and exploited by non-Indians who seek to avoid the dictates of basic social responsibility. It is hard to imagine how it could make sense for the state of Arizona to be forbidden from prosecuting domestic violence offenders who come in from out of State to commit their crimes. Similarly, it is preposterous to think that a company could do business in California, yet flatly refuse to pay taxes to the State of California.

These types of unethical actions by non-Indians are routinely tolerated under legal loopholes in Indian Country. The federal government has yet to pass reasonable laws allowing tribes to police fully all residents of their reservation communities to prevent local crimes, and to clarify the ability of tribal governments to assess taxes on the activities of non-Indian businesses within reservation communities to fund governmental services. Until such actions are taken, non-Indian criminals and non-Indian businesses without a sense of social responsibility will continue to be a danger and a net drain on reservation communities.

An important challenge in the coming millennium will be to close these loopholes with federal legislation that provides basic justice to Indian people by allowing Indian tribal governments to prevent crime and fully fund necessary governmental services through taxation of on-reservation activities.

2. Tribal Governments Exist To Protect Their Cultural and Natural Environments For Generations To Come.

Tribal governments are different from State governments to the extent that tribal governments are not representative of a mere coincidental collection of citizens who simply happen to live in the same geographic area, as do citizens of each State. Rather, tribal communities are defined by generations upon generations of cultural, political, and religious traditions, and social relationships that are the unique foundation of each Indian tribe. By understanding this basis for tribal citizenship, it is easier to understand why tribal governments are so concerned about the well-being and safety of their tribal members, and the protection of the environment for all life on Earth.

The survival of traditional Indian ways of life requires that the natural environment be respected and preserved. Such survival also requires that tribal members enjoy the basic ability to live freely within their religious and cultural traditions, with economic opportunities necessary to thrive and provide food, shelter, and financial stability to their families. This is no small task, given the genocidal and termination policies in American history that have sought to destroy Indian communities, steal Indian land, and wipe-out Indian religious life. Tribal governments are responsible for facilitating the recovery of Indian life from these tragedies that have occurred over the past several hundred years.

To protect tribal life, governments must protect and preserve the natural environment by exercising regulatory authority over tribal lands. Indian tribal governments share a philosophy of extraordinary respect for natural resources that often translates into unique and precedent-setting environmental policies.

With regard to water, for example, Indian tribal governments typically value water for different reasons, and in different ways, than state governments value water. Throughout the West, State regulation of water use is consumption-oriented, as most States require that one must consume the maximum amount of their water or risk losing some of that right to water under State law. The theory behind the policy is that it would be a waste of the water resource if that resource was not consumed. A strong bias exists, therefore, against leaving water in the rivers.

By contrast, Indian tribal governments value leaving water in the rivers to protect and preserve the health of each river, and all that lives within and around the river environment. For this reason, tribal water rights codes typically honor and respect the right of all to apply for in-stream flow permits to allow their water rights to remain in the river. This tribal philosophy of preservation - rather than consumption - is lighting the way for the State and federal governments to recognize what they ought to be doing to preserve and protect the natural environment through creative means so that generations into the future will be able to enjoy the earth's natural resources. The philosophy of Indian tribal governments with regard to natural resources, as the original shepherds of the lands of the United States and beyond, takes root in the fundamental reality that preservation of these precious resources gives strength to all life.

Tribal governments are responsible for protecting and preserving all that is necessary for Indian people and others to thrive as the Creator intends. No State government has such a daunting challenge in front of it. As we move forward into the next millennium, tribal governments should be understood as carrying out this important duty, and should have the support and encouragement under federal law and policy that is necessary to help facilitate the recovery of Indian life throughout the United States.

3. Tribal Governments Need Revenue To Carry Out Governmental Functions, Providing Utilities, Infrastructure, Social Services, and Economic Opportunity to Tribal Members and Others Living in Reservation Communities.

Much critical talk exists today regarding Indian tribes as casino developers, or proponents of business activities that make money from cigarette or other sales, as if there is something wrong with tribal business activity that generates profit from such activities. The truth is that Indian tribal governments have been pushed into such arenas by economic and legal challenges to collecting governmental revenue in the same ways that such revenue is collected by federal, State, and local governments.

While other governments simply collect taxes to raise the money that funds governmental services, Indian tribal governments face significant challenges in this regard. First, military action against Indian people has created Indian communities with tremendous economic needs and few financial resources. For this reason, Indian tribal governments typically are faced with a tax base that is much weaker than the tax base drawn on by State and federal governments. In addition, the problems posed by a fundamentally weak tax base are exacerbated by overly aggressive State taxation policies that seek to implement double taxation within Indian Country.

Federal law now allows states to collect certain taxes on non-Indians on Indian reservations. But, the non-Indians typically comprise the bulk of the reservations economy so states leave little room for tribal taxation. Finally, as mentioned above, non-Indian businesses often seek to exploit loopholes in federal law that allow them to take the benefit of governmental services in Indian communities without paying their fair share of taxes to Indian tribal governments.

Reservation economies originally took root in deep poverty caused by military action against Indian people in the first one hundred years of United States history. In addition to killing thousands upon thousands of innocent Indian people in order to take their land, the United States military also took their traditional economies away and forced the survivors of the attempted genocide to abandon traditional Indian economies through which Indian people had flourished for thousands of years.

When forced to move away from the successful economies that Indian people had established throughout what is now known as the United States, the rich life full of health and prosperity for Indian people disappeared. Instead, Indian people were imprisoned on Indian reservations and forced to pursue regimented agriculture which was the only model allowed by non-Indians. The collective efforts and communal living that provided Indian communities with generations of prosperity and good health were replaced by the individualism and profit motive that form the basis of American capitalism.

This attempted destruction of successful Indian economies based on traditional Indian ways of life has left a legacy of poverty and under-development on Indian Reservations. U.S. law and policy mandates Indian economic recovery. Because financial resources are so scarce within most Indian reservations, there is not the same kind of individual property ownership or personal income that can provide a healthy tax base, as exists for other governments that do not function within the reality of reservation histories and reservation economies. For this reason, the taxation of especially the more substantial non-Indian business activities on Indian reservations is an important tool to fund the services needed to grow Indian economies. Business leaders wishing to conduct business within Indian Country should embrace basic principles of social responsibility and pay their fair share of taxes to Indian tribal governments.

Because the businesses challenging tribal taxation typically have more resources than the tribal government being challenged, such businesses maintain an unfair economic advantage that makes litigation an attractive alternative, from a purely financial point of view. Such businesses should re-think their strategies in this regard, and consider making a commitment to health and prosperity of the very Indian communities that make their businesses possible and profitable.

At the same time, States must recognize that it is very difficult for reservation economies to grow in a healthy way if a State insists on trying to assert its own tax on business activities within reservation boundaries. While some States have begun to recognize the importance of respecting a tribe's need to be the lone taxing entity within Reservation economies, other States continue to insist on the pursuit of "double taxation" within Indian reservations by aggressively legislating and litigating all possible loopholes to allow various types of State taxation on non-Indian activity within the territorial boundaries of Indian tribal governments.

This pursuit of double taxation shows a basic disrespect by some State governments regarding the needs of Indian tribal governments to gather resources to fund the economic and cultural recovery of Reservation communities. Similarly, many non-Indian businesses routinely challenge tribal taxation, even when such businesses pay similar taxes to State and local governments. Because federal Indian law is constantly developing in the courts, non-Indian businesses that lack a sense of basic social responsibility find that it is more cost effective to force tribes into costly litigation rather than simply paying the taxes due.

As we move forward into the next millennium, it is important to remember that Indian communities are still in the process of recovery from the economic tragedies visited upon them by military action and attempted genocide. Tribal governments have begun to lift their communities out of such poverty and economic desperation, but this is an enormous task that will take many generations to accomplish. Both State governments and non-Indian businesses should act as responsible partners in this recovery, and should refrain from pursuing tax strategies that prevent Indian tribal governments from generating and collecting the governmental revenue necessary to fund this recovery.

And, as noted earlier the federal government also should act to close these loopholes through legislation that permanently solves these problems by preventing double taxation on Indian reservations and clarifying the right of Indian tribal governments to tax non-Indian business activity within reservation boundaries. The exploitation of these loopholes by State governments and non-Indian businesses are a large part of the reason why some Indian tribal governments have decided to pursue alternative sources of revenue from business activities.

The creative approaches to generating governmental revenue through business activities such as casino development and cigarette (or other) sales are part of the strong spirit of survival and endurance that has been the hallmark of Indian tribal governments throughout history. Indian tribal governments will survive through ever-changing political, cultural, and economic environments because they have a sacred mission, and will carry out their duties to protect Indian life and the natural environment even in the face of tremendous challenge, by any means necessary.

SECTION 3: SOCIAL DEVELOPMENT

EDUCATION

- Although there have been significant improvements in Indian education over the past two decades, Indian children suffer generally poor access to quality education and relatively low rates of educational performance.
- With the passage of the *Indian Self-Determination and Education Assistance Act* in 1975 and subsequent legislative efforts, many Indian communities have gained greater control over the primary and secondary education of their children. The result is Native-driven innovation in education, leading to more culturally appropriate learning environments and notable cases of educational improvement.
- At the post-secondary level, Native American college enrollment has been rising rapidly – but started from a position of deep deficit. Rates of college enrollment for American Indian and Alaska Natives continue to lag behind those of other racial and ethnic groups.
- 34 tribal colleges and universities are spread across Indian Country. These two- and four-year institutions are progressively addressing the demand for practical, improved educational opportunities in often geographically isolated areas, while maintaining cultural relevance in the higher education process.

From virtually the beginning of formal education efforts directed at Native Americans by European settlers and eventually the United States, the aim was the assimilation of Indian children into Anglo-American society. The Charter of the oldest college in the United States (Harvard University) made it a corporation dedicated to "the education of the English and Indian Youth of this Country in knowledge; and godliness"[439] "Godliness", of course, refers to Christianization. Until the last quarter of the twentieth century, Indian education policy in the U.S. was quite consistently aimed

[439] Samuel Eliot Morison, *The Development of Harvard University Since the Inauguration of President Eliot, 1869-1929*, (Cambridge, MA.: Harvard University Press, 1930), 6.

at acculturation, to be achieved by forcing Native people to relinquish their languages, their cultures, their customs, and even their families.

As in so many other dimensions, the histories of oppression, disempowerment, and poverty have left their legacies in Native education attainment and performance. Discouraging drop-out rates, classroom performance, and post-secondary graduation rates stand out as indicators today of these legacies. But progress is being made. The advent of policies of self-determination yielded a quick rise in contracting for school control by Native nations, as well as other pushes by these nations to get themselves into positions of decision making as it affects everything from funding to classroom teaching techniques. The results are encouraging: attainment is rising and Native control over Native education is engaging Indian families and communities in the educational process and reestablishing vital traditions and values in the education of Indian youth.

From Degradation to Empowerment

In many respects, U.S. Indian education policy has mirrored the larger trends of the federal government's relationship with American Indians and Alaska Natives. Until the dawn of the contemporary era of self-determination, federal policy with respect to Native control of education waxed and waned somewhat with political winds, but was dominated by the theme of non-Native control and decision making. In fact, the case can be made that, while much of the history of federal Indian policy has been dominated by usurpation of Native powers and by attempts at termination of Indian nationhood, federal Indian education policy sought the eradication of Indian identity, itself.

During the early years of the United States, Indian education was largely left to Christian religious organizations and missions. The churches and denominations of those times saw no impropriety in notions of educating the "savage", Christianizing the "heathen", and rescuing the "godless" by educating Indians in the ways of Anglo-American religion, culture, technology and lifeways. Following the Civil War, church responsibility for educating the Indigenous people of the Untied States became official policy. President Grant's "Peace Policy" sought to solve the "Indian problem" (consisting, at its core, of the inconvenient fact for the United States that Indian nations often stood in the path of demands for western expansion). At the center of the "Peace Policy" was formalization and, in 1871, federal funding of Methodist, Lutheran, Baptist, Catholic and other churches' roles as primary providers of education intended to pacify Native peoples by removing their Indianness and Americanizing them.[440]

By the late 1870s, support for education provided by church missionaries to the reservations began to give way to a new movement of centralized, federally-controlled boarding schools. The model for what would grow to a system of 25 schools was the Carlisle Indian School, founded by General Richard H. Pratt in 1879. Pratt set the agenda for the next 50 years of federally funded and controlled Indian schools:

> We do not separate the people of each nationality into schools exclusively for themselves… [But] we provide that the youth of all of our people go into all schools. We shall not succeed in Americanizing the Indian until we work on him

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[440] Francis P. Prucha, *The Great Father: The United States and the American Indians*, (Lincoln: University of Nebraska Press, 1984).

> exactly the same way… By means of the public school, Native Americans would take their place in the mainstream of American culture.[441]

Indian children attending these schools were often forcibly removed from their homes and then prevented from speaking their language, practicing their customs, and wearing traditional dress. The goal was to "convert" them to Western mores and practices.[442] The ideology underlying this approach to Americanization of the Indian population is illustrated by innumerable statements that bespeak of such overbearing racism, condescension and paternalism as to make them seem today to be made up for despicable shock value. As just one illustration, the federal Board of Indian Commissioners in 1880 set out the rationale of official federal policy that would prevail until into at least the 1930s:

> As a savage, we cannot tolerate him any more than as a half-civilized parasite, wanderer or vagabond. The only alternative left is to fit him by education for civilized life. The Indian, though a simple child of nature with mental facilities dwarfed and shriveled, while groping his way for generations in the darkness of barbarism, already sees the importance of education...[443]

Epitomized by the *Indian Reorganization Act* of 1934, the 1930s finally saw a shift away from federal policies of forced cultural assimilation. Instead, allotment was ended and tribal governments were constitutionalized. In education, emphasis shifted away from off-reservation boarding schools (although many continued to exist) and toward a willingness to recognize that Native culture and community continuity could play positive roles in the education of Native youth. This precipitated expansion of Bureau of Indian Affairs day schools on reservations, although a number of reservations continued to have boarding schools for students from multiple tribes.[444] Professed attention to the value of Native culture and curriculum bore little fruit, however. A survey of BIA schools in the Southwestern U.S. found no courses in tribal culture as late as 1969. Only 11.5% of the teachers in these schools were Indian.[445] *The National Study of American Indian Education* reported in 1970 that the curricula of federal reservation schools typically mimicked that of the state and municipal public schools around them.[446]

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441 Quoted in Eugene Provenzo, Jr. and Gary N. McCloskey, "Catholic and Federal Indian Education in the Late 19th Century: Opposed Colonial Models," *Journal of American Indian Education* 21, no. 1 (1981), 1. See this article more generally for the discussion here.

442 On the boarding school experience, see, for example, Clarke Historical Library, Central Michigan University, "Federal Education Policy & Off-Reservation Schools, 1870-1933," http://clarke.cmich.edu/indian/treatyeducation.htm (28 June 2006).

443 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, Abridged ed. (Lincoln: University of Nebraska Press, 1986), 194. Cited in Gayle Olson-Raymer, "Boarding Schools: Tools of Forced Assimilation, 1870 to 1934." http://www.humboldt.edu/~go1/kellogg/boardingschools.html(28 June 2006).

444 Edward Spicer, "The Sources of American Indian Art (Part Two)," *Journal of American Indian Education* 1, no. 3 (1962).

445 Clyde Thomas Gray, "Cultural Pluralism Increases in Southwestern Schools," *Journal of American Indian Education* 15, no. 1, (1975).

446 R.J. Havighurst, *The National Study of American Indian Education* (Chicago: University of Chicago Press, 1970).

The National Study called for greater local – i.e., Native – control over reservation schools and curricula. By the late 1960s, there was ample research demonstrating that American Indian children are as intelligent and educable as other American children. Yet, a survey of the research literature as it existed into the early 1970s found discouraging results in terms of Indian educational attainment. For example, "[o]n average, Indian students enter[ed] ninth grade achieving at slightly more than one grade level below the national average and complet[ed] twelfth grade nearly three years below the national average."[447] By measures of these types, however, Indian youth did somewhat better than youth of other ethnic minorities.[448] Various analyses put the dropout rate of Indian youth at 50 to 100 percent higher than the overall U.S. rate.[449]

The drive for self-determination that began in the 1960s and culminated in sea-change policies in the 1970s has altered the face and the fate of Indian education. Indeed, Indian educators were among the first to push for self-determination and, thus, cultural renewal. With the new attention to Indian identity, civil rights, and self-determination, 53.8% the Southwestern BIA schools that in 1969 had no course offerings in Native culture reported having one or more such courses by 1974.[450]

Importantly, Administration of the Navajo Nation's Rough Rock School, which the Navajos took out of BIA control in the early 1960s, was the first "contract" arrangement between the U.S. and a tribal government. It laid the groundwork for further contracting of educational and other services previously provided by the federal government, and ultimately led to the landmark of the self-determination policy – the 1975 *Indian Self-Determination and Education Assistance Act* (PL 93-638). The result is that Indian education can now be a culturally relevant tool of human capital accumulation, rather than a force of cultural assimilation and tribal termination.

More than one hundred Indian nations have created their own Tribal Education Departments (TEDs).[451] Reflecting the maturation of Indian governments, the departments arm Indian nations with the capacity to assess and direct the direction of their respective communities' education policy and investments. They serve as the administrative backbones of contracted and compacted reservation schools, allow a Native nation to interface with public and other schools attended by their students, create and use relevant data and research, and administer student support programs and financial aid. By taking over such functions from tribal councils, they permit specialization by a nation's educational professionals and free up tribal councils to focus on their tasks as legislatures. In the process, they tend to depoliticize and stabilize everything from student financial aid to teacher hiring.

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[447] Carolyn Croft, "The First American: Last in Education," *Journal of American Indian Education* 16, no. 2 (1977).

[448] Madison Coombs, "The Indian Student is Not Low Man on the Totem Pole," *Journal of American Indian Education* 9, no. 3 (1970).

[449] Ibid.

[450] Croft, *The First American.*

[451] National Congress of American Indians, *Indian Country FY 2007 Budget Request* (Washington, DC: February 2, 2006), 9. http://www.ncai.org/ncai/resource/data/docs/legislative/Tribal_Budget_Final.pdf (June 2006).

The State of Educational Attainment

The combination of the extremely troubled history of Indian education, chronic under-funding, and persistent poverty not surprisingly has historically left Indian Country with substantial deficits in education attainment relative to the general U.S. population. At the same time, today, the "glass half full/half empty" story that is emerging with respect to economic development is being retold in the educational arena.

As shown in Figure 16, over the decade of the 1990s, adult American Indians over the age of 25 living both in Indian Country and beyond achieved steady and, in some cases, quite impressive progress at all levels of educational attainment. Importantly, attainment of at least a college associate's degree and attainment of a high school degree (or equivalent) rose across the board. Native adults stuck with less than a ninth grade education declined, with this indicator of educational deficits showing particularly strong improvement for Indians living in Indian Country. Interestingly, a comparison of gaming and non-gaming tribes shows that the improvements in high-school attainment and post-secondary attainment both came predominantly from educational achievement among adult citizens of gaming tribes.[452]

Figure 16 indicates that improvements in educational attainment in the Native adult population allowed the share of adult Indians over the age of 25 holding a high school degree (or equivalent) to surpass the comparable figure for the adult U.S. population as a whole by 2000. The relative figures for the share of the adult Native population holding less than a ninth grade education and, especially, the share holding at least a 2-year college degree in 2000 are not as encouraging. There is a notable paucity of post-secondary educated Native citizens in Indian Country. Only slightly more than 12% of adult American Indians residing on reservations have higher education degrees, compared to almost 30% of the U.S. adult population overall. The deficit manifests itself negatively as Indian nations set about building their own economies, governments and social institutions; many have great difficulty finding qualified administrative, managerial and other skilled citizens to fill the positions they are creating.

[452] Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2005), 40-43.

Figure 16
Indian Educational Status
Percent of persons older than 25

	1990	2000*	% points change	AIAN v. All U.S. in 2000 % points
College Attainment**				
AIAN on Reservations	9.2%	12.1%	+2.9	-18.6
AIAN in All Indian Areas	10.9%	13.5%	+2.6	-17.2
AIAN U.S.-wide	15.7%	18.0%	+2.3	-12.7
All Races U.S.-wide	26.5%	30.7%	+4.2	--
High School Attainment or Equivalency Only				
AIAN on Reservations	29.4%	31.3%	+1.9	+2.7
AIAN in All Indian Areas	30.3%	33.0%	+2.7	+4.4
AIAN U.S.-wide	29.1%	29.2%	+0.1	+0.6
All Races U.S.-wide	30.0%	28.6%	-1.4	--
Less than 9th Grade Education				
AIAN on Reservations	21.7%	13.9%	-7.8	+6.4
AIAN in All Indian Areas	19.9%	12.7%	-7.2	+5.2
AIAN U.S.-wide	14.0%	11.1%	-2.9	+3.6
All Races U.S.-wide	10.4%	7.5%	-2.9	--

* For 2000 data "AIAN" here represents self-identified American Indians and Alaska Natives alone (i.e., not in combination with any other racial category). The 1990 Census did not allow multi-race identification.
** Associate's degree or higher.
Source: U.S. Census Bureau, Census 1990 Summary Tape File 3; U.S. Census Bureau, Census 2000 Summary File 3.

The near-term future of educational attainment in Indian Country, of course, will depend on the educational progress of younger Native Americans that are currently coming up through the primary, secondary and post-secondary educational systems, as well as the quality of those systems in meeting the schooling needs of Native students. Let us now examine those educational systems.

Primary and Secondary Education

In 2006, approximately 47,700 primary and secondary school students were enrolled in the 184 BIA-funded schools. One hundred and twenty-two of these schools were controlled by Indian nations under contracts or grants with the federal government. The 122 tribally-operated/BIA-funded and 62 BIA-operated/BIA-funded tribal schools are spread over 63 reservations in 23 states.[453]

Enrollment is BIA schools, whether BIA-run or contracted, is now dwarfed by the number of students attending non-BIA and non-tribal public schools. Research released in 2005 indicates that,

[453] James E. Cason, Associate Deputy Secretary, Department of the Interior, Hearings on Indian Education, U.S. Senate Committee on Indian Affairs, 26 May 2006.

as of 2002, there were approximately 624,000 American Indian and Alaska Natives enrolled in non-BIA funded or operated (typically state and municipal) public primary and secondary schools. The preponderance of state and municipal public school education over BIA-operated/BIA-funded and BIA-funded/tribally-operated schooling reflects many factors, including accidents of political history affecting where BIA schools were built, the fact that many Indian nations have been too small and/or poor to support on-reservation schools (compelling resident children to go off-reservation to attend nearby public schools), and histories of migration of families away from reservations.

By most measures, relative to other minorities and to the general U.S. school-age population, Indian school children are at or near the greatest risks of receiving poor education and underperforming at the elementary and secondary levels.[454] This is not surprising given that Indian youth are so likely to suffer from the harrowing psychological, sociological, and physical consequences of persistent poverty.[455] Combining data on Native Americans living in Indian Country (i.e., on-reservation or in an Indian Statistical Ares), the 2005 report of the National Center for Education Statistics, *Status and Trends in the Education of American Indians and Alaska Native*, finds:

- The percentage of Native 16- to 24-year-olds who were high school dropouts was 15.0%, compared to 9.9% for the U.S. as a whole. Only Hispanic Americans had a higher drop-out rate (at 23.5%).[456]
- Among eighth grade students, American Indian students have the highest rates of absenteeism when compared to any other group.[457]
- American Indians have the highest rates of, and are disproportionately placed in, special education and learning disabled programs.[458]
- Among eighth graders, only Hispanic students had lower rates of access to a computer at home.[459]
- At eighth grade, American Indian, Black American, and Hispanic American students' reading skills are on approximately the same level, but lag considerably behind those of Whites and Asian/Pacific Islanders.[460]

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[454] See, for example, U.S. Department of Education, *Indian Nations At Risk: An Educational Strategy for Action* (Washington, DC: U.S. Department of Education, 1991).

[455] See the "Social Development" section, especially the chapters on "Health," "Criminal Justice," and "Housing."

[456] Catherine Freeman and Mary Ann Fox, "Status and Trends in the Education of American Indians and Alaska Natives," National Center for Education Statistics (August 2005), 42. Note the authors warn that dropout figures must be interpreted with caution.

[457] Ibid., 44.

[458] Ibid., 34.

[459] Ibid., 86.

[460] Ibid., 50.

These outcomes not only reflect families and communities that frequently are dealing with poverty and its symptoms, but they also reflect a poor education environment. In their public schools Native children typically form a minority, and the problems they confront often are exacerbated by immersion into non-Native culture and the imposition of non-Native values. Those schools with higher percentages of Native American students have been found over the years to be more likely to cancel classes, to hire less qualified teachers, to suffer from low student expectations, and to lack parent and school board involvement.[461]

The effects of popular culture, in general, and television, in particular, complicate the struggle of Indian children trying to balance the retention of cultural heritage against the absorption of non-Indian values that are perceived to be required for "success" in the larger community. According to one noted Indian education scholar: "One cannot discuss Native communities without mentioning television… [t]he impact of [which] has dramatically modified the values system of [American Indian/Alaska Native] communities, so much so that cable TV seems to be finishing the work of Custer."[462] In addition to the impacts generally associated with television and the content of public media, the imagery onslaught of the dominant society threatens to overwhelm efforts by Native communities to retain tribal customs, values, and languages.

By all indications, reservation schools face even greater challenges than the municipal schools attended by Native youth. Reservation schools tend to exhibit poorer performance and more difficult access to quality education than the public schools. Of the more than 560 federally-recognized Indian nations, only 222 have Head Start programs, widely regarded as important for laying the groundwork for student success in primary and secondary school.[463] BIA schools are severely under-funded; spending per student is less than half of the amount spent in public schools on American students nationally.[464] In addition, the physical facilities in BIA schools are more likely to be substandard, as evidenced by a recent federal government study which concluded that, compared to other public schools, BIA schools "were in generally poorer condition, have more unsatisfactory environmental factors, more often lack key facilities … for education reform, and are less able to support computer and telecommunications policy."[465]

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[461] Michael D. Pavel, Thomas R. Curtain, and Summer D. Whitener, *Characteristics of American Indian and Alaska Native Education: Results from the 1990-91 and 1993-94 Schools and Staffing Survey* (Washington, DC: US Department of Education, 1997), 41-48. And Richard D. St. Germaine, "BIA Schools Complete First Step of Reform Effort," *Journal of American Indian Education* 35, no. 1 (1995).

[462] Richard D. St. Germaine, "A Chance to Go Full Circle: Building on Reforms to Create Effective Learning," paper delivered before the National American Indian Education and Alaska Native Education Research Agenda Conference (NAIE Conference), Albuquerque, NM (May 30-June 1, 2000), 1-4.

[463] National Congress of American Indians, *Indian Country FY 2007 Budget Request*, 10.

[464] U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (Washington, DC: July 2003), 23.

[465] US General Accounting Office, *School Facilities: Reported Condition and Costs to Repair Schools Funded by Bureau of Indian Affairs*, GAO/HEHS-98-47 (Washington, DC: U.S. General Accounting Office, December 1997), 2. The consequences are often significant. At Santa Fe Indian School, for example, an award from the Intel Corporation for computers and network-related facilities had to be put on hold when the only available space – located in the school's basement – was declared unsuitable for student use.

Tribally-Operated Schools

Notwithstanding the challenges they face, tribally-operated schools are increasingly sources of innovation. Although the 122 BIA-funded/tribally-operated schools and a growing number of independently-funded reservation schools reach only a fraction of the total American Indian and Alaska Native school age population in the United States, the significance of tribally operated schools should not be underestimated. Indeed, some scholars argue that "the education of these children represents efforts by American Indians and Alaska Natives to determine the mission, scope, and influence of their education upon their communities."[466]

Renewed tribal control over education is developing in multiple ways. At the primary and secondary levels, it is most often seen in efforts by Indian nation governments to take over schools formerly operated by the federal government. PL-638 recognized Indian nations' rights to run their own primary and secondary schools, and provided for doing so via contracting to run reservation schools previously operated by the Bureau of Indian Affairs. In addition, Title V of the *Stafford Elementary and Secondary School Improvement Amendments* of 1988 offered tribal groups the opportunity to operate schools using grants from the BIA.

Tribal takeover has been swift. In 1995, the balance permanently shifted to where, from that year forward, Indian nations have been operating more of the Indian Country schools funded by the federal government (under contracts and grants) than are operated by the Bureau of Indian Affairs. Indian communities are also working with the federal government to incorporate best practices aimed at improving student outcomes in these locally controlled schools. Both public and BIA-funded schools are more readily incorporating tribal culture into the classroom, seeking to create a less alienating learning environment, and infusing high quality learning with traditional knowledge and values.

With their emphasis on Native language, culture, and community, these institutions represent innovative alternatives to state-funded schools. For example, Tiospa Zina, a K-12 school on the Sisseton Wahpeton reservation in South Dakota, has gained nationwide attention for its culture-based curriculum and its education model based on the family. Graduating seniors are required to take classes in Dakota language and literature, while grades K-8 students take two to three hours a week in literature and culture.

The Santa Fe Indian School (SFIS) is an encouraging model. It was taken over from federal control via PL 93-638 contract and then PL 100-297 grant in the 1970s. It serves 19 pueblos under the direction of the All Indian Pueblo Council. The curriculum is based in part on a series of interviews with tribal elders and government officials. As a result of the issues raised in the interviews, students study topics such as water scarcity, alternative energy sources, and economic development.[467]

Education in Indian Country, however, still faces significant obstacles as evidenced by lower rates of educational attainment and disproportionately high dropout rates. Indian children represent one of the poorest segments of society and, consequently, they bring problems to the classroom that

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[466] Pavel, Curtain, and Whitener, *Characteristics of Native Educatio*n, 6.

[467] Marguerite D Carroll, "Making the Grade: Can BIA Schools Educate Today's Kids in Yesterday's Classrooms?" *American Indian Report*, November 1998, 12 -15.

are often associated with low socioeconomic status. The bombardment of popular culture serves to compound these issues. Culturally relevant curriculum is still hard to find and often must be custom-made by and for each tribe. Recruiting high quality and appropriately trained/prepared personnel is difficult and becomes increasingly complicated in remote communities. Educators working in Indian education are often underpaid relative to their "off-reservation" colleagues and confront a greater number of professional obstacles, ranging from professional isolation to substandard physical facilities. Many promising best practices still need to be validated through data and research on their true impact on Indian students, not to mention the need to disseminate best practices around Indian Country.

In addition to tribally controlled schools funded by the BIA, a new trend has emerged of Indian communities developing and maintaining schools completely independent of federal or state funding. One such school is the Ya Ne Dah Ah School established and run by the Ahtna Athabascan Village of Chickaloon. Located sixty miles northeast of Anchorage, Alaska, the school is dedicated to providing community youth with the skills necessary for functioning in a contemporary world while maintaining Native knowledge and practices. Supported entirely by private donations and tribal funding, the Ya Ne Dah Ah School is Alaska's only tribally owned and operated full-time primary school and day care facility. The school's students are taught – and excel in – the conventional topics of science, math, English, and social studies, while learning Ahtna Athabascan history, language, music, and art as integrated parts of the curriculum.

In another example, the Akwesasne Freedom School has provided Mohawk language education for over 25 years. The school rejects the teaching paradigm of mainstream schools, immersing children instead in the Mohawk way of thinking and learning. The curriculum is based on the *Ohen:ton Kariwahtekwen* (Words That Come Before All Else, or Thanksgiving Address) and the school operates year-round to take advantage of teaching based on the seasons. This approach is working and has made the Akwesasne Freedom School an Honoring Nations honoree.[468]

Systematically improving federally funded reservation schools has received considerable attention in the self-determination era. In particular, two landmark studies have given rise to focused efforts to improve BIA-funded schools: *A Nation at Risk: The Imperative for Educational Reform*[469] (which focused on education in America in general) and *Indian Nations at Risk: An Educational Strategy for Action*[470] (with a focus on tribal communities). Through these and other initiatives, leading Indian educators, including principals and administrators, federal line officers, and academics, have begun working with BIA-funded schools to begin a process of systematic review, restructuring, and renewal.[471]

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[468] Harvard Project on American Indian Economic Development, "Akwesasne Freedom School," *Tribal Governance Success Stories: Honoring Nations 2005* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2005).

[469] See U.S. Department of Education, *A Nation At Risk: The Imperative for Educational Reform* (Washington, DC: U.S. Department of Education, April 1983).

[470] See U.S. Department of Education, *Indian Nations At Risk: An Educational Strategy for Action* (Washington, DC: U.S. Department of Education, April 1991).

[471] These efforts were based on the research undertaken in the 1970s and 1980s by Rutter, Edmunds, Mortimore, and Sammonds, and others, which identified a set of school-level characteristics associated with higher-than-expected student performance. See, for example, St. Germaine, *A Chance to Go Full*

This federally driven reform effort was based on a set of research-identified "best practices" or characteristics correlated with higher-than-expected student performance, often referred to as "Effective Schools." These practices extend across, for example, school mission, curriculum and instruction, home-school-community relations, learning expectations, instructional leadership, and cultural relevance. The Effective Schools efforts was targeted more broadly than Indian Country, but were incorporated with into the BIA's efforts under the *Goals 2000: Educate America Act* of 1994. The first of two phases has since been completed. It examined all BIA schools using an instrument based on what best practices identify as critical factors in effective schools, and yielded a written report submitted to each school.[472] The second phase has involved individual BIA schools working with support teams to initiate school reform planning and staff development training.

While the results are preliminary, the evidence suggests that those schools taking part in the second phase of the reform effort have had increased student enrollment and attendance rates, have improved staff morale, have developed school improvement plans, and have increased staff expectations of students.[473] Just as importantly, administrators working with the program felt that they have been hearing a change in the "language of education" in Indian Country citing, as examples, the general move towards the implementation of more meaningful student assessment techniques, curriculum development focused on means and outcomes, and the greater diversification of teaching and educational techniques.[474]

Many of the outcomes of tribal operation of schools and related curricular developments will take time to appear. While early evidence seems to suggest that local control has a positive impact on graduation rates, more research must be done before the impact of culturally appropriate curricula can be fully understood and assessed. These efforts, however, represent an important component in tribal communities' efforts to retain their language, culture, and customs, and are now taking place in the context of a much broader school reform effort aimed at not only creating a more culturally sensitive environment, but also at improving the overall quality of education.

Education Reform

While tribally-controlled schools hold considerable promise for improvement, the predominant role that state and municipal public schools play in the education of Native youth across the United States means that improvements in Indian education require very broad reform. Although efforts under the "Effective Schools" movement appeared promising, the passage of the *No Child Left*

Circle. See also U.S. Department of Interior, Bureau of Indian Affairs, Office of Indian Education Programs, *O.I.E.P. Effective Schools Annual Report 1991-92* (Washington, DC: U.S. Department of Interior, 1992).

[472] St. Germaine, *BIA Schools Complete First Step*, 33. The article provides a complete list of the BIA's Effective Schools Correlates.

[473] Each individual school chose whether to participate in the process. Upon self-nomination, they received a scholarship from the Bureau Effective Schools Team (now known as Building Exemplary Schools Together, or "BEST"), which was managed by the National Indian School Board Administration.

[474] Communications with Richard D. St. Germaine and Cornelius Taylor, November 2000.

Behind Act (NCLB) of 2001, replaced *Goals 2000* and changed the direction of reform in Indian education for both tribally-controlled schools and public schools.[475]

With its emphasis on academic accountability, NCLB increased the demands on public schools by requiring demonstrable yearly progress for students. NCLB's goals include improving teacher quality, increasing parent and family choice, and using scientific research-supported methods of practice. However, shortfalls in funding have impeded the ability of schools and school districts to meet these requirements. These mandates have thus created additional pressure on schools in Indian communities and on schools serving sizable Indian student populations that are already struggling with a lack of resources, high teacher turnover, and inappropriate student assessment mechanisms. It is a pressure to improve.

The emphasis of NCLB on making adequate yearly progress often entails the use of standardized test scores to document student achievement. This directly conflicts with the documented shortcomings of standardized testing when used with students of different languages and cultures, especially American Indian and Alaska Native children.[476] Additionally, the struggle to hire and retain highly qualified personnel is particularly difficult for schools in many rural and disadvantaged areas and, accordingly, has been a constant challenge for many school districts serving Indian children. Lack of funding and support make it difficult to meet the goals of NCLB within the prescribed time limits, leaving already vulnerable Indian-serving schools open to punitive actions under the law.

Concerned that funding and support for these unique needs was lacking, leaders in Indian education lobbied for changes. In 2004, President George W. Bush signed an Executive Order on American Indian and Alaska Native Education.[477] The purpose of the Order is to "assist American Indian and Alaska Native students in meeting the challenging student academic standards of the No Child Left Behind Act of 2001 in a manner that is consistent with Tribal traditions, languages and cultures."[478] The Order specifically recognizes that a culturally based approach is, for Natives, not only an educational strategy for improved achievement, but also a fundamental civil right. The Order also provides support for research that will compile comprehensive data on the academic achievement of Indian students, identify best practices for raising student achievement and increasing school completion rates, and assess the impact of Native language and culture on academic achievement. The impacts of these provisions on the future of Indian educational sovereignty and cultural relevance have yet to be determined.

Post-Secondary Education

Over the last 20 years, the numbers of Native Americans pursuing post-secondary education have risen rapidly. After remaining in the range of 75,000-85,000 students over the second-half of the

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[475] U.S. Public Law 107-110. 107th Cong., 1st sess., 8 January 2002. *The No Child Left Behind Act of 2001.*

[476] John W. Tippeconnic III, "The Use of Academic Achievement Tests and Measurements with American Indian and Alaska Native Students," EDO-RC-03-07 (December 2003). http://www.ericdigests.org/2005-2/tests.html (28 June 2006)

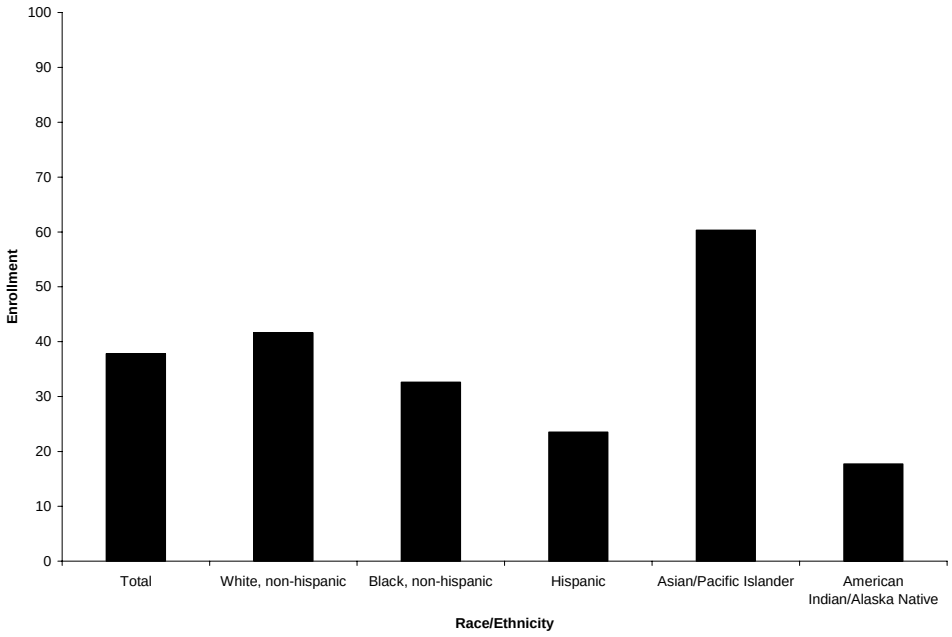
[477] See George W. Bush, "American Indian and Alaska Native Education," Executive Order 13336, 30 April 2004. http://www.whitehouse.gov/news/releases/2004/04/20040430-10.html.

[478] Ibid.

1970s and into the 1980s, Native students enrolled in degree-granting two- and four-year colleges and universities approximately doubled between 1984 and 2002, rising from 83,6000 to 185,900.[479] Degrees awarded have risen apace. As seen in Figure 16 above, the percentage of Native American adults over the age of 25 on reservations with at least a two-year college degree stood at 12.1%, up from 9.2% in 1990.

Despite these impressive gains, Native student participation in post-secondary education has had a lot of ground to make up. As Figure 17 indicates, as of the latest available data (for October 2003), American Indians and Alaska Natives had the lowest rate of higher education enrollment expressed as a percentage of 10- to 24-year-olds of any racial or ethnic minority. At 17.7%, this rate for Native Americans was less than one-half the rate for Americans in general. In addition, it appears that American Indians living on reservations may be only half as likely as white students to persist and obtain a degree.[480]

Figure 17
Higher Education Enrollment
As a percentage of 10-24 year olds



Source: as reported in Catherine Freeman and Mary Ann Fox, "Status and Trends in the Education of American Indians and Alaska Natives", National Center for Education Statistics, August 2005, 99.

[479] Freeman and Fox, "Status and Trends", Appendix Table A-7.1a.

[480] American Indian Higher Education Consortium, The Institute for Higher Education Policy, *Tribal Colleges: An Introduction* (Alexandria, VA: American Indian Higher Education Consortium, February 1999), A-2.

The changes in postsecondary education go beyond the matter of the level of attainment. For example, Indian undergraduate degrees historically have been clustered in education, health, and law. Today, they are showing up in growing numbers in a wider array of disciplines. Bachelor's degrees awarded to Native Americans are distributed approximately as they are across the general U.S. degree-earning population. The same basic pattern holds for graduate degrees, although at the graduate level, Native Americans remain somewhat underrepresented in the hard sciences, engineering and business, and are relatively overrepresented in such fields as education, psychology, public administration, and social sciences, and history.[481]

The Tribal Colleges and Universities

Arguably the most important development in higher education for the Indian nations in the era of self-determination has been the growth of a far-flung system of tribal colleges and universities. Starting in 1968 from the creation by the Navajo Nation of what is now called Diné College, as of 2005 34 tribal college institutions in 14 states belonged to the American Indian Higher Education Consortium (AIHEC), plus an additional college in Canada.[482] The tribal colleges offer hundreds of associate degrees, as well as vocational certificates in less-than-two-year programs of study. Four of the colleges are universities – offering four-year bachelor's degrees, and two offer master's degrees.

Tribal college enrollment has grown rapidly over the past two decades. In 1982, enrollment stood at a mere 2,100 students. As of 2005, the 34 federally-recognized tribal colleges and universities in the continental United States were serving over 30,000 full and part-time students, approximately 80% of whom were Native Americans.[483] The rate of growth in tribal college enrollments is outstripping the growth in Indian enrollments at non-tribal colleges and universities.[484]

President Clinton's October 1996 *Executive Order on Tribal Colleges and Universities* formally recognized the importance of tribal colleges and universities in serving the educational needs of Indian communities and created a federal mandate to fully support these unique and much-needed institutions.[485] President Bush then reauthorized the *Executive Order* in 2002.[486] Operating often as the only post-secondary institutions in their areas, community-developed tribal colleges and universities serve more than just college-age students. Senior citizens, adults, and children benefit by having increased access to job training, improved educational outcomes, and spaces for maintaining cultural traditions and languages. In cases such as Salish and Kootenai College at the Flathead reservation in Montana, tribal colleges and universities serve as engines of regional economic

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[481] Freeman and Fox, "Status and Trends", 114.

[482] "American Indian Higher Education Consortium." http://www.aihec.org (28 June 2006).

[483] These numbers represent only the tribal colleges and universities listed as federally recognized under The White House Initiative on Tribal Colleges and Universalities (WHITCU). Other tribal colleges do exist that are currently not part of this list. See "White House Initiative on Tribal Colleges and Universities Tribal Colleges and Universities Address List." http://www.ed.gov/about/inits/list/whtc/edlite-tclist.html (28 June 2006)

[484] American Indian Higher Education Consortium, *Tribal Colleges*, C-3.

[485] William Jefferson Clinton, "Tribal Colleges and Universities," Executive Order 13021, 19 October 1996.

[486] George W. Bush, "Tribal Colleges and Universities," Executive Order 13270, 3 July 2002.

development by offering curricula that meets local needs – to the point that Salish and Kootenai College is now a magnet for non-Indians in the region seeking to enroll in the College. As in the economic arena, the Confederated Salish and Kootenai Tribes seem to be out-competing its neighboring jurisdiction – the state of Montana.

Indian nations began to create tribally operated colleges in response to the negative outcomes experienced by so many Native students in non-Indian higher education programs. These colleges have served a number of purposes. They are intended to provide educational access to reservation-based Indian students who often may not have otherwise believed that attending college would be possible. The colleges are also aimed at reversing historically low success rates of Native Americans – particularly those from the reservation – in higher education. Both of these objectives are similar to the purposes of historically black and other community colleges. But tribal colleges and universities also have been designed "to rebuild, reinforce and explore traditional tribal cultures, using uniquely designed curricula and institutional settings; and at the same time capture Western models of learning by providing traditional disciplinary courses that are transferable to four year institutions."[487]

Tribal colleges and universities thus engage a dual mission of overcoming the historic barriers confronting Indians in higher education by bringing the cultures of Native Americans into the higher education learning process, while at the same time providing a solid education in mainstream disciplines. In cases such as Fort Peck Community College, this is done with an integrated approach that lets students "stop out", but not drop out. (See the essay on "Educating a Closed Population Pool" by James Shanley in this volume.) Bringing family, community and Native culture into the educational process enhances educational attainment in communities that heretofore saw few paths to higher education.

As noted by AIHEC, tribal colleges and universities vary in their respective states of physical development, structure, size, and other pertinent characteristics. There exist, however, some common characteristics. They are principally located on remote reservations and have relatively small student bodies; most were chartered by one or more tribes, but are organizationally separate and apart from the tribal governments; all have open admissions; and all began as two-year programs. Most are fully accredited.[488]

Because they are located, for the most part, on federal trust land, tribal colleges and universities receive little or no funding from state or local governments. Furthermore, tribal land status generally blocks the levying of property taxes to support higher education, which is an important source of revenue for many community colleges elsewhere in the United States.[489] Consequently, tribal colleges and universities rely heavily on the federal government for their core operational funding and, while they have received substantial private donations, they remain, by all accounts, significantly under-funded.[490] The current federal funding per Indian student is at about

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[487] American Indian Higher Education Consortium, http://www.aihec.org/ (28 June 2006)

[488] Ibid. See also the American Indian College Fund. http://www.collegefund.org (28 June 2006).

[489] American Indian Higher Education Consortium, *Tribal Colleges*, E-1.

[490] Beth Daly, "On Reservations, A Failing Mission," *The Boston Globe*, March 11, 2000, 1.

75% of the authorized level of $6000 per Indian student, and lags behind the monies received by non-Indian community colleges, which have much greater access to federal, state, and local dollars.[491]

In addition, a recent survey indicates that average faculty salaries at the tribal colleges and universities are low. At just under $30,000 dollars per year, these faculty members make approximately 50% less than the average salary at all public institutions of higher education and approximately 45% less than their counterparts at two-year non-Indian public institutions. In addition to facing low salaries and the challenges that arise from working in remote areas, the faculties of tribal colleges and universities often suffer from a lack of training. The consequences of these conditions are apparent – high staff turnover for example, remains a problem at many of the tribal colleges and universities. Nonetheless, the survey indicates that most appear to be more altruistic and more satisfied with their teaching experience than many non-tribal college colleagues, despite lower salaries, nearly twice the workload, and sometimes isolated working conditions. The survey also revealed that tribal college faculty members are more likely to be working toward an advanced degree than faculty in other, mainstream institutions of higher education.[492]

The Future of Indian Education

Native nations today have two primary educational concerns: increasing the level of educational attainment in their populations, and increasing tribal control over the educational process and the content of the education that tribal citizens receive. Recent decades have seen major progress on both fronts. Nonetheless, in education, as in so many areas, the picture is mixed. On the one hand, the gap between Indian and mainstream educational outcomes remains substantial in numerous dimensions. On the other hand, efforts to increase educational opportunity and academic achievement for all members of Indian communities are ongoing and far-reaching, and they are having significant effects.

Although the challenges are many, substantive reform efforts in Indian education—in particular those that promote performance-based assessment and create more culturally appropriate learning environments—are taking hold, with positive results. Most Native nations who have gained significant revenues from gaming and other economic ventures have poured dollars into education, investing in developing their own human capital. As tribal nations across the country assert their right to self-determination, seizing control of the education of their youth is invariably an important step in ensuring that policies and practices affecting the future of the tribe are grounded in shared values, respected traditions, and the academic skills needed to effectively manage indigenous affairs in a complex world.

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[491] American Indian College Fund. http://www.collegefund.org. (28 June 2006)

[492] Richard A. Voorhees and Nicole Adams, "Tribal College Faculty Survey: Despite lower pay, faculty tend to be content, altruistic, ambitious," *Tribal College Journal* 15, no. 3 (2004), 20-22.

Textbox: The Two-Plus-Two-Plus-Two Program, Hopi Junior/Senior High School, Hopi Nation

By the late twentieth century, the increasing influence of Western society and the transition to a wage economy posed a serious threat to Hopi traditions and heritage. A trend had developed in which nearly 70 percent of Hopi students did not pursue higher education, while those who did often dropped out and returned to the reservation with undeveloped skills or graduated and sought employment off of the reservation.

Faced with a real educational, demographic, and economic crisis, tribal leaders refused to give in to the forces that made it difficult for young tribal members to seek higher education and, for those who did, to return to the reservation. Instead, Hopi leaders made a commitment to enrich, strengthen, and encourage Hopi youth to fulfill their educational aspirations, with the understanding that investing in their children's education was also an investment in the Nation's economy, social development, and ability to self-govern.

In 1997, the Hopi community launched the Two-Plus-Two-Plus-Two college transition program, a partnership between the tribally-run Hopi Junior/Senior High School (HJSHS), Northland Pioneer College (NPC), and Northern Arizona University (NAU) that enrolls senior high school students in classes offering concurrent college credit. This innovative program fosters academic excellence within a cultural framework, expanding students' opportunities and strengthening community ties. For example, students enjoy the direct support of the Hopi community while they familiarize themselves with the demands of college-level curricula, thus increasing their skills, confidence, and chances of educational success. Curricula focus on science and math, addressing both recent economic trends and Hopi community needs. Finally, through collaboration with existing programs, such as NAU's Upward Bound program and Educational Talent Search and the University of Arizona's Health Careers Pathway Program, Two-Plus-Two-Plus-Two provides Hopi students with outstanding career guidance and development services.

The Program has led to a dramatic increase in college enrollment: 45 percent of the 2001 graduating class will attend two- or four-year higher education institutions, with three-quarters of those accruing concurrent credit through Two-Plus-Two-Plus-Two. And while no firm data are yet available, it appears that Hopi post-secondary dropout rates are decreasing. As the Program's first enrollees graduate from college and university, additional indicators of the Program's success will become evident, in reservation return rates, for example, and in changing employment center staffing patterns. This sustained interest in higher education has already prompted NAU and NPC to make physical investments at Hopi: NAU built a distance learning center at HJSHS, and NPC built a branch on the HJSHS campus, where it offers nursing training courses.

Before the inception of Two-Plus-Two-Plus-Two, many Hopi faced the difficult choice of either staying geographically and culturally connected to their traditional way of life or relocating off-reservation where opportunities for education and employment were more plentiful. Today, the Two-Plus-Two-Plus-Two Program is helping Hopi students attain advanced educational degrees on the reservation and, in doing so, empowering them with academic and technological skills that they can contribute to the Hopi Nation. **/END TEXTBOX**

Educating a Closed Population Pool

James Shanley (Assiniboine)
President, Fort Peck Community College
April 2004

The most serious problem in Indian education today is poverty. I'm pleased to see that *State of the Native Nations* takes poverty so seriously in its discussion of education. Developing educational standards is important. Designing culturally appropriate education is important. Still, the most serious challenges confronting American Indians are the result of daunting socioeconomic conditions, the result of poverty. Poverty plays out in our classrooms. And not just our classrooms: poverty plays out in classrooms of minority students throughout the United States.

Caring educators in Indian communities try to deal effectively with their students' poverty. I know of Indian schools in which teachers feed their students breakfast and lunch. They even send the children home with a snack. These students *eat* every day, but they still confront the alcoholism, drug abuse, disease, child abuse, and spousal abuse that are the symptomatic problems of poverty. At Fort Peck Community College we see the problems that poverty creates. We admit students who have an alcoholic parent or an abusive spouse. We admit students who have a sibling who struggles with a chronic disease. We admit students who, as a result of such problems, drop out of school long before they learn enough to be self-sustaining. We help our students deal with these problems. We *have* to.

We have to because we live in what I call a closed population pool. Fort Peck Community College is located in Poplar, Montana on the Fort Peck Indian Reservation. Although our reservation is large geographically, our population of Assiniboine and Sioux Indians is small. Our population is so small that our poverty is visible and the effects of that poverty upon our students—from first graders to tribal college students—are visible too. Half of our students don't graduate from high school. Of those who do graduate and go on to mainstream colleges and universities across the country, many drop out when they realize they don't have the skills they need to succeed. They quit and come home. In an urban area, when a student drops out of school, it doesn't seem to matter. That person disappears into the crowd. But in a small community like ours, that person doesn't disappear. They live next door. Our tribal college exists to help that person. We have to help that person because, in our closed population pool, that person is part of who we are.

At Fort Peck Community College, we don't let our students drop out. Some stop out, but they don't drop out. Our students know that they can come back, and they do. We have students who come back, on and off, for ten years. This is one way in which tribal colleges serve their closed populations pools. If we don't let our students come back, they won't get an education. If they don't get an education, they'll fall into deeper and deeper poverty. They'll live on welfare. They'll develop attitudes of dependency. This will kill their freedom and limit our ability to undertake real economic and community development.

To serve these students, Fort Peck Community College, like many tribal colleges, offers significant remediation education. This offering creates its own particular challenges. Even though the remediation problem—having a substantial population of people who don't have the basic skills to do post-secondary work—is common all over the country, it is the least funded of educational activities. Most of our funding comes from federal sources. We have to be very astute and very competitive to get it and, even then, there isn't much. Our nation wants to ignore the need for remediation or blame the individual. The general attitude is "It's your fault that you don't have a high school degree. Why should tax payers have to pay for you to go to college when you're not even studying college level material?"

We must change this attitude. I've described the Fort Peck community as being a closed population pool. Our country is a closed population pool, too. Our education system isn't working very well for anyone. Our math scores are way down in the international rankings. Our science scores are way down. Managers of large companies are wondering where they'll find the educated workforce to fuel the economy in the future. It's a real concern. We've survived industrially because we've imported a lot of talent, but we need to reconsider our own education system. We need to recognize the need for reforms. As we do that, our attitudes towards remediation must change.

Remediation at Fort Peck Community College is remarkably successful. We find that we can help our students reach a turn around point. If we get our students to this point, then, suddenly, they're off; nothing can stop them. They go through our offerings and move on. To bring our students to this point, we've learned that we have to acknowledge that our students are individuals in a context. The typical university student is treated *only* as an individual. They're admitted on the strength of their individual test scores; they bring their own money to pay their own tuition; they have their own set of challenges. The problem with this model is that Indian cultures—like most human cultures—are about families. We don't exist as individuals without a context. At Fort Peck, we acknowledge our students' familial contexts. If they come to us with an alcoholic spouse or a dependent parent, we recognize that this will impact their success. Our research indicates that our students don't drop out or stop out primarily because of academic problems—even though their need for remediation is enormous—but because of problems at home. If we don't set up structures to deal with those problems, then we help the student fail.

At Fort Peck, we work through a family education model. This model shapes the general attitude on our campus as well as our academic offerings. All of our efforts, from counseling to registration to advising, involve getting to know the contexts out of which our students come. We hold activities for families. We offer childcare. We train parents on how to parent. We also require an Indian Studies course. We find that a lot of our students simply don't understand the contexts out of which they come. They don't know the history of this place or how we came to be here. We try to emphasize the fact that if they understand themselves, if they understand their own contexts, then they will feel confident as they move into other situations. This sort of educational model is identity-forming and self-affirming.

Of course, our success brings its own challenges. Let's say our students experience that turn around moment and move on to complete their education. Let's say they make it through the process and become Ph.D.s or doctors or lawyers. They could return, but they probably won't. It's hard to live in a war zone. Some Indian communities are literal war zones. That's not only true of American Indian communities. It's true for people in the black community and the Hispanic community. The "brain drain" is real. It happens. Of course, there are exceptions to the rule. There are American Indians who come back. The Fort Peck Community College staff came back. Many of us saw political activism and reform in American Indian affairs for the first time in the 1960s and early 1970s. We saw that the average person had the ability to make a difference. Regrettably, that spirit has seemed to die, but then it moved a lot of people—particularly the tribal college people—in a particular direction. It brought us back.

We need to begin to transform Indian communities into communities that individuals will want to—and be able to—return to. I've talked about our communities as closed pools. That is a reality we must confront, but as we do so we can't become parochial. Too often Indians become too concerned with our own problems, our own affairs. We need to recognize that we face issues—poverty, remediation, community disintegration—that transcend our ethnic and cultural boundaries. For example, we have an organization called the Alliance for Equity that looks at what happens to

minorities in education. In the 1990s, members of Congress argued that prisoners shouldn't receive Pell Grants to go to college. This was in spite of the fact that the only measurable means of reducing recidivism among the prison population is education. I return, again, to the idea of the closed population pool. If someone from Fort Peck goes to prison, they'll return here afterwards. If they come back with a college education, we'll welcome them. But if they only took Burglary 101 and Assault 102, then they can't be productive members of our community. Our Alliance took a national stand on this issue. I'd like to see Indians become increasingly aware of issues like these that impact everyone, but have an especially significant impact on us. Such issues tie us to national and international communities.

As the work of mitigating poverty and strengthening Indian communities succeeds, my vision of an ideal Indian educational system moves far beyond effective remediation to include the preservation and survival of living Indian languages and Indian cultures. I don't know if that sort of preservation is possible, but that's what I'd like to see. There are many, many elements unique to Indian culture that will be lost if we don't attempt their preservation. They are elements that are important to human survival and human happiness. I'd like to make the attempt.

HEALTH

- While a number of indicators of the health of American Indians and Alaska Natives have improved over the last several decades, measures of personal health and access to public health infrastructure are discouraging when compared to the general U.S. population. In certain areas – suicide, alcoholism, diabetes – the negative health indicators for Native Americans are extreme.

- The types of health conditions affecting American Indians and Alaska Natives have changed over time, from primarily infectious diseases toward chronic and behavior-related diseases, such as diabetes, heart disease, and obesity.

- The Indian Health Service (IHS) is the primary federal agency responsible for providing, or funding through contracting and compacting with tribes, health care services to American Indians and Alaska Natives in Indian Country. Chronic under-funding impedes the agency's ability to provide or fund services commensurate with Indian Country's needs and the federal government's obligations.

- By taking over the administration of health care delivery systems from the IHS through contracting and compacting, Native nations have been able to reduce regulation, increase financial flexibility, and redesign service offerings to create effective, culturally appropriate health care programs.

In certain dimensions, Native health has shown substantial improvement over the last several decades. Particularly in Indian Country (i.e., on the reservations and in the Indian Statistical areas) this reflects the efforts of the Indian Health Service. Following its founding in 1955, not only did IHS turn itself to such challenges as infectious disease prevention and building hospitals in rural areas; it also has responded to the era of self-determination by attempting to work with the Indian nations on a generally government-to-government basis.

Progress in certain dimensions of health, however, cannot mask severe and stubborn problems in other areas. From suicide to alcohol-related health problems, from diabetes to obesity, these ongoing threats to individual and community well-being commonly have chronic and/or

behavioral components to them. The origin and stubbornness of such critical health threats are indicators of communities that have been placed under the severe stresses of deprivation and disempowerment. This suggests that substantial progress will come through holistic recovery in the fabric, institutions, and economies of Native nations; and some of the most encouraging developments in Indian health are coming in those communities where self-determination and self-governance are in fullest force.

As Native nations continue to push down the path of healing and building their communities, families, and individuals, maintenance of the federal trust responsibility is indispensable. Arguably, no other area of federal responsibility is as firmly rooted in treaties, law, and moral obligation as the duty to protect the health of Native Americans. Yet, Indian nations and the IHS are chronically short of resources in an environment in which needs are severe and costs of health care everywhere continue to rise. Lives hang in the balance.

History

Like every other aspect of their lives, Native Americans' medical practices and health status changed dramatically as a result of colonization. As sustained communities, Native societies at the time of European contact possessed knowledge and practices that addressed the health problems of the people. European contact and colonization led to a shift away from the many Native societies' extant approaches to health protection and health care. Europeans also brought new diseases of often extreme virulence for Native peoples. Over the centuries, too, the history of dispossession, impoverishment, and eventual denial of sovereignty and confinement on reservations subjected Native Americans to arguably as much stress and deprivation as any peoples in history. Turn around and recovery in the space of a few decades is hardly a reasonable expectation.

Numerous treaties, court decisions and subsequent legislation establish the federal government's trust responsibility to provide health care for American Indian and Alaska Native communities as federally-recognized tribes. As early as the 1830s, provision of health care by the U.S. government was a key aspect of land treaties. Eventually, the *Snyder Act of 1921* and the *Indian Health Care Improvement Act of 1976* provided the explicit Congressional authorization for the federal government to appropriate funding for Indian health care.

From the 1920s until the 1950s, Indian health care was managed through the BIA. In 1955, however, the Indian Health Service (IHS) took over federal responsibilities for Indian health, as an agency within the U.S. Department of Health and Human Services. Over the past five decades, the IHS has grown into a comprehensive primary care-oriented system that operates or funds under self-determination contracts and self-governance compacts reservation-based and urban health care through 49 hospitals and 600 other facilities spread over 35 states. It provides services to 1.8 million tribal citizens who live mainly on or near reservations and in rural communities. Its annual budget is approximately $3 billion.[493]

For Native Americans living away from Indian Country, providers other than IHS or IHS-funded sources are turned to for meeting health care needs. In the years 1997 and 1999, 49% of American Indians and Alaska Natives reported that they had health coverage that was employer-sponsored, privately purchased, or via Medicare; 17% reported that they were covered through public

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[493] Indian Health Service. *"Facts on Indian Health Disparities."* (January 2005; data for 1999-2000 reporting period), http://info.ihs.gov/Health/11_DisparitiesFacts-Jan2005.doc (28 June 2006).

health programs such as Medicaid, State Children's Health Insurance Program, or state health insurance programs; 16% were uninsured but reported IHS coverage; and 19% were uninsured but did not report IHS coverage.[494]

It is not surprising that many self-identifying Native individuals do not rely on IHS services or IHS-funded tribal services. IHS' efforts and resource allocations are concentrated in Indian Country: Even though the 2000 Census indicates that more than half of the American Indian population lives off-reservation and many of these individuals live in urban areas far from tribal service providers,[495] only 1% of the IHS budget is dedicated to urban Indian health programs. But in Indian Country, IHS services and resources remain critical to the health protection and care of the citizens of the Indian nations.

Health Status

In certain key ways, the status of American Indian health is much better than it was thirty years ago. From the early 1970s to the mid-1990s, Indian infant mortality fell by 60%, tuberculosis cases declined by 80%, gastrointestinal disease was reduced by 76%, death due to unintentional injuries fell 56%, and maternal mortality came down 70%.[496]

Yet, while these gains are properly characterized as progress, considerable differences still exist between the health of American Indians and Alaska Natives and the health of the general U.S. population.[497] For example, while infant mortality among Native American newborns has been brought down, American Indians and Alaska Natives experience the second highest infant mortality rate of any ethnic group in the U.S. – averaging 127% of the national rate. They experience twice the U.S. average rate of Sudden Infant Death Syndrome.[498] Similarly, while Native Americans saw the aforementioned drop of 80% in tuberculosis incidence, in 2002 the case rate for Indians was 453% higher than the U.S. average.[499]

At least through the mid- 20th century, infectious diseases were the greatest challenge to Native health, but in the 21st century, chronic disease has become the primary threat. Type 2 diabetes, for example, now stands at twice the U.S. general population rate, even though this preventable type

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494 Stephen Zuckerman, Jennifer Haley, Yvette Roubideaux, Marsha Lillie-Blanton, "Health Service Access, Use, and Insurance Coverage Among American Indians/Alaska Natives and Whites: What Role does the Indian Health Service Play?," *American Journal of Public Health* 94, no. 1 (2004), 53.

495 Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, (Cambridge: Harvard Project on American Indian Economic Development, January 2005), 2-5.

496 Indian Health Service, "Facts on Indian Health Disparities", see also Indian Health Services, *Trends in Indian Health, 1998-99* (Washington, DC: Indian Health Service, 2000), 56-57. http://www/ihs.gov/PublicInfo/Publications/trends98/trends98.asp (28 June 2006), parts 3, 4.

497 In part, this is due to the fact that rates are improving for all race/ethnic groups over time.

498 Indian Health Services, *Trends in Indian Health, 1998-99*, 63.

499 U.S. Centers for Disease Control and Prevention, Health, *Reported Tuberculosis in the United State*. Washington: Government Printing Office, 2002. http://www.cdc.gov/nchstp/tb/surv/surv2002/default.htm.

of diabetes was seen only rarely in the American Indian population as recently as the 1940s.[500] For some Native nations, the disease is epidemic: the rate of diabetes among the Akimel O'odham of the Gila River Indian Community, for example, has been labeled the highest in the world.[501] The rates of other chronic diseases, including cardiovascular disease, hypertension, obesity, and cancer, are increasing rapidly as well.

Certain lifestyle indicators also show disquieting divergence from general U.S. levels. The rate of tobacco use by Indian adults stands at 46.3%, which is the highest rate of any group in the country.[502] Indian teen cigarette use in 2002 stood at 213% of the national average, a difference which grew by 33% after 1996.[503] Though it has fallen consistently since 1975, the Native teen birth rate in 2001 was 183% of the national average.[504] Deaths from unintentional injuries remain at about 150% of the U.S. overall rate.[505]

Although there have been signs of decline in alcohol abuse over the last 30 years, the problem contributes to an estimated three-quarters of unintentional injury deaths to Indians and is a contributing factor in the high rates of domestic violence, motor vehicle accidents, cirrhosis, suicide, homicide, and fetal alcohol syndrome in the American Indian and Alaska Native population overall.[506] Indeed, American Indian adult deaths from alcoholism,[507] chronic liver disease, and cirrhosis[508] are roughly 500% higher than national rates.[509] Alcohol-related death rates for Indian

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500 Yvette Roubideaux, "Statement of Yvette Roubideaux, M.D., M.P.H., President, Association of American Indian Physicians, before the Senate Committee on Indian Affairs, On the Reauthorization of the Indian Health Care Improvement Act," (10 May 2000). And Yvette Roubideaux, "Using Diabetes Education Program Criteria to Evaluate the Quality of Diabetes Care in Indian Health Programs," (11 September 2000).

501 David Satcher, Surgeon General, and Conway, Hooper, Morgan, and Sauri, "American Indian and Alaska Native Health," *Current Bibliographies in Medicine*, 96-6 (Bethesda, MD: National Library of Medicine, 1996), 2.

502 Substance Abuse and Mental Health Services Administration, *Results of the 2002 National Survey on Drug Use and Health*, (Department of Health and Human Services, 2003), Table 2.29B.

503 Ibid., Table 2.31B.

504 U.S. Centers for Disease Control and Prevention, Health, *2004 With Chartbook on Trends in the Health of Americans*, (Washington: Government Printing Office, 2004), Table 8. http://www.cdc.gov/nchs/data/hus/hus04.pdf. "Teen birth rate" is here defined as live births to females under the age of 18.

505 Indian Health Service, *Facts on Indian Health*.

506 Satcher et al.; And Indian Health Service, *Facts on Indian Health*.

507 Ibid.

508 Indian Health Services, *Trends in Indian Health, 2000-2001* (Washington, DC: Indian Health Service, 2000), part 4, 113, Table 4-31. http://www.ihs.gov/PublicInfo/Publications/trends98/part4.pdf.

509 Indian Health Services, *Trends in Indian Health, 1998-1999*, part 4, page 113, Table 4-31. http://www.ihs.gov/PublicInfo/Publications/trends98/part4.pdf. (June 2006)

youth (ages 5 to 24) are roughly *seventeen times* the comparable level for all races.[510] Motor vehicle accident deaths for American Indians occur at approximately twice the national rate.[511]

The mental health status of American Indians and Alaska Natives has improved over time, but significant differences with the U.S. population remain. Native Americans report themselves as under "frequent mental distress" 20% more often than other populations.[512] Reported suicide rates for American Indians and Alaska Natives are 60% higher than the national average.[513] Finally, in total, the years of potential life lost – a measure of premature deaths from all causes – was 88.6 years per thousand for American Indians, as opposed to 48.4 years per thousand for the U.S. general population.[514]

Critical Under-Funding of the Indian Health Care System

Certainly, differences in health status between the U.S. general population and the American Indian and Alaska Native population relate to the significant social, economic, and history-dependent factors that differentiate the groups. Yet the differences are also a product of a health care system that, because of finance and management shortcomings, often cannot provide needed services. For two decades or more, the Indian health system has witnessed an increasing service population, rising per-patient demand for services, increasing costs of labor and goods, and stagnant budgets.[515] Recently, pressure has been added to increase reimbursements from third-party providers such as private insurers, Medicaid, and Medicare, and to keep costs down in keeping with managed care trends.[516] These forces have combined to produce low staff morale and high turnover at IHS, and to compromise the level of care that the Service can provide to its clients.[517]

The financial problem is acute and can be underscored by a variety of measures. For instance, IHS facilities are, on average, 34 years old, overcrowded, and equipped with medical and laboratory

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[510] W. Ron Allen, "W. Ron Allen, President, National Congress of American Indians, Senate Committee on Indian Affairs, Oversight Hearing on the Unmet Health Care Needs in Indian Country," (21 May 1998).

[511] Indian Health Service, *Facts on Indian Health Disparities*.

[512] Indian Health Service. *Mental Health*. 2005. http://info.ihs.gov/Health/5_MENTALHEALTH-Jan2005.doc.

[513] Indian Health Service. *Facts on Indian Health Disparities*.

[514] Indian Health Services, *Trends in Indian Health, 2000-2001*, part 4, 161, Chart 4.59. http://www.ihs.gov/NonMedicalPrograms/IHS_Stats/files/Trends00-01_Part4.pdf. Years of potential life lost (YPLL) is a mortality indicator that measures the burden of premature deaths. It is calculated by subtracting the age at death from age 65 and summing the result over all deaths.

[515] Michael H. Trujillo, "Challenges and Change, State of the Indian Health Service." (11 September 2000).

[516] Yvette Roubideaux, "Current Issues in Indian Health Policy: A Background Paper for the Conference – Native American Health and Welfare Policy in an Age of New Federalism," *Udall Center Publications #99-1* (Tucson, AZ: Udall Center for Studies in Public Policy, 1998), 1.

[517] About one-third of the health care practitioners in the IHS turn over every year. Communication with Yvette Roubideaux, Clinical Assistant Professor, University of Arizona College of Public Health, (26 January 2001).

instruments that may be 6 or more years out of date.[518] The system carries an operations and maintenance backlog of over $400 million.[519] The real, per capita budget of the IHS (that is, the budget adjusted for inflation and service population growth) has actually been falling over time.[520] The IHS' Federal Disparity Index Workgroup found that by 1999, IHS health plans were funded at a level less than 60% of a benchmark mainstream plan, and amounted to a $1.3 billion dollar gap.[521] In 2005, the average per capita expenditure on individuals in the IHS service population was projected to be $2,100 compared with a $5,298 national average for all Americans.[522]

The U.S. Civil rights Commission reports that per capita federal spending on Indian Country citizens through the IHS falls far short of federal spending on veterans, the average American, and even federal prisoners. (Figure 18) The widespread view that "Indians get their health care for free" simply misses how heavily the federal government spends on health care for the average American and even prisoners.

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[518] Indian Health Service "Funding Disparities" January 2005. http://info.ihs.gov/Resources/1_HealthFacilities-Jan2005.doc (June 2006).

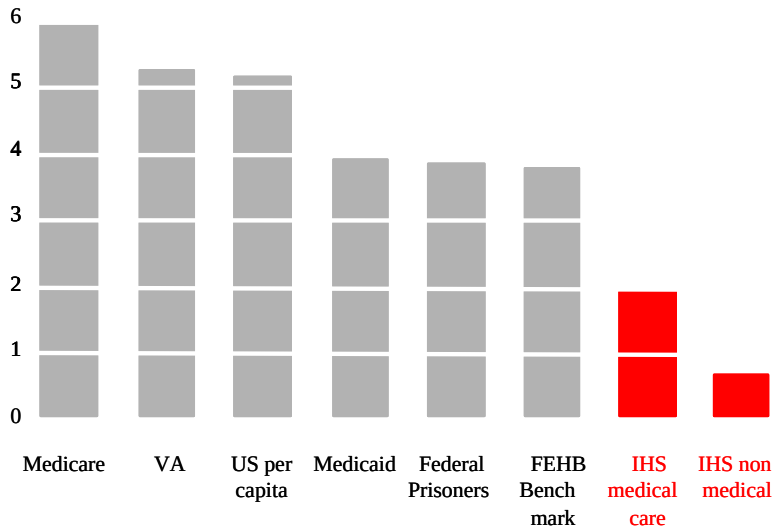
[519] Ibid.

[520] Michael R. Sinclair, "The Role of Private Foundations: Testimony of Michael R. Sinclair, Ph.D., Senior Vice President, Henry J. Kaiser Family Foundation, before the Committee on Indian Affairs, United States Senate Hearings on Unmet Needs for Native Americans," (21 May 1998); Dixon, Mim, Yvette Roubideaux, Brett Shelton, Cynthia Mala, and David Mather, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management* (Denver, CO: National Indian Health Board, 1998), 3.

[521] Indian Health Service. *Funding Disparities.*

[522] Indian Health Service, *Indian Health Service Year 2005 Profile* (Rockville MD, January 2005). http://info.ihs.gov/Infrastructure/6_ProfileSheet-January2005.doc. (June 2006)

Figure 18
IHS Appropriations vs. Other Federal Health Care Expenditures
Thousands of dollars per capita, 2003



Note: IHS non-medical spending includes community infrastructure items such as water and sewage treatment.
Source: U.S. Commission on Civil Rights, *A Quiet Crisis Federal Funding and Unmet Needs in Indian Country*. (Washington: Government Printing Office, July 2003), 44, citing IHS sources.

One important driver of low appropriations in the late 1990s and early 2000s was Congress' apparent lack of understanding about the capacities of IHS management information systems. Agency appropriations were made with the assumption that the IHS would also be billing Medicaid, Medicare and private insurers when a patient qualified for or had access to such programs. However, IHS systems were designed to keep track of patient medical information, not generate bills. This effectively made it impossible for the Service to access these monies. Thus, the IHS was forced to operate on a lower budget than was assumed by Congress. Faced with these funding shortfalls, the IHS increased its capacity to use Medicaid funding to help sustain its programs; by 2004, collections from Medicaid had grown to more than $446 million.[523]

Although third-party reimbursements have augmented IHS budgets, this reliance creates additional funding uncertainties. In 2004, revenues from Medicaid reimbursement accounted for approximately 16% of the IHS budget for clinical services and accounted for over two-thirds of the third-party collections made by the IHS.[524] Medicaid cutbacks, however, have been adversely affecting the amount of funds that can be recouped by IHS providers. Moreover, rising Medicaid expenses have led states to undertake cost containment measures by restricting patient eligibility or

[523] Mim Dixon and Kris Locke, "Overview of Medicaid and Indian Health Care," Northwest Portland Area Indian Health Board, National Indian Health Board, and the Urban Institute Medicaid Roundtable, Washington D.C. (31 August 2005), 15. http://www.npaihb.org/legis/MedicaidReform/PolicyPapers/Overview_MedicaidRoundtable_FINAL_8_18_05.doc

[524] Ibid.

cutting provider payments. Since the federal government provides Medicaid only for patients and services covered by a state's Medicaid program, these state administrative decisions reduce funding available to the IHS.[525]

The broader trend in U.S. health care towards managed care also has implications for the Indian health system.[526] The option of providing health care under managed care plans increases potential funding sources; however, the additional administrative burden can be significant. Under the managed care model, Indian health facilities must often meet specific requirements and regulations in order to become approved as a provider within the plan network. The terms of the plans also tend to restrict which patient services can be funded. Further, since managed care organizations rely on large pools of patients to manage risk, the relatively small health care delivery systems of the IHS provide little leverage for negotiations.[527]

The strain on health budgets is compounded by rapidly increasing rates of chronic diseases, such as cardiovascular disease, hypertension, obesity, and cancer. All of these conditions have significant behavioral components, such as dietary factors and physical activity, to their etiology and treatment. This requires a shift in the mindset and organization of the Indian health system. The system was developed primarily to deal with acute, urgent, and infectious diseases. Additional health care professionals are needed to deal with the complications of chronic diseases, as well as more community health services and activities to prevent and manage these conditions. The resulting additional demands on the health care system are costly.

Finally, as noted, the IHS devotes but 1% of its budget to urban Indians. This is not a criticism; it is consistent with IHS' mission to serve Indian Country. It does mean, however, that urban Indians must rely much more on state and federal programs designed to serve the general population or on private sector insurance to cover their health care costs.[528] Unfortunately, in order to access care through these programs, urban Indians have to know about them and qualify for them (this hold true for, for example, state Child Health Programs, Medicare and Medicaid), or gain access through employment and purchase (as is the case with private insurance). These barriers leave a substantial portion of the urban Indian population under-served. Further, even when health services are provided in these settings, they are not tailored to Natives' socio-cultural and health needs. The healthcare needs of urban Indians are an important subset of the overall impediments to improving the health of American Indians and Alaska Natives.

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[525] Andy Schneider, "Reforming American Indian/Alaska Native Health Care Financing: The Role of Medicaid," *American Journal of Public Health* 95, no. 5 (2005), 767.

[526] Roubideaux, "Current Issues in Indian Health Policy," 13-14.

[527] Mim Dixon, *Managed Care in American Indian and Alaska Native Communities*, (Washington, DC: American Public Health Association, 1998), Preface, 172.

[528] Roubideaux, "Current Issues in Indian Health Policy," 4, 10.

Self-Determination and Health Care

One of the promising areas of change in Native health care is the increase in tribal management through self-determination contracting and self-governance compacting.[529] For the federal government, this means that on an annual basis, Congress appropriates funds to the Indian Health Service not only for direct IHS service delivery, but also for those Native nations that have contracted with the IHS to self-administer health care. Indeed, a growing number of Native nations are taking advantage of the options to operate medical facilities. In 2005, of the overall IHS budget appropriation of approximately $3 billion, $540 million went to Indian nation governments under contracting and $918 million went to those governments under compacting.[530] As indicated in Figure 19, except for IHS hospitals, the majority of IHS facilities had been brought under tribal control by 2001.

Figure 19
IHS and Tribally Operated Medical Facilities, October 2001

		Tribally Operated[1]			
	IHS	Contract	Compact	% of Total	% Change since 1998
Hospitals	36	2	11	27%	+8%
Health Centers	59	108	64	74%	+11%
School Health Centers	2	2	1	60%	0%
Health Stations	49	55	29	63%	+11%
Alaska Village Clinics	-	16[2]	160	100%	+10%

Note: [1] "Tribally operated" also refers to programs operated by consortia of tribes.
[2] Total includes Non-638 Contracts used in Alaska.
SOURCE: Indian Health Service, *Regional Differences in Indian Health, 1998-99* (Washington, DC: Government Printing Office, 2000), 19; And Indian Health Service, *Regional Differences in Indian Health, 2000-2001*. (Washington, DC: Government Printing Office), 17.

For tribes, the shift away from service delivery by the IHS makes service providers more accountable to tribal citizens, increases the likelihood that service offerings will be tailored to Native nations' particular health priorities, and may even improve patient satisfaction and health outcomes. On the latter point, a 1998 National Indian Health Board (NIHB) survey of tribal leadership assessed the impact of tribal management of Indian health programs. The findings indicate that by comparison to tribes whose health services are provided directly by the IHS, self-administering tribes are making notable improvements in service delivery, and tribal leaders and citizens are more satisfied with the results.

The NIHB survey of tribal health directors and tribal chairpersons found that community satisfaction with tribal health care systems was higher where the Native nation had more discretion over programs.[531] The survey also found that tribes served directly by the IHS were less satisfied with the quality of their health care than tribes under contracts, and tribes operating under contracts were not as satisfied as those operating under compacts (where local discretion is highest). Additionally,

[529] For a more complete discussion of compacting and contracting, see the "Tribal Government" and "Tribal-Federal Relations" chapters.

[530] Indian Health Service, *Indian Health Service Year 2005 Profile*.

[531] Dixon and Locke, "Overview of Medicaid and Indian Health Care", 7.

the number of programs in operation, the number of facilities in place, the prioritization of preventative programs, the integration of programs, and the total payments collected from third parties was higher in those Indian nations that managed their own health care programs. In sum, the more control and discretion a Native nation had over its health care resources and service delivery systems, the more satisfied it was with the quality of service and the innovation in programs.[532]

Tribes also report that the self-government compacting approach reduces regulation, increases financial flexibility, allows the consolidation and redesign of programs, and increases access to new programs and funds.[533] Not surprisingly, tribal leaders predict in surveys that they will continue to increase their use of health care service compacting and contracting.[534] Other research, which queried more than 100 tribes (23% of which had switched from IHS to tribal management), indicates that the less responsive the IHS area office was to a tribe, the more likely it was that the Indian nation would take over health care.[535]

Self-Determined Indian Health

In light of the evidence that improved responsiveness and accountability, and ultimately better citizen satisfaction, come with tribal control of health care delivery, more efforts are needed to help tribes assert their right to self-governance and self-determination in the area. Given the rising rates of chronic diseases and the significant role of social, economic, behavioral, lifestyle, and community factors in the changing health status of American Indians and Alaska Natives, a more community-oriented, public health approach appears to hold the key to improving health in Indian communities. Greater self-governance in Indian Country transfers more decision-making power and control to Native communities, affording greater congruence with community priorities and more room for innovation.

Given the behavioral components of so many of today's health problems in Indian Country, Indian nations confront the complicated task of healing the socioeconomic forces that have led to unhealthy behaviors. This is not accomplished by taking a pill or getting vaccinated. Whole societies need to be healed. The evidence points toward the conclusion that policies of self-determination and self-governance hold the first prospect in a century or more of yielding an integrated path of economic improvement, restoration of communities' and individuals' sense of being in control of their own destinies, and positive expression of indigenous culture in pursuit of self-defined standards of well-being.

The case of improving health at the Mississippi Choctaw nation tells this story and holds this promise.[536] Much lauded for the unrelenting use of sovereignty to build one of the showcase

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[532] Ibid.

[533] W. Ron Allen, 3.

[534] Dixon and Locke, "Overview of Medicaid and Indian Health Care," 10.

[535] Alyce Adams, "The Road Not Taken: How Tribes Choose Between Tribal and Indian Health Service Management of Health Care Resources," *Indian Culture and Research Journal* 24, no. 3, (2000), 21-38.

[536] Harvard Project on American Indian Economic Development, "Mississippi Choctaw Health Center," *Tribal Governance Success Stories: Honoring Nations 1999* (Cambridge, MA: Harvard Project on American Indian Economic Development, 1999).

economies of contemporary Indian America, the Mississippi Choctaw have not been about getting rich. Rather, from the beginning, the nation's economic success has been driven by a desire to pull itself out of some of the most distressing social and public health conditions in the United States. In the 1960s, the members of the Mississippi Band of Choctaw Indians subsisted in miserable economic and health conditions. Nearly all tribal housing was substandard: 90 percent of tribal members lived in units with no plumbing and 30 percent had no electricity. Life expectancy was less than 50 years of age, and the infant mortality rate was among the highest in the United States. Poverty and ill-health went hand in hand. At that time, the Indian Health Services was the primary provider of reservation health care services.

Mired in substandard living and health conditions and dependent on federal programs and spending that seemed to offer little prospect of improvement, the Mississippi Choctaw tribal government determined that it would be better for the nation to work on its own to find solutions to its citizens' health problems. Over the next decade, the Choctaws pushed tirelessly to contract with the IHS to take over more and more management control of reservation health programs. It obtained IHS funds to build a new hospital (the now award-winning 58,800 square foot Choctaw Health Center opened in 1975) and set about contracting all of IHS' public health programs. On January 1, 1984, the Mississippi Choctaw Nation became one of the first Indian nations to contract for the management of a complete tribal health care system. In 1994, the Mississippi Choctaw nation took the final step in breaking away from federal control when it entered into a self-governance compact for all health care services.

The same drive for self-rule according to Choctaw values that has yielded the Nation's economic development has produced remarkable improvements in health care capacity and outcomes. By 1999, the Choctaw Health Center had seven full time physicians and over 240 employees, as well as an 18-bed inpatient acute care unit, a 24-hour emergency medical services department, outpatient and dental clinics, a mental health center, a diabetes clinic, a disability clinic, a women's wellness center, and a variety of preventative programs. The immunization rate for children was raised from 70 percent in 1990 to 95 percent in 1999. And in a stunning testament to the results that are possible, the average citizen's life span, which had been less than 50 years of age before the drive to self-determination began, was raised to 68 years of age by 1999.

As the case of Mississippi Choctaw and its dogged determination to turn things around for its citizens attest, there are considerable hurdles to overcome in transitioning from IHS-operated health care systems to tribal systems. As this process continues for many Indian nations, within IHS, staffing reductions will continue as contracting and compacting shift the IHS' budget away from direct operations. Moreover, tribes will have to be vigilant to ensure that the gradual devolution of IHS duties and funds to the Indian nations does not erode the federal government's trust and treaty obligations to provide health care to Native Americans. And, of course, there will be a continuing tension between the IHS' mission and its low funding levels.

Equally important, going forward, there will be an increased need for coherent intertribal data collection and for continuing the unified approach of seeking appropriations from Congress via the IHS; otherwise compacting and contracting tribes put Congress in the position of being lobbied by multiple Native nations, each with its own method of calculating and reporting health status. Public health surveillance and advocacy efforts will still be needed at a national level to ensure that improvements can be made in the Indian health system over time.

Building the capacity of individuals and communities to address the health problems of American Indians and Alaska Natives is a top priority for Indian nations in the 21st century. Native nations knew how to be healthy in the past, and they now have a chance to restore balance to their

communities and regain their health and well-being through self-governance, self-determination, and indigenously driven and managed public health efforts.

TEXTBOX: Whirling Thunder Wellness Program, Winnebago Tribal Health Department, Winnebago Tribe of Nebraska

As with many American Indian populations, diabetes is a destructive force in the lives of the Winnebago Tribe of Nebraska Reservation's 2,600 residents. The incidence of diabetes is 7.7 percent higher and its prevalence is 8.8 percent higher in the reservation's population than in the U.S. population at large. Over 30 percent of Winnebago adults have Type 2 diabetes, and 48 percent of Winnebago youth have hyperinsulinemia, a predictor of future diabetes.

There has been a concerted effort to treat diabetes on the Winnebago Reservation for more than two decades. In 1979, the Indian Health Service (IHS) established one of five model diabetes programs on the Reservation. The Winnebago/Omaha Diabetes Project operated out of the local IHS hospital and was administered by three community health nurses who served both the Winnebago and its neighboring tribe, the Omaha. Although the Project provided much-needed data collection and improved the clinical treatment of tribal citizens with diabetes, by the mid-1990s, there was a clear need for a tribally-specific program – one that would focus on diabetes prevention, operate in the field rather than out of the IHS hospital, and incorporate community values.

In 1995, the Tribe contracted its share of the Winnebago/Omaha Diabetes Project from the IHS under *the Indian Self-Determination and Education Assistance Act of 1975* (P.L. 93-638) and launched the Whirling Thunder Wellness Program. The twelve-person staff seeks to raise community awareness about diabetes and to provide primary and secondary prevention programs and services consistent with traditional Winnebago culture. To meet these objectives, Program staff has designed programs such as a "Team Up" retreat for diabetes patients, a "Seniors on the Move" wellness program, and a "Kidz Café" that provides healthy summertime meals and snacks to community children. After-school activities such as sports programs, traditional dancing, and corn harvesting, provide safe, adult-supervised cultural and physical activities for up to 50 children.

Since assuming control of the diabetes program, the Whirling Thunder Wellness Program has motivated community members to embrace healthier lifestyles. A study conducted by the University of Nebraska notes that weight gain among participants in Whirling Thunder-sponsored activities was dramatically less than in community members who did not participate. Whirling Thunder's influence in reducing obesity and other diabetes risk factors, the study suggested, is helping lead the community to victory in its battle against diabetes.

Tribal leaders, citizens, community health professionals, and Program staff are thrilled with the community's progress and committed to building upon their success. In a *Washington Post* article, one participant praised the "Team-Up" talking circles for offering support and a sense of hope: "The best thing the circles taught me is that we don't have to die from diabetes. Now I know my family has a chance." With its focus on prevention, this outreach program is changing individual and community behavior on the reservation and helping to ensure a healthy citizenry for generations to come. /**END TEXTBOX**

Health Care: A Trust Responsibility, A Sovereign Right

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Treaties between tribes and the federal government implied that in exchange for Indian lands, the federal government would provide for the health, education, and welfare of the tribes. Subsequent legislation and Supreme Court decisions have reaffirmed the trust responsibility of the federal government to provide health care for American Indians and Alaska Natives from federally recognized tribes.

Initially, the federal government sought to fulfill this obligation through the U.S. Public Health Service. However, relatively unorganized and poorly funded operations resulted in the rapidly declining health status of American Indians in the early 1900s. In 1921, Congress passed the *Snyder Act*, the first significant Congressional authorization for funding for Indian health, and, in 1955, organized the Indian Health Service (IHS) to bring increased funding, more facilities, and better operations to Indian health care.

Over the last fifty years, the IHS has made remarkable gains in the health status of American Indian and Alaska Native communities by adopting a public health approach. This approach involves not only a medical model, but services and programs to address the health needs of Indian individuals and communities.

The best example of this public health approach is the IHS National Diabetes Program, now referred to as the Division of Diabetes Treatment and Prevention (DDTP). In some IHS areas, obesity and diabetes have been problems for decades. In the 1970s, diabetes was noted to be occurring among some American Indian groups at epidemic levels. Chronic diseases such as diabetes provide a significant health care challenge because they are largely caused by environmental and lifestyle factors that are hard to change and are embedded in the culture and socioeconomic situation of the community. Relocation on reservations, high unemployment rates, poverty, the adoption of a diet high in calories and fat, and reduced physical activity have led to rising rates of obesity, diabetes, hypertension, cancer, and heart disease among American Indians and Alaska Natives.

Established in 1979 to address the growing problem of diabetes in American Indians, the IHS Division of Diabetes Treatment and Prevention has grown over the past twenty-five years into a comprehensive, national network of resources. The DDTP has a national office in Albuquerque, Area Diabetes Consultants in each IHS Area, and local diabetes programs in most Indian communities. The program develops standards of care for diabetes patients, monitors the quality of diabetes care delivered, provides educational resources and trainings for health providers, and administers the Special Diabetes Program for Indians, a Congressionally mandated grant program for Indian Health Service, Tribal, and Urban Indian health programs to implement diabetes prevention and treatment services.

The DDTP succeeds because the standards of care it establishes and the training for Indian health programs it offers focus on a team approach. It emphasizes the importance of working with the local tribes and community members to address this complex chronic disease. As a result, some tribes have taken their Special Diabetes Program for Indians funding and used it to revive cultural health-

related practices. These tribes have developed community gardens to grow healthier traditional foods, incorporated physical activity into traditional activities, implemented a variety of community events to promote physical activity, purchased needed exercise and sports equipment, and provided health education at cultural events. A recent study in the Aberdeen Area showed how a native form of communication—talking circles—has been used for diabetes education and has led to improvements in knowledge, attitudes and behaviors, and health care.

Although the IHS has realized successes through its public health approach, its efforts are compromised by severe under-funding. Health care is a part of the trust responsibility of the federal government to tribes. However, the treaties and subsequent legislation do not specify exactly how much funding is to be provided and, as a result, the IHS must get its budget through the Congressional appropriations process every year. The IHS has never been fully funded. When medical inflation and cost of living increases are factored in, the IHS budget has actually decreased over time. Currently, it is funded at about 40 percent of need. As a result, American Indians and Alaska Natives suffer from gaps in health care services and access, high provider turnover rates, outdated equipment, and an inadequate system for referrals and specialty care.

American Indian and Alaska Native tribes are—and have long been—advocating for additional funding for the IHS. A fully funded IHS would be the most important advance in American Indian health imaginable. To bring this about, tribes must continue to educate Congress and the general population about the persistence of disparities in American Indians' health status and quality of care compared to that of the general population.

However, even as tribes advocate for a fully funded IHS, many are taking matters into their own hands. Depending on their circumstances, tribes rely on the IHS, seek health care resources outside of the IHS, or manage their own health care programs. Some tribes use their own economic resources to enhance their health care systems. Tribes with successful casinos have used their profits to build new health facilities, add new programs, and make physicians' and other healthcare providers' salaries more competitive. Tribes and the IHS have also made significant efforts to improve their effectiveness at collecting third-party reimbursements for care provided in their facilities. In addition to collecting on private insurance, they can in some cases collect reimbursements for providing care to Medicare and Medicaid patients. For some Indian health facilities, over half of their operating budgets comes from third-party reimbursements.

Each tribe has the sovereign right to determine how to get the best health care for their members. For some tribes, taking over the management of their own health programs is the best way to get more health care services and resources. Public Law 93-638, the *Indian Self-Determination and Educational Assistance Act*, allows tribes to take over the management of programs previously managed by the IHS. The decision to transition to tribal management is itself complicated and tribes must consider whether or not they have the resources—both human and financial—to transition to tribal management. The transition process can take five to seven years. Tribes with significant community resources and economic enterprises tend to do best in tribal health care management since they can make up for the shortage of funding that they inherit from the IHS. Tribes with no other resources just inherit an under-funded system and suffer the same problems as the IHS.

Tribes that consider assuming management of their own health programs also need to realize that their health care system must be separate from the political process. Medical decisions must be made on the basis of medical and scientific evidence and standards, not on whether a tribal council member thinks a certain medication or treatment should be available. Healthcare providers have to feel secure in their ability to practice quality health care without political interference. Tribes that

have not done well with tribally managed health care programs have almost always had problems with political interference.

If tribes can assume management of their own health care, this is potentially the best course of action. Tribal health solutions are more likely to respond to local needs, to be culturally appropriate, and to have the flexibility to find additional funding sources. In 1998, I was involved in a large survey of tribal leaders conducted by the National Indian Health Board. They found that tribes that take over the management of their healthcare programs were able, on average, to implement more new healthcare programs, build more new facilities, and have more flexibility in finding funding sources outside the IHS. These tribes felt that they were better able to exercise their sovereignty when compared to tribes that still got their healthcare through IHS. Although studying such diverse health programs makes accurate comparisons difficult, there are likely to be significant differences between IHS administered health care and tribally managed health care.

Tribes that want to manage their own health care programs need to be fully informed. There are forums in which they may seek out relevant information, including belonging to the national Tribal Self-Governance Advisory Committee that advocates for tribes that manage their own health care programs. National Indian health conferences allow tribes who have made the transition to share their experiences while tribes who are contemplating the change may visit established programs to get ideas before they begin. Accurate information is critical to improving Indian health.

I became interested in Indian health when I realized, as a teenager, that the health care my family received in the IHS was very different from that of the general population. I became a doctor to help improve the quality of Indian health care, and then entered public health training once I decided I wanted to have an impact on a level greater than one patient at a time. During my public health education, I recognized the critical importance of data in informing health policy. The lack of quality data documenting specific Indian health needs compromises Indian health care. As a result, I transitioned to an academic career so that I could do research on Indian health issues that could eventually influence health policy.

There are other routes to improving Indian health care. Everyone involved in Indian health has the potential to make a difference. We rely on health care providers for improving care, on tribal leaders for advocacy, and on Indian communities for adopting healthier lifestyles. We want to be able to rely on Congress. Congress has the potential to fully fund Indian healthcare and make all of our efforts more effective in improving the quality of healthcare for American Indians and Alaska Natives.

FAMILY SUPPORT

- The stubborn legacy of generations of poverty and poverty program-dependence in Indian Country make efforts to bolster families and children a daunting challenge. Obstacles include lack of cultural sensitivity in many federal programs, weak tribal institutional capacity, perverse incentives for welfare system participation, and limited job opportunities.

- Federal welfare reform adopted in the 1990s continues to represent an opportunity and a burden for Indian nations. In particular, it expands opportunities for Native nations to take over welfare responsibilities under block grant funding by the federal Temporary Assistance to Needy Families (TANF) program. Funding for tribal TANF, however, has been limited and uncertain, and Indian nations have struggled to build their needed administrative capacities.

- Under the *Indian Child Welfare Act*, Native nations are regaining control over the placement of at-risk children. More Native foster and adoptive children are being placed with tribal citizens' families, helping to keep ties to community and family intact.

- As Indian nations build their administrative and financial capacities, family support in Indian Country is changing from a fractured series of independent offices and federal programs to tribe-specific approaches that serve families in an integrated manner.

Persistent poverty, unemployment and social distress in Indian Country means that meeting the basic needs of citizens is a pressing problem for the vast majority of Native nations. Rates of reliance on public assistance in Indian Country are substantially higher than for the general U.S. population. There are no substantial federal welfare assistance programs directed specifically at Native individuals and families. Rather, Native nations are treated much like states, with abilities to take on responsibility for administering federal assistance programs and supplementing assistance to citizens if possible. With the advent of welfare reform and other Congressional legislation, more Native nations than ever are finding ways to construct novel and culturally customized approaches to the task of sustaining and strengthening their families and communities.

Having endured eras in which federal authorities divided families by taking students off to boarding schools and sponsored programs to have Indian children adopted into non-Indian homes, protecting and controlling the welfare of children are understandably particularly deep concerns of Native communities. With tribal sovereignty in the area recognized and guarded by the *Indian Child Welfare Act* of 1978 (ICWA), Indian nations exercise exclusive jurisdiction over the care, placement and adoption of Indian children in need. Innovative programs to serve children in need are underway as tribal jurisdiction is backed up tribal government resources and management.

History of the Destruction of Native Families

The care and well-being of families and individuals are integral parts of the historic fabric of Native societies. Recent centuries have torn at this fabric. Diseases brought from Europe, warfare, forced migrations under horrid conditions, reservation confinement, and grinding poverty disrupted and destroyed countless Native families and familial relationships. Denials of traditional means of subsistence and the locating of responsibility for Indian affairs in the War Department of the United States up to the mid-19th century put War Department agents in charge of delivering food and other necessities to tribes as part of a concerted policy of forced assimilation. The "services" provided by the agents often consisted of insufficient supplies with excessive restrictions aimed at increasing dependency.

As discussed above in the chapter on education, by the late 1860s, church missionaries acquired semi-governmental status and direct federal funding. Their charge under President Grant's Peace Policy was not only to "Americanize" the Indians through missionary education, but also to provide basic social services such as health care as means of "pacification". As federal reliance on church missionaries waned toward the end of the 1870s, the Bureau of Indian Affairs, which had been transferred from the War Department to the Interior Department in 1849, took on greater responsibility for overseeing and providing for the welfare of reservation residents. By the end of the 1890s, the newly created BIA assumed full responsibility for providing social services in Indian Country, resulting in a paternalistic system with little to no input from tribal nations or their citizens. As one scholar puts it, by 1900 the Bureau of Indian Affairs' "Indian agent had, in effect, become the tribal government."[537] It effectively remained so until at least the 1970s and the adoption of federal policies of self-determination.

For much of the history of the United States, Indian children were removed – often forcibly – from their families with the intention of eliminating their language and culture. During the era of boarding schools, not only were children compelled to drop the core of their cultural practices, but Indian families were actively discouraged from visiting or even knowing where their children were placed. The result was generations of Indian children who grew up with little to no connection to their native homes or community life.

Even as the Indian Boarding schools lost their Americanization mission in the twentieth century, Indian children at risk upon family disruption and/or impoverishment were subjected to approaches similar to those imposed earlier on boarding school students. Federal and state child welfare workers developed policies of early intervention and early removal designed in ignorance of tribal social systems and the parenting skills of Indian families. The BIA and private agencies such as

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[537] C.L. Henson, "From War to Self-Determination: A History of the Bureau of Indian Affairs," *American Studies Online* http://www.americansc.org.uk/Online/indians.htm. (28 June 2006).

the Child Welfare League of America undertook to place Indian children with white foster and adoption families, often far away from natural parents and extended families.

Policymaker, philanthropist, and general public ignorance of extended-family child rearing in Indian families combined with cultural insensitivity, assimilationist goals, and outright racism perpetuated policies which took early separation from families as being the best outcome for Indian children. At times, the effort to remove Indian children from Indian homes took on the character of a public works program. This persisted well into the second half of the twentieth century. From 1958 until 1967, for example, the BIA, the U.S. Children's Bureau (now part of the Department of Health and Human Services' Administration for Children and Families), and the Child Welfare League of America joined forces to form the *Indian Adoption Project*, which placed approximately 400 Indian children from western states with white families in the East and Midwest.[538]

Overall, the effort to place Indian children in non-Indian homes cut a massive swath of family destruction across on Indian America. From the late nineteenth century on, thousands and thousands of Indian children were moved into non-Indian homes via adoption and foster care. The First Nations Orphan Association has estimated that, "between 1941 and 1978, 68% of all Indian children were removed form their homes and placed in orphanages or white foster homes, or adopted into white families."[539] The United States House of Representatives found in its House Report accompanying the *Indian Child Welfare Act* of 1978 that:[540]

> Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four Indian children under 1 year of age was adopted.
>
> The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care of in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being

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538 "The Adoption History Project: Indian Adoption Project." http://darkwing.uoregon.edu/~adoption/topics/IAP.html (28 June 2006).

539 See Kristen Kreishner, "Coming Home: The Lingering Effects of the Indian Adoption Project," *Children's Voice*, Child Welfare League of America, 11, no. 2, March/April 2002. http://www.cwla.org/articles/cv0203indianadopt.htm (28 June 2006).

540 U.S. House of Representatives, *House Report 95-1386*. (Washington: Government Printing Office, 1978), 9.

> separated from their parents is nearly 1,600 percent greater than it is for non-Indian children.

The House Report also found that "85 percent of all Indian children in foster care were living in non-Indian homes" and, where state data were available, "the norm" was that more than 90 percent of adoptions of Indian children were into non-Indian families. Moreover, the House Report concluded that as late as 1971, more than 35,000 Indian children were in BIA boarding schools – representing 17 percent of the Indian school age population of federally-recognized tribes at the time. At the Navajo Nation, 90 percent of the school population in grades K thru 12 lived at boarding schools.[541] These striking statistics cover the living memories of American Indian families and policymakers today. They represent scars that are hard and wounds that are slow to heal.

The Growth of Modern Welfare Programs

The Johnson Administration's War on Poverty in the 1960s initiated an expansion of social services throughout the United States. "Great Society" programs emanated from numerous federal Departments, including Labor and Health and Human Services, and reached deep into Indian Country. When these social welfare programs were initially introduced to the reservations in the 1960s and 1970s, they greatly altered the size of tribal governments and the demands placed upon them. The Zuni Pueblo, for example, went from nine employees during most of the 1950s to 54 by the end of the '60s. The Zuni Community Action Program became the largest component of the tribal government with 33 employees and a major share of the budget.[542]

Across most reservations, the Great Society programs had a similar effect on tribal government, swelling budgets and paperwork, and directly increasing the number of tribal employees.[543] As helpful and necessary as these programs may have been as lifelines for Indian citizens and for the expansion of jobs on the reservation, the on-reservation administration of these programs entailed hiring tribal members to administer programs designed, implemented, and monitored from Washington, DC. Thus, while tribal governments were greatly expanded in size, they were not given a commensurate increase in governing or management power since discretion over program design – including the ability to create solutions tailored to local priorities, values, and circumstances – was constrained by federal rules and regulations.

The build-up of tribal governments that began in the 1960s has left an enduring pattern of institutional dependence across many Indian nation governments. Not accompanied by policies and

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[541] Ibid.

[542] T.J. Ferguson, E. Richard Hart, and Calbert Seciwa, "Twentieth Century Zuni Political and Economic Development in Relation to Federal Indian Policy," *Public Policy Impacts on American Indian Economic Development,* ed. C. Matthew Snipp (Albuquerque, NM: Native American Studies, Institute for Native American Development, University of New Mexico, 1988), 113-44, as cited in Stephen E. Cornell, "'We Gotta Get Somethin' *Goin'* Around Here!' Welfare Reform, Job Creation, And American Indian Economies," unpublished monograph prepared for the symposium on "Empowering American Indian Families: New Perspectives on Welfare Reform" (Washington University, St. Louis, MO: 5-6 May 2000).

[543] Some indirect private sector employment must have accompanied the increased federal spending of the Great Society programs, as the tribal government purchasing power increased. Such induced multiplier effects appear to be *de minimus* around Indian Country and are certainly not adequate to employ those still seeking work.

reforms that could generate economic development, the growing social service budgets and programs in the areas of public assistance, education and health were the primary sources of employment on many reservations, particularly employment for the relatively well-educated who were suited to public administration jobs. Moreover, as tribal governments' primary sources of revenues, these programs induced those governments seeking survival to adapt themselves to interface effectively with the requirements of federal system. As a result, to this day, many tribal governments carry a strong a federal feel and flavor. In everything from program designs to personnel systems, from hours of operation to managerial hierarchies, the legacies of the federal government's ways of doing things often persist.

Family Poverty in Indian Country Today

Using the U.S. Census Bureau's standard definition of "poverty",[544] Figure 20 summarizes the state of family poverty in Indian America. As of the 2000 U.S. Census, 21.8% of American Indian and Alaska Native families nation-wide had household incomes below the poverty level. This represented a substantial improvement over the 1990 poverty rate of 27%, but was still more than twice the rate (9.8%) for the U.S. population of all families. Focusing on both Indian areas (Indian statistical areas, which are primarily in Oklahoma, plus reservations and Alaska Native Villages) and reservations alone, Native family poverty rates in Indian Country are considerably higher than nation-wide Native family poverty rates.

[544] United States Census Bureau, "How Poverty is Defined," *Areas with Concentrated Poverty: 1999*, Census 2000 Special Reports, July 2005, 2.

Figure 20
Indian Poverty and Welfare

	1990	2000*	% points change, 1990-2000
Family Poverty Rate			
AIAN on Reservations	47.3%	35.6%	-11.7
AIAN in All Indian areas	38.1%	28.7%	-9.4
AIAN U.S.-wide	27.0%	21.8%	-5.2
All Races U.S.-wide	10.0%	9.2%	-0.8
Child Poverty Rate			
AIAN on Reservations	55.5%	44.2%	-11.3
AIAN in All Indian areas	47.7%	37.4%	-10.3
AIAN U.S.-wide	38.8%	31.6%	-7.2
All Races U.S.-wide	18.3%	16.6%	-1.7
Deep Poverty Rate**			
All Races on Reservations‡	26.7%	20.9%	-5.8
All Races U.S.-wide	9.1%	8.7%	-0.4
Public Assistance			
All Races on Reservations‡	18.7%	16.8%	-1.9
All Races U.S.-wide	7.5%	7.8%	+0.3

* For 2000 data "AIAN" here represents self-identified American Indians and Alaska Natives alone (i.e., not in combination with any other racial category). The 1990 Census did not allow multi-race identification.
** Deep poverty is defined as the proportion of people living at less than 75% of the poverty level.
‡ The AIAN figures are not available, only the all-races data are available. Given that the income per capita of people of all races on reservations averaged 82% higher at the time of the 1990 Census and 56% higher at the 2000, these all-races figures most likely understate the Indian-only rate.
Source: U.S. Census Bureau, Census 1990 Summary Tape File 3; U.S. Census Bureau, Census 2000 Summary File 3.

On reservations, the economic development that took hold in the 1990s is making headway against the extreme poverty reflected in the on-reservation family 1990 poverty rate of over 47%. Nevertheless, more than 35% of the families living on reservations in 2000 lived below the poverty line. This approaches four times the rate of the U.S. as a whole. The presence of tribal government gaming in a reservation economy does not result in an appreciably different picture: 34% of Native families on reservations that had gaming in the 1990s subsisted on incomes below the poverty line as of 2000.[545]

The impact of reservation poverty is suggested by the data on children. As Figure 20 indicates, in 1990, substantially more than half of Indian children living on reservations lived below the poverty line. By 2000, this had improved, but more than 44% of Indian children on reservations

[545] Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses* (Cambridge, MA.: The Harvard Project on American Indian Economic Development, 2005), 21

were growing up in poverty. Nationwide, Native children were almost twice as likely (at 31.6%) to be growing up in poverty as the average American child. This amounts to on the order of 185,000 young people.[546]

Reservation poverty is not only high; it is deep and persistent. This is seen in the data on "deep poverty." Deep poverty is defined at subsisting on income which is less than 75% of the U.S. Census-defined poverty line. Figure 20 shows that more than one in five (20.9%) of reservation residents was stuck in deep poverty in 2000. This figure reflects the data for all races on-reservation. All of the indicators suggest that the Indian-only rate of deep poverty must be higher. The higher- and deeper-than-U.S. poverty on reservations, coupled with high unemployment, not surprisingly show up as higher rates of reliance on public assistance. Almost 17% of on-reservation residents relied on public assistance as of 2000, compared to a rate of 7.8% of the general U.S. population. (Figure 20)

The data on aggregate rates of reservation poverty mask substantial variation. On reservations such as Crow Creek in South Dakota, Hualapai in Arizona, Rosebud in South Dakota, and Goshute in Utah, more than half of all families are living below the poverty line. At the other extreme, the Census data for the Oneida Nation of New York and the Mashantucket Pequot Nation of Connecticut indicate no families living below the poverty line as of 2000, and nations such as Grande Ronde in Oregon and Lower Sioux in Minnesota show family poverty rate which are below the 9.8% rate for all U.S. families. The aggregate data of Figure 20 indicate that the average or representative case in Indian Country is much more like Crow Creek and Hualapai than Oneida and Mashantucket Pequot.

Finally, numerous indicators of social stress come along with poverty among Native Americans. The discussion in the chapter on health above highlights the alarming rates of suicide, alcohol abuse, and related indicators of ill-health. In addition, poverty is affecting family life and structure in Indian America. Native teens nationwide have birthrates nearly 50% higher than their non-Indian counterparts; and a higher share of births to a never-married mother occur among American Indians and Alaska Native than in the general population. Native children are 50 percent more likely than their non-Indian peers to live in a single parent household; and Native youth are 60 percent more likely than non-Indian youth to report being in a fight at school over the last year.[547]

Impact of Federal Welfare Reform

Native nations first gained partial discretionary power over the administration of federal family support programs with the passage of the *Indian Employment, Training and Related Services Demonstration Act* of 1992 (PL 102-477). Addressing only the employment training aspect of welfare programs, PL 477 gave Native nations the right to self-nominate as "demonstration tribes" under an arrangement in which the tribe could combine as many of a designated set of employment, job training, skill and opportunity development and related programs as it wanted to into one program.

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[546] Based on U.S. Census data indicating a Native population in 2000 of 1.8 million (single race self-identified), with one-third of the population being below the age of 18. See U.S. Bureau of the Census, "We the People: American Indians and Alaska Natives in the United States", *Census 2000 Special Reports*, 2006, 2, 5.

[547] Data here for teen birthrates, births to the never-married, single-parent households, and school fighting are from Amy Besaw, Joseph P. Kalt, Andrew Lee, Jasmin Sethi, Julie Boatright Wilson, and Marie Zemler, *The Context and Meaning of Family Strengthening in Indian America: A Report to the Annie E. Casey Foundation by The Harvard Project on American Indian Economic Development*, (Baltimore, Maryland: The Annie E. Casey Foundation, August 2004).

One of the main benefits of this arrangement was that tribes could save considerably on administrative overhead because the BIA became the central clearinghouse for statistical and financial reporting, and tribes could combine programmatic reports at a substantial saving of paperwork. More importantly, the Act gave to the secretaries of the relevant departments (Health and Human Services, Labor, and Interior) the power to waive statutory and regulatory requirements affecting the covered programs so long as such a waiver would not violate the Indian-specific provisions of the relevant law or policy.[548] In other words, Indian nations would not necessarily be bound to follow federal statutes and regulations directed at the states and could, on their own initiative, begin to overcome the rigidities of the federal government's one-size-fits-all translation of social welfare programs to the particular requirements of Indian Country.

Tribal authority over federal programs under PL 477 has tended to improve program effectiveness. While the number of Native nations and Alaska Native organizations participating in the PL 477 arrangement was modest even after six years under the Act, those 22 that did participate reported improved effectiveness, with higher numbers of job placements and more client program completions. In addition, the overhead savings created by reducing client records from one per program to one per client were re-dedicated to client services.[549] Thus, while PL 477 was limited in scope and may not have engendered widespread innovation across Indian Country, it did mark the beginning of a transition to tribally managed anti-poverty programs.

In the mid-1990s, Congress and the Clinton Administration radically changed welfare with the passing of the *Personal Responsibility and Work Opportunity Reconciliation Act* (PRWORA).[550] The Act overhauled a number of welfare programs, putting greater emphasis on work and support for work, including child care and child support enforcement. Among other things, it replaced Aid to Families with Dependent Children with Temporary Assistance to Needy Families. TANF is administered via block grants to the states and tribes under rules that allow considerable flexibility of operation and program design within certain defined constraints. Most salient among these constraints embodies the slogan "welfare to work": Recipients receiving assistance for at least two years are required to participate in some form of work-related activity (subsidized or not), and recipients cannot receive federal welfare payments for more than a cumulative total of five years.

"Welfare to work" is particularly problematic in Indian Country. With unemployment at 30, 40 or 50 percent, how are those on welfare to move into jobs that did not exist? If "welfare to work" is not feasible, where can funding come for families in need when TANF funds are exhausted? Tribal leaders have reacted to the modification of welfare under PRWORA with strong positions. Quickly after its passage, the National Congress of American Indians issued a "Tribal Leaders Statement" acknowledging the harmful effects of welfare and the benefit of having tribes in control of TANF and other programs. The statement was very critical, however, of how the new Act would affect tribes:

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[548] U.S. Public Law 102-477, § 7. 102nd Cong., 2nd sess., 23 October 1992. *The Indian Employment, Training, and Related Services Demonstration Act of 1992.*

[549] U.S. Department of Labor, Employment and Training Administration, Division of Indian & Native American Programs, "Public Law 102-477 at a Glance," http://www.wdsc.org/dinap/html/ 477glnc1.html. (28 June 2006).

[550] U.S. Public Law 104-193. 104th Cong., 2nd sess., 22 August 1996. *Personal Responsibility and Work Opportunity Reconciliation Act of 1996.*

> Tribal governments strenuously object…to the means by which this "opportunity" [to manage TANF] is being provided. After decades of federal support for state-controlled "welfare" systems, with no meaningful consultation or negotiation with tribes and with no resources made available, tribal governments are faced with coping with the disruptions and dislocations of "welfare reform" legislation… Immediate and severe impacts on tribal members and tribal governments clearly are going to occur and the means for tribal governments to intervene to mitigate the potential damage is [*sic*] not provided.[551]

Although some technical amendments were made to PRWORA in 1997, American Indian governments have been forced to adapt to the Act. The challenges faced in implementing welfare in the reservation context are significant. They include institutional capacity, funding levels, employment potential, and perverse incentives unique to Indian Country. Indeed, the confluence of obstacles to welfare reform on reservations has led some observers to conclude that "current welfare policies are bound to fail in much of Indian Country."[552]

Implementing TANF in Indian Country

Welfare reform under PRWORA was intended to reduce reliance on public assistance. Generally speaking, however, while the effect of welfare reform has been to reduce the number of individuals receiving support, its impact has been less pronounced in Indian Country than in the country at large. From 1994 though 2002, national welfare caseloads fell from 5.5 million to approximately 2 million.[553] From 1994 to 1998, caseloads in the 33 states the U.S. Department of Health and Human Services identifies as having federally-recognized tribes fell 46%, however, the TANF caseloads including an American Indian or Alaska Native in those states fell only 38.8%.[554] Overall, Native families served by state or federal TANF programs fell by approximately 44% between 1994 and 2002.[555]

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[551] National Congress of American Indians, "Tribal Leaders Statement: Implementation of Public Law 104-193, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996" (1996).

[552] Eddie F. Brown, Stephen Cornell, Michelle Hale, Miriam Jorgensen, Ami Nagle, Melinda Springwater, Leslie Whitaker, "Welfare, Work, and American Indians: The Impact of Welfare Reform. A Report to the National Congress of American Indians," (St. Louis, MO and Tucson, AZ: George Warren Brown School of Social Work and the Udall Center for Studies in Public Policy, 2001), 2.

[553] U.S. Department of Health and Human Services, *Temporary Assistance for Needy Families (TANF) Program: Sixth Annual Report to Congress.* (Washington: Government Printing Office, November 2004), 3.

[554] Sarah Hicks and Eddie F. Brown, "The Future of Welfare Reform: Considerations for Reauthorization," (Washington, D.C.: National Congress of American Indians, 2000); Sarah Hicks, Eddie F. Brown, and Miriam Jorgensen., "Framing the Future: Trends that Will Impact Indian Country's Social Welfare Systems," in Eddie Brown (Chair), *Capacity Building and Sustainability of Tribal Governments.* Symposium conducted at George Warren Brown School of Social Work, Washington University, St. Louis, MO, May 2002.

[555] U.S. Department of Health and Human Services, *Temporary Assistance for Needy Families (TANF) Program: Sixth Annual Report to Congress* (Washington: Government Printing Office, 2004,) x, I-2, XI-5, Appendix Table 11:2.

There has been tremendous heterogeneity in the rate of change in caseloads. Wisconsin saw a 92% decrease in American Indian and Alaska Native TANF cases from 1994 to 1998, yet Minnesota saw a 21% *increase*.[556] Some observers have noted that easier access to locally administered and more culturally sensitive TANF programs may help explain the increasing numbers of welfare recipients on some reservations.[557] By the end of FY 2002, 36 federal Tribal TANF plans had been approved on behalf of 175 tribes, Alaska Native villages, and consortia on behalf of tribes and Alaska Native villages. These served approximately 25,000 Native families. Meanwhile, state Tribal TANF programs served about 27,000 Native families.[558]

The implementation of welfare reform has strained Indian nations' political, administrative, and financial capacities. Far more than simply reducing caseloads, the changes require developing new capabilities, managing changes in funding, and dealing with mandated "welfare to work" workforce participation. The few tribes that initially participated in a PL 477 reorganization were somewhat braced for the radical transformation ushered in by PRWORA, often folding welfare reform into their existing job training agreements.[559] In general, however, the arrival of welfare reform to Indian Country created an abrupt policy change.

When federal welfare reform hit, many tribal governments were unprepared to assume responsibility for administering welfare programs. Most tribes assuming management of TANF have done so from a standing start. In contrast to the experience and expertise the states had developed through administering federal welfare programs, substantial portions of which were underwritten by federal technical assistance and administrative subsidy, most Indian governments had virtually no prior experience in the administration of welfare. Taking over TANF intensifies a tribal government's need for effective political, constitutional, and bureaucratic structures to deliver welfare payments to program participants, while keeping errors, mismanagement – and misappropriation – to minimal low levels.

In addition to straining Indian governments' administrative and political capabilities, federal welfare reform has been accompanied by funding uncertainty and limitations. Although Native nations are able to take over TANF administration from the states,[560] the entire in-place program funding does not go automatically to tribes. State matching funds contributing to the provision of welfare on reservations are not required to be provided to Indian nations that take over TANF; and states have varied from relatively forthcoming to stingy. Thus, at least as of 2003, states such as California and Nebraska had maintained welfare support in accord with pre-reform efforts (known as "maintenance of effort" or MOE). Meanwhile, Alaska provided only 50% MOE to but four

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[556] Administration for Children and Families, Office of Planning, Research, and Evaluation, *Temporary Assistance for Needy Families (TANF) Program: Third Report to Congress*. (Washington: Government Printing Office, 2000), 170.

[557] Hicks and Brown, "The Future of Welfare Reform," 13.

[558] U.S. Department of Health and Human Services, *Temporary Assistance for Needy Families*, x.

[559] The Sisseton-Wahpeton Sioux Tribe, for example, has integrated its TANF program into its PL 477 approaches. See Andrew Grey, Tribal Chairman, Sisseton-Wahpeton Sioux Tribe, "Prepared Statement before the Senate Committee on Indian Affairs: Public Law 102-477 and Welfare Reform" (14 April 1999).

[560] States administered welfare programs on Indian reservations, including AFDC, prior to PRWORA.

consortia, and Wisconsin and New Mexico did not provide MOE.[561] The funding limitations mean that, in most cases, tribes who are benefiting from culturally and locally appropriate policy innovations are doing so with fewer resources than were previously being dedicated to the effort. Essentially, for Indian nations, welfare reform is a mandate with risky funding, if not an outright unfunded mandate.

The lack of specific consideration of Indian needs in the *Personal Responsibility and Work Opportunity Reconciliation Act* means that the Native nations actually receive less funding than their state counterparts. Indeed, of the 26 tribes or tribal consortia that opted to take over TANF by September 2000, only nine came from states that had not pledged to commit state matching funds to tribal TANF programs – the bulk of them were casino tribes.[562] The fact that less than one eighth of the more than 560 federally recognized tribes sought to implement welfare reform nearly three years after its passage[563] can be attributed in part to concerns about funding. By the end of 2002, this figure had still only risen to one in ten tribes (see above).

As noted, mandated, "welfare to work" workforce participation creates particular challenges in Indian Country. In contrast to tight labor markets in many U.S. urban areas, a severe lack of economic opportunity characterizes the environment in which many tribal welfare-to-work initiatives operate. Even the most efficient tribal TANF programs may have only limited impact because there are simply no jobs available for TANF clients. On reservations where jobs are scarce, the only option may be unpaid work experience. Indeed, Indian TANF recipients have a higher-than-average rate of participation in subsidized work. As with much of the non-Indian former welfare population, Indian TANF recipients tend to be employed at wage rates well below the poverty line.[564]

The long-standing backlog of unmet social investment needs in Indian Country means that welfare reform in tribal communities requires greater funding for expanded support services. For example, interviews with TANF recipients on three Arizona reservations indicate that they are one-third less likely to have had previous job experience compared to the average U.S. family on public assistance,[565] yet they favor living on the reservation two to one. The study also reported that transportation and child care are severely inadequate, that nearly half the recipients are not able to buy the food they need for their families, and that three-quarters of the recipients do not have high school

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561 Walter Hillabrant, Mac B. Rhoades, Jr., and Nancy Pindus, "Lessons Learned from Implementing Tribal TANF Programs," *Perspectives on Poverty, Policy, and Place*, Rural Policy Research Institute 1, no. 4 (Winter 2004), 10-11.

562 U.S. Department of Health and Human Services, "Characteristics of Approved Tribal TANF Programs," (20 September 2000). http://www.acf.dhhs.gov/programs/dts/tcht922.pdf (14 January 2001).

563 W. Ron Allen, "Testimony of W. Ron Allen, President, National Congress of American Indians, before the U.S. Senate Committee on Indian Affairs Regarding the Implementation of Welfare Reform in Indian Country," (14 April 1999).

564 Ibid. Note that many observers consider the official poverty line to be an understatement of a family's ability to sustain itself over the long term. See, for example, Constance Citro and Robert T. Michael (eds.), *Measuring Poverty: A New Approach*, Panel on Poverty and Family Assistance: Concepts, Information Needs, and Measurement Methods, Committee on National Statistics, Commission on Behavioral and Social Sciences and Education, National Research Council (Washington, DC: National Academy Press, 1995).

565 Only 46% of the sample had previous work experience, whereas the national average is 75%.

diplomas.[566] The reality of economic conditions, combined with welfare reform requirements, increase the risk that Indians dropping off the welfare rolls will suffer critical levels of poverty with nothing to fall back on.

Attempts have been made to tailor federal welfare reform in certain respects to the realities of Indian Country. The amended PRWORA stipulates that months spent by a TANF recipient on an Indian reservation with a jobless rate of 50% or greater do not count against the five-year cap on TANF benefits. As of the 2000 Census, 135 (43%) of the 311 reservation land areas in the U.S. – representing 50% of the on-reservation working-age population – met this criterion.[567] Therefore, depending on their residency, many Indian welfare recipients do not face TANF time limits.

Although this exemption benefits the most persistently poor reservations, the requirement that states and tribes keep information regarding the residency of recipients has added a layer of administrative cost. Such records were heretofore not systematically tracked for the purposes of determining welfare eligibility.[568] Further, this PRWORA provision may actually be contributing to increased welfare rolls and, in some instances, may act as a disincentive to economic development efforts. Since there is no restriction on collecting benefits in certain areas, off-reservation welfare recipients have an incentive to move to "exempt" reservations in order to collect welfare benefits as they approach their maximum time limits. This incentive can lead to a pooling of the most difficult-to-serve welfare clients on the most desperate reservations, depending, of course, on labor market factors such as distances to jobs, the attractiveness of family and cultural ties, and the availability of housing. Strikingly, the incentive to move applies equally to Indian and non-Indian TANF recipients, alike.[569]

The "welfare to work" exemption provision when reservation employment exceeds 50% can distort economic development incentives for tribal governments. While the economic difference between 48% and 52% joblessness is probably minimal to most families on a reservation (both rates greatly exceed the U.S. unemployment rate of the Great Depression), community well-being is radically different under TANF time limits. Indian nations sitting close to the cutoff point of 50% unemployment can face a difficult choice between letting the economic development chips fall where they may, and exerting diligent efforts to get economic development going, knowing their success will restart all of their TANF recipients' benefits clocks. The presence of this abrupt threshold in the welfare reform law adds unnecessary risks to the general development of tribal communities at or near the threshold.

Notwithstanding the strains that Indian governments have been put under by federal welfare reform, the number of Tribal TANF plans has continued to grow, and tribes have continued to

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566 Shanta Pandey, *et al*., "How Are Families on Reservations Faring Under Welfare Reform?" Working Paper 2 (St. Louis, MO: Kathryn M. Buder Center for American Indian Studies, Washington University, 2000).

567 Using all-races data for the reservations from U.S. Census Bureau, Census 2000 Summary File 3, per the observation in National American Indian Housing Council and Norm DeWeaver, Indian and Native American Training Coalition, "The Impact of Welfare Reform on Tribally Designated Housing Entities" (Washington, DC: National American Indian Housing Council, 1999), 8, that the PRWORA amendments apply to the whole reservation population.

568 Ibid, 8.

569 Ibid.

innovate in making their welfare programs work. These innovations are diverse and often tied to cultural concerns of innovating communities. Thus, for example, various Indian nation TANF programs employ such provisions as: exemptions from work requirements for providing elderly care, lack of child care, a death in the family, or being a child caregiver; accepting as work activities studies toward the GED, volunteering for community work projects, participating in small business training, and participation in cultural activities; and tying receipt of benefits to a client's children getting good grades in school, school attendance, and participation in cultural awareness workshops.[570]

At-Risk Children

Another area of rapid change in family support services in Native nations is occurring in the area of child foster placements and adoption. In the 1960s, Indian activists increasingly denounced the placement of Indian children off reservations and with non-Indian families. Vocal concerns about the cultural decimation that was emanating from the volume and anti-Indian sentiments of decades of removing Indian children from their homes and communities (see above) provoked a series of Congressional hearings on Indian child welfare in 1970s. These hearings documented more than one hundred years of relentlessly destructive policies that threatened the cultural existence and physical presence of many tribes. Congress found that:

> [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions … there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[571]

To address these concerns, tribes and their allies developed comprehensive legislation aimed at ensuring tribal sovereignty in child welfare and placement decisions. The *Indian Child Welfare Act* of 1978 initiated a long-awaited return to tribal control of the welfare of at-risk children.[572] ICWA reserves the exclusive jurisdiction of Indian governments over the care, placement, and adoption of Indian children. ICWA additionally establishes minimum standards for this responsibility both in and out of the state and tribal court system. The Act contains three major directives:

- No Indian child may be removed from their family without proper notification to the indicated tribe or extended family members;
- Every effort must be made to place a child with extended family, other tribal members, or other Indian families (in that order) before allowing non-Native placement; and

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[570] Walter Hillabrant, Mack B. Rhoades, Jr., and Nancy Pindus, *Operating TANF: Opportunities and Challenges for Tribes and Tribal Consortia*, United States Department of Health and Human Services (Washington, D.C.: Government Printing Office, August 23, 2003), Table III.1. http://aspe.hhs.gov/hsp/TANF-tribes03/index.htm (June 28 2006).

[571] "Tribal Court Clearing House: A Project of the Tribal Law and Policy Institute." http://www.tribal-institute.org/lists/chapter21_icwa.htm. 28 June 2006.

[572] U.S. Public Law 95-608, 95th Cong., 2nd sess., 8 November 1978. *The Indian Child Welfare Act.*

- Tribal courts must have ultimate jurisdiction in all matters pertaining to child welfare services whenever possible.

Additionally, court proceedings for child placement require the testimony of expert witnesses familiar with the tribal culture of the child at issue. These expert witnesses are expected to make statements to the court concerning the child's best interest with respect to matters of culture and traditions.

The passage of the *Indian Child Welfare Act* was groundbreaking in its recognition of tribal sovereignty, yet it was slow to be implemented in state courts and social service agencies. Confusion over requirements, complexity of implementation, and contention around the perceived boundaries of state jurisdiction revealed a need for clarification in practice. Originally ICWA applied only to Indian children who resided on reservations, but the Act was amended to include all Indian children whether or not residing on reservations, Indian children from state-recognized tribes, and all Alaska Native children. Additionally, the law now increases the time period for extended family and tribal notification, narrows the conditions under which states can refuse to transfer authority to tribal courts, and more clearly defines and describes federal review processes for ICWA violations, federal oversight responsibilities, and enforcement options.

While difficulties certainly remain, Indian nations have gained widespread recognition and acceptance of their jurisdiction over the welfare of their children. In May 2001, Child Welfare League President and CEO, Shay Bilchik, reflecting new understanding, publicly apologized for the organization's earlier role in the Indian Adoption Project, saying: "What we did may have been well-intentioned, but it was wrong, it was biased, it was hurtful. It is time to tell the truth-that our actions presupposed that Indian children would be better off with white families as opposed to staying in their own communities and tribes-and be reconciled."[573] Although the Indian Child Welfare Act and its amendments continue to face direct and indirect challenges, as recently as 1989 the U.S. Supreme Court upheld the constitutionality of the law in *Mississippi Choctaw v. Holyfield*.[574]

In keeping children within their cultures and with their extended families, and in finding improved ways of caring for them, Native communities are taking responsibility for families and future generations of tribal citizens in a way that was impossible for hundreds of years.

Building a Future for Families

Federal welfare policy has progressed to the point of giving Indian nations the option of program self-management. Yet the framework within which tribes are allowed to operate is still constrained. Federal welfare goals are not necessarily shared by the Native nations. The debate between Indian nations and the federal government about the appropriate mechanisms of support for needy individuals and families in Indian Country will undoubtedly intensify over the coming decades. Welfare reform will continue to increase demands on the institutions of tribal government, and will push Native nations to find more innovative, appropriate, and effective ways of reducing dependence of citizens on public assistance.

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[573] See Child Welfare League of America, "News and Media Center." http://www.cwla.org/newsevents/default.htm. (28 June 2006)

[574] *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (S.Ct. 1989).

The many obstacles facing welfare reform underscore the need for a more comprehensive approach to family support in Indian Country. Tribes are working to establish service models focused on prevention, intervention, and family strengthening as ways for providing support without perpetuating dependence. In order to permanently move families off public assistance, Native nations will have to develop economic growth strategies and link them to their TANF programs. Efforts to improve on-reservation child care, transportation, and job training will enable more individuals to contribute to reservation economies. Providing counseling, substance abuse treatment programs, and mental health services to parents at risk of losing their children will help keep families intact. Although initial steps have been taken, Native nations require more program flexibility and more resources to design and operate the types of integrated programs that are so sorely needed.

Tribal responses to poverty and family dislocation have a direct impact on the quality of daily life of the most vulnerable tribal citizens. As such, these services are a very visible measure of the ability of tribal governments to contribute to social development. By building their capacity to cope with the social problems of their neediest citizens, Native nations will make significant advances in strengthening their nations.

Textbox: Fond du Lac Foster Care Licensing and Placement Agency, **Fond du Lac Lake Superior Band of Chippewa**

In 1991, in Saint Louis County, Minnesota, only 30% of Indian children in foster placement in were in Indian homes. The Fond du Lac Band had reached a saturation point for eligible foster homes on the reservation, and it was vital for Indian children to be placed in off-reservation Indian homes. Unfortunately, off-reservation non-Indian agencies had difficulty recruiting Indian families. In 1991, for instance, there were no Indian foster care homes in Saint Louis County. This poor record was largely attributable to a lack of trust and understanding between Indian families and county and state government representatives. In particular, Indian families were concerned that cultural misunderstanding or even racism would cause non-Indian licensing officials to underestimate their ability to care for foster children.

Fond du Lac's directors of human and social services believed the answer to this problem would be for the Band to license off-reservation Indian foster parents. But the Band's government lacked licensing authority outside the reservation boundaries. By establishing a separate non-profit entity, chartered under state laws, which then contracted with Fond du Lac's Division of Human Services to provide all necessary programmatic and administrative services, the Band could legitimately work toward expanding the availability of Indian foster homes in northeastern Minnesota. The Fond du Lac Foster Care Licensing and Placement Agency solved both the recruitment and jurisdictional problems.

The establishment of the off-reservation placement agency caused many Indian families to step forward to be considered for licensure. In fact, before the Agency even opened its doors, interested parents were calling to ask how to apply. The instincts of the staff had been correct – Indian families were more comfortable working with the Band than with country and state officials. As one mother who became a foster parent explained, "We don't have to explain [to the Fond du Lac program] why we live the way we do, why we smudge the house down with sage or why we go to Canada for a pow-wow."

In the last decade, the Fond du Lac Foster Care Licensing and Placement Agency has helped assure that fewer Indian children in Minnesota grow up in non-Indian homes, with little or no cultural contact. Statistics attest to specific program successes. Each year between 1995 and 1999 the Agency licensed 58 off-reservation Indian and placed more than 70 children each year since 1995. Today, some 60 percent of the Indian children in out-of-home placement in St. Louis County are in Indian homes. /**END TEXTBOX**

HOUSING

- American Indians live in housing that is substantially more likely, on average, to be in substandard condition than the average American's. American Indians are also more likely than average to face problems of affordability and overcrowding.
- Federal housing policies based on non-Indian housing programs have had limited success in dealing with the unique legal, financial, geographic, and cultural aspects of Indian housing needs.
- In 1996, federal legislation gave Native nations greater administrative and policy flexibility, allowing them to spend federal funds as block grants under programs of their own design. Some tribes have faced well-publicized difficulties in managing federal housing funds.
- Tribal institutional capacity development is critical, but is beyond the mandate of federal housing assistance. Indian nations are building their own capacities. The result is encouraging innovation that has already yielded marked improvements in both housing and the wealth accumulation that goes with home ownership.

The average state of Native American housing is deplorable in comparison to national averages. Poverty and the complexity of reservation land ownership, in particular, have created obstacles to the development of viable housing markets on Indian lands. Federal housing policies have proven relatively ineffective in meeting Indian housing needs. However, in recent years the situation has shown signs of improvement. Federal programs were radically overhauled in the mid-1990s in favor of an approach that gives Indian nations greater control in using federal housing funds. Consequently, the future resolution of the Indian housing crisis rests increasingly with the tribes and upon the effectiveness of their governments.

Early Indian Housing Policy

Although the federal government has treaty and statutory obligations to provide adequate housing to Indians, housing needs on reservations historically have been largely neglected. Under the *Snyder Act* of 1921, the Bureau of Indian Affairs was authorized to provide housing assistance on

reservations, but little was done. The Depression prompted the federal government to pass the *Housing Act* of 1937, which supported the provision of public housing for low income families. However, the focus was on mainstream Americans and the specific needs of Native Americans were ignored until three decades later.

In a 1960 campaign speech, John F. Kennedy observed that "housing conditions on Indian reservations are a national shame." Shortly thereafter, on the basis of a 1961 opinion of the Interior Solicitor, the federal government applied its 1937 *Housing Act* policies to Indian reservations. By the 1990s, a broad portfolio of programs was in place, most of which have been administered by the U.S. Department of Housing and Urban Development (HUD).

Today, a number of federal programs exist to attempt to solve the housing problems faced by Indian Country. The *Mutual Help Homeownership Program* combines a contribution of land, labor, and materials from the participating tribe and the occupant with federal outlays in a lease/purchase arrangement. The *Home Improvement Program*, run by the BIA, targets the lowest-income households, and is primarily focused on home maintenance, repair, and expansion. The *Rental Program* in Indian Country operates very similarly to the national Public Housing program. Indian Housing Authorities (IHAs) receive grants to purchase home sites or to buy and renovate existing homes for subsequent rental to low-income families. The *Section 8 Certificate and Voucher* programs assist low-income tenants in renting private sector housing; HUD payments make up the difference between market rent and the tenant's ability to pay (capped at 30% of income). HUD *Block Grants* are available to tribal governments for housing assistance programs of their own design. Indian *Community Development Block Grants* are also available, and they can be applied to certain housing development activities. *Finance Assistance* is made available through federal mortgage insurance programs ("Section 248") and via federal loan guarantees ("Section 184").

The development of adequate housing in Indian Country has been profoundly affected by the status of Indian lands.[575] As noted in the chapter on Native lands above, lands which are held in trust by the federal government for tribes cannot be used as collateral for a mortgage or home loan. In cases where the federal government holds land in trust for individual Native Americans, federal approval must be received before a lender can encumber the property. These restrictions have resulted in a general absence of individual home purchase financing options. American Indians have either faced limited choices in lenders or have had to access loans through inflexible federal funding programs that have generally been incapable of responding to individual needs or circumstances.

The State of Indian Housing

American Indian housing has long been inadequate in quantity and quality, and it remained so through the 2000 Census. On tribal lands, 14.7% of homes were overcrowded compared with 5.7% of national households. Almost 11% of reservation homes lack complete plumbing in contrast to only 1.3% of all homes in America. As a barometer of the quality of Native housing, the U.S. Government Accounting Office reports that, as of 2005, 11% of Indian homes lack modern kitchen facilities, compared to 1% for the general U.S. population.

Nonetheless, Indian housing has improved over the last decade relative to U.S.-wide averages. The proportion of overcrowded housing on reservations in 1990 was nearly three-and-a-half times the U.S. rate, but declined to about two-and-a-half times the U.S. rate in 2000. This change in

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[575] See the "Native Lands" and "Economic Development" chapters.

relative position is explained both by an increase in the percentage of overcrowded homes in the U.S. as a whole and a decrease in the rate of such homes on reservations. Housing lacking complete plumbing and housing lacking complete kitchens display a similar pattern of change. (Figure 21)

Figure 21
Indian Housing Status

	1990	2000*	% points change
Overcrowded Homes (%)**			
All Races on Reservations‡	16.9%	14.7%	-2.2
All Races U.S.-wide	4.7%	5.7%	+1.0
Homes Lacking Complete Plumbing (%)			
AIAN on Reservations	20.2%	13.7%	-6.5
AIAN In all Indian areas	14.9%	10.1%	-4.8
AIAN U.S.-wide	6.0%	4.4%	-1.6
All Races U.S.-wide	0.8%	0.6%	-0.2
Homes Lacking Complete Kitchens (%)			
All Races on Reservations‡	11.5%	10.9%	-0.6
All Races U.S.-wide	1.1%	1.3%	+0.2

* For 2000, "AIAN" here represents self-identified American Indians and Alaska Natives alone (i.e., not in combination with any other racial category). The above data are for all reservations and Indian areas in 1990 and 2000, respectively.
** Homes with 1.01 people per room or more.
‡ The AIAN figures are not available, only the all-races data.
Source: U.S. Census Bureau, Census 1990 Summary Tape File 3; U.S. Census Bureau, Census 2000 Summary File 3.

Geographic location affects housing indicators. The 2000 Census data on American Indian and Alaska Native homes lacking complete plumbing indicate that the quality of housing rises as the analysis moves from the reservations (13.7%) to all Indian lands (10.1%), and from there to the national average for American Indians and Alaska Natives (4.4%).[576] The geographic pattern is further confirmed by research showing that conditions for Indian households in counties surrounding reservations are worse than average nationwide.[577]

While the geographic breakdown highlights the poor housing conditions on the reservations—a lack of complete plumbing more than twenty times the U.S. rate in 2000—the trend over time is more hopeful. Census data on lack of plumbing show that the improvement over 1990-2000 on the reservations and in Indian areas to be greater than elsewhere. Even when the quantity and quality of housing are adequate, affordability can be a concern, however: A 2005 study by the Fannie

[576] The data are specific to individuals self-identifying as American Indian or Alaska Native whether residing in Indian Country or not.

[577] Thomas Kingsley, Maris Mikelsons, and Carla Herbig, *Housing Problems and Needs of American Indians and Alaska Natives* U.S. Department of Housing and Urban Development (Washington, DC: Government Printing Office, 1996), vii.; and communication with Jacqueline Kruszek, U.S. Department of Housing and Urban Development, Office of Native Programs.

Mae Foundation found that more than 26% of households in an "other" ethnic grouping made up predominantly of Native Americans experienced poverty induced by housing costs. This was second only to housing induced poverty of African Americans (at 30%).[578]

The national picture masks significant regional variations. In 1996, 29% of all Indian households faced housing affordability problems, and on tribal lands this number jumped to 44%. At the most basic level, the definition of the "Indian housing problem" varies according to the land-base integrity of a particular tribe. In areas of high private land ownership, the problem is more one of affordability than shortage or poor quality. Oklahoma, for example, had the lowest share of physical deficiencies, yet one of the highest shares of affordability problems (21%) as of the second half of the 1990s. Moreover, those reservations that are characterized as having relatively large populations, having a relatively large number of non-Indians landowners within the political boundaries of the reservation, and being relatively close to urban economies had a physical deficiency rate of 12% and affordability problem rates averaging 21%.[579] In contrast, those reservations having none of those characteristics had physical deficiency rates of 52%, yet affordability problems for only 10% of their units.[580]

Even in areas where the housing problem is characterized by shortage and low quality, rather than affordability, there has been tremendous variation. In Alaska, the physical deficiency (overcrowding and facility deficiencies) rate in 1996 was 63% and in Arizona-New Mexico it was 61%. Around the rest of Indian Country, overcrowding is a critical problem, but the incidence of facility deficiencies is less pronounced.[581] In 2004, the National American Indian Housing Council (NAIHC) surveyed 246 IHAs, and 59% reported overcrowded housing on their reservations. 83% reported substandard housing, with problems of plumbing, sanitation, and lack of insulation.[582]

To meet the demand for Indian housing, by 1997, tribal governments and some states had created 201 Indian Housing Authorities under applicable HUD rules. That year IHAs reported management of approximately 69,000 housing units and had another 10,000 under development. In addition, Indian households had acquired title to another 8,700 units using federal home purchase assistance. All told, by the mid-1990s, federal housing comprised 25% of the total housing stock on tribal lands, while federally supported construction accounted for more than 80% of new reservation-based construction.[583]

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578 Nandinee K. Kutty, "A New Measure of Housing Affordability: Estimates and Analytical Results," Fannie Mae Foundation *Housing Policy Debate* 16, no. 1, 2005, 129.

579 A housing affordability problem is here defined as a payment requiring more than 30% of the tenant's income. U.S. Department of Housing and Urban Development. *Assessment of American Indian Housing Needs and Programs: Final Report* . Washington: Government Printing Office, May 1996). http://www.huduser.org/publications/hsgspec/native.html. (28 June 2006)

580 Kingsley et al., *Housing Problems and Needs*, xi-xii.

581 Ibid., xi-xii.

582 Mary Fitzgerald, "Indian Housing Issues Deficits Described," *Washington Post*, 21 September 2004, A19.

583 *Joint Hearing Before the Committee on Indian Affairs, U.S. Senate, and the Committee on Banking, Housing, and Urban Affairs*, U.S. Senate, 104th Congress, 2nd Session, 20 June 1996, as cited in Roger

Despite this effort by the federal government – an effort that contrasted sharply with the decline of federal involvement in urban and other housing programs – the need for housing in Indian Country at the end of the decade was acute. NAIHC finds that 90,000 Native families are homeless or under-housed.[584] The National American Indian Housing Council estimates the need to be 200,000 additional units, or more than two times the federally provided stock of units and about 20 times the annual development rate sustained by the IHAs at the middle of the decade.

Challenges in Federal Indian Housing Policy

Beginning in the early 1990s with the congressionally mandated National Commission on American Indian, Alaska Native, and Hawaiian Housing, and following with the HUD-sponsored review of housing data and needs in Indian Country, the federal government undertook a re-assessment of housing programs directed at Indian Country.[585] Among other things, this 1995 review concluded that:

- There was a continuing need for housing assistance – particularly more efficiently coordinated assistance.
- Legislation needed to be passed to allow HUD to make block grants out of housing programs so that tribes would have more discretion and authority to spend the money in order to customize housing programs to local circumstances and priorities.
- As resource allocation decisions were devolved to Indian nations, there was a need for federal support for "capacity building" to effectuate better tribal execution of housing programs.[586]
- Greater Indian access to housing programs outside of tribal areas was needed to address Native needs for better affordable housing.[587]

Among the frustrations of the existing policy arrangement was the often-contentious relationship between the tribal governments (i.e., elected tribal councils), HUD, and the IHAs.

Biles, "Public Housing on the Reservation," *American Indian Culture and Research Journal*, 24, no. 2 (2000), 57.

584 National American Indian Housing Council (NAIHC), "Indian Housing Data: State of Indian Housing Fact Sheet," http://naihc.indian.com/housingdata.htm. (28 June 2006)

585 See National Commission on American Indian, Alaska Native, and Hawaiian Housing, *Building the Future: A Blueprint for Change* (Washington, DC: Government Printing Office,1992); National Commission on American Indian, Alaska Native Hawaiian Housing, *Supplemental Report and Native American Housing Improvements Legislative Initiative* (Washington, DC: Government Printing Office, 1993); Kingsley et al.; and Maris Mikelsons and Karl Eschbach, *Housing Problems and Needs of Native Hawaiians* (Washington, DC: The Urban Institute, 1995).

586 An Urban Institute analysis found that "a fractious political relationship between IHAs and tribal officials" is "widely perceived as the greatest constraint on the capacity of IHAs to meet the housing needs of Native Americans effectively." Nonetheless, federal emphasis in capacity building was on "staff training, technical assistance, and information dissemination" rather than on tribal institutions of governance. Kingsley et al., *Housing Problems and Needs*, 217, 220.

587 Ibid., xxvi-xxvii.

Ostensibly, the tribal councils were in charge of the IHA boards via powers of appointment; however, HUD regulations and practices granted substantial resources and operational independence to the IHAs. In the eyes of many government leaders around Indian Country, this gave too much power without enough accountability to the local IHAs. Though the regulations allowed IHAs to innovate and design programs outside existing program guidelines, IHA directors complained that as long as HUD regulations prevented IHA staffs paid out of HUD funds from working on non-HUD programs, there would be no opportunity to innovate at the IHAs. Finally, both IHA directors and outside observers complained that tribal councils were too meddlesome in IHA affairs, and that many tribal governments were incapable of enforcing collection of overdue rents and Mutual Help payments, or were incapable of maintaining minimum standards of accountability.[588]

More generally, HUD's translation of the country's urban housing programs to remote Indian reservations left much to be desired. Diverse examples, some of which are common, others extreme, make the point. "Subdivisions" of HUD housing – complete with streets, sidewalks, and driveways – were constructed on the remote prairies at the end of long dirt roads that could not connect with the subdivision because the muddy roads were two feet or more below the subdivision street level. Tight clusters of housing in which residency was assigned by lottery went against the grain of local custom and created or worsened problems with gang violence, teen drug use, and the like.[589] One-size-fits-all HUD rules blocked the utilization of millennia-old pueblo and other culturally-specific construction techniques. Most importantly, the HUD approaches had done little to address the lack of private mortgage financing on the reservations.[590] By the mid-1990s, most participants in the arrangement under which federal Indian housing programs were administered agreed that it was ripe for reform.

Self-Determination in Housing

Congress initiated reform with the *Native American Housing Assistance and Self-Determination Act of 1996* (NAHASDA).[591] Similar in spirit to PL 93-638 – the Act that had initiated the federal policy of Indian self-determination 21 years earlier – NAHASDA essentially turned programs HUD had been administering into a block grant that tribes could apply to obtain. As early as 1992, HUD had been "deregulating" its programs by combining some of them into mini-block grants. This legislation freed nine of HUD's 14 programs for combination under block grants. Tribally Designated Housing Entities could now submit one-year and five-year plans to HUD, stating their goals, objectives, needs, activities, and resource requirements. In return, HUD would let Indian nations design and implement their own programs. HUD was to write rules implementing the program. Unfortunately, the effort was interrupted by scandal.

In December 1996, the *Seattle Times* published a series of Pulitzer Prize-winning articles examining HUD programs on reservations around Indian Country. It reported 29 incidents of corruption, self-dealing, and misspending of federal funds across a number of IHAs that had been

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588 Biles and Kingsley et al. both give this diagnosis of the IHA-HUD-Council interplay.

589 Biles, "Public Housing on the Reservation," 58.

590 Kingsley et al., *Housing Problems and Needs*, xxv. See also the discussions of land control and collateralization in the "Native Lands" and "Economic Development" chapters.

591 U.S. Public Law 104-330. 104th Cong., 2nd sess., 30 October 1996. *Native American Housing Assistance and Self-Determination Act of 1996*.

operating under the "deregulation: initiated under HUD Secretary Kemp and then-Under Secretary Cisneros. The articles asserted that HUD's loosening of regulations in favor of self-determined housing policy had created an "anything goes" atmosphere – albeit without putting the reported misspending in the larger context of the effective IHAs around Indian Country.[592] In congressional hearings the subsequent year, HUD's Inspector General stated that the Department believed that waste, fraud, and mismanagement were much more prevalent in Indian housing programs than in HUD's standard programs.[593] An internal HUD investigation later found the *Seattle Times*' coverage to be "generally accurate."[594]

Apart from the question of how much of the Indian housing efforts were appropriately tarred with the *Times*' brush, the effect of the articles was to interrupt substantially the federal government's focus on NAHASDA implementation and to put HUD in a much more delicate position of balancing accountability for its funds against tribal self-determination.[595] As the then-Chairperson of the Board of the National American Indian Housing Council aptly put it:

> I, as an Indian leader, realize that accountability is one of the most critical factors facing Indian housing today. I'm not talking about accountability to HUD, I'm talking about accountability to our very own people. The accountability is to ourselves, while having the strength to pursue our visions and make them a reality.[596]

As with so much affecting Indian development, the challenge for at least those 29 tribes identified by the *Times* articles was to build governments that were capable of self-policing.

Indeed, recent research of pre-NAHASDA IHA performance indicates that once regional economic and other variations are taken into account, the effectiveness of an IHA as measured by

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592 Eric Nalder, Deborah Nelson, and Alex Tizon, "The Tulalips: Despite $92,000 Income, Couple Got Federal Aid to Build 5,300-square-foot House," *The Seattle Times,* 1 December 1996; Nalder, Nelson, and Tizon, "Tribal Housing: From Deregulation to Disgrace," *The Seattle Times*, 1 December 1996; Nalder, Nelson and Tizon, "State by State Examples of Mismanagement and Abuse," *The Seattle Times*, 1 December 1996; Naldler, Nelson and Tizon, "South Dakota: 'Vicious' Politics Gets the Blame for Nepotism," *The Seattle Times,* 3 December 1996; Nalder, Nelson and Tizon, "From Deregulation to Disgrace: Tribal Housing," *The Seattle Times,* 3 December 1996; Nalder, Nelson, and Tizon, "Tribal Housing: From Deregulation to Disgrace," *The Seattle Times,* 5 December 1996; Kevin E. Marchman, "Series on Indian Housing Overlooked HUD's Gains," *The Seattle Times,* 19 December 1996; Jacqueline Johnson, "Indian Housing and the American Dream," *The Seattle Times,* 10 January 1997; and Chuck Taylor, "Reporters' Relentless Pursuit of Facts won Times 2 Pulitzers," *The Seattle Times,* 8 April 1997.

593 Susan Gaffney, Inspector General, U.S. Department of Housing and Urban Development, as quoted in Biles, "Public Housing on the Reservation," 58.

594 Ibid.

595 It should be noted that while the *Seattle Times* exposé was a backdrop for the rulemaking process, it was the mandated negotiated rulemaking process that extended the time required to publish a final rule. Even at that, the final rule was published much quicker than rules developed by other agencies working in Indian Country when negotiated rulemaking has been mandated.

596 Johnson, "Indian Housing".

HUD's Administrative Capacity Assessment score[597] is best predicted by the quality of a Native nation's governing institutions. The caliber of formal tribal institutions, such as the independence of dispute resolution mechanisms, the effectiveness of tribal bureaucracies at paying down debts, and the form of government a tribe has, are positively and significantly correlated with higher scores.[598]

Thus, successful housing program management rests on the strength of tribal governing institutions. Although Tribally Designated Housing Entities can in some instances direct program funds toward technical "capacity building," the kind of changes the research indicates are required include judicial (tribal court) reform, constitutional reform, personnel system re-design, grievance process design, internal auditing, inspection capabilities, and the like. These areas of capacity-building typically are well outside the jurisdictional and professional scope of the executive directors of Tribally Designated Housing Entities and, especially, of HUD.

Challenges Ahead

Programs designed to expand Indian housing opportunities commonly operate in difficult settings. The remoteness and limited human resources of many tribal communities raise labor costs from a general figure of 50% of housing costs to 65% of costs.[599] The lack of suitable land and the severity of the climate in some locations add to the costs of maintenance and upkeep. The wage rates mandated for Indian housing projects by statute and, occasionally, the difficulty in meeting Indian-preference hiring requirements also raise construction and maintenance costs. Vandalism, tenants' neglect, and unpaid rent put financial pressure on the IHAs whose collections are generally rededicated to maintenance and operations. [600]

Clearly, the need for housing assistance continues, and so, too, will treaty obligations and trust responsibility continue to require the federal government's involvement in this policy area. Yet the goal of allowing greater program innovation at the tribal level remains as high a priority as ever. Thus, as in other areas, the federal government finds itself in the awkward position of trying to step out of its relationship as paternalistic administrator of the reservations while trying to fulfill its duty to meet its obligations to Indians.

The indications are that progress is being made. Today, close to 200 tribes and Indian entities participate in HUD's Section 184 Housing Loan Guarantee Program, helping to overcome the difficulties of borrowing in Indian Country.[601] Between 1995 and 2005, the Section 184 Program

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[597] ACA scores encompass the development, modernization, administration, financial management, occupancy, and maintenance performance of IHAs.

[598] Miriam Jorgensen, "Bringing the Background Forward: Evidence from Indian Country on the Social and Cultural Determinants of Economic Development," Doctoral Dissertation (Cambridge, MA: Harvard University John F. Kennedy School of Government, June 2000), Chapter 4.

[599] Judy A. England-Joseph, "Native American Housing Challenges Facing HUD's Indian Housing Program," Statement before the Committees on Indian Affairs and Banking, Housing, and Urban Affairs, U.S. Senate, 12 March 1997, GAO/RCED-97-105 (Washington, DC: General Accounting Office, 1997), 5.

[600] Ibid., 5-10.

[601] U.S. Department of Housing and Urban Development, "Indian Housing." http://www.hud.gov/offices/pih/ih/homeownership/184/tribal_list.cfm (28 June 2006).

supported loans to almost 2800 individuals and tribal IHAs, totaling approximately $300 million. NAHASDA's consolidation of various programs into block grants has resulted in approximately $600 million in Indian Housing Block Grant (IHBG) activity, supporting home building in particular. The U.S. Department of Agriculture's Section 502 Program resulted in close to 3000 direct and guaranteed loans on trust and allotted lands between 1999 and 2005, totaling more than $200 million. Fannie Mae offers conventional loans through the Native American Conventional Lending Initiative and purchased loans covering almost 12,000 single-family homes on reservations and in Indian areas over 1995-2005. This amounted to loan purchases of approximately $1.1 billion. This activity and security has brought private lenders into the Indian housing sector, with major banks finally learning how to work in Indian Country.[602]

Coupled with these infusions of funding, expansions of tribal self-determination efforts are starting to repaint the housing picture in Indian Country. With greater tribal control, tell-tale signs of BIA and other federal planning are giving way to new models of both financing and community design. The cookie-cutter "boxes" that have typified federal housing projects on innumerable reservations are giving way to real, owner-occupied housing developments which not only shelter Native families and create vibrant neighborhoods, but also allow families to accumulate wealth.

In additions to cases like the Chickasaw Nation's Chuka Chukmasi Home Loan Program (see text box), at the Navajo Nation, the Navajo Partnership for Housing and the Navajo Housing Authority have worked to support loans for houses built on trust lands. Hundreds of Navajo families now own their own homes as a result.[603] The White Mountain Apache Tribe of Arizona has built Apache Dawn, a 250-unit neighborhood development that was built by leveraging IHBG dollars and issuing the first-ever mortgage revenue bond in Indian Country. This has facilitated the building of homes on trust lands, and rent-to-own financing has smoothed the path for tribal citizens to take the first steps toward home ownership.

The Winnebago Tribe of Nebraska has leveraged the success of its for-profit experience with its Ho-Chunk Inc. into the Ho-Chunk Community Development Corporation (HCCDC). HCCDC is enabling Winnebago citizens to borrow for home purchase in an environment in which they have historically been locked out of private mortgage markets. The result is affordable housing, a reduction in the waiting list for on-reservation housing, and homes that are not prescribed by federal rules, but designed and selected by private tribal citizens. The centerpiece of HCCDC's efforts is Ho-Chunk Village, a new town that is under construction and, when completed, will offer not only housing for 110 families, but the complete array of public and commercial facilities that are otherwise so rare in reservation towns.[604]

Cases such as these suggest that NAHASDA may be able to provide the flexibility and the funding for Native nations to effectuate a good deal of capacity building, both for management and for strengthening tribal government institutions. But federal programs can only open the door of self-determination, and Native nations will have do more than tinker with HUD programs as they adapt

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602 Steve Barbier, "Mortgage-financed homeownership in Indian Country," *Navajo Hopi Observer*, 7 April 7 2006. http://www.navajohopiobserver.com/main.asp?SectionID=29&SubSectionID=41&ArticleID=4792 (28 June 2006)

603 Ibid.

604 Winnebago Tribe of Nebraska, "Ho-Chunk Village Project." http://www.winnebagotribe.com/winbagoFrameset-1.htm (28 June 2006).

them to local conditions under their newfound NAHASDA flexibility. Housing efforts will need to be bolstered by strengthened Native governing institutions and accountability. Moreover, tribes will have to direct continued effort at the structural problems obstructing the development of more fluid on-reservation housing markets, including infrastructure deployment, land fractionation, and the difficulties of collateralizing trust lands.[605] This will entail comprehensive land, infrastructure, and capital access plans. The challenges of developing these policies are formidable. Yet this broad, capacity-building approach is showing real promise for improving Indian housing and the lives of tribal citizens.

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[605] See the "Native Lands" and "Economic Development" chapters.

TEXTBOX: Chuka Chukmasi Home Loan Program, Division of Housing, Chickasaw Nation

Among the Chickasaw, the absence of a solid tradition of home ownership coupled with severely limited financing options resulted in a lack of home purchasing "know-how." Generations of Chickasaw citizens lived without understanding basic mortgages, financing processes, or how to correctly report their equity in a loan application. Compounding the issue, many Chickasaws unknowingly turned themselves into high-risk applicants through the mishandling of their financial information. Over the years, the Chickasaw Nation participated in a number of housing programs with the goal of increasing homeownership yet these programs typically imposed requirements that the average Chickasaw citizen could not meet. In the late 1990s, the Tribe realized that all of these factors translated into a discouraging statistic: nearly 60 percent of their citizens' home loan applications were being denied.

In 1998, the Chickasaw Nation's Division of Housing created the Chuka Chukmasi—or "Beautiful Home"—Home Loan Program to promote home ownership among its citizens. In its first year, Chuka Chukmasi negotiated partnerships with financial institutions to offer Chickasaw citizens living within the Tribe's geographical boundaries conventional, secondary home loans to cover the down payment and closing costs associated with a home purchase. The program was a near-immediate success, creating the impetus for the program's further growth. Chuka Chukmasi formed additional partnerships and developed loan products designed expressly to respond to the needs of a large number of Chickasaw citizens considered high-risk borrowers.

Today, Chuka Chukmasi offers a variety of services including first and second mortgage processing and second mortgage loans. There are no income guidelines and these programs are available to Chickasaw citizens throughout the continental United States. Moreover, American Indians within the Chickasaw service area that do not have access to tribal loan programs of their own are also eligible to apply. Chuka Chukmasi's loans enable clients to purchase, renovate, or refinance homes. By 2004, Chuka Chukmasi and its lending partners had closed 273 home loans in addition to down payment and closing cost assistance loans.

Chuka Chukmasi also educates its clients about the home purchasing process through a comprehensive home ownership course for potential homebuyers as well as credit and mortgage-management counseling. Clients are not only taught about the purchasing process, but learn financing terms, budgeting, and investment management. By facilitating financial literacy, Chuka Chukmasi strengthens the skills of individual Chickasaw citizens and encourages individuals and families to invest in their communities. Chuka Chukmasi borrowers—65 percent of whom are first time homeowners—currently enjoy a zero default rate.

Chuka Chukmasi has proven that a powerful combination can secure home loans at competitive rates: fostering partnerships with innovative financial institutions along with educating individuals in the basics of loan applications and mortgage financing. By helping hundreds of Chickasaw citizens realize their dreams of homeownership, Chuka Chukmasi is helping to build a healthy nation, home by home. **/END TEXTBOX**

PUBLIC SAFETY

- For Indian Country, trends in public safety are quite alarming. This stands in stark contrast to the situation in non-Indian America where crime indicators have generally been in broad decline.
- Many Native nations have taken control of policing, which has facilitated culturally acceptable approaches to law enforcement and improved citizen satisfaction.
- In developing criminal justice systems that can respond to the needs of their communities, the Native nations are hampered by jurisdictional complexity, severe under-funding, and a lack of comprehensive programs.
- A number of Native nations are undertaking innovative preventative programs and restorative approaches to crime, with encouraging results.

In Indian Country, as elsewhere, a complicated interrelationship exists between criminal justice policy, law enforcement, and the socioeconomic health of families. A volatile mixture of despair and lack of opportunity, burgeoning youth populations, and inadequate police resources contribute to what can only be described as a crisis. Of all the problems that face the Native nations, these may be the most troubling and daunting.[606] While the Native nations are beginning to adopt new approaches, crime and safety indicators remain important exceptions to the overall positive trends in other indicators of well-being in Indian Country.

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[606] For an expression of this alarm, see Kevin Gover, "Kevin Gover, Assistant Secretary – Indian Affairs, U.S. Department of the Interior, before the 55th Annual National Congress of American Indians" (Myrtle Beach, SC: 20 October 1998).

History

Traditional methods of dealing with undesirable behavior in Native America varied tremendously depending on the way in which tribes were governed and structured. Depending on the tribe, disputes were mediated by clan elders, tribal norms, formal policing fraternities, and other traditional means. As tribes were forced onto reservations, the U.S. military became involved in policing tribal areas. The priorities of the military were often anathema to tribes. Soldiers were charged with ensuring that tribes remained contained on reservations, with preventing violence on the reservations from spreading beyond the borders of the reservation, for overseeing the distribution of food and other rations, and for enforcing prohibitions on traditional activities which were viewed as immoral or criminal.[607]

Although Native police officers were hired as members of reservation police forces as early as 1860, they enforced non-tribally determined policies and were commonly viewed with distrust by community members.[608] For example, reservation police in many areas were involved in forcibly removing children from their families to federal boarding schools. The *Major Crimes Act of 1885* gave the federal government jurisdiction over most serious crimes on Indian lands, further reducing the role of tribal governments in criminal justice.[609] Reservation police forces remained small throughout the first half 20th century, with the exception of the Prohibition years.[610]

Indian activism and civil disobedience in the late 1960s and early 1970s led to a new emphasis on law enforcement in Native America. The BIA Division of Law Enforcement Services increased its influence on reservations, the BIA Law Enforcement Academy was established, tribal police forces were expanded, and more funds were made available for policing on reservations. Reservation law enforcement was professionalized using the model of municipal police forces which had become independent from political leadership, was strictly focused on fighting crime, and was organized in a centralized hierarchy in response to problems with corruption.[611] This approach to law enforcement caused tribes to be essentially shut out from the design and oversight of their police forces.

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607 See, for example, William T. Hagan, *American Indians* (Chicago: University of Chicago Press, 1961); William T. Hagan, *Indian Police and Judges* (Lincoln: University of Nebraska Press, 1980); Ken Peak, "Criminal Justice, Law, and Policy in Indian Country: A Historical Perspective," *Journal of Criminal Justice* 17(1989), 485-494; David Barlow, "Minorities Policing Minorities as a Strategy of Social Control: A Historical Analysis of Tribal Police in the United States," *Criminal Justice History* 15(1994), 141-163; and David Wachtel, "An Historical Look at BIA Police on the Reservations," *American Indian Journal* (May 1980), 13.

608 Stewart Wakeling, Miriam Jorgensen, Susan Michaelson, Manley Begay, *Policing on American Indian Reservations: A Report to the National Institute of Justice* (Washington, D.C.: National Institute of Justice, 2000), 62.

609 See the "Jurisdiction" chapter.

610 Wakeling et al.., 63.

611 Ibid, 64.

Status

It is worth noting that accurate data on crime in Indian Country is hard to gather and many crimes are most likely considerably under-reported.[612] The data that are available for Indian Country paint a troubling picture. American Indians are incarcerated at a rate 38% higher than the national per capita rate.[613] The rate of violent victimization of Native Americans is twice the national average.[614] The rate of crime victimization experienced by Indian women is 50% higher than that reported by black males.[615] American Indian women are also more than twice as likely to be raped by a domestic partner as non-Indian women.[616]

Crime rates may vary significantly from Indian nation to Indian nation so that the aggregate picture may not reflect conditions faced by a particular community. The murder victimization rate of American Indians nationwide is very similar to the non-Indian rate.[617] However, the murder rates on some reservations are at par with, or even exceed, those of the most violent cities in the nation. One report on crime in Indian Country notes that, in 1995, "the murder rate on the Ft. Peck Reservation in Montana was more than twice that of New Orleans, one of the most violent cities in the United States. During 1996, the people on America's largest reservation, the Navajo Nation, endured 46 non-negligent homicides, resulting in a rate which would place it among the top 20 most violent cities."[618]

On reservations, youth gangs are prevalent and growing, along with the attendant violence often associated with such groups.[619] One in four Indians between the ages of 18 and 24 becomes a victim of a violent crime. A 1998 survey of 132 tribes unveiled an estimated 375 gangs with 4,650 members. The number of drive-by shootings witnessed by the Salt River Pima-Maricopa Community skyrocketed from one to 55 in two years. The Menominee Reservation police report two organized gangs establishing themselves and juvenile arrests increasing 293% in four years, in contrast to adult crime which increased by 45%.[620]

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612 See Wakeling et al., 23-28.

613 Laurence A. Greenfield and Steven K. Smith, *American Indians and Crime* (Washington, DC: U.S. Bureau of Justice Statistics, 1999), vii. See also U.S. Justice Department, Bureau of Statistics, *Differences in Rates of Violent Crime Experienced by Whites and Blacks Narrow. (*Washington: Government Printing Office, March 2001).

614 Ibid.

615 Ibid.

616 Greenfield and Smith, *American Indians and Crime*, 3.

617 Ibid.

618 Department of Justice, Executive Committee for Indian Country Law Enforcement Improvements, *Final Report to the Attorney General and the Secretary of the Interior* (Washington, DC: Government Printing Office, 1997).

619 Seth Mydans, "Gangs Reach a new Frontier: Indian Reservations," *New York Times*, 18 March 1995, sec. A1.

620 Dom Nessi, "Statement of Dom Nessi, Acting Director, Office of Economic Development, Bureau of Indian Affairs, U.S. Department of the Interior, before the Committee on Indian Affairs, United States

The nature of policing on reservation is as varied as the nations themselves. More than 200 tribal police departments operate to protect public safety in Indian Country. Some rural departments have only two or three officers, while others operate within urban or semi-urban areas. The Navajo Nation police force of approximately 200 officers covers a land area bigger than a number of U.S. states. A survey carried out in 2001 of 40 tribal police departments operating within the continental U.S. concluded that with a small number of police officers and a large land area, the level of police coverage is "much lower than in other urban and rural areas of the country."[621] The survey also found that the typical tribal police department generally contends with older facilities and equipment than its counterparts in non-Indian communities.

A large number of the Native nations are subject to policing under P.L. 280, which gives certain states jurisdiction over criminal enforcement on the reservations.[622] Many of these communities have a restricted land base and/or small populations, and for the most part rely on state and local police departments for law enforcement. In some cases, tribes pay surrounding municipalities, state or county forces to provide law enforcement services.

The BIA is responsible for policing – directly or through contracting and compacting – in states in which Public Law 280 does not apply. Many Indian nations have moved under self-determination to gain increased control of their law enforcement. A 1995 report found that of the 178 tribes eligible for BIA law enforcement, 64 remained under BIA administration.[623] By 2002, the BIA supported 206 tribal police departments, 163 (79%) of which were operated by Indian nations under contracts or compacts.[624] A handful of tribes fund their own police departments.

The Indian incarceration/under-supervision rate was estimated in 2001 to be 44% higher than the national U.S. rate.[625] The majority of incarcerated American Indians and Alaska Natives are held in federal, state or local facilities outside of Indian Country. In mid-2003, the U.S. Department of Justice estimated that 7,200 American Indians and Alaska Natives were in municipal jails, with a further 12,438 in state prisons and 2,160 in federal facilities.[626] Within Indian Country, there are 70 correctional facilities which supervise approximately 1800 inmates.

Senate, Hearing on Native American Youth Activities and Initiatives," 26 May 1999; U.S. Department of Justice, Executive Committee for Indian Country Law Enforcement Improvements, *Final Report.*

621 Wakeling et al.

622 See the "Jurisdiction" chapter.

623 Bureau of Indian Affairs, Division of Law Enforcement Services, "Listing of Reservations Where Major Crimes Act Applies By Area Office and Type of Law Enforcement Program," (Albuquerque, NM: U.S. Department of the Interior, 31 March 1995).

624 Bureau of Indian Affairs, "Law Enforcement Assessment" (2006). http://www.whitehouse.gov/omb/expectmore/detail.10001082.2005.html (28 June 2006)

625 Marika F. X. Litras, U.S. Department of Justice, Bureau of Justice Statistics. *Tribal Justice Statistics Collection Efforts*. Washington: Government Printing Office, 2001).

626 U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Jails in Indian Country 2003.* Washington: Government Printing Office, April 2005, 2.

Correctional facilities on Indian lands are operated either by tribal authorities (48 facilities) or the BIA (20 facilities).[627] Overcrowding is a persistent problem, with at least 15 Indian Country jails operating 150% above capacity each year since 1998.[628] In the most extreme cases reported by the Department of Justice for June 2003, the facility at Fort Berthold Agency was operating at 456% of capacity, while the Crow Police Department facility held 60 prisoners in a facility rated for 14.[629] The U.S. Department of Justice reports that Indian Country jails are "substandard in such critical areas as staff and inmate safety, inmate services and programs, fire safety, communicable disease prevention, sanitation and hazardous substance control."[630] Furthermore, many of the detention facilities in Indian Country are inappropriate for the nature of offenders held, are housed in aging buildings, and in need of renovation to conform to building codes.[631]

Public Safety Issues in Indian Country

All law enforcement agencies in the United States contend with jurisdictional issues. For the Native nations, however, jurisdictional complexities are exceptionally pronounced. In the case of some types of crimes, there are jurisdictional voids that frustrate law enforcement altogether. In marked contrast with non-Indian communities, the federal government is potentially involved in nearly every serious crime in Indian Country through the provisions of the Major Crimes Act.[632] Tribal jurisdiction is limited to sentences of 1 year and a maximum fine of $5000.[633]

When a crime is committed in Indian Country, tribal police are constrained by whether the offender is Indian or non-Indian, whether or not the offence took place on Indian or non-Indian land, whether the victim is Indian or non-Indian, and what type of crime was committed. A tribal police officer on the reservation contemplating making an arrest is forced to make a series of determinations about the identity of the suspect and victim, as well as to be cognizant of the ownership of the land on which the offence has taken place. Since almost half of residents on reservations nationwide are non-Indian, and many reservations are significantly checkerboarded, this is a significant burden.

The restriction of tribal authority over many aspects of public safety stymies Indian nations' efforts to establish a cohesive approach to criminal behavior. Native nations generally cannot prosecute non-Indians for crimes occurring on Indian lands, while states lack jurisdiction if the victim is Indian, creating a void for law enforcement. One study concludes: "It is not uncommon for non-Indian offenders to commit crimes in Indian country knowing that there will be little, if any,

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627 Bureau of Indian Affairs, "Law Enforcement Assessment"

628 Ibid., 4.

629 Ibid.

630 U.S. Department of Justice, Office of Tribal Justice, *Final Report to the Attorney General and Secretary of the Interior*. (Washington: Government Printing Office, October 1997). Quoted in U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (Washington DC: Government Printing Office, July 2003), 78.

631 U.S. Commission on Civil Rights, *A Quiet Crisis*, 78.

632 See the "Jurisdiction" chapter.

633 25 USC §1302 (7).

retribution for their crimes."[634] Another scholar points out that, although the federal government retains jurisdiction over most crimes, it is not required to provide for public safety on reservations other than in cases where this is specified within a treaty.[635] Indeed, tribes complain that federal agencies give low priority to prosecuting on-reservation crime. Federal agencies, in turn, feel that the cases referred by tribes are not adequately prepared and belatedly reported.[636] Such poor communication and lack of trust contribute to disturbingly uneven law enforcement.

Since tribal courts have jurisdiction over a limited number of crimes, most deviant behavior by tribal members must be adjudicated outside the community. The overrepresentation of Native Americans in the criminal justice system has created a deep-seated perception of bias within Indian Country. Critics charge that Indians are more likely to be prosecuted for crimes, that they are less likely to have adequate legal representation, and that they are more likely to be convicted. There is also a broad concern that state and federal courts are upholding *their* community norms and values, which may not reflect those of tribal citizens.

Even apart from the jurisdictional complexities, the criminal justice system in Native America operates within a social context which is exceptionally challenging. Poverty and lack of economic opportunity are the unfortunate reality in many communities, with their attendant social problems. Widespread substance abuse fuels continued high rates of criminality and accidents. In many places, the breakdown of traditional norms contributes to alienation, social dislocation and an increase in lawless behavior. In places where traditional means of dispute resolution have been suppressed or are otherwise on the decline, Native nations face the daunting task of either designing new institutions for changed norms or seeking to revitalize customary mechanisms of justice.[637]

In spite of the jurisdictional complexity, high crime levels, and social distress on Indian lands in the aggregate, federal funding for public safety is severely inadequate. The U.S. Commission on Civil Rights notes that "funding for criminal justice systems in Indian Country remains insufficient to meet the immediate needs of these communities, much less establish a framework for eventual self-sufficiency."[638] Indeed, the resources available in Indian Country for policing are far less than those used by non-Indian jurisdictions. Available data indicate that the typical tribal police department operates on a budget which is only 55%-75% of the budget available to comparable non-Indian communities. The Tribal Law and Policy Institute estimates that Indian Country needs more than

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634 National Institute of Corrections, *Improving Safety in Indian Country: Recommendations from the IACP 2001 Summit* (Washington, DC: Government Printing Office, 2001). http://nicic.org/Library/017388 (28 June 2006).

635 Victor H. Holcomb, "Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country." *North Dakota Law Review* 75 (1999), 766. Cited in U.S. Commission on Civil Rights, *A Quiet Crisis*, 67.

636 Wakeling et al., *Policing on American Indian Reservations*, 27.

637 Ibid., 26.

638 U.S. Commission on Civil Rights, *A Quiet Crisis*, 79.

4,000 additional personnel to attain approximate parity with similarly situated non-Indian law enforcement.[639]

The BIA under-deploys officers and under-spends on law enforcement. (Figure 22) Comparable low-density rural jurisdictions are closest in resource availability to what is available for use in Indian Country. However, it can readily be argued that the appropriate benchmark ought to be high-crime areas, which maintain a much higher law enforcement presence. Other costs of providing criminal protection in Indian Country – such as the relative capital intensity of serving a high-crime, albeit low-density, population – tend to drive the true cost of providing the same quality public safety coverage higher still, making the deficit in Indian Country even more pronounced.

Figure 22
Resources Available to Reservation Police Departments

	Indian Country	Comparable Rural Jurisdictions	National Average	Comparable High-Crime Jurisdictions
Officers per 1000 capita	1.3	1.8-2.0	2.3	3.9-6.6
Dollars per capita	$83	$104	$131	-
Dollars per employee	$36,000	$43,400	$48,200	-

Source: Stewart Wakeling, Miriam Jorgensen, Susan Michaelson, Manley Begay, *Policing on American Indian Reservations: A Report to the National Institute of Justice* (Cambridge, MA: Harvard Project on American Indian Economic Development, 2000), 17.

High rates of population growth on many reservations underscore the urgency of reforming and properly funding public safety in Indian Country. American Indians today are the youngest and fastest growing ethnic group in the United States, and this population growth does not appear to be losing momentum. With the noted strains on families and in the absence of adequate economic activity, many reservation youth find themselves growing up in a dispiriting environment. Resulting boredom, youth substance abuse, and gang activity increase the likelihood of criminal behavior.

Policy Responses

The federal government recently began certain efforts to address the multiple, interacting problems associated with crime, youth, and substance abuse. The Department of Health and Human Services is integrating approaches across health and social programs. The Assistant Secretary of Interior Indian Affairs, the Commissioner of the Administration for Native Americans, and the Director of the IHS have sponsored a youth conference that, among other things, has introduced federal and tribal officials to national youth organizations such as UNITY Inc., Indian Youth of America, the Boys and Girls Club of America, and others.[640] The Department of Justice has supported tribal efforts to develop "Tribal Healing to Wellness Courts," which, like their non-Indian

[639] Tribal Court Clearinghouse, "Tribal Law Enforcement." http://www.tribal-institute.org/lists/enforcement.htm (28 June 2006).

[640] Ibid.

counterparts, the "drug courts," integrate treatment, non-adversarial approaches, and sanctions with traditional and community-based approaches.[641]

Nonprofit organizations, too, are engaging these problems. Indian Dispute Resolution Services (IDRS), a California non-profit organization, conducts about ten youth leadership development sessions annually. These aim at teaching young Indians conflict resolution techniques, personal ethics, and leadership. IDRS has also introduced "compensation circles" into non-Indian public school classrooms which children of the Hoopa Valley Tribe attend. The compensation circles are a traditional restorative justice mechanism that was embraced by the non-tribal school teachers as a way of mediating disputes and resolving disciplinary issues in the schools.[642]

Beyond the punitive and deterrent measures traditionally associated with non-Indian policing and adversarial judicial proceedings, a number of Native nations have undertaken both preventative programs and restorative justice approaches to crime. The Winnebago Tribe of Nebraska puts troubled youth to work on a bison herd owned by the tribe.[643] The Navajo Nation applies traditional restorative justice approaches to dispute resolution in its Peacemaker Court.[644] The Navajo also incorporate the principles of *K'e* into their court system, and have thus integrated traditional culture, more standard alcohol prevention activities, and clinical care to actually reduce chemical abuse.[645] At Grand Traverse, trained peacemakers not only help resolve disputes; they join troubled youth on week-long, Outward Bound-style trips that build discipline and confidence. Tribal police forces have begun organizing youth activities, such as sobriety dances and sledding parties.[646]

Towards Improved Public Safety in Indian Country

The inability of federal, state and Indian governments to provide for adequate public safety on Indian lands is shocking. Accepting the status quo of the criminal justice system in Native America ironically perpetuates injustice in tribal communities. A growing recognition of this crisis, increased willingness of various agencies to coordinate responses, and the introduction of new-but-old tribal approaches are beginning to suggest alternative paths which will enhance public safety in Indian Country. But until a concerted effort is made to build Native nations' capacities to plan and design adequate institutions, crime will continue to be a black spot on an otherwise improving picture for Native America.

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[641] U.S. Department of Justice, Tribal Law and Policy Institute, *Healing to Wellness Courts: A Preliminary Overview of Tribal Drug Courts* (Washington, DC: Government Printing Office, 1999).

[642] Communication with Stephen Haberfeld, Acting Director, Indian Dispute Resolution Services (31 January 2001).

[643] Nessi, 1.

[644] See also the discussion of courts in the "Jurisdiction" chapter.

[645] Michel Lincoln, "Statement of Michel Lincoln, Deputy Director, Office of the Director, Indian Health Service, Department of Health and Human Services, before the Senate Committee on Indian Affairs" (13 October 1999).

[646] See Standing Rock Police Department, "Mission Statement." http://www.standingrock.org/police.htm (28 June 2006).

In spite of increasing consolidation and coordination, the Native nations still confront public safety problems with fractured funding sources and program agendas. For example, there are six programs alone in the Department of Justice that fund tribal law enforcement and criminal justice. As observers point out, the fractured resources and mandates coming from Washington serve to distract – if not frustrate – Native nations in their efforts to design and implement programs that are both locally designed and comprehensive in scope.[647]

Building effective programs in Indian Country will require continuing attention to the multiple and interacting problems associated with crime. As Native nations take responsibility for policy and outcomes in a range of areas, they will gain more ability to plan holistic approaches to the community problems that are fueling crime. Remarkable population growth in Indian Country, which shows no signs of slowing, drives home the urgency of dealing with these issues. To be successful, the criminal justice systems of Indian nations need to become a fully functioning arm of tribal government.[648] These institutions would thus become truly accountable to the communities they serve. In the coming decade, Native nations, working with the federal and state governments, will have to increasingly tackle public safety issues by engaging those nations' citizens in designing and implementing appropriate criminal justice policies and systems.

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[647] Wakeling, et al., 84.

[648] Ibid., 7.

TEXTBOX: Kake Circle Peacemaking, Organized Village of Kake

For generations, the Tlingit people of Kake, Alaska, witnessed their youth population's descent into patterns of underage drinking and substance abuse. Unfortunately, the Alaska State justice system juvenile probation officer assigned to Kake lived on another island and could pay only limited attention to Kake's youth.

By the late 1990s, Kake residents realized that without breaking this cycle, the Village's future looked bleak. Volunteers organized the Healing Heart Council and Circle Peacemaking in 1999. This reconciliation and sentencing process is embedded in Tlingit tradition and works in conjunction with the Alaska State court system. When a Kake juvenile enters a guilty plea with the state court, the state judge, with the concurrence of the prosecutor, the public defender, and the offender, may turn the juvenile's case over to the Healing Heart Council for sentencing.

The Council initiates Circle Peacemaking by bringing together a group of village volunteers to formally sentence the young offender(s). Circle Peacemaking involves the participation of individuals and groups who rarely come together under western systems of justice—the offender, the victim, families, friends, church representatives, police, substance abuse counselors, and concerned or affected community members. Participants, who may number from six to sixty, sit in a circle while a Keeper of the Circle facilitates the discussion. Discussions always begin and end with a prayer, and negative comments are strictly forbidden. Circle discussions are kept entirely confidential, and the Keeper encourages participants to speak from their hearts. The meetings typically last two to four hours, but they can only end when forgiveness and healing are apparent and consensus is reached about the offender's sentence. This sentence then becomes public. Afterwards, the circle participants are responsible for ensuring that offenders adhere to their sentences.

Today, the Healing Heart Council offers not only sentencing circles for juvenile offenders, but also sentencing circles for adult offenders who request Circle Peacemaking, healing circles for victims, intervention circles for individuals who seem to be losing control of their lives, celebration circles for offenders who have completed their sentencing requirements, and critical incident circles for individuals involved in an accident or crime who require immediate counseling. The number of mandated sentencing circles has decreased and the number of volunteer support circles increased—initiated by individuals who have not yet committed offenses and are determined to avoid doing so. Significantly, Kake Circle Peacemaking's successes are occurring where the Alaska State court system repeatedly failed. Over four years, Circle Peacemaking has experienced a 97.5 percent success rate in sentences fulfillment compared to the Alaskan court system's 22 percent success rate.

Skeptics of Circle Peacemaking challenged the ability of an isolated, small, and socially interconnected village to establish a successful sentencing process. In Circle Peacemaking, however, these realities lie at the heart of the circles' successes. Circle Peacemaking is a deeply personal justice system that depends upon and promotes the interconnectedness of a compact and culturally whole village. The successes of Kake Circle Peacemaking rely on the village's determination to understand and utilize its most salient characteristics as strengths. The Council practices a form of community justice reminiscent of the Deer People, an almost-forgotten group of traditional Tlingit peacemakers who healed, restored, and prevented escalating harms within their villages by consulting with all who were affected by the actions of an offender. **/END TEXTBOX**

SECTION 4: CULTURE, ARTS, AND MEDIA

CULTURE

- "American Indians and Alaska Natives" are treated as a single category in most U.S. Census compilations. In reality, the category includes a multitude of diverse populations, circumstances, and cultures. Generalizations about "Native culture" are hard to come by.
- Federal policies that explicitly promoted acculturation, assimilation, and termination lasted well into the 20th century and often had devastating effects on indigenous cultures. Many Native peoples lost their languages, important cultural practices, and significant indigenous knowledge.
- Nonetheless – and as evidence of often phenomenal resiliency – many Native values, beliefs, and ways of doing and thinking have endured, deeply embedded in the day-to-day activities and relationships of Native communities. These orientations and practices continue to differentiate Native communities from much of mainstream American culture.
- Today, as Native nations reassert control over their own affairs, they are investing in the restoration of language, the protection of objects of cultural patrimony, the revitalization of ceremonial cycles and Native arts, and the defense of indigenous systems of values and cultural practice. Some are turning to their own political cultures for solutions to governance challenges.

It is worth keeping in mind the admonition of Vine Deloria and Clifford Lytle, writing in *The Nations Within*: "Culture is a most difficult subject to discuss. It is also the single factor that distinguishes Indians from non-Indians in the minds of both groups."[649] That said, culture encompasses at least three different, but intimately related, dimensions of human life. The first is cognitive: how people think, what they value, and the understandings they have of themselves and the world around them. The second is behavioral: what people actually do, the relationships they enter into and sustain, and the activities they undertake. The third is material: the objects (from

[649] Vine Deloria, Jr., and Clifford Lytle, *The Nations Within* (New York: Pantheon Books, 1984), 250.

houses to art) that they make and use as they solve practical life problems and celebrate, commemorate, or symbolize themselves and the world in which they live.

Diverse American Indian Cultures

The cultures of Native America at the time of European contact were enormously diverse along all three dimensions. The hundreds of indigenous societies of North America had distinctive ideas about themselves and the world around them; they engaged in a variety of activities and relationships; and they produced a wide array of material goods as they used their ideas about the world to address the practical circumstances in which they lived. One could not have spoken with any accuracy of "Indian culture" at the time of European contact, and one cannot speak with any accuracy of such a single "Indian culture" today. The ways of the Hopi are very different from the ways of the Gwich'in in the interior of Alaska. Choctaw language speakers cannot understand Blackfeet language speakers. Iroquois ways of governing are not the same as Navajo ways.

There are numerous drivers and dimensions of this cultural variation, including environment, language, contact experiences, and trade. For example, the broad range of geographical and attendant environmental conditions found in North America helped establish locally shared but regionally variant traditions of industry and livelihood: farming in the eastern forests; nomadic hunting on the plains and prairies; farming and herding in the Southwest; seed gathering in California and the inter-mountain "great basin"; ocean and river fishing in the Northwest; nomadic hunting, fishing, and foraging in the transcontinental sub-Arctic; marine animal subsistence in the Arctic; and hunting and gathering on the Hawaiian Islands.[650]

Trade and economic interactions supported cultural exchanges as well, which bridged and smoothed differences. Not surprisingly, the hundreds of known Native languages of North America – vital receptacles of culture – tend to echo many of these regional distinctions and relationships. The history and politics of contact with non-Natives further distinguish today's Native nations' cultures. Scholars have written volumes on the conflict, compromise, spread of disease, and demographic changes that resulted from European contact. Over time, the people of each American Indian nation experienced different challenges and opportunities and met them in unique ways. Those variegated experiences have left their marks on the living cultures of Native peoples.

The extraordinary cultural variation among the Indian nations of North America raises several points. First, any single image of what constitutes a "real Indian" is an unjust over-simplification. This holds true for both times past and today. The iconic horse-mounted Plains Indian of the 19th century pervades the novels, movies, and media of pop American culture. But even before the romanticizing, the Presidential visits, and misinformed teaching that makes use of the icon today, the languages, dress, arts, social structures, ceremonies, world views, histories, economies, governments, and other cultural traits of one of the Plains tribes – say, the Lakota – bore little resemblance to the desert-dwelling agricultural communities of the O'odham or the fishing communities of the Pacific Northwest coast. Indeed, Lakota culture differed sharply from the culture of the neighboring Apsaalooké (Crow). Certainly, the historical "Indian" of pop culture does not represent the actual Indian who is today the Armani-clad CEO of his tribe's casino, or the Princeton

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[650] Substantially derived from Harold E. Driver, *Indians of North America*, 2d edition, rev. (Chicago: University of Chicago Press, 1969), and Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985).

graduate who is chair of her tribe, or the world-class and internationally-competing young Seneca lacrosse player, or the Makah whale hunter.

Second, Indian cultures are *living cultures* and, as such, they carry both long-rooted and more contemporarily developing elements. For instance, in the 1990s the leaders of the Gila River Indian Community labeled tribal government buildings (formerly known by their English descriptions, such as "Social Services," "Defense Advocates," etc.) with *O'odham* names, an exercise that entailed direct translation, the adaptation of old words to new uses, and the creation of wholly new phrases. The changes were not merely symbolic of "for show". They represented a seemingly universal trait of a people naming what they see, do and create according to their own cultural lights.

Third, the degree of cultural change over time, and particularly change that has blurred distinctions between historic culture and contemporary mainstream American culture, varies among Native communities. For inexperienced outsiders entering a Native community, this cultural variation is often disorienting. In some cases, a mainstream American's "internal societal compass"[651] can provide good navigation through the culture, but in others that compass is of limited use. The laptop-toting director of the tribal roads department may not only be a cracker-jack civil engineer; he may also be a spiritual leader in his clan. The fact that "civil engineer" may not seem quite "Indian", while "spiritual leader" fits with the pre-conception of the non-Indian visitor, is most likely a material distinction only in the *visitor's* mind.

At a profound level, mainstream society's tendency to see Native Americans only or primarily through the lens of history is dehumanizing; real human societies live and change. Whether or not it runs counter to someone's stereotype, being the Armani-clad CEO of a large tribal enterprise *is* part of what it means to be Native to that Indian person today. Speaking one's native language with the elders or while at home for a sweat, but conversing in English on the job as the only Native doctor in the health clinic, is not a contradiction; it is real life for that Indian person. Winning the slam dunk basketball contest at Crow Fair and struggling to learn the Apsaalooké language may signal a culture that continues to go through change; but it is part of what it means to be Crow Indian to that teenager today.

Mainstream society does not see contemporary U.S. politicians as no longer "American" because they no long wear the powdered wigs of their founding forefathers, or Texans as no longer "Texan" because they have given up the horse culture of previous Texans. In the face of both minor and major cultural change, Americans go on seeing themselves as American; Texans go on seeing themselves as Texans. And they go on believing that they rightfully sustain their rights to self-determination and sovereignty despite such change. Unfortunately, the very small size of the Native population means that Native Americans' real lives are seldom seen by mainstream society without media filtering and misinformation. When seen, those lives run the risk of being defined as no longer "Indian" and, perhaps, as no longer entitled to the rights attendant to Native nationhood that emanate not from some notion of "special rights" owing to Native ethnicity, but from pre-contact status as sovereigns, the Constitution, Congress, treaties, executive orders, and the courts.[652]

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651 The phrase "internal societal compass" is used to indicate the implicit assumptions about the values and goals of society that individuals instinctively use to determine impressions and appropriate behaviors in a given situation.

652 For particularly strong illustration of such non-Native misconceptions and muddled reasoning, as set forth by a Nobel Prize-winning economist and a very prominent federal judge and legal scholar, see Gary S. Becker and Richard A. Posner, "The Becker-Posner Blog", at http://www.becker-posner-

Clearly then, there are numerous Indian cultures among contemporary Native Americans. This multiplicity, however, does not mean that there are not some salient elements of culture – and cultural strain – that cut across tribes and communities today. In part, of course, there is shared history: the substantially common history of treatment under federal policy. This shared experience has contributed to a thread of "pan-Indian" culture that runs through Native America. Pan-Indianism is a unification of certain Native ideals and practices that can trace its roots to the Indian boarding schools of the late 19th and early 20th century and finds celebration on the modern pow-wow circuit.

The most significant manifestation of pan-Indianism can be found in the political activism of the 1960s and 1970s, when Native Americans rallied around indigenous rights issues. Pan-Indian strategies created a movement that fought for improved material circumstances for Indian communities, land preservation, treaty rights, and the validity of Native identity. Notably, while Indians engaged in political activism like other groups, they did so with a very different agenda. Their politics were less about distribution (such as access to jobs) and discrimination against individuals than about recognition of collective political rights and cultural difference. Non-Indian activists wanted an end to prejudice and a piece of the pie; Indians wanted autonomy, control, the right to be and govern themselves.[653] Ultimately, the movement not only was founded on pan-Indian culture, but also reinforced it.

Policies and Processes of Cultural Suppression

Indigenous cultures have long been prime targets of assimilationist American government policies. Among other things, such policies have sought over time to eradicate Native languages and ceremonial practices, replace community land rights with individual rights, and turn Indian hunters into small-scale farmers. In the face of removal, outright Indian wars, incarceration on reservations, allotment of Indian land, mandatory boarding school attendance, the forced fostering of Indian children, and general social management by U.S. government agents, Indians fought to retain the cultural bonds – rituals, beliefs, systems of social and political organization – that constituted their societies.

Sometimes they were especially successful. One strategy was to adopt an outward show of assimilation and to hide customary practices from colonial oversight. For example, under pressure first from the Spanish and then from the U.S., Pueblo societies adopted many trappings of Western civilization. At the same time, they moved many of their traditional governance and religious practices underground (literally), to the *kivas*. Likewise, the Sun Dance, common to many high Plains cultures, was conducted in secret well into the 20th century, even as official U.S. policy banned the practice. These are remarkable demonstrations of cultural resilience.

While this resilience is impressive, the efforts to destroy Indian cultures were unrelenting and powerful, and much was lost. During the long period of overt discrimination, which commenced even

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blog.com/archives/2006/01/the_economics_o_1.html and http://www.becker-posner-blog.com/archives/2006/01/comment_on_amer.html (January 2006). For the contrary perspective, see Joseph P. Kalt and Joseph W. Singer, "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule" (Cambridge, MA: The Harvard Project on American Indian Economic Development,2004).

653 See, for example, Stephen Cornell, *Return of the Native: American Indian Political Resurgence* (Oxford: Oxford University Press, 1990).

before the U.S. became an independent national entity and continued at least through the late 1960s, many indigenous systems of government, Native languages, and Native religious practices, and even entire Native nations atrophied and disappeared. For example:

- The Choctaw once had a highly differentiated government system, composed of three major bands in a confederacy. By the mid-1800s, when the Oklahoma Choctaw embarked on a process of formalizing and amending their constitution, many of the intricacies of this system were a distant memory.[654]

- Many Native nations have few or no fluent speakers of their language. It is likely that the last speakers of the Miluk language, for example, once spoken by the Coquille Tribe, died in the early 1970s.[655] Some 20 years onward, the Coquille began to seek funding for a project to revive the Miluk language, relying primarily on tape recordings from the 1930s.[656]

- After a revival early in the 20th century, concerns resurfaced in the 1990s that important Navajo healing knowledge was being lost – practicing *hatalii* (medicine men) were aging, their numbers were falling, new recruits had less time and fewer resources to turn to learning the complicated songs and sand painting arts, and a narrower assortment of ceremonies were being performed.[657]

- In August 1911, a starving man, speaking a language no one understood, was found in the backyard of a slaughterhouse near Oroville, CA. This man, dubbed "Ishi" because he never revealed his name to the anthropologists and medical staff at the University of California San Francisco who befriended him, is suspected to have been the last of the Yahi, a Native nation of northern California. Ishi died from tuberculosis in 1916.[658]

Even after federal policy shifted away from some of the harsher means of cultural suppression and U.S. policy-makers sought to address concerns about the social welfare of Native peoples, there was a tendency to equate acculturation to mainstream norms and beliefs with progress.

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654 See Duane Champagne, *Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw and the Creek* (Palo Alto, CA: Stanford University Press, 1992).

655 "Coos (Coosan, Hanis, Miluk)," http://www.native-languages.org/coos.htm, (24 May, 2006); this page is part of the larger, highly informative project "Native Languages of the Americas: Preserving and promoting American Indian languages," http://www.native-languages.org/, (24 May, 2006).

656 Jerry Farley, "Statement of Jerry Farley, executive vice president, Coquille Economic Development Company," *Native American Languages Act of 1991: Hearing before the Select Committee on Indian Affairs*. (Washington: Government Printing Office, 1992), 29.

657 See "Pueblo Culture," http://www.insiders.com/santafe/main-cultures2.htm#Heading2 (2 February 2001); "FAQs About Life on the Navajo Nation and Among the Navajo People," http://navajocentral.org/faq2.htm (2 February 2001); Alisa Blackwood, "Navajos Create Program to Train Youth in Traditional Ceremonies," Associated Press Newswires (23 March, 1999).

658 Orin Starn, *Ishi's Brain: In Search of America's Last "Wild" Indian* (New York: W.W. Norton, 2004). See also Jeff Miller, "Who was Ishi?: A Source of Surprise, Humility and Humanity," *UCSF Daybreak Newsbreak*, 2 October 1998. http://www.ucsf.edu/daybreak/1998/10/02_ishi.html (25 May 2006).

As late as 1969, a BIA report stated that "Indian economic development can proceed only as the process of acculturation allows."[659] When Indian cultures were acknowledged, as with the passage of the *Indian Arts and Crafts Board Act* in 1935,[660] such efforts "encouraged both Indians and non-Indians to think of culture as primarily the artifacts produced by the ancestors of today's Indians"[661] – that is, to view Indian cultures in a discrete, compartmentalized way ("crafts," "music," etc.) and to view these arts as dying or dead.

In the 1960s and 1970s, in the face of increasingly activist and confrontational Indian politics, the unilateralism of federal Indian policy and its antagonism to indigenous cultures began to change, opening space for Native priorities and practices. Some of the results were symbolic, such as the return to older hairstyles and images among some Indian political activists, but a cultural resurgence was also apparent in efforts to revitalize Indian languages, introduce tribal histories and cultures into reservation schools and tribal college curricula, and draw on indigenous models for solutions to governance challenges.

Today, numerous tribal health care programs provide indigenous medicine in addition to Western medicine; educational systems are being changed to reflect indigenous knowledge and pedagogy; social service programs are being developed that strengthen family, clan, and tribal bonds; and tribal environmental managers are marrying Western science with Native approaches to restore vital natural resources.[662] The tribal push for self-determination – supported by the federal policies of self-determination and self-governance (P.L. 93-638 and its amendments) – has been at the same time a push for cultural renewal.

Nonetheless, self-determination policy retains some assimilationist pressures. While contracting and compacting afford tribal governments greater control over services and programs, in their present incarnation, the processes do not encourage tribal applicants to *redesign* programs according to their specific needs and worldviews. Instead, the processes tend to promote replication of the federal government's management structure at the tribal level. Certainly, compacting *allows* program redesign. As implemented by the federal government, however, the compacting process does not *promote* redesign. And, because the amendments to the policy permit the Native nations to compact in a piecemeal fashion (one program at a time), the end result can be similar to contracting – the creation of tribal programs that closely mirror their federal precursors.

Similarly, policy-makers and pundits have called upon Native nations to strengthen their court systems as a means of improving self-government and advancing economic development. Yet is it unclear whether non-Native complainants and non-Indian courts with competing jurisdictions will accept the authority of judicial systems that often have strong and obvious cultural differences from

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659 US Bureau of Indian Affairs, "Economic Development of Indian Communities," in United States Congress, Joint Economic Committee, *Toward Economic Development for Native American Communities* (Washington: Government Printing Office, 1969), 333.

660 "Indian Arts and Crafts Board Act," August 27, 1935, (49 Stat. 891; 25 U.S.C. 305 et seq.; 18 U.S.C. 1158-59).

661 Deloria and Lytle, *The Nations Within,* 250.

662 There are programs of each of these types (and more) among the winners of the "Honoring Contributions in the Governance of American Indian Nations" awards program; see http://www.ksg.harvard.edu/hpaied/hn_main.htm (26 May 2006).

the Western model.[663] In the case of tribal police departments, tribal self-determination has replaced BIA forces in many Native communities. The newer tribal departments often strengthen their ranks by sending recruits to state police academies. A useful byproduct of this training has been the increased acceptance that tribal officers receive among their municipal and state police colleagues – acceptance that may deter tribal police departments from further organizational strengthening along strictly cultural lines. In a nutshell, federal policies that increase the self-determination of Indian governments may nonetheless foster some "your government should look like our government" demands.

To be sure, increased recognition of Indian cultures in federal policy has not ended outside governments' assaults on Native American communities. While the U.S. government's self-determination policies have created more room for Indian cultures, they also have opened the door to increased pressure from the state and local levels. For example, groups such as the North Central Idaho Jurisdictional Alliance (of city and county governmental entities surrounding the Nez Perce reservation), the 15 local governments that make up the Montana Association of Reservation Counties, and other similar organizations were formed for the purpose of opposing Indian nation jurisdiction as tribes flexed their powers of self-rule in the 1980s and 1990s. Parallel non-Indian interest groups, with names such as All Citizens Equal and Montanans Opposing Discrimination,[664] lobby the federal and state governments to abolish the "special standing" of Natives and "treat all citizens the same" – although Montanans are noted for their resistance to anything that would resemble the relinquishing of Montana's sovereignty under U.S. federalism to California.

Today, of course, government actions are not the only, or even the primary, source of pressure on Native cultures. The values, customs, and norms of the American mainstream are part of the daily experience of all Native people. Technology has a central role in this cultural hegemony. When asked the root cause of his community's current problems with youth, an Akimel O'odham elder from the Gila River Indian Community replied, "That," pointing out the window to a car. He explained that contemporary technology, typified for him by the automobile – and for others by television, computers, etc. – dramatically increased the volume and speed of cultural incursions from the non-O'odham world and that these incursions had destroyed the community's traditional means of training its youth.

Such incursions mean that Native nations must continue what they have long done – seeking a balance, within their evolving cultures, between indigenously driven and outsider-driven change. A good example is technology used in service of cultural preservation and revival. From the creation of a Lakota alphabet and dictionary in the early twentieth century to the digital recording of

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[663] The Navajo Nation Judicial Branch is an oft-cited success in these terms. Certainly, it has gained great acceptance among the federal and state courts of Arizona and New Mexico, despite the full integration of Navajo common law into its rulings. Yet, this standing was achieved only through intense and ongoing training of non-Native judges and lawyers by the largest Native judicial system in Indian Country – observations that make one wonder about the acceptance that would be gained by a small, less influential Indian nation's judicial system, if it operated along distinctly non-Western lines. An argument of exactly the kind found in the text – that Native judicial systems are "too different" – was used by Justice Souter in his concurring opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001): "The resulting law applicable in tribal court is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out," 11.

[664] See, for example, Michael Moore, Missoulian.com, "Anti-Indian Movement Lingers, Speaker Says." http://missoulian.com/articles/2006/04/07/news/mtregional/news05.txt (June 2006).

Muckleshoot elders' stories, from early photographs of American Indians using traditional tools *in situ* to high tech museum displays of Native lifeways, technology has provided and continues to provide a means by which Native Americans can maintain, communicate, and celebrate their cultures.

A final observation is that Native societies are not immune to internal cultural factionalism. The struggle is often framed as "traditionalists" versus "non-traditionalists," and sometimes the tension is even expressed in terms of "full bloods" versus "mixed bloods." In either case, the question is this: Around whose norms and values is the society to be organized? For example, what policies are to be implemented? What should the basis of the nation's relationship with the federal government be? What cultural changes are to be encouraged or resisted, to what degree, and by whose consent? On the one hand, the substance of these questions and, hence, the struggles themselves, are unique to Indian Country. On the other hand, the fundamental issue is universal. "Culture wars," "far right," "liberal left," "Christian conservative," "pro-life," etc. are familiar terms to anyone with a casual interest in U.S. politics and society. Names and labels aside, the disagreement is about the norms by which society is to conduct itself. Cultural ideas in Native America, as in any other society, are often under contention.

The Status of Indian Languages

North America is a fertile linguistic field, in large part because of the diverse languages historically spoken by its indigenous populations.[665] Yet, as noted above, language loss has been one of the most devastating aspects of colonization and acculturation. What is the state of language survival in Native America? One conservative estimate is that at least 75 Native languages once spoken in North America have been lost since European contact.[666] Moreover, "as of the 1960s, the best count for languages still spoken north of Mexico came to 175. Of these 175 languages, 136 each had less than 2,000 speakers, 34 of them with ten speakers each at most. Many speakers of these 136 languages would have been elderly at the time of the count; additionally, the children in many cases had been growing up monolingual in English."[667] These linguists go on to predict that there was therefore little likelihood that the 34 languages with 10 or fewer speakers could or would survive into the late 20th century (their point of reference).

Overall, data from the 2000 US Census reinforce such pessimism: Native language knowledge rates among the youngest Indians are typically very low. (Figure 23). On average across Indian Country, it appears that less than 1% of the people speak their Native languages. Not all of the news is bad, however. There is still significant Native language retention in some tribal communities,

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665 Most North American Indian languages can be grouped into one of seven primary families: (1) Inuit and Aleut (Far North); (2) Algonquian (various tribes in the eastern forests, the Plains, and the Far West); (3) Athabascan (the Mackenzie-Yukon Basin, the Navajos in the Southwest, and some West Coast peoples); (4) Uto-Aztecan (the Great Basin and Rocky Mountains area, the Plains, and the majority of the Pueblos); (5) Chinookan (several scattered Far Western tribes); (6) Siouan (people in such highly separated regions as the Northeast, the Southeast, the Plains, New Mexico, and northern California); and (7) Native Hawaiian languages; see, for example, Harold E. Driver, *Indians of North America*, 25-53, especially Table 2, 43-45.

666 Shirley Silver and Wick R. Miller, *American Indian Languages: Cultural and Social Contexts* (Tucson, AZ: University of Arizona Press, 1997), especially 7-8.

667 Ibid., 8. Linguists at the Piegan Institute, a Native language study center in Montana, estimate that 185 North American Native languages survived into the late twentieth century. Thus, the figures are not exact, but it is clear that many American Indian languages have been lost over the last 600 years.

and even a few communities in which youth language knowledge may be turning the tide of language loss. Nations such as Zuni and Mississippi Choctaw, for example, sustain rates of greater than 50% Native language knowledge among adults, and have raised the rates of the young (5 to 18-year olds) even above the adult rates. At the other end, nations such as the Puyallup and Osage have quite low rates of adult Native language knowledge, but also have elevated the rates of the youth.

Figure 23
Estimated Native Language Knowledge*
Selection of Large Native Nations (pop. 1000), 2000

Tribe	Location	???Age	Age 5+
Zuni Pueblo	NM	80%	82%
Navajo Nation	AZ/NM/UT	75%	68%
White Mountain Apache Tribe	AZ	73%	59%
San Carlos Apache Tribe	AZ	64%	46%
Mississippi Choctaw	MS	63%	64%
Acoma Pueblo	NM	57%	48%
Crow Nation	MT	54%	50%
Hopi Nation	AZ	54%	52%
Tohono O'odham Nation	AZ	49%	46%
Rosebud Sioux Tribe	SD	28%	23%
Gila River Indian Community	AZ	27%	23%
Oglala Sioux Tribe	SD	27%	23%
Cheyenne River Sioux Tribe	SD	20%	18%
Shoshone & Arapahoe of Wind River	WY	20%	22%
Red Lake Band of Chippewa	MN	15%	14%
Eastern Cherokee Tribe	NC	14%	16%
Confederated Salish and Kootenai Tribes	MT	10%	13%
Fond du Lac Band of Chippewa	MN	10%	9.2%
Yakama Nation	WA	10%	13%
Oklahoma Muskogee/Creek Nation	OK	9%	10%
Oklahoma Choctaw Nation	OK	8%	8%
Seneca Nation	NY	7%	5%
Blackfeet Tribe	MT	6%	10.1%
Turtle Mountain Chippewa Band	ND	5%	6%
Puyallup Nation	WA	4%	9%
Osage Nation	OK	3%	6.4%
Average across all U.S.-based Tribes	---	.7%	.7%

*These are based on U.S. Census information on the percentage of the reservation population speaking a language other than English in the home. Significantly, the estimates should not be interpreted as fluency or even comfort communicating in the given language; they only indicate that it is likely that the stated percentage of individuals sometimes use Native language in the home.
SOURCE: U.S. Bureau of the Census 2000, Summary File 3.

The cases of Native language use among youth beginning to exceed rates among adults hint at remarkable efforts underway across Native America to counter language loss. Various Native

nations have begun their own innovative language programs, often working in conjunction with other governments or with nonprofit organizations. Federal laws recognize and facilitate these efforts.[668] Elementary and secondary schools – tribal, state, and private – as well as colleges and universities (especially those with significant Native enrollment) are also important partners. At the University of Arizona, for example, three Native languages and writing systems are taught (Hopi, Navajo, and Tohono O'odham). The University also is home to the American Indian Language Development Institute, a summer program now in its 26th year that serves teachers, teacher aids, language specialists, and Native speakers. And it is not just language teaching programs *per se*, but also efforts such as place name projects, that help revitalize Native tongues and reinforce the indigenous knowledge behind the words.[669]

Just a few noteworthy examples of these programs include:

- The Master-Apprentice Language Learning Program, sponsored by the Advocates for Indigenous California Language Survival, pairs speakers with non-speakers of near-extinct California Indian languages and supports the relationships with materials, workshops, house calls, and very small grants.[670]

- The Port Angeles High School Heritage Language Class teaches Klallam as one of its foreign language offerings. Significantly, language materials for the heritage language class were developed over the last 15 years with the support of grants from the National Parks Service and the Administration for Native Americans, the commitment of tribal elders, and the institutional guidance of the local school district.[671] Teaching materials now range from Klallam video games to lessons on CD-ROM.

- The Akwesasne Freedom School – also discussed in the chapter on education above – is a Mohawk immersion school for grades pre-kindergarten through six and a transition school for grades seven and eight. As much as possible, the school immerses children, teachers, and staff not only in Mohawk language, but in an *entirely* Mohawk way of thinking and learning. Mohawk philosophy and cosmology motivate the curriculum, teaching methods, and even the pattern of the school day and year. For example, the school day begins and ends with recitation of the *Ohen:ton Kariwahtekwen* (Words That Come Before All Else, or Thanksgiving Address). Because the Address pays respect to all things, the school has been able to

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668 For example, see U.S. Public Law 101-477. 101st Cong., 2nd sess., 30 October 1990, *Native American Languages Act of 1990*. Also see U.S. Public Law 102-254. 102nd Cong., 2nd sess., 26 October 1992, *Native American Languages Acts of 1992.*

669 Keith H. Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque, NM: University of New Mexico Press, 1996) describes the richness of this process.

670 Katharine Whittemore, "To Converse With Creation: Saving California Indian Languages," *Native Americas* (Fall 1997), 46-53.

671 Lisa L. Diaz, "Native Languages for Foreign-Language Credit," *The Seattle Times*, 20 May 2000.

base its curriculum on it: The Address's teachings are the doorway into instruction in math, science, history, geography, reading, writing, etc.[672]

- The Cherokee Language Project is a multi-faceted approach to language preservation, which includes an immersion school, Cherokee courses for non-immersion school students, curriculum development, teacher training, a Cherokee language youth choir, a weekly all-Cherokee radio program, and on-line language classes geared toward adult learners. The unique approach of the immersion school is to start with pre-kindergarten and then adds a grade each year until the school teaches pre-K through 12th grade. Knowing that such an ambitious effort requires a growing cadre of trained teachers, the program has partnered with Northeastern State University in Tahlequah, Oklahoma to create a Cherokee teaching degree program.[673]

For most such programs, it is too early to tell exactly how far reaching their impacts will be. But their successes to date have already been invaluable to Native peoples: As noted by an elder of the Atchumawi-Atsugewi Tribe, "We must know the white man's language to survive in this world, but we must know our language to survive forever."[674] This defining connection between language and culture – well known to anthropologists and cultural studies experts, but worth emphasizing to all – means that when a language is lost, the world loses not only an alternate means of communication, but also an alternate conceptual apparatus, a different way of seeing and symbolizing the world.

Native Cosmologies and Religions

Native ways of seeing and symbolizing the world vary just as non-Native ones do. But what, if anything, do they have in common? One thread is that Native cultures tend to privilege relationships with animals and the earth in ways that most Western cultures historically have not. An examination of various Native creation stories, for example, reveals a set of beliefs in which human beings are but one integral part of the natural order.[675] They are not assumed to be superior or exercising dominion, nor are they assumed to be the sole proprietors of spirituality. Stories from the land and the landscape bring forth a constant reconnection between people (human people, animal people, plant people, rock people, etc.) and spiritual powers, and generate stronger ties between the past, the present, and the future.[676] Indeed, this perspective underlines why access to and control over sacred landscapes is so important to so many American Indian nations.[677]

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[672] The Harvard Project on American Indian Economic Development, "Akwesasne Freedom School," *Tribal Governance Success Stories, 2005* (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2005).

[673] The Harvard Project on American Indian Economic Development, "The Cherokee Language Revitalization Project," *Tribal Governance Success Stories, 2005* (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2005).

[674] Quoted in Leanne Hinto, *Flutes of Fire: Essays on California Indian Languages* (Berkeley: Heyday Books, 1994), 234.

[675] See, for example, James Wilson, *The Earth Shall Weep: History of Native America* (New York: First Grove Press, 1999), Chapter 1.

[676] For more complete discussions see Wilson, *The Earth Shall Weep*, especially the Prologue and Chapter 1; Kenneth M. Morrison, "Native American Religions: Creating Through Cosmic Give and Take," in Duane

Concrete examples point to worldview distinctions. The Native people involved in these events and activities have a quite different perspective on their meaning than non-involved, non-Natives might have.

- *The Wounded Knee Memorial Ride* The Ride is an annual pilgrimage, begun in the winter of 1990, in which hundreds of Lakota people have relived the last journey of Chief Big Foot and his people. Participants travel for days across the Plains, on horseback and in open wagons, often in frigid conditions, to Wounded Knee, a site on the Pine Ridge Reservation where the US Army's 7th Cavalry slaughtered Lakotas in 1890. Non-Natives reading the popular press might interpret the Ride as "an epilogue to a tragic event played out in archetypal images." But for the participants, the Ride is much more than that. The stories of Wounded Knee, having been passed down through the generations, connect those who came before to those who are still struggling with suffering. Hence, the lives and difficulties of many contemporary Lakotas cannot be disconnected by linear time alone from the historical tragedy. The Ride heightens this spiritual connection, commemorates the dead, and initiates a healing process aimed at mending the Sacred Hoop that joins both the original victims of the massacre and those living today. History and the story are the same, "the past, present, and future all converge, …[and] in an event such as the Wounded Knee Ride, commemoration of the dead is inextricably mingled with concern for the living and unborn."[678]

- *The Great Lakes Indian Fish and Wildlife Commission* (GLIFWC) Viewed through a Western lens, GLIFWC might be effectively described as a highly efficient natural resource regulatory body created by Ojibwe communities bordering the Great Lakes to assist in the maintenance and regulation of communal rights to off-reservation resources. But to the member Ojibwe communities, this description would fail to capture the meaning of and need for such an institution. GLIFWC is a vehicle by which they maintain a connection to their "place," a place foretold to them and to which their creator led them. Thus, to forgo forest rights is to forgo more than mere resources, to forgo more than access to traditional foods and medicinal plants, and to forgo more than the opportunity to practice sacred rituals and customs. It would mean a deep, cosmological disconnection from what they understand themselves, as a people, to be.[679]

Champagne (ed.), *Native America: Portrait of the Peoples* (Detroit: Visible Ink Press, 1994); Steve Talbot, "Pluralistic Religious Beliefs," in Champagne, *Native America: Portrait of the Peoples*; and Vine Deloria, Jr., *God is Red* (New York: Grosset and Dunlap, 1973).

677 See, for example, Philip M. Klasky, *An Extreme and Solemn Relationship* (San Francisco, CA: Bay Area Nuclear Waste Coalition, undated). http://banwaste.enviroweb.org/thesis/toc.html; and Valerie Taliman, "Sacred Landscapes," *Sierra Magazine*, November/December 2002, http://www.sierraclub.org/sierra/200211/sacred.asp (28 June 2006).

678 Wilson, *The Earth Shall Weep*, xix.

679 The Harvard Project on American Indian Economic Development, "Treaty Rights/National Forest Management Memorandum of Understanding," *Tribal Governance Success Stories, 2000* (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2000).

None of this is to say that the great variation in Indian cultures does not also apply to religious practices. Threads of commonality in worldviews, and related fusion of the secular and non-secular in everyday life, are played out in a multiplicity of religious practices. In some ways, Indian Country religion is a replica of American religion more generally: both familiar and diverse. Christian churches are familiar sights on reservations; they include Catholic, Baptist, Lutheran, Methodist, Pentecostal, and many other congregations. Usually less visible to the casual visitor are still-vibrant indigenous religious practices, many of them long suppressed by federal controls, but now resurgent as Indian communities reclaim their own spiritual ways. Exactly which religions are practiced and how, however, varies greatly from community to community and from individual to individual.

Indeed, as a result of European contact, missionary movements, revivals, and the resilience of Native religion, we find Native Americans in virtually all categories of religious practice: (1) acceptance of Christianity through acculturation; (2) rejection of Christianity through the retention of traditional religious beliefs and practices; (3) reaction to Christianity and Anglo domination through the rise of revitalization movements and new religions (such as Wovoka's Ghost Dance and Handsome Lake's Longhouse religion); (4) blending or mixing of Christian and traditional Indian religious practices and beliefs (such as the use of sage and cedar smudging in Lakota Catholic practice, and the Native American Church's emphasis on Jesus *and* traditional Indian religious views); and (5) pluralism, where forms of both Christianity and traditional or new religions are embraced (such as an American Indian who describes himself as both Longhouse and Christian, or herself as both traditional Navajo and Morman).[680]

Several significant issues affect the current practice of indigenous Native religions. As conscious government policies of cultural assimilation abated in the second half of the 20th century, the overt practice of Native religions appears to have increased. Outside Native America, there has been a growing interest in Native religions, especially by individuals who desire spiritual experiences but have rejected Western, Judeo-Christian practices. These two forces have created a number of problems with "access," which have to do both with metaphysical knowledge and physical sites. For example, traditional Native practitioners are increasingly concerned about fraudulent practice, misrepresentation, and the commercialization of sacred rites. Contentious discussions surround the issue of whether or not non-Indians can participate in practices such as the Sun Dance or a vision quest. And "New Age pilgrims" are sometimes said to compromise Natives' access to sacred sites, especially if those sites are environmentally fragile or are on treaty, but not reservation, land.[681]

The tenet of the separation of church and state is much touted, if not always practiced, under the U.S. Constitution. Yet Native American cosmology and worldviews often lead to practices that, while not fusing church and state, certainly go beyond the boundaries advocated by strict separationists in mainstream U.S. society. For example, in the fall of 2000, the Eastern Band of Cherokee School Board opted to continue to broadcast a Christian prayer over the school's public address system prior to home football games, in direct contravention of a US Supreme Court decision outlawing such practices. For the Cherokee, the action reflects their sovereignty (the U.S. Supreme Court cannot adjudicate within the Eastern Cherokee Nation) and their culture (which is strongly

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680 Categories listed by Talbot, "Pluralistic Religious Beliefs," 477.

681 See, for example, John Young, "New Age Assault on Bear Butte Decried," *Indian Country Today*, 29 June 1994; and David Melmer, "Sacred Butte Gets Hearing," *Indian Country Today*, 23 July 2004, http://www.indiancountry.com/content.cfm?id=1090593489 (28 June 2006).

Christian today). While direct challenges of this lack of separation are yet to emerge, they may be likely and will run directly into issues of tribal sovereignty.[682]

Some Native spiritual practices have pushed against the legal boundaries of religious freedom in the United States. The primary battleground has been the use of peyote by members of the Native American Church. Peyote is a naturally occurring, but controlled, substance with hallucinogenic effects when consumed. In 1990, the US Supreme Court ruled that the possession and use of peyote by Native American Church members was not protected under the US Constitution.[683] In response, the US Congress enacted statutes in 1993 and 1994 to offer such protection.[684] More generally, debates about appropriate drug use, equality under the law, and religious priorities remain active on the national agenda, and questions persist about the appropriateness of what opponents portray as "one racial group practicing one religion using one controlled substance."[685] While the right to peyote use is in place for now, these debates and questions pose an ongoing threat to the free practice of religion by many Native Americans.

Cultural Artifacts, Repatriation and Museums

For decades, non-native "collectors"— often professional ethnologists, anthropologists and paleontologists – have collected and even stolen the cultural patrimony, sacred objects, and physical remains of America's indigenous peoples for display, scientific examination, and sale. Ishi's brain (see discussion above) sat in a climate-controlled Smithsonian Institution research center for nearly 90 years before Native people learned that it (against Ishi's express wishes) had been taken. Mound burial sites throughout the Midwest have been operated as tourist attractions, with skeletons and funerary objects placed on public and often eerie display. Sacred medicine bundles and totem poles were stolen and sold to museums, which in turn refused their original owners access to their meanings and powers.

Against this history, recent decades have witnessed important developments with regard to the return, treatment and display of cultural artifacts. In 1990, Congress passed the *Native American Graves Protection and Repatriation Act* (NAGPRA). This Act requires museums and cultural centers receiving federal funds to inventory their American Indian holdings, make the inventories public, and at the request of tribes, negotiate the return of sacred artifacts and human remains. In essence, the Act

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682 This statement is an example of the misunderstanding and possible source of legal challenges: "I do believe this interpretation is a bit off base. I think this is an attempt to elevate a federal law above the Constitution. I would not assume a Native American school would have the right to open with prayer before football games," Robert Boston of Americans United for Separation of Church and State (a Washington, DC-based civil liberties organization), quoted in "Cherokee Nation Will Continue Prayers Before Tribal-School Games," the Associated Press, 28 August, 2000. http://www.firstamendmentcenter.org//news.aspx?id=5685&SearchString=cherokee_nation (28 June 2006).

683 *Employment Division, Department of Human Resources of Oregon, et al., v. Smith, et al.,* 494 U.S. 872 (S.Ct. 1990).

684 U.S. Public Law 103-141. 103rd Cong., 1st sess., 16 November, 1993. *Religious Freedom Restoration Act of 1993*; U.S. Public Law 103-344, 103rd Cong., 2nd sess., 6 October, 1994. *American Indian Religious Freedom Act Amendments of 1994.*

685 Robert Jesse, "Testimony of the Council on Spiritual Practices," Hearings of the Committee on Drugs and the Law of the Association of the Bar of the City of New York (October 10, 1995), 3.

is human rights legislation that acknowledges the role and participation of tribes in the ultimate disposition and control of their cultural patrimony. Indian nations now get to *choose* whether sacred artifacts, objects, and ancestors should or may be held by tribal or non-tribal institutions. They can decide whether objects may be displayed publicly or not.

These activities have not only increased non-tribal institutions' knowledge about cultural artifacts,[686] but also have fueled internal demands for cultural knowledge. Today, museum inventories are ongoing, many tribes are active in the claims process, and more and more cultural knowledge is being elicited, interpreted, and preserved by both tribal and non-tribal entities. As of mid-2001, of the 1,010 NAGPRA notices logged, 702 had been published in the *Federal Register* and completed.[687] By the end of 2004, over 1000 museum inventories had been completed and 701,091 cultural items had been repatriated to Native nations and organizations through NAGPRA.[688]

NAGPRA is not without its limitations. The law has no authority over private or international collections, for instance, which house numerous sacred objects and Native remains, often illicitly acquired and held. As to museums that are subject to NAGPRA, many have been charged with foot-dragging and with poor identification schemes, which exacerbate tensions between tribes on the appropriate patrimony of objects. Moreover, the legal obligation rests with the Native nations to prove ownership and sacred cultural connections to objects. Thus, as in so many other dimensions, the Indian nation that has its organizational act together organizationally is more likely to succeed in asserting its rights under NAGPRA.

Success for Indian Nations in exercising their powers under NAGPRA can be quite costly. Native nations must bear the costs of any legal challenges to their claims. The most prominent challenge to date surrounded the appropriate disposition of the remains of "Kennewick man," a 9,000-year-old skeleton found in Washington State in 1996. The Umatilla, Yakama, Nez Perce and Colville tribes claimed the right to the remains under NAGPRA but physical anthropologists filed suit to keep the skeleton for study. After an eight year legal battle, the tribes were unsuccessful at persuading the federal courts to return the remains.[689]

Even when a Native nation establishes its right to take possession of an object, many are unequipped to exercise stewardship. In March 2001, for example, the American Indians Museum Program worked with only 157 tribal museums and cultural centers.[690] AIMP is non-exclusive, so this number was close to the total number of tribal museums among the 560-plus American Indian and Alaska Native nations at the time. Even if a dozen new tribal museums were built each year,

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686 Rick West, Director of the National Museum of the American Indian and a Cheyenne Indian, has summarized this process well: "Even a collection as great as ours is very spottily documented, and through this process of repatriation we've had people from Native communities visiting our collection who can inevitably tell us a great deal about objects that are not subject to repatriation," quoted in Stephen Kinzer, "Museums and Tribes: A Tricky Truce," *The New York Times*, 24 December, 2000, 39.

687 Communication with John Robbins, National Parks Service, 16 May, 2001.

688 National Parks Service, "National NAGPRA FAQ." http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM#How_many (28 June 2006).

689 James May, "Study begins on Kennewick Man," *Indian Country Today*, 25 July, 2005.

690 Communication with Lisa Watt, American Indian Museums Program, 18 June, 2001.

hundreds of nations would still lack one. Further, only a fraction of tribal museums has adequate support staff and appropriately equipped museum space (e.g., climate-controlled display and/or storage areas).[691]

Taking the broad view, however, changes in conventions around the display of Native American artifacts in both Indian and non-Indian museums reflect an important cultural trend in Indian Country today. Indian nation museums' renewed authority over cultural patrimony helps ensure that tribal histories are told in a way consistent with local understandings and protocol. Non-Indian museums that for years had stewardship over important cultural material have sometimes, and possibly inadvertently, supported cultural survival. Most notably, the establishment of the National Museum of the American Indian by an act of Congress in 1989,[692] the construction of a Cultural Resources Center to store the collection, and the decision to allocate the last remaining museum tract on the Mall in Washington, DC for the museum facilities reflect a new relationship. The fact that NAGPRA so prominently seeks "to reconcile two profoundly different value systems, one based on the primacy of reason and science and the other revolving around spiritual and religious values,"[693] shows a greater openness in mainstream society than has perhaps ever before existed to acknowledge, learn from, and perhaps even be changed by indigenous value systems.

Indigenous Knowledge

Indigenous cultures are rich knowledge systems that reflect vast generational experience with the land, animals, plants, natural processes, healing and history. For years, these knowledge systems were effectively dismissed by non-Indians and non-Indian institutions. Native peoples valued them, but non-Natives did not. That is starting to change. Some of that change is encouraging to Native peoples, some is more than a little troubling to them, and the process overall involves thorny intellectual property issues for everyone concerned.

On the positive side, historians, archeologists and paleontologists (among others) are paying closer attention to indigenous knowledge and Native oral histories. The "combined approach" that melds oral history and mythology with physical science and fieldwork can provide all scientists working in these fields with deeper insights into research methodologies and perspectives.[694] On the other hand, while the importance of indigenous knowledge is being recognized, recognition brings its

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691 In a 2003 survey of Native-controlled cultural arts organizations, 79% of the museums and cultural centers responding to the survey stated that they lacked adequate storage space; see Miriam Jorgensen, "Native Cultural Arts Organizations: Who They Are and What They Need, An Analytic Summary of Atlatl's National Survey of Native American Controlled Cultural Arts Organizations," (Tucson, AZ and Phoenix AZ: Native Nations Institute and Atlatl, Inc., October 2005).

692 U.S. Public Law 101-185. 101st Cong., 1st sess, 21 November 1989. *National Museum of the American Indian Act.*

693 Kinzer, "Museums and Tribes," 39.

694 The Navajo Nation Archeology Program is an important example of the new methodology and its significance; see The Harvard Project on American Indian Economic Development, "Navajo Nation Archeology Department – Training Programs," *Tribal Governance Success Stories, 2000* (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2000). . And, certainly, there is not complete agreement on this point; see, for example, Elizabeth Weiss, "NAGPRA: Before and After," *Friends of America's Past*, 2006. http://www.friendsofpast.org/nagpra/06WeissNAGPRA.pdf (28 June 2006).

own perils – in particular, the risk of expropriation. Pharmaceutical companies have particularly strong interests. According to one estimate, "a quarter of all prescription drugs sold in the United States have plant chemicals as active ingredients," yet more than 80 percent of these drugs come from fewer than 100 plant species.[695] Indigenous people have long relied on the healing properties of flora and, thus, many further expansions of the Western pharmaceutical arsenal may depend on scientists' careful attention to indigenous knowledge about the healing properties of plants. The pressure to do so *now* is especially intense, since both the number of knowledgeable people and the plant diversity they relied upon are rapidly decreasing. This raises issues of intellectual property rights.

The U.S. and even the international economic and legal systems are increasingly prepared to recognize intellectual property rights. At the same time, the U.S. and the international community have been relatively unprepared to properly credit those who are unable to come forward to challenge ownership in non-Indian courts, or to defend cultural property whose use does not render the owner a commercial loss.[696] Unless Native people are proactive in claiming their intellectual and cultural property rights and in challenging current interpretations of intellectual property law, opportunities for recognition and protection of Native intellectual property are lost.

Culture's Role in Shaping the Future of Native America

As the 21st century begins, Indian nations are making a wide variety of culturally related investments. Some are seeking to better align their formal governing institutions with their informal cultural rules. Others are finding ways for their citizens to engage in traditional artistic or subsistence pursuits and still survive – even thrive – in the modern economy. Citizens are learning Native languages and finding ways to reconcile ancient and modern religious practices. Educational substance and pedagogy in many Native nations is becoming decidedly more locally indigenous.

The simple existence of efforts to re-integrate cultural components into the lives of their citizens and society is evidence of the ongoing value of culture to tribal nations. If Indian nations with scarce resources nonetheless use those resources for purposes with strong cultural components, then they are arguably doing more than merely trying to differentiate themselves from the dominant society. Citizens' participation in cultural practices enhances a sense of self and of belonging, which in turn reinforce community cohesion and survival.

Indeed, quantitative research is showing that such investments in cultural institutions, organizations, and customs are well placed, presumably because of their effects on identity, cohesion, and community cooperation. As discussed above, for example, tribes have been able to call upon their sociocultural capacities to improve outcomes for operations as diverse as timber enterprises and low-income housing authorities. Programs in such areas generally are more productive and sustainable when Native language use in the community is highest.[697] Similarly, institutions designed with cultural appropriateness in mind have greater resonance within the community and tend to be more

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695 Mark J. Plotkin, *Tales of a Shaman's Apprentice: An Ethnobotanist Searches for New Medicines in the Amazon Rain Forest* (New York: Penguin Books, 1993), 7.

696 See Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12, no. 2 (Spring 2001).

697 Jorgensen, "Bringing the Background Forward."

successful.[698] Overall, it appears that Indian societies that have been able to successfully synthesize the past and present – "to simultaneously animate traditional values in contemporary circumstances"[699] – have increased their probability of sustaining their nations and their people.

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[698] Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," *Economic Inquiry* 33 (July 1995).

[699] Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley, CA: UCLA Press, 1995), 103.

TEXTBOX: Ojibwe Language Program, Department of Education, Mille Lacs Band of Ojibwe

In 1994, only 10 percent of the members of the Mille Lacs Band of Ojibwe were fluent in the Band's native language, and the youngest native speaker was 37. Faced with these statistics, tribal leaders had great cause for concern—declining language use was a disturbing indicator of the loss of tribal traditions. The Band's Chief Executive summarized her colleagues' sentiment: "Our families were not engaging in our traditions, our children were turning away from our values, and little by little we were losing the battle to protect the uniqueness of our culture."

Educators working at the Band-controlled, reservation-based Nay Ah Shing School were the first to take action against this problem. School staff members created an Elders Advisory Board, invited five traditionalists to serve on it, and charged them with structuring an Ojibwe language and culture program.

By 1999, the tribally funded Ojibwe Language Program served 350 students, from toddlers to teenagers. The very youngest students—those in Head Start and day care programs across the reservation—spend four to eight hours a day with a fluent Ojibwe instructor. Kindergarten to 12th-grade students at the Nay Ah Shing School attend daily 35-45 minute Ojibwe language classes. Even Band members attending non-tribal public schools have the opportunity to benefit from the Program, as the high school language classes at Nay Ah Shing are broadcast on interactive television to them.

The teachers and elders who designed the Program believe strongly that Ojibwe will take root among the young only if language learning is relevant and enjoyable. To accomplish these goals, language instructors rely on conversation, classroom interaction, singing, and comic books. With elders as instructors, student-teacher conversations become a means not only of language instruction, but also of satisfying students' curiosity about cultural practices and values. The Program's comic books teach language in an amusing format while tackling important contemporary issues. For instance, the book "Dreams of Looking Up" discusses the challenging concept of American Indian nations' sovereignty. School music and video projects have helped make it "cool" for youth to speak to each other in Ojibwe, and some students have even composed Ojibwe rap songs.

Language and other traditional knowledge sustain American Indian nations—they are an integral part of the fabric that binds a Native society together. The Ojibwe Language Program has increased the pride that Mille Lacs Band members, young and old, feel in knowing their language and practicing their traditions. The Program strengthens the Mille Lacs Band's unique cultural resources and thus strengthens the nation. In particular, learning the Ojibwe language gives Mille Lacs youth the self-confidence and cultural pride necessary for them to become the Band's next generation of leaders. **/END TEXTBOX**

A Valued Past and a Vibrant Present

Hartman Lomawaima (Hopi)
Director, Arizona State Museum
Professor, American Indian Studies Program
University of Arizona

When I'm pushed to identify *the* common element among Indian cultures, I say that Indians are survivors. For years and years, they have survived deliberate acts of destruction on the part of hostile individuals and governments.

Others may see more cultural commonality than I do. Certainly, the impulse to see a common Indian culture exists. Consider the Boston Tea Party. Who dumped the tea into Boston Harbor? Englishmen masquerading as Mohawks. In their little world of New England, Englishmen perceived all Indians as Mohawk-like peoples. Later, the imagery of the Great Plains warriors dominated the American imagination. Then, the Navajo took over as *the* American Indian. Today, there are well over five hundred indigenous nations and communities in America with populations ranging from a few hundred to more than two hundred thousand. This diversity can't be reduced to a common culture.

Of course, there have been moments in American Indian history when Indians themselves have chosen to assume a common culture. At one time, there were more Indian communities in California than in the rest of the fifty states. Then, within a decade or two, genocide and the spread of communicable disease reduced these communities so severely that some individuals—survivors—chose to merge with others. They chose to become part of other cultural communities. More recently, in the late 1950s, Indians were relocated in wholesale fashion into cities. Today, the largest community of American Indians of various cultures is in Los Angeles. These individuals share a common interest in expressing a shared cultural distinctiveness.

But if there is a true form of cultural commonality today, I think it is expressed in moments when American Indians and Alaska Natives wrap their arms around significant social change. In 1975 the *Indian Self-Determination and Education Assistance Act* changed Indian perspectives. At the local level as well as at the national level there was a surge of activism around this legislation. This activism became a form of cultural commonality. This legislation enabled Indians to preserve their own distinctive identities through taking control of their own peoples.

If one common misperception is that all Indians share a common culture, another is that that Indian culture is of the past. One of the most frequently asked questions by visitors to national parks—this is true—is "Why did Indians only build ruins?" This question, asked in the past tense, relegates Indians and their cultures to the past. Not that the past isn't fascinating. I still remember the first time I saw an Edward Curtis print. I was struck by those sepia-toned images of dead Indians. I wanted to know who they were. The past *is* fascinating, but it's dangerous to allow our understanding of what Indian cultures were in the past to determine our understanding of what Indian cultures are now.

Within all Indian cultures—in their great diversity—there is both continuity and change, both evidence of a valued past and a vibrant present. Not only do we have to allow for this, we have to embrace it. Recently, an American Indian College Fund ad campaign circulating in a number of popular magazines featured the caption, "Have you ever met a real Indian?" One ad showed Lori Arviso Alvord, a Navajo, who is a surgeon and Dean of Student Affairs at Dartmouth Medical

School. Another showed W. Richard West, a Southern Cheyenne, who is the Director of the Smithsonian National Museum of the American Indian. These are *real* Indians. They wear surgical scrubs and suits. They contribute to the economy. They have families. They are responsible citizens of this country. They are living now. As *real* Indians, we will not be reduced to sepia-toned prints in others' minds.

Indian cultures are of the present as well as the past. We know that if we don't allow for change, we won't survive. But, of course, there are certain ideas and values and traditions that we hold in high value and that we want to see continue. All cultures—not just Indian cultures—face the challenge of dealing with change while determining what must be preserved. I am struck by how effective Indians have been in turning the agents of change to the defense of their cultural continuity. I'll never forget a visit to Bethel, Alaska in which I watched the television program "All in the Family" dubbed in the Yup'ik language. Imagine Archie Bunker speaking Yup'ik! What a great use of technology! At the American Indian Language Development Institute, I have heard program participants from all across the country insist that television is a vital tool for language preservation. Remarkable gains are being made with computers. Indian communities that don't have the resources for televisions or computers frequently establish a local radio station, allowing their people to hear their own language.

Museums perform this vital work of preservation in the presence of change. In fact, the best museums are havens for Indian cultures' continuity *and* change. I see "living" museums emerging among Indian peoples. In Arizona, the four hundred members of the Ak Chin Indian Community have a museum that is among the first of its kind in the country. The Ak Chin Eco Museum includes a repository of cultural materials, but it also includes community space. It hosts weddings, wakes, and exhibits of tribal members' present involvements as well as their past pursuits. Then, there are other excellent museums like the Mashantucket Pequot Museum and Research Center. That museum not only organizes and galvanizes descendants of early Pequots, but also serves as a research center for the larger Connecticut area as well as a place for public school students to get to know the history of their region. Museums such as these allow Indians to control their own past and, in so doing, to take charge of their present and future.

The *Native American Graves Protection and Repatriation Act* (NAGPRA) has been an important part of ensuring that museums' representations of an Indian past lead visitors to a better understanding of an Indian present. NAGPRA provides for consultation between Indian communities and museums. Under NAGPRA, museum curators and staff members have hosted Indian delegations' visits to their repositories. They have also traveled to and worked within the Indian communities whose artifacts they preserve. Such consultations have inspired museums to think about the cultures that they're interpreting. Now curators say to themselves, "We can't do an exhibit on Navajo rugs without soliciting the perspectives of Navajo weavers. Perhaps we should include them in the programming or the educational outreach that will take place along with the exhibit." Museums have also begun to seek out talent from the various minority groups that comprise the communities they represent. It used to be that when I attended national museum association meetings and conventions I had to look very hard to find other Indians. Now, Indians are organizing sessions. They are chairing committees and roundtables. As museum personnel, Indians are actively involved in the responsible representation of their cultures—past and present.

Right now, we have a remarkable opportunity to responsibly represent Indian cultures—past and present—on a national scale. On September 21, 2004, the Smithsonian National Museum of the American Indian (NMAI) opened on the Mall. When I was invited to serve on the museum's board, I suggested that the NMAI should have been the first Smithsonian Museum. Although we weren't the first, we now have the opportunity to represent indigenous populations not only from the fifty states,

but from the entire western hemisphere. We've already designed our first exhibits and a series of symposiums. Importantly, our first symposium focused on the development of indigenous and tribal museums and cultural centers. The NMAI intends to develop strong relationships with the communities it represents. We understand that, for all these communities, the NMAI's position at the foot of Congress is very important. Our visitors include senators and congressmen and their staff. We call their attention to the interests of the Indian communities we represent. While this will be an on-going interest of the museum, the NMAI's opening calls the nation's attention to the vibrant present of Indian peoples. On September 21st a procession of those whose cultures are represented in the NMAI's collections moved down the mall to the museum's door.

A museum should offer an accurate reflection of a cultural community—the community as it once was and as it continues to be. When I meet with delegations from Indian communities that intend to establish their own museums, we talk a lot about philosophy. What is the community's philosophy? What has the community held in high regard over centuries? What is the foundation of their culture? An Indian museum should never feel foreign to its people because Indian cultures endure—however changed—into the present. Several years ago I visited the Chitimacha Tribe of Louisiana. I knew about the challenges they had faced. I knew that they were using gaming as a way to sustain their economic needs. I found the Cypress Bayou Casino. I lost twenty bucks there. Then, I was invited to visit their museum. It was small, just a start. But I listened as they talked freely about their philosophy. In those moments, they shared the essence of who they are—now and historically. I wonder how many visitors see Chitimacha simply as a gaming establishment and how many will understand this essence.

Despite historical crises, despite the depletion of Indian populations, despite modernization, despite urbanization, the essence of Indian communities endures. I know this and my work communicates it.

ARTS

- Native American arts express the aesthetic perspectives and utilitarian needs of artisans, groups, and communities. Native art forms today are rooted in history, tradition, and experience, yet often incorporate new messages, methods, and styles.
- Native American artists in many fields of endeavor have been increasingly successful at producing and marketing a widening array of art forms.
- The growing demand for Indian art has led to an increase in the misrepresentation of goods in the marketplace. Indian art cooperatives, as well as more stringent federal legislation protecting artists and consumers, have had limited success in discouraging piracy.
- As Native artisans broaden their subject matter and styles beyond historical and mainstream-expected forms of expression, they face questions about the "Indianness" of contemporary forms of artistic accomplishment.

Art conveys the vigor and variety of tribal nations today. Yet the integrity and economic significance of Native-made arts and crafts are being challenged – if not compromised – by imitations. Tribal governments, federal agencies, community organizations and individuals are taking action to safeguard and promote artistic endeavors within Indian Country. At the same time, contemporary Native American artists are being accepted by the larger art world and are little constrained by traditional modes of expression.. They are overcoming misconceptions of what constitutes "Indian art" and are eschewing and avoiding being relegated to categories such as folk and primitive art. These efforts will strengthen the development of art that uniquely expresses Native American perspectives, grounded in both traditional and contemporary cultural and social realities.

The Arts in Native America

American Indian artistry is part of a tradition that enables Native cultures to identify and express themselves. Art also carries with it economic value, and is used for intra-tribal, inter-tribal, and larger marketplace trade. Among some Native American cultures, art forms are proprietary; that

is, design, form and function are the property of individuals, families, or clans. In other areas, innovations and technologies may be commonly held and shared. Whether proprietary or shared, however, Indian arts and crafts – such as Hopi Kachina carvings, Pomo baskets, Ojibwe beadwork, Haida poles, Acoma pottery, and Osage and Potawatomi ribbon work – are all distinctive and carry with them intellectual and cultural significance and integrity.

Traditional crafts and textiles are the items most typically associated with Indian art. The many and various Native nations have long traditions of producing crafts and objects specific to their culture, time, and societal conditions. Many colors, designs, and methods of producing traditional items hold religious or historical significance and meaning. Artisans may also create individual craft and textile styles based on specific cultural artistic traditions.

Many individuals and collectors regard historic or traditional arts and crafts as most "authentic." Yet Native American painters, sculptors, and photographers have worked in every medium, created personal styles, and led broad-based contemporary Indian art movements. In the 1950s, many Native American artists abandoned traditional styles of painting, adopting instead a style that reflected modernist movements. This style, known as New Indian Painting, gave rise to an intense debate about the role of individual interpretation within Native American art. Eventually, expressions of personal creativity rooted in both Native tradition and modern Anglo-European technique became increasingly accepted as "authentic" Indian visual art.[700]

Music, dance and performance art have also evolved from specific cultural traditions. Hundreds of distinct dances exist for both ceremonial and social purposes. Many tribes consider their musical traditions sacred, and preserve them accordingly. Dances may be performed publicly or privately, at a place chosen by the dancer or the community, at a powwow, or in a formal exhibition space. One author notes that "thousands of [Native American] dancers perform every day …not to satisfy paying audiences or patrons, but to assure the continuation of ancient lifeways, to honor deities and each other, to associate with friends and kin, and to affirm their Indian identities."[701]

The Marketing of Indian Arts and Crafts

The aesthetic and economic success of American Indian artisans has brought on a costly (although not new) problem: the introduction of fakes, forgeries, and intentional misrepresentations into the marketplace. Today, imitations, knock-offs, and misrepresentations are taking their toll on the Indian art market as a whole, sometimes with devastating impacts on individual artists. The Indian Arts and Crafts Association (IACA) estimates that up to one-half of the $1 billion of Indian-style arts and crafts sold annually in the United States may not have been produced by American Indians. For example, Mexico-based weaving operations utilize Navajo rug designs that importers sell at a fraction of the cost of Navajo weavings.[702] It is estimated that 80% of the jewelry attributed to Native

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[700] Heard Museum Resource Guide, "New Indian Painting" (Phoenix, AZ: Heard Museum, 1994). http://www.heard.org/nafarmg.pdf (28 June 2006).

[701] Charlotte Heth (ed.), *Native American Dance: Ceremonies and Social Traditions* (Golden, CO: Fulcrum Publishing, 1993), 1-2.

[702] "Indian Arts Hub Takes Aim at Imposter Goods," *Indian Country Today*, 27 January 2000.

American craftsmanship and sold in major market centers like Gallup, New Mexico, are non-Indian-made reproductions.[703]

Native American artisans have not been complacent about this issue. Arts cooperatives and guilds established since the 1940s have served to educate the consumer and offer a wide array of locally produced arts and crafts. These include the Navajo Arts and Crafts Enterprise, Ramah Navajo Weavers Association, the Hopi Arts and Crafts and Silvercraft Cooperative Guild, and the Zuni Cultural Arts Council, to name but a few. These organizations have as a mission the advancement of the collective interests of the artisans by improving their members' access to the marketplace, offering business services that may not otherwise be available to individual artisans, and trying to offer some level of protection of cultural designs and authenticity.

Through the efforts of such organizations and allied interests, Congress passed the *Indian Arts and Crafts Act* in 1990, a truth-in-advertising law that prohibits misrepresentation in the marketing of Indian arts and crafts, traditional and contemporary, within the US. The Act defines an Indian product as any craft or art made either by 1) a member of a federally- or state-recognized Indian tribe, or 2) a non-tribal member artisan certified by an Indian tribe as such, or 3) a legally-established Indian arts and crafts organization composed of members of Indian tribes.[704] Most notably, the law imposes stiffened penalties for misrepresenting products as "Indian-made." Individual violators now face a fine of up to $250,000 and a possible five-year prison term, while businesses can be fined up to $1 million.

Since the *Indian Arts and Crafts Act* took effect, there have been several remedial actions taken by the Indian Arts and Crafts Board (IACB), the agency located within the Department of Interior responsible for the implementation and enforcement of the Act. Although the law allows the IACB to make recommendations regarding prosecution to the Department of Justice, and several cases are pending for referral, to date there have been a handful of civil but no criminal prosecutions. Part of the reason for this appears to be the lack of investigative powers on the part of the IACB. The IACB has been focusing its efforts on resolving complaints that do not require litigation, promoting Native art through its consumer directory and three regional museums, and offering professional and consumer education.[705]

In addition, groups such as the IACA and IACB have begun to work with individuals and tribes to register texts, designs, and methods with the U.S. Patent and Trademark office. Such efforts confront their own unique set of obstacles, however. A patent cannot, for example, prevent the continued imitation of those patterns and designs currently existing in the public domain. Once a patent, trademark, or copyright has been registered, the holder must defend it out of his or her own funds. And while the IACB is supposed to be the governmental agency responsible for facilitating the efforts of tribes or individual tribal artisans who are attempting to obtain patents, federal regulations governing this process currently stymie the IACB's efforts. Finally, some artisans find the idea of a copyright culturally alien.

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[703] Communication with Kathleen M'Closkey, Adjunct Professor, University of Windsor, Ontario, Canada (September 2000).

[704] U.S. Department of Interior, "Final Rule: Protection for Products of Indian Art and Craftsmanship (*Indian Arts and Crafts Act* of 1990, Public Law 101-664)," *Federal Register* 61, no. 204. (Washington: Government Printing Office, October 1996), 54551-54556.

[705] Communication with Cheryl Rakestraw, IACB Program Specialist (1 December 2004).

Defining and Redefining Contemporary Indian Arts

Today, many Native American artists, drawing upon contemporary themes, techniques, and styles, have risen to the forefront of their respective artistic trades. This success is both a reflection of and a tribute to the growth of Native educational and professional institutions serving contemporary Native artists. These institutions include, for example: tribal colleges, such as the Institute of American Indian Art, an accredited tribal college located in Santa Fe, New Mexico specializing in the fine arts;[706] professional organizations such as the American Indian Film Institute, which held its 31st annual American Indian Film Festival in 2006; the Iroquois Indian Museum, which hosts extensive collections of both historical and contemporary Iroquois art; Atlatl, which serves to connect contemporary Native artists and art organizations through newsletters, conferences, exhibitions and events; and the Native American Music Awards, which has held annual award ceremonies since 1999.[707]

The entry of Native Americans into the contemporary art scene has added a new twist to the debate over what constitutes "Indian" art.[708] At the center of this discussion resides the negotiation faced by many minority artists among their own cultures, their individual voices, and the demands of the mainstream art world. Ironically, the debate in Native America today centers around the hard-fought success of the first contemporary Indian artists.

Many of today's contemporary Native artists still find that exposure, and thus success, are only given to those willing to work in a particular style that is based on non-Indian preconceptions of what "contemporary Indian" art ought to look like. In particular, the use of modernistic styles such as abstract expressionism in the late 50s and early 60s by the first Native American artists attempting to encompass a broader range of styles and techniques – and the eventual success of those artists – has given rise to the development of and demand for a certain mode of expression that has itself become standardized. In short, what was once "contemporary" has now become "traditional." Native American artists attempting to explore artistic expression beyond this particular motif hit what is commonly referred to as the "buckskin ceiling" – the refusal of galleries and museums to accept such work.

Some argue that while such stereotypes might exist, Native American artists must push beyond non-Native definitions of what is or is not American Indian art. From this perspective, the survival of American Indian arts depends less on adequate gallery or institutional representation than on the ability of Native Americans, in general, and contemporary Indian artists, in particular, to define themselves "beyond belonging to a certain tribe or territory."[709] Native American artists must reclaim

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[706] Institute of American Indian Art, founded in 1962 by the Indian Arts and Craft Board and the Bureau of Indian Affairs, was the first government-sponsored art school for Indians. Its mission was "to acquaint its young Indian students with an appreciation of their own tradition" while "foster[ing] new and noteworthy creations leading to new traditions."

[707] See "The Eighth Annual Native American Music Awards." http://www.nammys.com/index.cfm (28 June 2006).

[708] Ken Shulman, "The Buckskin Ceiling and Its Discontents," *The New York Times*, 24 December 2000, 37. See also Marjane Ambler, "For Native People, Art Is Not Optional," *Tribal College Journal* X, no. 4 (Summer 1999), as well as associated articles; and Heard Museum Resource Guide, "New Indian Painting."

[709] Shulman, "The Buckskin Ceiling."

their own cultures while learning to define themselves as contemporary artists, i.e., "mediating between ethnicity and ego."[710]

In this regard, many of the obstacles confronting today's contemporary Native artists are the same that confronted yesterday's. The artwork of Oscar Howe, one of the first contemporary Native American artists, was rejected by an exhibition on American Indian painting in 1958. In a letter to the curator of the exhibit, Howe "refuted definitions of authenticity by the non-Native art world which would effectively deny expressions of individual creativity."[711] Reflecting on this subject years later, Howe stated: "I had to concede that if Indian art were to exist I must do it as an individual effort. Indian art became an individualistic art."[712] This point of view is now held by many contemporary artists.[713] Contemporary Indian art, as all contemporary art, will continue to redefine itself, delighting and confounding audiences in the process.

Notwithstanding hurdles that stand in the way, the breadth of Native contributions to the arts is now as broad as the media through which art is expressed. Native painters and sculptors, including those active today (such as Kevin Red Star, Joe Ben, Tony Abeyta, and the many Inuit stone carvers) and recently deceased artists such as R.C. Gorman and Allan Haozous (Houser), have not only found worldwide commercial success but have broken molds and stereotypes with their unique, but undeniably Native, expressions of identity and meaning. Contemporary Native American musical artists such as Robert Mirabal, Joanne Shenandoah, and bands such as Indigenous and Pima Express, produce music inspired by their heritage and often meld Native music and instruments with non-Native musical styles from opera to rap to rock. Native American dancers also participate in modern dance and ballet companies, ascending to the peaks of the fields.

Notably, Native American artistry is also expressed through literature and film. N. Scott Momaday won the Pulitzer Prize for fiction in 1969, and before and since, Native American authors, including Leslie Marmon Silko, Sherman Alexie and Louise Erdrich, have published volumes of powerful, award-winning fiction, nonfiction, and poetry. Native American writers, video editors, and directors produce Indian and non-Indian television programs and films, and actors, such as Wes Studi and Irene Bedard, have starred in Native and non-Native television programs and movies. Tellingly, Native artists such as these and across all genres are marked by unmistakable Native expression that, at the same time, is aggressively *not* adhering to non-Native expectations and iconography. A burgeoning younger generation of Native artists promises to push boundaries even further.

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[710] Ibid.

[711] Heard Museum Resource Guide, "New Indian Painting."

[712] Margaret Archuleta and Rennard Strickland, *Shared Visions: Native American Painters and Sculptors in the Twentieth Century* (New York: The New Press, 1991), as quoted in the Heard Museum Resource Guide, "New Indian Painting."

[713] Communication with Kevin Red Star, artist (November 2000).

TEXTBOX: Cherokee National Youth Choir, Cherokee Nation

The 1838 removal of the Cherokee people from their traditional eastern homelands to the present-day Oklahoma was a devastating journey. Over one third of the twelve thousand Cherokee died in the infamous Nunna dual Tsuny, or "Trail of Tears." During this terrible trek, families sung songs in the traditional language to locate their kin and to bring comfort to the grieving. The Cherokee language and songs held their people together.

In October 2000, the Nation launched the Cherokee National Youth Choir. As a critical component of the Nation's comprehensive language program, the Choir sings songs and hymns in the Cherokee language. Now comprised of forty Cherokee youth between the ages of thirteen and eighteen, the Choir performs both traditional and contemporary songs.

Even though the Choir itself is relatively small, its activities touch thousands. Every hour of rehearsal and performance exposes the Choir members, their families, and their audiences to the Cherokee language. Adults and elders relish hearing their language in the youth's voice. The Choir's songs are heard regularly on the radio, on home stereos, at community gatherings, in church services, and at public ceremonies across the Cherokee Nation. Although the language remains threatened, the language and songs are once again being viewed as sacred treasures that must be both protected and used in everyday life. The Choir embraces a long-term goal: to inspire current youth to one day teach their children and grandchildren the language and traditions.

The Choir is regularly called upon to perform at venues throughout the state of Oklahoma and across the US. For example, the Choir was featured at the Annual Smithsonian Folklife Festival in Washington, DC and at the Smithsonian's George Gustav Heye Center in New York City. At each venue, the audience learns about the Cherokee people, their rich history, and their unique culture. Because its repertoire includes songs and hymns once used to comfort individuals and families walking the "Trail of Tears," the Choir is also called upon to perform at memorial services. Among them was a moving performance at Ground Zero in New York City.

The Choir's first album, "Voices of the Creator's Children," was an instant success and won a prestigious Nammy for Best Gospel/Christian Recording at the Native American Music Awards in 2002. The album includes songs from the "Trail of Tears" and hymns translated into Cherokee. The Choir's second album, "Building One Fire," won another Nammy for Best Gospel/Christian Recording in 2003 and was one of the five nominees for Album of the Year.

The Cherokee National Youth Choir exhibits to its audiences – at venues in Cherokee communities and across the country – the resiliency and power of a people committed, in the presence of great difficulties, to their culture and language. It stands as a symbol to all Native nations struggling to preserve their precious languages through strategies as simple and beautiful as singing the sacred songs that have sustained them over centuries. Most importantly, the Choir has proven itself to be an effective tool for inspiring Cherokee youth to learn their language, culture, and history – giving real hope that the sacred gifts of language and song will never be lost. **/END TEXTBOX.**

American Indian Art: A Way of Life

Kevin Red Star (Crow)
Artist, KRS, Inc.
January 2005

Although in the past it was possible to identify art produced by American Indians, there is no way to do so now. Several hundred years ago, American Indian art appeared on the artists' dwellings and clothing. It was part of their daily life. Then, American Indian art was identifiable because it was indistinguishable from American Indian life. Now, although American Indian art still draws on life experiences, many artists work in non-objective, impressionistic, or even abstract forms. A visit to a museum in New York or Santa Fe reveals the vast diversity of their ideas and compositions.

Identifying American Indian art is also challenging as a result of the many non-Indian artists who work on American Indian subjects. Paul Pletka is a fine, fine artist who brings his research and his love of Indian imagery to his magnificent work. He is not American Indian. There are other non-Indian artists who respond to the power and spiritual quality of American Indian imagery and who produce nothing but American Indian subjects. I find nothing wrong with this. As long as artists don't claim to be who they aren't and as long as their art is respectful of the culture they portray, I support their efforts.

Real artists work with what they love. This was true of American Indian artists of the past: they created for their own benefit, their own enjoyment. This should be true of American Indian artists today. the *State of the Native Nations* addresses the pressure that American Indian artists feel to create identifiably Indian art. I don't feel this pressure. I've never felt this pressure. Even in high school when I began to sell my small sketches, drawings, and paintings, I never let the public dictate what I would do. I think that the real artist is adventurous. I know that I keep experimenting. I am amazed when collectors see and want works of mine that are quite different. I'm delighted by their interest, but I never let it dictate my work. What if a piece doesn't sell? What if it doesn't move? I never think about that. I work with an idea that is of interest to me. Then, I work with another idea. I am comfortable with the creative process and with who I am, where I am, and where I'm going. An artist has to come to this point.

I succeed because I'm an artist, not because I'm an American Indian artist. It's hard for an American Indian to make it in the art world—even in the American Indian art world—because you're always competing with the non-Indian. I now have work in museum collections across the United States—from the San Diego Museum to the Smithsonian—as well as in museum collections all over the world—from China and Japan to Russia, Belgium, and France. But I don't have work in these museums because, at some point, I said, "I'm going to do what I have to do to get there." And I don't have work in these museums because I'm an Indian artist. I have work in these museums because I work, work, work.

American Indian artistry is so diverse now because our exposure to tools, technologies, and artistic traditions has increased. Speaking simply as a painter, my pigments don't have to be ground down as they did several hundred years ago. Everything is more immediate. I have also had exposure to diverse artistic traditions. I seek this exposure. I am trained in European art, American art, and realism. I still travel. I visit museums and galleries. I gather ideas. Even though I haven't stayed within any particular tradition, I understand the tools and techniques of many. I use these as well as my ongoing exposure to other artistic traditions to portray what I find engaging—American Indian thought.

I seek exposure now, in part, because my exposure to art was so limited when I was young. There were no art programs on the reservation. There were no teachers or tools. In those years, American Indian art wasn't even considered art at all. Indians trivialized their own work. Actually, as a young American Indian growing up on a reservation, I was very fortunate. My mother was skilled at creating beadwork and appliqués for costuming and everyday use. There was always music in my home. I was surrounded by creativity. I simply didn't understand that this was unusual, that this creativity could result in "art," or that I could be an "artist." There was certainly no recognition of a Crow artistic tradition. This was a real disadvantage.

It was only when I went to school in Santa Fe that I was exposed to art *as* art. It was at the Institute of American Indian Art that I developed an appreciation for Native arts. We traveled through the Southwest and around Santa Fe. We attended Pueblo ceremonies and festivals. We studied regional painting, sculpture, pottery, jewelry, and rugs. We also looked beyond the Southwest to make comparative studies. We considered the basket weaving of the California Indians in contrast to the basket weaving of the Apache. And we looked beyond Native arts. It was at the Institute of American Indian Art that I studied American art of the west and east coasts, European art, and Asian art. All of this was fascinating. All of this has influenced my work.

Still, the most significant influence on my art has been the study I undertook of the Crow Indians. Even though I am Crow and even though I was born and raised on the Crow reservation, I hadn't looked at Crow artistry intelligently until I studied at the Institute of American Indian Art. It was there that I began to understand Crow designs. On the reservation, I didn't think about them, but when I saw a Hopi design, I couldn't help but notice the differences. They had their mesas; we had our mountains. These realities revealed themselves in our arts. I began to understand, as well, how Crow art differed from that of the Sioux, Cheyenne, Arapaho, and Blackfeet.

Am I now part of a Crow artistic tradition? That's what people say. I'm Crow. I work largely with Crow Indian imagery. I'm sixty years old and I'm still discovering new ideas within my own people. I'm still comparing Crow designs to other Indian designs—the geometric designs for which the plains Indians are known or the floral designs of the woodland peoples. I'm still wondering at the fabulous, fascinating colors that the Crow used two and three hundred years ago. I'm still studying the designs of their quillwork, their war implements, and their tools. Perhaps, if I explore the Crows long enough, I'll turn to something else, something entirely different. I don't know. I'll follow whatever fascinates me.

Even though the absence of the recognition of a Crow artistic tradition was a real disadvantage, I still lived in a moment of opportunity. In the early sixties, when I began my serious study of art, the arts were gaining new prominence on a national level. The Kennedy administration promoted the arts and funding for institutions such as the Institute of American Indian Art became available. I was fortunate to be part of that movement. Although opportunities on reservations were limited, the Institute of American Indian Art recruited students throughout the United States. It invited young Indians who had potential in painting, sculpting, dance, theatre, writing, and the applied arts to explore their gifts in an encouraging environment.

Now, young American Indians interested in the arts confront different challenges. Certainly, they have advantages that I didn't have. Native artistic traditions are recognized and valued; people understand that art is a part of life, a way of life. Resources are broadly available; computers offer young American Indians instructional aids to which I never had access. But there are disadvantages as well. On a national level, the attention to the arts has dwindled and funding has slowed down. This matters. If arts aren't supported at the highest levels, then we struggle to pursue them on our

reservations. Now, the reality is that, even though those of us in the art world are trying to do our part, there are very few art programs open to young American Indians.

The challenges don't end there. Indian artists confront unusual challenges in marketing their work. It's expensive to travel to art shows. It's expensive to advertise through the television and radio or newspapers and magazines. It's especially expensive in removed regions of the country where so many of our reservations are located. And even though the *Indian Arts & Crafts Act* has helped Indians defend the integrity of their art, many Indian artists confront the challenge of fending off fraudulent imitations.

For all these challenges, the world of American Indian art is still vibrant. I celebrate the successes that American Indian artists—painters, sculptors, writers—experience. When I was invited to create a poster for the American Indian Film Festival in San Francisco, I encountered a whole network of Native directors, writers, producers, and actors. This was exciting. In every field, there are excellent American Indian artists taking bold advantage of their medium. These artists love their work and, like all artists, they nurture the drive within.

MEDIA

- There are more than 600 tribal newspapers, approximately 40 tribal radio stations, and a growing number of television programs created by and for Indian communities.
- The mainstream media are largely ignorant of Native nations' histories and unique relationship with the federal government. Non-Indians' portrayal of Native Americans has tended to reflect the views, norms, stereotypes, and desires of non-Indian society.
- The vast majority of tribal news services are financed and operated by tribal governments, leading to questions and conflicts concerning the role of the press in tribal communities.
- The Internet has revolutionized Indian media and communications and has the potential to facilitate community development and cultural understanding.

The print, broadcast, and web media, through the conveyance of information, help contribute to the construction of society and its culture through the creation of what has been termed a "common consciousness."[714] As the media inform, so too do they shape communities' social values, personal experiences, and public awareness by determining not only which issues get placed on the public's agenda, but the way those issues are portrayed.

The mainstream media are perceived with suspicion by many Native Americans. The need for representation of a Native voice has led to a proliferation of alternative Native-controlled outlets. With this has come both opportunity and tensions over the proper role of media in Native nations.

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[714] Masaki Hidaka, *Media Coverage of Native Gaming Ventures: An Analysis of National and Regional Trends and Prescriptions for Improvement* (Cambridge, MA: John F. Kennedy School of Government, Harvard University, April 1998), 1.

The Development of Media Perspectives

Numerous studies have found that non-Indian media often misrepresent Indians and Indian issues. [715] Non-Indians' portrayals of Indians have tended to disregard Indian cultures and histories, reflecting instead the uninformed views, desires, and moral judgments of the day in non-Indian society. The themes expressed in the mainstream media have changed as federal policy and social trends have changed. Over the past 300 years, Indians have been pigeonholed variously as heathen savages, noble sages offering a reproach from the perceived vices of Western civilization, victims of federal policy, culturally fashionable activists, dependent and/or incorrigibly corrupt federal wards, and wealthy political insiders.[716]

While the depiction of Indians has changed periodically, one constant until very recently has been the lack of Native American perspective in the stories being told. Corresponding problems have included misrepresentation of issues of importance to Native Americans, conceiving of all tribes as similar despite varying cultural differences, and combining the examination of Native Americans with moral judgments about them.[717] One scholar notes that Native Americans, "having been stripped of identity, dignity, and distinction for more than two centuries, are convinced that false media caricatures have helped rob them of their history."[718] In particular, what have historically been missing in the national media are the voices of the tribes and Native individuals themselves.

Despite an increased recognition of the need to reflect Native viewpoints, the depiction of Native America in the mainstream media continues to be a source of frustration in Indian Country. Contributing to the situation is what one expert refers to as "the cultural divide" that exists between the national media and tribes.[719] As the national, and largely non-Native, media have depicted Native Americans through the cultural lens of the dominant society, Native nations and Native people have often been consigned to silence in response to the palpable intrusion of the mainstream media into Native affairs. This reaction is partly due to the poor historical record on the part of the press in their portrayal of Native Americans and partly due to ignorance of the newsmaking process. The result, however, is that the Native voice remains largely excluded from the national media even when the media may seek out that voice.

In the 1990s, this phenomenon most noticeably played out in non-Indian media coverage of tribally-owned gaming operations. One study found that non-Indian media generally framed tribal gaming issues around corrupt campaign practices, tying gaming operations to political contributions

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[715] See, for example, Hidaka, *Media Coverage*; Bill G. Miller, "The Press, the Bold Decision, and Indian-White Relations," *American Indian Culture Research Journal* 17, no. 2 (1999).

[716] See, for example, Miller, and Hidaka, *Media Coverage*.

[717] Ibid.

[718] John Siegenthaler, Foreword in Mark N. Trahant, *Pictures of Our Nobler Selves* (Nashville, TN: Freedom Forum First Amendment Center: 1995), iii. http://www.freedomforum.org/publications/newsroomtraining/picsnoblerselves/pictureofournoblerselves.pdf (28 June 2006).

[719] Communication with Liz Hill, independent journalist and public relations expert (February 2001).

in general, and the 1996 Federal election campaign finance scandal, in particular.[720] The Jack Abramoff lobbying scandal has again brought forth these themes.[721] If anything, the Abramoff scandal teaches that Native nations, like other non-Indian communities and institutions, are susceptible to the same machinations of the disreputable lobbyists and charlatans that have long roamed the rest of the United States.

With more than 200 Native nations engaged in the gaming industry, it is hardly surprising that the record is not spotless, and it is obvious that "bad news sells." Still, the mainstream media have rarely included in their reports matters that might serve to educate and inform the general public. Only very rarely does the non-Indian media pick up on and convey information on, for example, Native nations' legal rights to own and operate tribal gaming operations, details about the limited number of such operations and the range of success of those that do exist, discussions of the relatively poor socioeconomic conditions typically found across Indian Country, and the use by Native nations of their gaming incomes to support the rebuilding of those nations. The non-Indian media also have largely ignored the context in which Native leaders and citizens engage in political action – for example, that political contributions, and the rules established by the U.S. government concerning their use, structure the means by which Indian nations and others gain access, heretofore denied, to the corridors of political power.[722]

Media in Native America

One answer to the dilemma of skewed reporting and misrepresentation in the mainstream media has been the creation of Native-owned outlets which can better reflect the issues and concerns of tribal communities. As early as 1828, the Cherokee Nation began publishing the bilingual *Cherokee Phoenix*, the first tribally owned newspaper. Since then, Native nations, communities, and interest groups have created their own media to support the causes and rights of Indian nations, as well as to offer forums for exploration and discussion of issues of relevance to Native America.

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720 Hidaka, *Media Coverage*, 9; See also "Majority Report: Executive Summary," Campaign Finance Special Report *WashingtonPost.com* (1998). http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/execsumm030698.htm. (12 December 2004).

721 See "Tribal-Federal Relations" chapter.

722 The *McCain-Feingold Bipartisan Campaign Reform Act* was passed in 2002 to prohibit soft money contributions to national political parties. However, members of both political parties have created "527 groups" – tax-exempt non-profit political organizations – which use soft money contributions to fund voter mobilization and education initiatives. Though 527 organizations whose "major purpose" is to influence federal elections are required to register as federal political committees and limit contributions accordingly, the Federal Election Commission (FEC) has not attempted to curb the activities of incompliant organizations. Both Republican and Democratic senators have since filed negligence suits against the FEC. See John McCain "Paying for campaigns: McCain eyes next target." *USA Today*, 3 November 2004. http://www.usatoday.com/news/opinion/2004-11-03-mccain-campaigns_x.htm (28 June 2006). In their investigative report on the 1996 Federal election campaign finance activities, the Senate Governmental Affairs Committee stated that "the [Democratic National Committee] also took advantage of two Oklahoma tribes that sought the return of their former lands, and made contributions in the belief that their prospects for favorable action would be enhanced." Hidaka, "Majority Report."

There exists today a wide diversity of media owned and managed by American Indians and Alaska Natives. [723] Among these are a handful of national Indian-owned newspapers including *Indian Country Today*, *News from Indian Country*, and *Native American Times*. Over 600 tribal newspapers also exist, ranging from various community publications with circulations in the hundreds to the *Cherokee Phoenix and Indian Advocate,* which has a circulation of 100,000. [724] The *American Indian Report,* a monthly news magazine published by the Falmouth Institute, covers topics from around Indian Country and the US.

There are also a growing number of radio outlets throughout Native America. Several commercial stations and approximately three dozen public stations specifically serve American Indian and Alaska Native communities.[725] One of the largest Indian-owned, publicly operated station, for example, is KILI (pronounced "KEE-lee") Radio on the Pine Ridge Reservation. Its 100,000 watt signal reaches three Lakota reservations spread out over 10,000 square miles, covering an area larger than the State of Delaware. KILI has been called the "lifeline" of the Lakota people, because the station offers not only a playlist of traditional and contemporary Native American music, but also provides public service announcements including the weather and job listings, covers tribal, state, and federal news, and broadcasts live public hearings in both Lakota and English. Thus, KILI allows all tribal citizens to stay abreast of important events. A nonprofit, educational station, KILI's seven-member staff operates on a $300,000 dollar annual budget.[726]

A growing number of programs are being broadcast throughout Indian Country and beyond. Many of these are oriented toward public television and radio and are picked up by local tribal affiliates of the public broadcast network. For example, a Native-owned and operated media organization, Koahnic Broadcast Corporation (KBC) in Anchorage, Alaska, produces a range of national programming. Offerings include *National Native News* and the phenomenally successful *Native America Calling*, a live, one hour call-in show heard by the broader U.S. public on National Public Radio. KBC has further expanded its offerings by creating the Alaska Native Youth Media Institute and the National Training Center to provide educational opportunities and professional development for broadcasting hopefuls and professionals.[727] In response to KBC's growth and contributions to the community, in 2002, the Anchorage Chamber of Commerce and the Alaska Journal of Commerce named Jaclyn Sallee, the Alaska Native president and CEO of KBC, one of Alaska's *Top 40 Under-40* business and community leaders.[728]

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[723] Communication with Mike Burgess, former Acting Director of the Native American Journalists Association; Karen Lincoln Michel, "Repression on the Reservation: Native American Journalists Are in a Tough Fight for Their Basic Freedoms under the First Amendment," *Columbia Journalism Review* 37 no.4 (November/December 1998).

[724] The Cherokee Nation Official Site "Rates Information," (2004). http://www.cherokee.org/Phoenix/RateInfo.asp (14 December 2004).

[725] Michelle Tirado, "Native American Radio," *American Indian Report*, July 2005.

[726] "KILI radio" www.lakotamall.com/kili (28 June 2006); GrassRoots.Org. "KILI Radio." www.grass-roots.org/usa/kili.shtml (28 June 2006).

[727] Koahnic Broadcasting Corporation, "About Us" (2004). http://www.knba.org/ (14 December 2004).

[728] Alaska Journal of Commerce, "Jaclyn Sellee" *Top 40 Under-40* http://www.alaskajournal.com/top40/jsallee.html (28 June 2006).

A non-profit organization, Native American Public Telecommunications, produces and develops educational Native programming, and maintains a catalog of Native American-created documentaries and entertainment films.[729] Its American Indian Radio on Satellite (AIROS) network distributes shows such as *National Native News* and *Native America Calling* to more than 30 radio stations from Alaska to New York to Florida.

The Native media is increasingly professional in its training and standards. In 1984, a group of Native American journalists at Pennsylvania State University created the Native American Press Association (NAPA). The mission was to "reinvigorate the Native media, address the widespread barriers and challenges facing Native journalists, and build on the strengths of Native communications."[730] Members spoke out against discrimination in the workplace and suppression by tribal government. Occasionally, they ran risks in order to report on events, such as when journalist and former Native American Press Association president Timothy Giago had his car fire-bombed and the windows shot out of his office after publishing articles that "apparently displeased the tribal members."[731]

NAPA eventually evolved into the current Native American Journalists Association (NAJA), which includes reporters in radio and television and reflects broadened goals of improving tribal and international communication, promoting diversity, and helping establish and defend a free press in Indian Country. Among other activities, NAJA members organize events to discuss industry practices with non-Indian media executives and consortia of minority journalists. The association also offers professional development and scholarships, as well as summer programs in journalism for Native American students.[732]

The Question of the Ownership of Indian Media

Tribal governments own the majority of media outlets in Native America. This overwhelmingly reflects the poverty and lack of wealth on so many reservations, rather than some unholy scheme of tribal governments to control news content on reservations. For many Native nations, those nations' governments have been the only institutions capable of funding the development of media outlets. Thus, government ownership has allowed many media that would otherwise be financially insolvent to undertake and sustain publication or broadcasting.

But government ownership of tribal media has not been entirely benign when it comes to content. As it does everywhere, government ownership of media has also resulted in conflicts over the role of Native media in Indian America. Some observers have suggested that government filters can keep inexperienced or poorly trained media staff from presenting incorrectly recorded or interpreted

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[729] See Native American Public Telecommunications, http://www.nativetelecom.org/ (14 December 2004).

[730] Native American Journalists Association, "About NAJA: 2001-2004." http://www.naja.com/about/ (12 December 2004).

[731] TheFileRoom.org. (1987). http://www.thefileroom.org/documents/dyn/DisplayCase.cfm/id/175 (12 December 2004).

[732] Native American Journalists Association, "About NAJA."

information about tribal events to the international community.[733] Yet, tribal governments have also used this power to promulgate false or misleading information about their actions and the overall state of their nations. As employees of a tribally-controlled media outlet, journalists, editors, and broadcasters can be and have been fired for coverage considered negative or otherwise contrary to the positions of tribal leadership. For example:

- In October 2003, Lori-Edmo Suppah, editor of the *Sho-Ban* (Shoshone-Bannock) *News* and former president of the Native American Journalists Association, was reported as being fired for "gross insubordination" after publishing readers' letters to the editor that contained criticism of the tribal government.[734]

- In June 1998, Frederick Lane, editor of *Squol Quol*, the Lummi Tribe's monthly newsletter, was reported as being fired for failing to have his articles approved by the tribal political leadership.

- In February 1998, then-President of the Navajo Nation Albert Hale was reported as threatening to shut down the *Navajo Times* newspaper for its coverage of Hale's political and personal battles.

- In October 1997, a reporter for the *Native American Press/Ojibwe News* in Minnesota was arrested by tribal police for trespassing while covering a meeting about a controversial land sale among Minnesota Ojibwe tribes.[735]

It is not, however, the case that tribal media are completely without protections. In limited instances, tribes have adopted written constitutions containing specific provisions for a free press within their sovereign reservation boundaries. More than a dozen Native nations have passed free press acts.[736] Moreover, the *Indian Civil Rights Act* of 1968 (ICRA), which accorded certain rights of the U.S. Constitution to Indians living under tribal governments, extends the right of freedom of the press to Indian Country.[737]

That said, many members of the Native press corps assert that tribal provisions for free press are commonly ignored. Journalists working for tribal media argue that free press guarantees as provided under ICRA offer little or no protection as tribal governments tend to view newspaper staffs

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[733] Dan Gunderson, "Speech on the Reservations Isn't Free," *Minnesota Public Radio News* (April 2001). http://news.minnesota.publicradio.org/projects/2001/04/brokentrust/gundersond_freespeech-m/index.shtml (December 2004).

[734] Mark Connors, "Native to Them," *The Reporters Committee for Freedom of the Press* 28.1 (2004), 16. http://www.rcfp.org/news/mag/28-1/new-nativeto.html (12 December 2004).

[735] Michel, "Repression on the Reservation," 2.

[736] "Cherokee Nation Status Report 2000," The Cherokee Nation Official Site (2000). http://www.cherokee.org/TribalGovernment/SR2000BriefHistPage.asp?ID=9 (13 December 2004).

[737] The *Indian Civil Rights Act* states that "no Indian tribe [shall make or enforce a law] abridging the freedom of speech, or of the press," *Indian Civil Rights Act* of 1968 (25 USC 1301-03).

as tribal employees and the media as wholly answerable to tribal government.[738] Responsible journalists, editors, and broadcasters, therefore, often find themselves caught between fulfilling the desires of tribal leadership and reporting honestly and providing diverse opinions on pressing issues.

New Approaches to Media Issues

Seeking to strengthen Native media, conscientious tribal government leaders, media professionals and tribal citizens have introduced new measures that support greater freedom of the tribal press. As an example, the Oklahoma Cherokee Nation Tribal Council created two laws specifically to free Cherokee media from political influence. In 2000, the Council unanimously passed the *Free and Independent Press Act*. The act established an office for official communications and a separate three-panel board, with two panel members appointed by the Council and the Chief, respectively, and the third selected by the two appointed members, to oversee the Cherokee newspaper.[739] In 2001, the Council unanimously passed the *Freedom of Information Act*, which opened current and future tribal government meetings and financial records to the public.[740] "If I'm doing something wrong," said Cherokee Nation Principal Chief Chad Smith, "the Cherokee people need to be able to read about it…"[741]

In their 2000 Status Report, the Cherokee Nation Council expressed the hope that the Cherokees' and others' free press laws would inspire more Native nations to pass similar laws.[742] In step with this, the National Congress of American Indians (NCAI) passed a "Support of a Free and Independent Native Press" resolution in 2003, co-sponsored by the vice-president of NAJA. The resolution affirms all people's right to have and to disseminate information and exhorts Native nations to adopt policies that free media professionals to research and report on tribal events without fear of government reprisals. In 2005, NCAI adopted a resolution affirming the Cherokee free press act as a model for free press legislation across Indian Country.[743]

There is also a growing movement toward independent ownership of Native media. Managing Editor and CEO Paul DeMain established *News from Indian Country* in the 1980s, buying the *LCO Journal* from the Lac Courte Oreilles Ojibwe tribe after a meeting with tribal leadership. He built the paper into a national bi-weekly paper with a circulation of approximately 8000. In the same vein, confident that their newspaper's revenues could support its publication and distribution, the staff of the *Navajo Times*, one of the largest American Indian publications, recently sought to privatize the organization. In October 2004, the Navajo Nation Tribal Council voted to approve the newspaper's

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738 Michel, "Repression on the Reservation," 2.

739 "Cherokee Nation Status Report 2000."

740 The Cherokee Nation Official Site "Cherokee Nation News Release" (2001). http://www.cherokee.org/TribalGovernment/CouncilNewsPage.asp?ID=3 (14 December 2004).

741 "Cherokee Nation Status Report 2000."

742 Ibid.

743 National Congress of American Indians, "Affirmation of Cherokee Independent Press Act of 2000 as a Model for Free Press Legislation," Resolution #Tul-05-105 (4 November 2005).

independence and a private corporation, Navajo Times Publishing, Inc., was formed to manage and publish the newspaper.[744]

The Growing Role of the Internet

Geography, small populations, and a lack of available knowledge have historically restricted the access of many Native American communities to media outlets. The internet offers promising opportunities to overcome these constraints. Regardless of where they live, the internet makes information about Native America available to tribal citizens. Internet media outlets, such as *Pechanga.net* and *Indianz.com*, are free, web-based sources of news about Indian issues that may not receive extensive coverage in the mainstream media. In addition to its distribution through broadcast outlets, AIROS offers live radio streaming and webcasts of popular shows.

A very large number of Native nations have also used the internet to establish tribally-owned and controlled sites that present their perspective on their nation's history, culture, and current issues. These websites commonly set out basic information such as the nation's constitution and form of government, as well as announcements of political and community events. For example, the Pechanga Band of Luiseno Indians includes among other information on its website an explanation of myths and facts about the nation's culture, as well as a description of tribal gaming practices and regulations.[745] In response to proposed development in Alaska's Arctic National Wildlife Refuge, the Gwich'in have created a locus of news, images, and documentation describing the adverse effects of current and proposed oil and gas drilling on Alaska's North Slope on their culture and their territory.[746] The Cherokee Nation in Oklahoma routinely posts the national government's press releases, and used its website as a primary source of information regarding the Nation's recent constitutional convention.

Indian businesses, nonprofits, collectives, associations, and individuals, too, post websites and blogs to disseminate information, reaching a wider audience than ever before possible. These systems are enabling the agglomeration of knowledge and news about Indian Country, and opposition groups in a number of Native nations employ the internet as organizing and information dissemination devices. The internet is opening an avenue for free discussion on past and current events, and is supporting the diversity of perspectives within Indian Country.

In some cases, the internet can be one of the only connections remote Native communities have with the outside world. In some areas of the Navajo Nation, for example, land-based telephone lines are nonexistent and cellular phones are unreliable. The Southwest Navajo Virtual Alliance, though, has connected the Nation's 110 reservation chapters through a satellite network. As the chapters have come online, citizens have availed themselves of a wide array of otherwise inaccessible information and public and consumer services. These range from researching guidelines for applying for federal grants to purchasing truck parts.[747] The 2,500 Athabascan residents living on Alaska's

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744 Connors, "Native to Them,"16.

745 The Pechanga Band website is available at http://www.pechanga-nsn.gov (28 June 2006).

746 The Gwich'in website is available at http://www.gwichinsteeringcommittee.org/index.html (28 June 2006).

747 Leslie Harris and Associates, "Bringing a Nation Online: The Importance of Federal Leadership," (The Benton Foundation: 2002), 24. http://www.benton.org/publibrary/nationonline/bringing_a_nation.html (12 December 2004).

55,000 square mile Yukon Flats can access the internet through a Wide Area Network, and find information on any topic, participate in distance education classes at the University of Alaska, and communicate with friends, colleagues, and other professionals.[748]

The impact of the internet on Native America remains uneven. While urban Indians, college students and those residing on reservations near metropolitan centers may have ready access, a 2002 study by the Benton Foundation found that, of rural Native households, only 9% had computers, and of those, only 8% had internet access.[749] Continued investment in on-reservation computers and networks will be needed to enhance Indian America's access to information.

Looking to the Future

While Native Americans have started to enter the professional ranks of the mainstream media, they are still underrepresented. The American Society of Newspaper Editors, for example, has found that Native journalists make up just 0.5 percent of newspaper employees.[750] A 2005 survey of broadcast newsrooms conducted by the Radio and Television News Directors Association and Ball State University found only 0.3% of those working in local television newsrooms and 0.5% of those working in radio in 2004 were Native American.[751] This lack of representation will continue to have consequences for Native Americans as it impacts the perspective brought by the national media to the non-Native majority.[752]

The prevailing question confronting Indian-controlled media revolves around the purpose of the media. Non-Indian controlled media have tended to disregard the everyday, contemporary lives of Native Americans, while framing Native Americans and their issues of concern via the norms and values of the dominant society. Many Natives are now looking to the media –newspapers, radio, television and, increasingly, the worldwide web – as opportunities to give voice to their values, their concerns, and their lives. Even if not directed at or able to impact the dominant society's information and knowledge, at least media coverage within Native communities might be improved. The Native-controlled media provides a voice for Native Americans in support of, and in contribution to, the maintenance of their cultural identities, political rights, current events, and citizenship concerns.

In providing a forum for public discourse and education, news media that operate under the direct control of tribal governments confront the danger of crossing tribal political leaders and officials. This is particularly true at the local level, where the preponderance of Indian-controlled media services exists. While offering a voice to Native Americans, tribally owned media, thus, still confront a difficult question: what purpose do they play in the creation of a civil society? That is, is

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748 Ibid., 22.

749 Ibid., 10.

750 Native American Journalists Association, "American Indians Left Out of $1 Million CNN Minority Scholarship Donation" (6 June 2005).

751 UNITY: Journalists of Color, "Unity Discouraged By The Slow Progress Of Diversifying Broadcast Newsrooms," News Release (13 July 2005).

752 Kelly Nunn Martin, "Native American Journalists Say Bias, Dubious Statistics Hold Them Back," *Freedom Forum Online*, 15 May 2000. http://www.freedomforum.org/templates/document.asp?documentID=3043 (28 June 2006).

their purpose to serve the citizens of the tribal nation by, for example, acting as an independent forum of ideas and printing discourse of concern to tribal citizens? Or, as some argue, would such purpose only serve to aid anti-Indian forces? Should the tribal media strive to serve tribes by restricting their role to the diffusion of information and items of general interest? These questions are being debated today as Native-owned newspapers and other media outlets seek to define their role across and within their respective Indian nations.[753] The vigor of this debate is evidence of the vitality of Native nations, as well as the relevance of Indian media in citizens' lives.

[753] See Trahant, *Our Nobler Selves*.

SECTION 5: ALASKA NATIVES, NATIVE HAWAIIANS, AND URBAN INDIANS

ALASKA NATIVES

- Nationwide, approximately 120,000 persons in the 2000 Census were affiliated with Alaska Native groups—predominantly Alaska Athabascan, Aleut, Eskimo, and Tlingit-Haida. Between three-quarters and four-fifths of Alaska Natives resided in Alaska, where they constituted approximately 15% of that state's total population. Together with other Indians, they made Alaska the state with the highest proportion of American Indians and Alaska Natives (at 19%).

- In 2005, 229 Alaska Native tribes and villages were federally recognized. The *Alaska Native Claims Settlement Act* established Native corporations that are owned by Alaska Natives.

- Per capita incomes have been rising, but Alaska Native income is less than half the level of income per capita of non-Native Alaskans. Income growth for Alaska Natives in the 1990s lagged behind U.S. income growth and American Indian income growth nationwide. Alaska Natives in remote rural areas actually saw earned income shrink in the 1990s. Subsistence hunting, fishing, and gathering complement cash incomes and contribute to Alaska Native well-being.

- Socioeconomic patterns seen for the overall Native American population in the United States also broadly apply to Alaska Natives. Although accounting for only about one-fifth of the state's population, Alaska Natives represent one-third of the unemployed in the state. High school and college attainment have been on the rise, but Native teachers and faculty are scarce, and challenges are seen in dropout rates and poor performance on standardized tests. Progress has been made in both health and health service delivery, but health problems associated with relatively low incomes and social stress remain troubling.

Unlike American Indians living in the lower 48 states, Alaska Natives in Alaska are generally members of twelve regional corporate structures created by the *Alaska Native Claims Settlement Act* of 1971 (ANCSA), and many reside in federally-recognized Alaska Native villages rather than on

reservations.[754] These institutions give Alaska Natives a distinctive relationship with the federal and state governments, as well as individual ownership stakes in the assets and corporations that emanate from the Settlement. While the model established under ANCSA represented a unique approach to self-government and economic development, the strengths and weaknesses of ANCSA's framework are becoming more evident. Many Alaska Natives are developing and demanding new arrangements which will allow villages to make more effective use of their resources to promote sustainable communities.

History

Alaska Natives have lived in the area of present-day Alaska for many thousands of years, and European exploration remained relatively less intrusive and disruptive for a longer period than experienced by their counterparts in most other parts of the western hemisphere. In 1741, the Russian government sent Vitus Bering and Aleksei Chirikov to explore the Alaskan coast and claimed the territory for a century and a quarter. Russia eventually sold the territory that now comprises Alaska to the United States in 1867.[755] Although few Russians actually settled in Alaska, those who did had a considerable impact on the indigenous peoples they encountered. Today, Russian colonization still colors religion, surnames, and other features of Native life. As elsewhere, the Europeans introduced foreign diseases, exploited the fur-bearing animal population to an extreme degree, and maltreated the Native population in other more direct ways. As much as 80% of the Aleut population was decimated after contact with Russians.[756]

U.S. administration of Alaska in the late nineteenth century carried the flavor of Indian policy in the U.S. generally: militarized pacification of the frontier and "civilization" of the Indian. The military was deployed to enforce federal law and protect non-Indian traders and settlers. Shortly thereafter missionaries established schools and parishes around the territory, including boarding schools patterned after Indian boarding schools in the rest of the United States.

Beginning in 1905, apartheid impulses also guided policy in Alaska, as heretofore open enrollment schools closed their doors to "uncivilized' Alaska Natives. Notwithstanding the U.S. *Organic Acts* of 1884 and 1912, which ostensibly protected Alaska Native rights to land, laws precluded Natives from owning gold they discovered (per the Mining Act's exclusion of non-citizens), Overt racism—such as advertising restaurants with "All White Help"—extended and supported the formal and legal parallels to Jim Crow in Alaska. Congress finally passed certain special protections for Alaska Natives' subsistence hunting (the *Alaska Game Act* in 1902 and the *Migratory Bird Treaty Act* in 1918) and reindeer raising (the *Alaska Reindeer Act* in 1937). However, the bulk of policy aimed to deny Alaska Natives their indigenous identity, assimilate them into American society, and segregate those who would not assimilate. That legacy died hard: property

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[754] This recognition makes Alaska Native villages eligible for funds and programs administered by the federal government, but does not extend the full concept of Indian Country and its powers of sovereignty to those villages.

[755] Russia "sold" Alaska to the U.S.; Native title to the land would not be recognized formally for more than a century.

[756] Gerald A. McBeath and Thomas A. Morehouse, *Alaska Politics and Government* (Lincoln, NE: University of Nebraska Press, 1994), 35.

owners and developers continued to write racial covenants and deed restrictions into the mid-twentieth century.[757]

The *Indian Reorganization Act* of 1934 (IRA) generated controversy in Alaska. Prior to its passage, various U.S. presidents had employed executive orders to authorize more than 150 special Native reserves for reindeer herding, school sites, and other uses.[758] When IRA implementation turned to the creation of formal Alaska Native reserves analogous to reservations in the lower rest of the U.S., the Alaska territorial government raised vehement resistance in Washington. Only six reserves were established under the IRA,[759] and at the start of the new millennium, only one formal reservation, the Annette Island Reserve in far southeast Alaska, remained. The IRA did, however, allow the organization of Alaska tribal government, and as of 1998, 71 of 221 Alaska tribes organized themselves under its provisions.[760]

Alaska statehood in 1959 brought with it a mandate that the state select lands claimed by the federal government to become state lands. Alaska Native land claims remained unresolved at the time, and encroachments of all kinds dated back to the Russian period. The state's selection process ground to a halt as regional Native associations raised strenuous objections to state selections, and the Secretary of Interior instituted a moratorium until Native claims could be addressed. The prospect of developing enormous gas and petroleum reservoirs in Prudhoe Bay on the North Slope of Alaska finally catalyzed the resolution of long-simmering land claims conflict. Development of the Prudhoe Bay oil and gas reserves and of pipelines to serve such development could not proceed without Native assent.

Alaska Natives and the Settlement of Land Claims

In 1966, various regional associations of Alaska Natives joined in a statewide organization, the Alaska Federation of Natives (AFN), to speak with a unified voice about land transfers, land claims, and resource development. This group pushed for settlement of Native land claims, and with oil discovered in Prudhoe Bay and the accompanying demand for a pipeline traversing Native lands, the issue of Native lands came to a head. Congress acted by passing the *Alaska Native Claims Settlement Act* of 1971 (ANCSA).[761] This piece of legislation (together with its 1991 amendments) formulates unique institutional arrangements that distinguish Alaska Native affairs dramatically from Indian affairs in the lower forty-eight states.

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757 See, for example, Northern Construction Company, "Letter of Restrictive Covenants to U.S. Commissioner's Office," 10 May, 1948 http://www.alaskool.org/projects/JimCrow/cov_res.htm (2 June 2006) specifying "The property hereby conveyed shall not be sold or alienated in any manner whatsoever to other than Americans of the white race." See, also, "Warranty Deed." http://www.alaskool.org/projects/JimCrow/warrdeed.htm (28 June 2006).

758 McBeath and Morehouse, *Alaska Politics*, 107.

759 Ibid.

760 Stephen Cornell, Jonathan Taylor, Kenneth Grant, Victor Fischer, and Thomas Morehouse, *Achieving Alaska Native Self-Governance: Toward Implementation of the Alaska Natives Commission Report Final Report - AFN Version*, (Cambridge, MA: The Economics Resource Group, Inc., May 1999), Appendix A.

761 U.S. Public Law 92-203 (43 USC §1601, *et seq.*), 17 December 1971. *Alaska Native Claims Settlement Act*

In rough terms, ANCSA is part land treaty and part corporate chartering. ANCSA extinguished Native subsistence hunting rights and aboriginal claim to nearly all Alaska lands in exchange for $962.5 million in compensation (an Alaska Native Fund) and approximately one-ninth of the state's land base (44 million acres). Unlike a pure land treaty, however, Congress explicitly refrained from creating Alaska reservations and excluded Bureau of Indian Affairs (BIA) trust responsibility for the land and monetary parts of the Settlement.[762] Instead, the Act established twelve regional for-profit corporations under state law. A thirteenth was added later for Alaska Natives living outside the state. Each Alaska Native received 100 shares of stock, and pursuant to ANCSA amendments, that stock cannot be alienated from Native ownership.[763] The Alaska Native Corporations (ANCs) own the 44 million Settlement acres in fee simple title (rather than under U.S. trust ownership), and they administer the Alaska Native Fund. Seventy percent of an ANC's natural resource income must be shared among all the Alaska Native Corporations.

ANCSA also revoked all existing reserves and reservations except the Annette Island Reserve.[764] In their stead, the Act created Alaska Native Village Corporations (ANVCs), whose shareholders could vote to acquire title of the reserve lands.[765] ANVCs could be established in all settlements with a population of 25 or more. Like the regional ANCs, these corporations operate under state law governing corporations. Villages had the choice to be non-profit corporations, but all chose to be for-profit. Each Alaska Native covered by ANCSA became a shareholder in one of the 13 regional corporations and, if enrolled in a village, a shareholder of one of more than 200 village corporations. In terms of the ANCSA settlement assets, regional corporations own the subsurface rights, while the village corporations own surface rights to modest amounts of land in the vicinity of their villages. As is the case for businesses incorporated under state law generally, the ANCs and ANVCs are obligated to exert best efforts to generate profits for shareholders.

Outside the provisions of ANCSA, twelve regional non-profit entities emerged from the pre-ANCSA regional associations. These regional non-profits specifically address themselves to the socioeconomic conditions of Alaska Natives through various programs and activities. They derive their power to act on behalf of Natives via formal tribal grants of authority and via tribal board representation. On occasion, federal statutes also define a formal role for the associations. Within their regional territories (which are usually identical to ANC regions), the associations provide services to all eligible American Indians and Alaska Natives and do not serve exclusively ANCSA-identified Alaska Natives. The regional associations have become the primary contracting parties for the delivery of federal Indian programs under PL 93-638 contracts and compacts on behalf of the 229 federally-recognized Alaska Native village and tribal entities eligible to receive Bureau of Indian Affairs services and funding.[766]

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762 McBeath and Morehouse, *Alaska Politics*, 109.

763 Only Alaska Natives born before December 18, 1971 are initial shareholders of ANCSA corporations. Alaska Natives born after that date can become shareholders under the terms of probate law and in certain other limited circumstances (see, e.g., 43 USC §1606(h)(1)(B)).

764 43 USC §1618.

765 For a detailed map of Alaska Native Villages and corporate regions see U.S. Census, "The American Indians and Alaska Natives in the United States Wall Map". http://www.census.gov/geo/www/maps/aian_wall_map/ aian_wall_map.htm (26 June 2006).

766 *Federal Register* 70:226, November 25, 2005, 71198-71197.

Historically and substantively, ANCSA falls between termination and self-determination. Temporally, the Act came after the Eisenhower era policies of tribal termination and before the watershed Indian self-determination policy—the *Indian Self-Determination and Educational Assistance Act* of 1975. Procedurally, substantial Native participation helped produce ANCSA, and the political voice of the Alaska Federation of Natives remains potent decades after ANCSA's passage. ANCSA recognizes that security of Native title support and "maximum participation by Natives in decisions affecting their rights and property."[767] Such provisions support socioeconomic strengthening and recognize that problems such as Native poverty, much less lifeways, do not warrant assimilation.

On the other hand, associations together with shareholder corporations mobilize the mainstays of Alaska Native participation in self-determination. This is in contrast to the more direct government-to-government relationships that are coming to characterize much of Indian policymaking in the lower forty-eight states. Substantively, ANCSA endows not tribal governments, but individual share owners in corporations with the vast bulk of Native title assets. This arrangement has characteristics akin to earlier federal termination and allotment policies that allocated tribal assets to individuals and to corporations operating under state law (as the ANCs do). The unique status of Alaska Natives, their lands, and their assets colors their drives for self-determination and self-governance.

Alaska Native Socioeconomic Status

The 2000 Census, enumerated at least 118,846 persons nation-wide who identified themselves as affiliated with an Alaska Native group. In the state of Alaska itself, 98,403 people self-identified as American Indian/Alaska Native (AIAN) alone; 119,241 people identified as AIAN alone or in combination with one or more other races (Figure 24). Altogether, four-fifths of the Census respondents indicating AIAN alone and affiliation with one Alaska Native group resided in Alaska, and three-quarters of those reporting AIAN alone or in combination with another race resided in Alaska.[768] Given Alaska's Census-recorded total population of 627,000 in 2000, Alaska was the state with the highest proportion of American Indian/Alaska Natives citizens. Nearly one in five Alaska residents (19%) considered their heritage to be Native or part-Native.[769] According to the U.S. Census, in 2000 43% of Alaska Natives lived in the relatively densely populated Anchorage, Fairbanks, Juneau, Mat-Su, and Kenai Peninsula boroughs.[770]

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[767] 43 USC §1601(b).

[768] US Bureau of the Census, "Census 2000 PHC-T-18. American Indian and Alaska Native Tribes in the United States: 2000,: Tables 1 and 16.

[769] Note, these statistics would include, for example, Navajos living in Alaska, but exclude Eskimos living in Chicago. Stella U. Ogunwole, *The American Indian and Alaska Native Population: 2000. Census 2000 Brief C2KBR/01-15*. (Washington: Government Printing Office, 2002), 5.

[770] Goldsmith, Scott, Jane Angvik, Lance Howe, Alexandra Hill, and Linda Leask, *Status of Alaska Natives 2004* (Anchorage, AK: Institute for Social and Economic Research, University of Alaska Anchorage, 2004), 2.

Figure 24
Alaska Native Tribal Affiliations Nationwide, 2000

Tribal Grouping	AIAN Alone		AIAN in Combination with Other Race(s)		AIAN Alone or in Any Combination*
	One Tribal Grouping	Multiple Tribal Groupings*	One Tribal Grouping	Multiple Tribal Groupings*	
Eskimo	45,919	1,418	6,919	505	54,761
Tlingit-Haida	14,825	1,059	6,047	434	22,365
Alaska Athabascan	14,520	815	3,218	285	18,838
Aleut	11,941	832	3,850	355	16,978
Other Alaska Tribe	8,713	805	2,894	263	12,675
TOTALS:	95,918		22,928		

* Numbers by tribal grouping do not sum to the total population because they represent tallies of *responses*, not of respondents; a response of "Eskimo and Aleut" would be counted in both the Eskimo and the Aleut numbers, or likewise "Aleut and Navajo." This issue of double-counting does not affect the totals for respondents giving only one tribal affiliation.
Source: Stella U. Ogunwole, *The American Indian and Alaska Native Population: 2000*. *Census 2000 Brief C2KBR/01-15*. Washington: Government Printing Office, 2002, 11.

Like Indians in the lower forty-eight states, Alaska Natives achieved some socioeconomic gains late in the twentieth century. However, the gap between Natives and the rest of Alaska society remains large and the pace of Native improvement in some key socioeconomic indicators slowed in the 1990s or, worse, reversed for some segments of the Native population. Rural Alaska Natives, in particular, suffered particularly low standards of living.[771] This hastened migration into urban and regional hub areas.

Cash Income: Over the period from 1960 to 1990 in Alaska, Native per capita income grew exceptionally fast, exceeding even the fast pace of non-Native income growth (compare bars in Figure 25). Native income grew from a quarter of the non-Native Alaska average to approximately one-half in thirty years. In the 1990s, however, the pace of change slowed dramatically. The average income of all Natives in Alaska—those living in rural *and* urban locations—grew only 9% over the decade (equivalent to an average annual compound growth rate of 0.9%). That rate lagged the US all-races income growth rate over the decade (11%), and fell substantially behind the general pattern of Indian income growth nationwide (15%) and on Indian reservations (32%).[772] Declines in the Alaska Native poverty rate also came to a halt in the 1990s. After declining steadily from 64% in the 1960

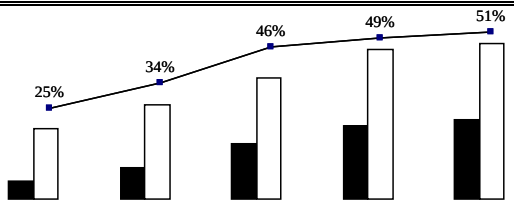
771 Scott Goldsmith and his colleagues at the Institute for Social and Economic Research, University of Alaska Anchorage, have created a voluminous and detailed portrait of Alaska Native socioeconomic status which repays careful reading and from which the remainder of this subsection draws heavily. See, Goldsmith et al., *Status of Alaska Natives, op cit.* See also the companion review report: Alaska Native Policy Center, *Our Choices, Our Future: Analysis of the Status of Alaska Natives Report 2004* (Anchorage, AK: Alaska Native Policy Center, 2004).

772 Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, The Harvard Project on American Indian Economic Development, January 2005 and accompanying data at http://www.ksg.harvard.edu/hpaied/pubs/pub_152.htm.

census to 19% in 1990, the Native poverty rate rose to 20% in 2000—nearly three times the state poverty rate of 7%.

The slow income growth rate for Native Alaskans in the 1990s no doubt arose in part from the relatively slow growth of all Alaskans' incomes (4% over the decade). Nevertheless, the worrisome plateau in the ratio of Native to non-Native income levels raises the specter of a persistent income gap in the future.

Figure 25
Income Per Capita in Alaska, 1960-2000
In 2000 dollars



	1960	1970	1980	1990	2000
■ Native	$2,833	$5,089	$8,947	$11,706	$12,817
□ Non-Native	$11,377	$15,079	$19,421	$23,918	$24,920
—■— Native Share	25%	34%	46%	49%	51%

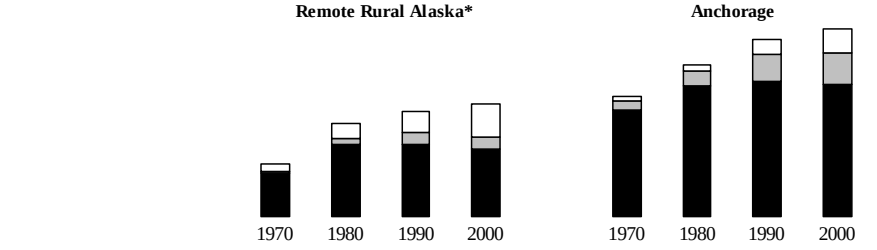
Source: Goldsmith, Scott, Jane Angvik, Lance Howe, Alexandra Hill, and Linda Leask. (2004). *Status of Alaska Natives 2004* (Anchorage, AK: Institute for Social and Economic Research, University of Alaska Anchorage), p. 12, citing the U.S. Bureau of the Census.

The Alaska-wide averages mask an even more troubling reality. Total income grew over the decades, but as Figure 26 shows, *earned* income declined in the 1990s, particularly in remote rural Alaska (by 7%). Forty-two percent of Alaska Natives lived in that region and comprised eighty-two percent of that region's population. Remote rural Alaska lacks road or ferry access to the rest of Alaska and depends more upon government for employment than Anchorage.[773] Compounding the reliance on government for employment, the dependence on transfer income in rural Alaska jumped 52% in the 1990s and wholly accounted for what negligible income growth the region actually did experience.[774] As of 2000, transfer income constituted 29% of total per capita income in remote rural Alaska, double its level in 1970 (15%) and more than double the level in Anchorage in 2000 (13%).

[773] Ibid., 5-2 and 2-31.

[774] Note that, while the data in Figure 26 cover Alaskans of all races, the predominance of Alaska Natives in remote rural areas (at 82% of the population) implies that the rural data are representative of Native living conditions; if anything, the likelihood that non-Natives in rural areas earn more income means that the rural averages overstate Native income.

Figure 26
Sources of Income in Anchorage and Remote Rural Alaska, 1970-2000
Income for persons of all races in 2000 dollars



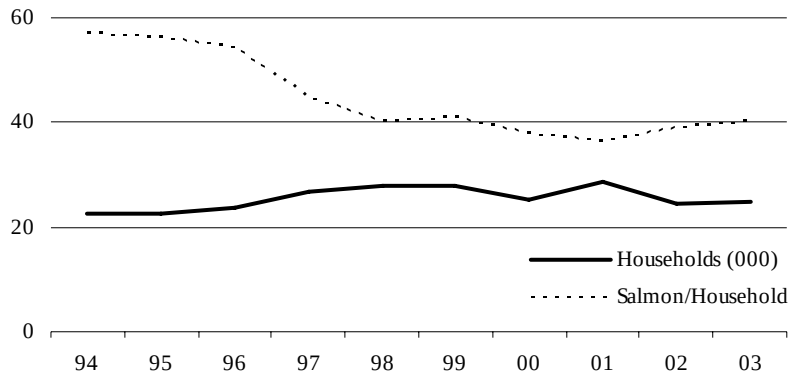
	Remote Rural Alaska*				Anchorage			
	1970	1980	1990	2000	1970	1980	1990	2000
□ Transfers**	$1,508	$2,887	$4,027	$6,121	$647	$1,177	$3,036	$4,713
▒ Dividends, interest & rent	$263	$996	$2,125	$2,250	$1,856	$2,832	$4,984	$5,832
■ Wages & Salaries	$8,110	$13,623	$13,603	$12,708	$19,900	$24,501	$25,355	$24,762

* Defined in Goldsmith, *et al.* to be Wade Hampton, Bethel, Nome, Dillingham, and Yukon-Koyukuk census areas, and the North Slope, Northwest Arctic, and Lake and Peninsula Boroughs, p. 5-1.
** Annual distributions from Alaska's Permanent Fund are here classified as transfers.
Source: Goldsmith, Scott, Jane Angvik, Lance Howe, Alexandra Hill, and Linda Leask. (2004). *Status of Alaska Natives 2004* (Anchorage, AK: Institute for Social and Economic Research, University of Alaska Anchorage), p. 4-64, citing the U.S. Bureau of Economic Analysis.

Subsistence Income and Lifeways: Hunting, fishing, and gathering complement household cash incomes in Alaska—sometimes very substantially. Perhaps even more importantly, engaging in subsistence activities is at the core of identity and civic life for many Alaska Natives. In rural areas, the subsistence harvest in the 1990s averaged 375 pounds per person. In western and interior Alaska it averaged nearly twice that level: 664 and 613 pounds per person, respectively.[775] This critical support for Native household economic self-sufficiency also contributes to Native well-being across cultural and social dimensions. Unfortunately, it too was under pressure at the turn of the millennium. Salmon harvesting per household, for example, declined by almost a third in the decade from 1994 to 2003. As Figure 27 demonstrates, this decline did not arise from an increase in the number of families dependent on the resource. Permits held relatively steady. Rather, declines in the harvest came from declines in the fishery. As ecological and commercial pressures weakened subsistence resources, Alaska Native families found their ability to supplement cash incomes increasingly at risk. Together the trends in rural Alaska Native incomes—whether earned as wages or harvested as subsistence foods—should cause policymakers concern because Native economic independence and participation in subsistence lifeways have been becoming increasingly difficult in rural Alaska.

[775] Wolfe, Robert J., *Subsistence in Alaska: A Year 2000 Update* (Juneau, AK: Alaska Department of Fish and Game, March, 2000), 2.

Figure 27
Alaska Subsistence and Personal-Use Salmon Harvests, 1994-2003



Source: Alaska Department of Fish and Game, *Alaska Subsistence Fisheries: 2003 Annual Report*, Juneau, AK: 2005, 18.

Employment: Work, of course, substantially drives income levels. In that arena, Alaska Natives also lag behind non-Natives. According to the 2000 census, Alaska Native unemployment was 17% for women and 24% for men, while for non-Natives in Alaska it was only 6% for men and 8% for women. Alaska Native male labor force participation stood at 47%, compared to 73% for non-Native men in the state. Similarly, Alaska Native female labor force participation (48%) lagged behind the rate for non-Native women in the state (64%). In addition, Native workers worked more often in part-time jobs than non-Native workers in Alaska.[776]

Health: As with Indian health in the lower forty-eight states, Alaska Native health problems shifted from access-to-care problems in the mid twentieth century (e.g., immunizations, pre-natal care) to lifestyle-related disease at the turn of the millennium (e.g., preventable diabetes, substance abuse, violent death). Immunization rates, for example, exceeded U.S. averages, but so did adult smoking rates.

Overall Alaska Native life expectancy at birth increased substantially after the 1950s, but the rate of improvement slowed in later decades. By the late 1990s, Alaska Native life expectancy at birth was approximately 69.5 years, compared to the U.S. all-races expectancy of 76.5 years. Infant mortality declined, as did the teen pregnancy rate, though the latter remained at a rate more than twice the U.S. average. Smoking by Native high school students fell by a third between 1995 and 2003, but remained four times as prevalent as for other students. Adult smoking held steady at 40% compared with 25% for other Alaska adults. Reported rates of Fetal Alcohol Spectrum Disorder—a pernicious and varied condition resulting from exposure to alcohol *in utero* and leading to lifelong impairment of mind and body—doubled for Alaska Natives since the early 1990s, and the Native rate was a full twenty-five times the non-Native average. Native diabetes incidence jumped from half the U.S. rate in 1985 to slightly ahead of the U.S. rate in 1999. Alaska Native death rates in all age brackets exceeded

[776] Data from Goldsmith et al, *Status of Alaska Natives,* 4-2, 4-7, and 4-13.

U.S. averages, and in the age 25 to 34 bracket, the death rate was four times the U.S. average.[777] Diabetes and other "lifestyle diseases" are quite difficult to tackle as they require not only medical and public health resources, but basic socioeconomic and lifestyle change as well.

Criminal Justice: A number of sociopathologies accompany Native income stagnation, in general, and alcohol abuse, in particular. At the turn of the 21st century, Alaska Natives died from homicide at three times the U.S. age-adjusted rate for Whites. Alaska Native children constituted more than half the victims of substantiated child abuse and neglect in Alaska, though Alaska Native children comprised only a quarter of the child population of Alaska. In Alaska, more than a third of all domestic violence victims and almost half of all sexual assault victims were Native, though Natives comprised only about one-fifth of the state adult population. Alaska Natives constituted more than a third of the state's inmate population.[778]

Education: Alaska Native high school attainment improved dramatically in the second half of the twentieth century, yet Native progress slowed in the 1990s and remained below the non-Native level in Alaska. Over the period 1970 to 2000, the number of Alaska Natives with high school degrees leaped from 2,259 to 52,872, due in part to the construction of high schools around rural Alaska under a 1976 litigation settlement. While the proportion of rural Native adults aged twenty and older with high school degrees or higher increased dramatically from 48% in 1980 to 68% in 1990, it increased only slightly to 71% in 2000.[779] Statewide, 73% of Alaska Native adults had high school degrees in 2000. These figures compare to a rate of 89% for all Alaskans.[780] Despite the needed gains in graduation rates, forty to sixty percent of Native students passed Alaska's standardized achievement tests, versus seventy to eighty percent of the non-Native student population. In 2000, about one-third of Native adults living in Alaska held at least some college credit. Encouragingly, the number of Alaska Native going on to four-year college degrees tripled between 1980 and 2000.[781]

Challenges for Alaska Natives

Many Alaska Natives contend with the challenges of living in uncommonly remote areas, with high costs of living, with inadequate basic infrastructure, and in the 1990s, with slow-growing incomes. Alaska Natives cannot readily change these economic features. Nonetheless, the income stagnation and retrenchment evident in Figure 25 and Figure 26 distinguish Alaska Natives from Indians elsewhere in America and tarnish ANCSA's promise.

Three prominent features of the post-ANCSA landscape impede the mechanisms of Indian self-governance which have worked well to reduce poverty elsewhere: i) the structural complexity of the institutions under which Alaska Natives live; ii) the unique disconnection between the vast majority of Native assets and the governments which would deploy the yields of those assets for

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777 Goldsmith et al,, 3-2 to 3-3, 3-17 to 3-19, and 3-27.

778 Ibid., 3-3, 3-21, 3-22, and 3-29.

779 Ibid., 14 and 6-6.

780 U.S. Bureau of the Census, *American Fact Finder*, Detailed table, factfinder.census.gov. (retrieved 31 May 2006).

781 Goldsmith, et al., 1-10, 6-2.

Native socioeconomic improvement; and iii) lack of support and, in some instances, hostility from the state of Alaska and its representatives to robust Native self-government.

Alaska Natives can potentially draw upon a wide variety of institutional forms to organize their affairs. Locally, traditional or IRA-organized governments oversee Native communities, and the ANCSA-created village corporations manage the bulk of Native village assets. Under Alaska local government laws, rural communities can organize under two classes of cities, and two classes of boroughs can be established for larger geographic areas. At the regional level, twelve for-profit Native corporations and approximately a dozen non-profit Native associations govern economic development and service delivery.

The state and federal governments, of course, also play myriad roles in arenas ranging from natural resource management to health care delivery. And, together, governments have created amalgamated forms in which intergovernmental agreements, sub-regional associations, or co-management arrangements bring overlapping governing interests together. To a certain degree, the multiplicity of options yields flexibility for innovation. But the multitude of institutions also scatters resources, disconnects responsibility from control, fragments power, and disperses and disconnects ultimate accountability to the Natives seeking socioeconomic well-being.

For example, the state of Alaska may claim authority to regulate hunters and fishermen, yet fail to fund the necessary rangers to keep their human waste out of Native water supplies. A village's specific need for nursing may be lost in a swirl of Indian Health Service regulation, regional non-profit prerogatives, and inter-tribal rivalry. The necessary materials to build a new tribal administration building may be trapped by inter-corporate disagreement over whether gravel constitutes surface or subsurface assets. A remote community may live simultaneously under a municipal government, a tribal government, a borough government, a village corporation, a regional corporation, and various state government departments; meanwhile, confronting federal land managers from the Bureau of Land Management, Fish and Wildlife Service, Forest Service, Environmental Protection Agency, and more federal and state agencies. Far too many Alaska Native public managers find their working environment Byzantine, and the outcomes of their work suffer accordingly.[782]

The limited resources, remoteness and small size of many Alaska Native villages place premiums on effective self-determination, as well as on inter-village cooperation that can tap into efficiencies of larger scale with effective governance and management. In this regard, innovation under self-determination has been racing to keep up with the challenges of community development, economic security and cultural strengthening. The following are but four examples:[783]

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[782] A discussion of a) the differences between Alaska institutions of Native self-governance and typical Indian institutions in the lower forty-eight states; and b) the benefits and limits of the Alaska arrangements can be found in Section III of Cornell, Stephen, Jonathan Taylor, Kenneth Grant, Victor Fischer, and Thomas Morehouse, *Achieving Alaska Native Self-Governance: Toward Implementation of the Alaska Natives Commission Report Final Report - AFN Version* (The Economics Resource Group, Inc., Cambridge, MA, May 1999), available at: www.ankn.uaf.edu/curriculum/AFN/selfgov.pdf.

[783] These condensed cases are more fully described in Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works?*, Joint Occasional Papers on Native Affairs, (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2003), 5-8.

Akiachak: In 1990, Akiachak became the first city in Alaska to dissolve its city government in favor of a Native village government, the Akiachak Native Community. This was done in an effort to revitalize tribal self-governance and re-establish local control over education, the land, and its natural resources. Akiachak Native Community has assumed substantial responsibility for a wide range of services, including water, sewer and electric service, trash collection, roads, housing, natural resource protection, health, child welfare, and police and fire protection. It operates its own jail, health clinic and dock site and has established a tribal court that works with its own police, Alaska state troopers on such matters as public behavior, solid waste disposal and alcohol problems. Moreover, Akiachak Native Community is part of the Yupiit Nation, a loose and pragmatic confederation of about a dozen Yup'ik peoples seeking to regain decision-making authority over local affairs. Some of these tribes have followed Akiachak's lead by discarding city governments and replacing them with Native village government structures. Among other efforts, the Yupiit Nation has established the sub-regional Yupiit School District, replacing the regionally based system. In 2000, the district provided instruction to more than 400 students, including a Yup'ik language immersion program in some schools. (See essay of Willie Kasayulie, President and CEO of Akiachak Limited, below.)

Chilkoot: Prior to 1990, the Chilkoot Tlingit had little collective control over major decisions affecting their health, welfare, education, and economic circumstances. Local programs and services were administered by outsiders, employed outsiders, and failed to address many of the community's needs. In 1990, the community set out to reverse these trends through active self-governance. Reviving their dormant government and working closely with tribal elders to frame long-term development and community strategies, the Chilkoot Indian Association (CIA) has become a primary provider of services to its people. Through the Southeast Alaska Regional Health Consortium, the CIA works to improve health services and financial stability at the tribal health clinic. In cooperation with the Central Council of Tlingit and Haida Indians, the CIA also has significantly improved community solid waste management. By obtaining control over housing funds and program management, the CIA has been able to improve housing quality and access. And in an arrangement with the U.S. Army and the Bethel Native Corporation, the CIA is involved in the removal of contaminated buildings from tribal lands, providing local citizens with jobs and opening up new development opportunities for the tribe.

The Council of Athabascan Tribal Governments: In the 1980s, the Athabascan villages of the Yukon Flats were concerned with the lack of jobs in their villages, the lack of Native control over subsistence resources in the region, and the lack of local control over service delivery. In 1985, chiefs, elders, and other citizens of ten largely Gwich'in Athabascan villages gathered to establish the Council of Athabascan Tribal Governments (CATG). The organization has little power over village affairs and is largely dependent on the voluntary cooperation of the member villages, but it offers an organizational basis for enlarging the villages' political voice. It also creates economies of scale by managing programs that would be prohibitively expensive to manage at the village level. The path has not been easy. CATG has had to struggle to find federal agencies willing to allow Alaska Native villages to run their own programs, and the challenges of cooperation among ten small villages spread out over a large geographical region have been substantial. Nonetheless, CATG has been successful at running health, natural resources, and early childhood education programs. It has helped to prevent service delivery jobs—badly needed in villages characterized by high unemployment—from migrating to Fairbanks. It has expanded local management capacities. It has served as a resource to local governments. And it has engaged local citizens in generating their own solutions to problems.

NANA: The Northwest Arctic region of Alaska includes the city of Kotzebue and a number of Native villages, most of them located around Kotzebue Sound and along the Kobuk and Noatak Rivers. Alaska Natives, most of them Inupiat Eskimo, make up more than three quarters of the

region's population. In an attempt to improve overall governmental coherence and efficiency, to better leverage scarce resources, and to enhance Native self-governance, regional and village leaders began to consolidate programs, services, and organizations in the early seventies. Between 1972 and 1986, they moved toward a far more integrated model of governance. At the regional level, activity is focused in two corporations: the for-profit NANA Corporation, which concentrates on economic development and growth, and the non-profit Maniilaq Association, which concentrates on social services. Each village holds at least two seats on NANA's board, assuring a village voice in development strategy and corporate actions. At the same time, the villages designated Maniilaq as the appropriate recipient of federal service grants and contracts; the Maniilaq board consists of representatives from each of the villages. Maniilaq is the primary social service provider to all of the region's population, Native and non-Native. In 1986, the region's residents created the Northwest Arctic Borough and School District so as to increase their control of land use, education, and related activities and, in 1987, adopted a home-rule charter.

Notwithstanding these and other Alaska Native efforts to confront the challenges of self-governance creatively, a difficult divergence of capacity and responsibility occurs at the frontier between ANCSA business and Alaska Native government. While share owners possess the vast bulk of Alaska Native assets that could be turned toward socioeconomic strengthening, they do so under laws mandating the pursuit of profit. ANCSA corporations can propel socioeconomic change using employment, dividends, and (modest) philanthropy as implements. And they have done so. In 2003, thirteen regional ANCs and twenty-eight ANVCs paid dividends totaling $78 million, employed 2,700 Alaska Natives, and donated $11.2 million in scholarships and other philanthropy. Gross revenues for the thirteen regional corporations exceeded $2.5 billion, up from a little more than half a billion in 1993. In 2003, net income for the thirteen was $92 million, and ANCs ranked among the top corporations in Alaska.[784] In short, ANC performance in recent years stands in marked contrast to past ANC woes.[785]

Yet as welcome as a dividend, a job, or a scholarship may be to the Native beneficiary, together such economic benefits could not sway the economic fortunes of 98,000 Alaska Natives in the 1990s. Dividends in 2003 averaged less than $1,000 per capita, despite an average income Native/non-Native gap in Alaska of $12,000 (per Figure 25). ANC Native employment of 2,700 fell far short of the need for jobs: in 2000, 9,400 Native men and women actively sought work. Still more reported not actively seeking work.[786] And as welcome as ANC philanthropy is to those who benefited from it, in 2003 it amounted to a tiny fraction of unmet needs.

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[784] Association of ANCSA Regional Corporation Presidents/CEOs, *Walking in Two Worlds with One Spirit: Alaska Native Corporations, Annual Economic Report* (Anchorage, AK: Association of ANCSA Regional Corporation Presidents/CEOs, 2005), 13-14.

[785] In the past, many ANCs ran years of consecutive losses and some even veered toward bankruptcy despite the advantage of natural resource exploitation and the unique ability to sell net operating losses to any U.S. corporate taxpayer. See, e.g., Steven Colt, "Financial Performance of Native Regional Corporations," *Alaska Review of Social and Economic Conditions* 28 (December 1991), and Colt, Steven, "Alaska Natives and the 'New Harpoon': Economic Performance of the ANCSA Regional Corporations," unpublished manuscript dated February 2001, www.iser.uaa.alaska.edu/iser/people/colt/colt_newharpoon2.pdf (28 June 2006).

[786] Goldsmith et al., 4-6, citing the U.S. Census.

Not only have ANC benefits been modest in the aggregate, some ANCs perform much more poorly than the averages. Greater than half of the $2.9 billion in 2003 revenue came from but two of the companies, Arctic Slope and Chugach Alaska Corporations.[787] The ANCSA stipulation to share seventy percent of natural resource income between ANCs helps balance the distribution of shareholder revenues. Nonetheless, employment, dividends, and philanthropy diminish rapidly toward the lower end of the corporate income distribution.

Perhaps most critically, the ANCs are *corporations* and are poorly equipped to deal directly with social problems. They cannot effectively counsel teenagers with substance abuse problems, run suicide hotlines, teach kindergartens, or otherwise help Alaska Natives become or stay employable. Governments and civil society institutions typically engage that work, and ANCs cannot. Corporations under Alaska law—Native or not—have limited discretion to pursue philanthropic and social service delivery functions, and even without the constraints of corporate law, Native shareholders' interests do not run directly toward more ANC philanthropy. Moreover, the ANCs remit no taxes to Alaska's tribal governments. The proceeds derived from the vast bulk of ANCSA assets are thus inaccessible to tribal governments for Native socioeconomic improvement. Funding what ANCs cannot accomplish via employment, dividends, and philanthropy falls on the federal and state governments.[788]

The state of Alaska has compounded the challenge of Native community building and self-determination by adding its recalcitrance toward tribal rights of administration and jurisdiction.[789] In the rough calculus of state elected leaders, tribal sovereignty and state sovereignty mutually exclude each other, and recognition of tribal sovereignty carries negative implications for control over Alaska's natural resources. Even apart from petroleum, natural gas, and timber, Alaska has generally and steadily maintained that the status of Alaska Natives differs inconsequentially from any other group of Alaska citizens on issues of taxation, education, regulation, and subsistence hunting and fishing. The state argues that ANCSA extinguished Native rights, noting, for example, that ANCSA Native Corporations own land in fee simple title rather than in trust.[790] The state government also actively works to strike down efforts by tribes to engage in nation-building approaches to fostering the well-being of their communities. It fought the Native Village of Venetie's policy of taxing contractors working on reserve lands all the way to the U.S. Supreme Court and prevailed.[791] It

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787 Association of ANCSA Regional Corporation Presidents/CEOs, *Walking in Two Worlds*, 13.

788 After the U.S. Supreme Court decision in *Alaska v. Native Village of Venetie*, Alaska tribes have virtually no power to tax. *Alaska v. Native Village of Venetie Tribal Government* 522 U.S. 520 (S.Ct. No. 96-1577, 1998).

789 Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government… and Service Delivery: What Works?*, Joint Occasional Papers on Native Affairs, (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2003).

790 Fae L. Korsmo, "The Alaska Natives," *Polar Peoples: Self-Determination and Development*, ed. Minority Rights Group. (London: Minority Rights Publications, 1994), 81-104.

791 *Alaska v. Native Village of Venetie Tribal Government* 522 U.S. 520 (S.Ct. No. 96-1577, 1998). To alleviate the shortcomings of limited federal and state assistance, some villages have been successful in creating their own private corporations, although these instances remain relatively rare. The Louden Tribal Council, for example, created the Yukaana Development Corporation to contract with the U.S. Air Force to clean up pollution left in the community since World War II (see "Yukaana Development Corporation" in

repeatedly blocks Native village actions to address local problems on the basis of jurisdiction and then fails to provide the necessary resources to address the issue itself. Paradoxically, Alaska's attacks on tribal self-determination perpetuate Native dependence on the state and federal treasuries.

Prospects for the Future

After statehood, Native fortunes improved as the state deployed schools, as federal and then regional public health institutions improved their efforts, as the federal government formally recognized tribes, and as new corporate opportunities emerged. Even so, Native improvement in several key indicators slowed by the turn of the century, well short of closing Native/non-Native gaps in Alaska Assuredly, the next half of the income gap will be harder to close than the last. And, as health concerns continue to shift toward problems arising from lifestyle and the sociopathologies of poverty (e.g., diabetes, obesity, substance abuse, and domestic violence), the task of revitalizing society will severely tax the creative energies of Native public managers and institutions.

Local Native self-governance—the approach which is bearing fruit in the lower forty-eight states—plays a constrained role in Alaska. For a variety of reasons, regional, state, and federal bureaucracies dominate service delivery. By the design of ANCSA, corporations own and develop Native resources, providing jobs, dividends, and philanthropy, yet operating beyond the reach of tribal government. And those tribal governments operate with limited or nonexistent powers of self-rule, lacking powers and authorities to tax, regulate, and police the activities that go on within them.

Alaska Natives generally acknowledge that ANCSA remains a living experiment, and Congress has amended the Act several times in ways which reflect Native participation, if not instigation. Nevertheless, self-governing rights for Alaska Native villages have never been a central part of the ANCSA project. With the challenges ahead, leaving Alaska tribal governments in their relatively weakened position omits a key element in the portfolio of institutions which would promote Native well-being and relieve social distress. Regional non-profits and ANCSA corporations will still matter, but village self-government must complement their strengths.

Notwithstanding the impediments to local self-determination, Alaska tribal governments demonstrate vigor and creativity in economic development (e.g., Louden Tribal Council – see textbox on Yukaana Development), in criminal justice (e.g., Organized Village of Kake – see textbox), in education (e.g., Chickaloon Village Tribal Council), and in environmental management (e.g., Yukon River Inter-Tribal Watershed Council).[792] The demonstrated success of self-government in the lower forty-eight states together with these and other examples from Alaska showing remarkable achievements at the grassroots,[793] compel a frank and honest reevaluation of the decisions made by the framers of ANCSA. In particular: Should Alaska Native policy encourage more robust mechanisms of self-government? Should Alaska Native policy continue to divorce the vast majority

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the textbox). Such corporations are few in number and miniscule in combined revenues when compared with the ANCSA-created corporations.

[792] See the Harvard Project on American Indian Economic Development, "Honoring Contributions in the Governance of American Indian Nations" http://www.ksg.harvard.edu/hpaied/hn_main.htm (28 June 2006).

[793] For more examples, see, e.g., Sections IV. A through IV.G of Cornell, et al., *Achieving Alaska Native Self-Governance.*

of Native assets from Native governments? Under what conditions would melding village corporations into village tribal governments support self-government and community development? What similarities and differences between Alaska's 229 recognized tribes and the Indian Nations in the lower forty-eight require altering the groundwork for Native self-government? The future of Alaska Native social, cultural and economic well-being hangs critically on Native answers to such questions.

TEXT BOX: Yukaana Development Corporation, Louden Tribal Council

The traditional homeland of the Louden Tribe is in the interior region of Alaska, near the hub village of Galena, which lies 270 air miles west of Fairbanks. Most of the Tribe's 575 members live in or near Galena, and like many other Alaska Natives, they rely upon subsistence fishing, hunting and gathering. Galena is also home to the United States Air Force Galena Air Station. Throughout the base's active lifespan, the Air Force has dumped 55-gallon drums that were used to transport petroleum products on adjoining tribal and tribal subsistence land. Periodic flooding of the Yukon River has scattered tens of thousands of these drums in the wetlands downriver from Galena.

Tribal leaders initiated a series of community planning sessions intended to give the Tribal Council greater strategic direction and, ultimately, to strengthen the Tribe's governmental capacity. The community and the tribal government embraced a theme that would guide their actions from then on: "Neel ghul neets niiy," which translates to "We Work Together, We Help Each Other."

In 1994-95, with grant funding, the Tribe undertook a series of studies to assess the environment. An independent environmental engineering firm found significant contamination of heavy metals, pesticides and petroleum-based products, and it recommended that as many as 64 sites receive further environmental assessment. The Tribe considered two options – engage in costly litigation against the U.S. military, or work cooperatively with it to remedy the situation. Consistent with "Neel ghul neets niiy," the Tribe chose the latter, and in 1996 brought together 27 state and federal agencies in a public meeting to demonstrate the Tribe's willingness to cooperate, government-to-government basis, in environmental remediation.

In 1997, the Council made a further move that was unprecedented in Alaska – it created the Yukaana Development Corporation as a for-profit tribal corporation, chartered under State of Alaska Laws. Since tribal and community members were uncertified in environmental remediation, the Tribe built its pool of qualified labor by collaborating with the Environmental Protection Agency, the Alaska Department of Environmental Conservation, laborers' and operators' unions and others to train community members. The Tribe took the lead in establishing a regional job bank for Galena and five surrounding villages.

As an environmental remediation business, Yukaana Development Corporation is meeting critical needs. Yukaana employees were able to respond to a large oil spill in a bay 1,200 miles away, an effort that earned the Louden Tribe a citation from the State of Alaska. Arctic Slope Construction, Inc. subcontracted the company to stage and compact 38,000 barrels (contaminated and uncontaminated) for removal. Yukaana Development Corporation was the major subcontractor on a $2.7 million project to clean a 10-mile radius surrounding the Galena Air Force Station, and the company successfully removed 12,000 55-gallon drums and 3,200 barrels of tar products from the area. The company continues to provide environmental remediation and demolition services for the Air Force through its partnerships with the Bethel Native Corporation International and Artic Slope Construction Inc.

The Tribe, in its pursuit of self-determination, has created a self-sustaining and growing for-profit institution that offers employment opportunities in a region where such opportunities are scarce. While there is much to be done before the Louden Tribe will consider the area environmentally clean, the achievements of the Yukaana Development Corporation have already given them great success. **/END TEXTBOX**

Sovereignty in Alaska

Willie Kasayulie (Yupik)
President & CEO, Akiachak Limited
December 2004

The political realities confronting Alaska Natives are fundamentally different than those confronting other American Indians. This isn't broadly recognized; few individuals understand our politics. Alaska Natives work through many Native political organizations. Our tribal politics are very complex and they can be very confusing.

This complexity and confusion have their origins in the singular relationship of Alaska Natives and the United States government. In the 1867 treaty signed between the United States and Russia, there is a reference to the "uncivilized tribes of Alaska." At the time the United States assumed jurisdiction over Alaska, this reference established our relationship with the federal government. Alaska Natives, unlike Natives in the lower forty-eight states, never signed treaties with the federal government directly. In fact, it was in 1867, the very year in which the United States signed its treaty with Russia, that Congress formally ceased establishing treaties with tribes. Our relationship has been defined, instead, through the courts and through legislative acts, such as the *Indian Self-Determination Act,* that are directed toward tribal groups generally. It is defined, as well, through legislative acts unique to Alaska Natives such as the *Alaska Native Claims Settlement Act* (ANCSA) and the *Alaska National Interest Lands Conservation Act* (ANILCA).

Several of the legislative acts unique to Alaska Natives, such as ANCSA, were designed at a time when the majority of us hadn't realized how much common ground we share with tribes in the lower forty-eight states. Despite our differing political realities, many of the issues we confront are the same. Our leaders of today and our elders were out conducting subsistence activities or attending school; they simply hadn't recognized our common challenges. It wasn't until the early 1980s that our growing political awareness led to our increased participation in the national discussion of Native issues.

The most significant results of our growing political awareness have been our attention to issues of tribal governance and our determination to defend our tribal sovereignty. The Akiachak Native Community has been on the forefront of this struggle. Even prior to Alaska statehood, the Akiachak Native Community was organized as an Indian Reorganization Act government. Later, in the 1970s, our community incorporated as a municipal government under the State charter. In the 1980s, however, as a few of us began to bring word of tribal sovereignty and tribal jurisdiction to our community, our goal became to strengthen *tribal* governance. In 1985, through the authority of our IRA government, Akiachak placed a referendum before our residents suggesting that we dissolve our state-chartered municipality. Our residents overwhelmingly supported it; the State fought it. Over several years, we worked to convince the State. This struggle was documented in state-wide newspapers. It alerted Alaska's Natives and non-Native citizens to the issue of tribal sovereignty. Then, when Ada Deer became Assistant Secretary of the Interior, she identified two hundred and twenty-six tribes as having equal status with tribes in the lower forty-eight states. From that moment, our efforts to defend tribal sovereignty have gained momentum.

Alaska Natives' efforts to assert tribal sovereignty are complicated by our relationship with our state. Since Alaska achieved statehood in 1959, it has had a rocky relationship with tribes. Several governors, in reference to our state constitution that insists on equal treatment for all, have insisted that there simply are no tribes in Alaska. Others have tried to forge more positive relationships with

Alaska Native tribes. During his tenure, Governor Tony Knowles developed the "Millennium Agreement" to redefine tribal-state relations. Having served as mayor for a number of years before he became governor, Knowles was aware of the problems with which Natives—particularly those in urban areas—struggle. He wanted to improve relationships between the State government and tribal governments. Our current governor, however, is insisting once again that tribes don't exist or that, if we do exist, we don't have any governmental authority.

Critical issues turn on our ability to exercise governmental authority. Public safety is such as issue. Governor Knowles' public safety commissioner was an Alaska Native and understood our challenges. He understood how thin state troopers are spread in rural areas. He understood that violent episodes are usually resolved on a tribal level long before state troopers arrive in our villages. He understood how critical it is that we maintain our tribal police forces. Now, the State insists that we don't have the governmental authority to do so and compromises our safety.

Alaska Natives' efforts to assert our tribal sovereignty are further complicated by the fact that at the time of the land claims debates we weren't actively defending that sovereignty. ANCSA does not address the rights of our tribal governments. I mentioned that the tribal government of the Akiachak Native Community was incorporated as an IRA government. Under the IRA, we have a tribal government; we also have a corporate charter. The ANCSA corporations took over the responsibilities that we have the right to exercise under our tribal corporate charter. At the time of the land claims debates, the tribal governments were ignored and set aside. This is my complaint with ANCSA: the tribes were not invited to the table to be involved in the discussion of the land claims.

We have been involved in amending ANCSA. As a result of ANCSA, some confusion has existed regarding the implementation of the *Indian Self-Determination Act* in Alaska. In some instances, ANCSA corporations have actually been recognized as tribes for the purpose of contracting for BIA services under the *Indian Self-Determination Act*. Still, there has been no clear understanding as to whether these corporations have any right to exercise governmental authority. As tribal governments, we want to move away from this confusion. We want to exercise our rights to contract at the tribal level and have our authority for self-government recognized at the tribal level. These rights and authority should exist only at the tribal level, not at the regional level.

We have been working to amend ANCSA even to the point of transferring lands held by the village corporations to tribal governments. We want to exercise government authority over our traditional homelands selected by the ANCSA corporations. Akiachak Limited has authorized Akiachak Native Community regulatory authority over lands selected by the village corporation. However, when we conduct our traditional subsistence activities, we move far beyond the boundaries of the ANCSA corporation onto the federal and state lands. Forty-four million acres may sound like a lot of land allotted to Natives by ANCSA. These lands are our traditional homelands—we have always used them—and we would like to exercise regulatory authority over them. Our goal is to protect the lands in perpetuity. Our argument is that if the lands are under the control of ANCSA corporations, they may be subject to bad investments. My argument is that we are governments. Governments have a right to preside over lands - lands *and* waters.

We hope to see intertribal organizations help us assert our governmental authority. In the 1960s, the Alaska Federation of Natives (AFN) was established only to advocate for a settlement of the land claims, but in the 1980s, it turned from an exclusively corporate focus to consider tribal issues. I co-chaired AFN for one year. I suspect I was elected because of my community's interest in highlighting the issue of tribal sovereignty at the State level. However, it was in that year the delegates introduced the motion to elect co-chairs. I suspect they were concerned that AFN should maintain a balance of attending to corporate as well as tribal issues.

More recently, I've been involved in the organization of the Alaska Inter-Tribal Council (AITC), a state-wide organization consisting primarily of federally recognized tribes. The AITC advocates for tribal sovereignty. Governor Knowles worked with AITC in the development of the Millennium Agreement. Although AFN wanted to play a role, the governor and AITC were united in saying that AITC was responsible for developing the agreement. AFN represents ANCSA corporations and ANCSA corporations don't have governmental authority.

In the end, tribes need to assert our governmental authority ourselves. We've heard the phrase, "Sovereignty: Use It or Lose It." Tribes simply need to exercise their powers of governance. It will happen. The *Indian Self-Determination Act* has helped. It has assisted Alaska Natives in developing governmental infrastructure on the tribal level. Some progressive tribal governments are enacting and enforcing ordinances on lands still retained by ANCSA corporations. Some neighboring tribes are organizing consortiums to exercise the authority of tribal governments collectively.

While I believe that the assertion of tribal authority must happen at the tribal level, it is possible that Alaska Natives will exert our authority most effectively as we join together in collective governance. I entered politics on the tribal level in the Akiachak Native Community. Over time, I became involved with our regional non-profit organization, an organization that predates ANCSA. Throughout these years, I have spoken with elders from many Native communities about their perspectives on governance. Over the last decade, we have discussed a new political possibility: regional tribal government. Regional tribal governments would allow Native villages to retain their governmental authority on the local level while exerting tribal governmental authority in the place of state governmental authority through already existing regional organizational structures. Regional tribal governments would replace non-profit organizations by consolidating the administrative services of regional Native non-profit organizations. And, in doing so, regional tribal governments would realize my hope for Alaska Natives. These governments would allow us to exert our governmental authority not only over our own villages, but over those interests that extend beyond the borders of our villages.

NATIVE HAWAIIANS

- Over 400,000 U.S. citizens self-identified as Native Hawaiian in the 2000 Census. Two-thirds of these persons also identified with at least one other race. Sixty percent of Native Hawaiians live in Hawai'i, where they constituted 20 percent of the state's population. The rest lived on the U.S. mainland, primarily in the West.

- Native Hawaiians confront challenging socioeconomic conditions. On average, Native Hawaiians suffer disproportionately from poverty, unemployment, poor health, and inadequate housing compared to other ethnic groups in Hawai'i. However, compared to their American Indian counterparts on the mainland, they are also relatively better represented in the upper reaches of socioeconomic status in Hawai'i.

- Native Hawaiians have qualified like American Indians for many federal programs and services, but the United States government has not recognized Native Hawaiians as constituting a "nation-within-the-nation" the way it has American Indian tribes. In 1993, the U.S. government formally apologized to the Native Hawaiians for the 1893 overthrow of the Kingdom of Hawai'i, and the federal government and Native Hawaiians have since been in the process of reconciling via policies addressing self-determination and land restoration.

- Upon admission to statehood, the state of Hawai'i accepted responsibility for the Hawaiian Home Lands, a trust established by the Congress of the United States in 1920 for homesteads to "rehabilitate" Native Hawaiians of at least 50 percent Hawaiian "blood quantum." A 1978 amendment to the state constitution established an Office of Hawaiian Affairs (OHA) to manage and administer resources dedicated to Native Hawaiians. Subsequent legal battles have called into question the permissibility of state programs tailored to and run by Native Hawaiians.

Historical Context

The Native Hawaiian people lived on the islands in the Pacific that became the fiftieth U.S. state for over a thousand years prior to U.S. statehood. They sustained themselves on well-adapted

systems of agriculture and aquaculture.[794] Initial contact between Native Hawaiians and Europeans took place in 1778 with the arrival of Capt. James Cook. In 1810, King Kamehameha I united the islands and established the unified Kingdom of Hawai'i.

Following European contact, because of their importance to fur trade and the Pacific whaling industry, the Hawaiian Islands experienced rapid change and increased exposure to foreign trade, missionaries, and economic systems. After 1870, and with the establishment of lucrative sugar cane plantations and the decline of whaling, the monarchy of Hawai'i experienced an influx of labor from Asia and the Philippines.[795] There was also increased diplomatic pressure from European nations seeking to add the wealth of the islands to their empires. Over a period of 60 years between the 1820s and the 1880s, the United States entered into several treaties of peace, friendship and commerce with the Kingdom, recognizing the Kingdom's status as an independent sovereign.

During the late 19th century, however, the Western influence over the Kingdom of Hawai'i intensified, and in 1893, the American and European plantation owners—acting in concert with the U.S. Minister and military forces—moved to seize control of the Kingdom. The plantation owners formed a Provisional Government (and its immediate successor, the Republic of Hawai'i), which claimed control over the Crown and Government lands of the Kingdom. At the invitation of the planter-led government of the Republic of Hawai'i, the United States annexed Hawai'i in 1898 without the consent of the Hawaiian people.

The annexation treaty adopted by the Republic of Hawai'i ceded the public and former crown lands of the Kingdom of Hawai'i to the United States without compensation. In annexing these lands, Congress stipulated that revenues derived from them "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[796] Then, in response to the economic deprivation experienced by many Native Hawaiians in the early territorial period, the U.S. Congress passed the *Hawaiian Homes Commission Act* of 1921, which set aside more than 200,000 acres drawn from the "Ceded" lands to be reserved for homesteads for Native Hawaiians of at least 50 percent Hawaiian "blood quantum." Ever since, the Ceded lands and of the Hawaiian Home Lands have remained sources of controversy between Native Hawaiians, the state of Hawai'i, and the United States government.

Who Are Native Hawaiians?

The 1990 Census counted 211,000 self-identified Native Hawaiians living in the United States, of whom 140,000 lived in Hawai'i. In the 2000 Census, over 400,000 U.S. citizens self-

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[794] See U.S. Department of Interior and U.S. Department of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process Between the Federal Government and Native Hawaiians*. Washington: Government Printing Office, October 2000). This report provides an excellent overview of the history of Native Hawaiians.

[795] E.C Nordyke, *The Peopling of Hawai'i*, 2ns ed. (Honolulu: University of Hawai'i Press, 1989).

[796] United States Congress, *Joint Resolution Annexing Hawaii to the United States*, 7 July 1898. http://www.hookele.com/non-hawaiians/newlands.html (28 June 2006).

identified as Native Hawaiians.[797] Of these, 66% also reported being of at least one other race, per the allowance for multi-race self-identification in the 2000 Census. Sixty percent lived in the state of Hawai'i. The largest number (153,000) lived on metropolitan Oahu Island (home to the city of Honolulu), yet the Neighbor Islands had a larger Native Hawaiian population share (26% vs. 17% for Oahu). Native Hawaiians were one-fifth of the State's population in the 2000 Census and had a median age of 25 (compared to a median age of 36 for all Hawaiian residents).[798]

Because of the high rate of intermarriage between Native Hawaiians and others, the issue of who is a Native Hawaiian is a focus of debate. Methods of classification are varied. For example:

- The U.S. Census now relies upon self-identification for determining the Native Hawaiian population.

- In the state of Hawai'i, birth certificates indicating Native Hawaiian ancestry are issued without regard to blood-quantum, and are issued if either parent indicates Hawaiian or part-Hawaiian ancestry.

- The *Hawaiian Homes Commission Act of 1921* created a specific class of beneficiaries, Native Hawaiians, defined "as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

- The *Hawaiian Apology Resolution*, passed by Congress in 1993, identifies "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i..."

- Native Hawaiian culture traditionally considers genealogy to be the determining factor in defining membership in the Native Hawaiian community. Other practices, such as *hanai* (adoption) and apprenticeship with cultural masters, have brought non-Natives into the Native community.

In 1984, the Office of Hawaiian Affairs (OHA), a state agency that serves Native Hawaiians regardless of percentage Hawaiian ancestry, conducted the only contemporary survey on the blood quantum of Native Hawaiians.[799] This survey found that 39% of 208,000 persons surveyed reported a Native blood quantum of greater than 50%, with a much smaller proportion reported for those younger than 20 years old. These figures were not verified by documentation, as would be required of homesteaders applying to the Department of Hawaiian Home Lands (DHHL) for land. Another OHA survey found that among Native Hawaiians, 68% disagreed with the 50% blood quantum requirement, while 19% strongly agreed with the requirement. Questions about the appropriate quantum found support for significantly lower levels, ranging from "a drop of Hawaiian blood" to 12.5%, 25-30%, and less than 50%.

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[797] U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2000*. (Washington: Government Printing Office, 2001). http://www.census.gov/prod/2001pubs/c2kbr01-14.pdf (28 June 2006).

[798] U.S. Census Bureau, Census 2000 Summary File 3.

[799] Office of Hawaiian Affairs. *Population Survey / Needs Assessment. Final Report*. Washington: Government Printing Office, 1986). http://www.oha.org/databook/databook1996_1998/tab1-14.98.html (28 June 2006).

In 2000, the U.S. Departments of Justice and the Interior articulated their preference for dealing with the issue of membership and identity: "In the Departments' view, it would be preferable to empower the Native Hawaiian people to develop a community membership rule, consistent with federal law. Congress could then use Native Hawaiian membership in place of current statutory definitions, while still respecting the specific trust established by the Home Commission Act for persons with qualifying 50% Hawaiian ancestry."[800]

Although most discussions of Native Hawaiians focus on the Native population within the islands of Hawai'i, over 160,000 Native Hawaiians live in the mainland United States according to the 2000 Census. The states of California (60,000), Washington (13,500), Nevada (8,300), and Texas (7,800) have the largest numbers of Native Hawaiians on the mainland.

Current Conditions

As is the case for American Indians in the United States, Native Hawaiians are on average disadvantaged relative to most other population groups in Hawai'i in measures of socio-economic status, health, and housing. This disadvantage, however, is not as large as that experienced by American Indians. And, while Native Hawaiians are statistically over-represented at the lower end of the income and education distributions, they are also comparatively well represented at the higher end of the socioeconomic continuum within the State of Hawai'i. Native Hawaiians also do not concentrate in as many pockets of isolated poverty as are found in some rural communities of American Indians.

- *Work and Income*: In 2003, approximately 14% of Native Hawaiian households had incomes less than $20,000 per year, compared to 11% for all Hawaiian households.[801] In the 2000 U.S. Census, the Native Hawaiian poverty rate was 16%, compared to 11% for the State's overall all-races population. Per capita income for Native Hawaiians ($14,200) was just 66% of the State-wide per capita figure ($21,500). The 2000 Census unemployment rate for Native Hawaiians in the civilian labor force was 9.8%, compared to the state's overall unemployment rate of 6.2%. In 2000, 28% of welfare recipients in Hawai'i were Native Hawaiians.[802] Some of the relative position of Native Hawaiians—about 30%—is attributable to their much younger age structure, and the remainder to other causes.

- *Housing*: Native Hawaiians were over-represented among the homeless in 2000 (30%) and in public housing in 1998 (24%), compared to their share of the state's population (20%).[803] Among Native Hawaiian householders in 2000, 47% had one or more housing problems for which information is collected in the Census: incomplete plumbing or kitchen facilities, crowding (persons per room 1), or affordability

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[800] Office of Hawaiian Affairs, *2002 Native Hawaiian Data Book: Statistical Profile of the Hawaiian Population in Hawai'i*. Washington: Government Printing Office, 2002; U.S. Department of Interior and U.S. Department of Justice, *From Mauka to Makai*.

[801] Office of Hawaiian Affairs, *2006 Native Hawaiian Data Book*, 160-61.

[802] U.S. Census Bureau, Census 2000 Summary File 3.

[803] Office of Hawaiian Affairs, *2002 Native Hawaiian Data Book*, 34-35.

(housing costs 35% of household income). The housing problem rate for Native Hawaiian households was 31% higher than that for other households in Hawai'i.[804]

- *Education*: In 2000, Native Hawaiian adults age 25 or older living in Hawai'i were slightly more likely than the state's adult population to be high school graduates (87% vs. 86%). However, they were much less likely to have attended college (42% vs. 56%) or to have received a Bachelor's or graduate degree (13% vs. 26%).[805]

- *Health*: On the positive side, Native Hawaiians suffer from arthritis and high cholesterol at rates much lower than the state average.[806] On the other hand, Native Hawaiians have the highest rate of cancer mortality of any ethnic group in Hawai'i.[807] In 2004, resident infant deaths were higher for Native Hawaiians than any other ethnicity polled in the state.[808] Native Hawaiians lead the state by a wide margin in the percentage of live births with inadequate prenatal care and the percentage of live births to unwed mothers in 2000.[809] As of 2003, Native Hawaiians had higher rates of asthma and diabetes than the rest of the state. Native Hawaiian teenagers in the 12th grade have higher lifetime rates of alcohol and drug use than the rest of the state's teenagers.[810] All told, Native Hawaiians had the shortest life expectancy at birth of any ethnic group in Hawaii for virtually the entire second half of the twentieth century.[811]

- *Public Safety*: As of 2005, 38% of the inmate population in Hawai'i was Native Hawaiian, far higher than any other ethnic group.[812] In terms of crime and the

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804 U.S. Census Bureau, Census 2000 Summary File 3.

805 Ibid.

806 Ibid., 18.

807 Cancer Research Center of Hawai'i, and Hawai'i Department of Health, *Hawai'i Cancer Facts and Figures 2003-2004: A sourcebook for planning and implementing programs for cancer prevention and control* (Honolulu, HI: American Cancer Society, 2003), 13.

808 Hawai'i State Department of Health. *Vital Statistics Report*. http://www.Hawai'i.gov/health/statistics/vital-statistics/index.html/vr_04/infant.pdf, Table 60 (27 October 2005).

809 Office of Hawaiian Affairs, *2002 Native Hawaiian Data Book*, 17.

810 Ibid., 19.

811 Hawai'i State Department of Business, Economic Development, and Tourism, *State of Hawai'i Data Book, A Statistical Abstract* (2002), Table 2.11. http://www3.hawaii.gov/DBEDT/images/User_FilesImages/databook/db04/sec02_a1877.pdf (28 October 2005).

812 Office of Hawaiian Affairs, *2006 Native Hawaiian Data Book*, 170.

criminal justice system, Native Hawaiians constitute 27% of all arrests.[813] Native Hawaiian juveniles accounted for more than 36% of all juvenile arrests, as of 2003.[814]

Native Hawaiian Policy and Governance

A primary point of contrast between the political status of Native Hawaiians and American Indians is that Native Hawaiians have not had federal recognition as nations with sovereign nation-within-the-nation status, Instead, Hawai'i developed a system of Native Hawaiian-controlled programs serving Native Hawaiian needs from within the framework of state government. As discussed below, the U.S. Supreme Court decision in 2000 in *Rice v. Cayetano* called these arrangements into question over concerns that they were race-based, and thereby put the future of Native Hawaiian policy in doubt.[815]

The assumption of state responsibility for the administration of programs for Native Hawaiians was written into the federal *Hawai'i Admission Act* of 1959, by which Hawai'i was admitted as the 50th U.S. state. This act assigned the administration of the trust responsibility to Native Hawaiians that had been created by Congress through the *Hawaiian Homes Commission Act* of 1920 to the state government. The *Admission Act* also transferred the Ceded Lands to the state, at the same time requiring the state to use the revenue from these lands for five specific purposes, including to benefit Native Hawaiians as defined by the *Home Lands Act* (that is, with a 50% Hawaiian blood quantum requirement).

In 1978, a Constitutional Convention held to review and revise the Hawai'i State Constitution adopted an amendment that provided Native Hawaiians, without respect to percentage of Hawaiian ancestry, a *pro rata* 20% share of the millions in annual revenues collected by the state of Hawai'i from the Ceded Lands Trust.[816] The Office of Hawaiian Affairs (OHA) was created and charged with the responsibility of managing these revenues.[817] And the Hawaiian language was named as an official language of Hawai'i, along with English.

The establishment of OHA, limited as it may have been, provided the first opportunity for Native Hawaiians to regain control of their affairs. Among other things, OHA created a board of nine Native Hawaiian trustees who manage property as a trust for Native Hawaiians. Ongoing lawsuits by OHA to recover funds from the state that had been earned from these lands raised controversy over the extent of OHA's entitlement to income from state lands. In 1997, the Hawai'i State Legislature appropriated funds in order for the Department of Land and Natural Resources (DNLR) and OHA to conduct a Ceded Lands inventory so as to begin to resolve the issue. However, no agreement could be reached between the DLNR and OHA on how to conduct the inventory, and the funds lapsed. As of mid-2006, the United States had not substantially enforced the trust protections against the state of Hawai'i under the *Admissions Act*.

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[813] Ibid., 176.

[814] Ibid., *2006 Native Hawaiian Data Book*, 177.

[815] *Rice v. Cayetano*, 528 US 495. (S.Ct. 2000).

[816] *Act 273* in 1980 and *Act 304* in 1990.

[817] See "Office of Hawaiian Affairs." http://www.oha.org (28 June 2006).

The Hawai'i Department of Hawaiian Home Lands (DHHL) is another state agency that serves the needs of Native Hawaiians. DHHL facilitates the use of the Home Lands created by the *Hawaiian Homes Commission Act* of 1920. Though some of the Home Lands are leased to Native Hawaiians for agricultural uses, DHHL makes improved house lots available to Native Hawaiians who are qualified by their 50% Hawaiian ancestry for a homestead lease. A would-be homeowner under the program is financially responsible for the construction of the house, or purchases a "turnkey" house in a DHHL organized development.

The distribution of lands by DHHL has not always gone according to plan. Some of the land has been allocated under long-term leases with non-Native tenants or used for public purposes not related to the trust's beneficiaries. Some land is inappropriate for housing because it is distant from urban employment centers or because it is cost-prohibitive to provide infrastructure. Through the decades, DHHL has not been provided with a consistent funding stream adequate for development sufficient to meet demand from qualified beneficiaries. Many eligible but economically disadvantaged Native Hawaiian beneficiaries have also lacked the resources to pay for a mortgage on a house on the Home Lands. Because the house lots are trust lands that are leased to the Native Hawaiian home owners and cannot be repossessed, commercial mortgage lenders are discouraged from offering mortgages on homestead housing. Consequently, there is a long waiting list for housing, and the provision of lots for new homes has been excruciatingly slow.[818] The 2000 Census counted 18,600 Native Hawaiians living on Hawaiian Home Lands, or about 8% of the state's Native Hawaiian population.

Since the 1970s, the United States Congress has passed various legislation to address specific problems concerning the education and health of Native Hawaiians.[819] For example, the *Native Hawaiian Education Act* of 1988 funded Native Hawaiian schools and education councils to promote special education programs for Native students.[820] The *Native Hawaiian Health Care Improvement Act* of 1988 established a health care support system, Papa Ola Lokahi, which focuses on the health needs of Native Hawaiians by providing education, research, and support services to traditional and mainstream health care providers.[821]

The 1993 passage of Public Law 103-150 represented a move to further recognize the responsibility of the federal government to Native Hawaiians. The Congressional resolution—informally the *Apology Resolution*—was enacted as a commitment to pursue "reconciliation" between the United States and the Native Hawaiian people. The Resolution was the first official federal

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[818] Maris Mikelsons and Karl Eschbach, *Housing Problems and Needs of Native Hawaiians*, U.S. Department of Housing and Urban Development. Office of Policy Development and Research HUD-1573-PDR. Washington: Government Printing Office, 1996.

[819] Although special legislation identified Native Hawaiians as an indigenous people, it was not until 1974 that Native Hawaiians began to be included in legislation designed to benefit other Natives, i.e., American Indians and Alaska Natives.

[820] *Native Hawaiian Education Act* 20 USC §7902 and *Native Hawaiian Health Care Act* 42 USC §1701 (HHCA).

[821] See "Papa Ola Lokahi" http://www.papaolalokahi.org (28 June 2006).

acknowledgement of the United States' complicity in the overthrow the Kingdom of Hawai'i and the denial of Native Hawaiian rights to self-determination.[822]

The *Apology Resolution* was followed in 1995 by passage of the federal *Hawaiian Home Lands Recovery Act* (HHLRA). Pursuant to the Act, the state is in the process of identifying and returning or compensating for any federal lands that were originally part of the homelands set aside in 1921, but that have subsequently been lost.[823] In December 1999, a delegation of U.S. officials met with the Native Hawaiian community to discuss the reconciliation process between the federal government and Native Hawaiians. In more than 40 hours of public statements, 265 Native and non-Native Hawaiian individuals and organizations identified key issues of concern (Figure 28).

Figure 28
Top Concerns of Native Hawaiians for Reconciliation with the United States

Topic	Count	% of Respondents
Sovereignty	75	29
Land & Natural Resources	63	24
Education	55	22
Health	52	20
Community & Economic Development	47	19
Housing	43	17
Self-Determination	43	17
Anti-Reconciliation	18	7
Nation-within-a-Nation	15	6

Source: U.S. Departments of Interior and Justice. *From Mauka to Makai: The River of Justice Must Flow Freely. Report on the Reconciliation Process Between the Federal Government and Native Hawaiians.* (Washington: Government Printing Office, October 2000), 16.

Nearly a year later, the U.S. Departments of Interior and Justice released a draft reconciliation report entitled, *From Mauka to Makai: The River of Justice Must Flow Freely.* The report recognized the concerns of the public, addressed the steps towards reconciliation, and identified the goals of establishing full self-determination for Native Hawaiians. In the words of the report:

> *[T]*here are numerous Native Hawaiian organizations working for re-establishment and recognition of a sovereign Native Hawaiian nation. These organizations seek to improve and uplift Native Hawaiian health, education, and standards of living and to protect religious and cultural customs, beliefs and practices. In the last fifteen years there has been a wide-ranging discussion on the issue of Native Hawaiian self-determination and sovereignty. There are many views on the definition and strategies

[822] U.S. Public Law 103-150. 103rd Cong., 1st sess., 23 November 1993. *Joint Resolution 19.* http://www.Hawai'i-nation.org/publawall.html (October 28, 2005).

[823] This was in part a follow-up to a federal-state task force in 1983 that had examined the issue of the homelands and the problems associated with the homelands, including inappropriate withdrawals of homelands from the trust. The state in response returned land to the trust and paid for use of some of the homelands.

> for sovereignty. Many people agree that self-determination, whatever the form, is the necessary outcome of the reconciliation process. The reestablishment and recognition of a government provides the framework for Native Hawaiians to address their most pressing political, health, economic, social, and cultural needs.[824]

Despite apparent progress of the reconciliation discussions in the 1990s, a series of more recent court decisions has called into question the state-based form of self-determination for Native Hawaiians. Non-Hawaiians have challenged state and non-governmental programs targeted at Native Hawaiians, arguing that they are impermissibly race-based. The U.S. Supreme Court agreed when it ruled in *Rice v. Cayetano* that the restriction of voting for OHA Trustees to Native Hawaiians alone violated the Fifteenth Amendment to the U.S. Constitution.[825] In part, the Supreme Court found that because Native Hawaiians are not federally recognized in the same manner as many American Indian tribes, the state had no authority to restrict the franchise for OHA trustees—a state agency rather than a recognized tribal government—to membership in the Hawaiian ancestry population. Under this precedent, the restriction that OHA Trustees be Native Hawaiians was subsequently eliminated. Lawsuits challenging the maintenance of state programs serving Native Hawaiians exclusively are in progress, but have met with no success.[826]

Affecting the non-governmental sector, a related set of court cases have sought to change the admissions policies of Kamehameha Schools, a trust established by a member of the Native Hawaiian royal family in the 19th century. The trust was established to support schools for the education and betterment of Native Hawaiian youth. Kamehameha Schools is the largest of several trusts established to benefit Native Hawaiians, and holds assets now valued in the billions of dollars. Kamehameha Schools restricts its services primarily to students with proven Hawaiian ancestry. This policy has been challenged in lawsuits as impermissibly race-based, and in August 2005 the federal Ninth Circuit Court of Appeals agreed. Upon rehearing, however, the Ninth Circuit ruled in December 2006 that Kamehameha Schools could favor Native Hawaiians in its admission policies.[827]

Faced with vacillating judicial fortunes, some Native Hawaiians and supporters of Native Hawaiian rights have concluded that Native Hawaiians should seek status similar to the federal recognition of American Indian tribal governments. Federal recognition, it has been hoped, would eliminate challenges to state programs for Native Hawaiians by making clear that these programs are based on a recognized government. At the same time, many within the Native Hawaiian community believe that Native Hawaiians deserve a much stronger form of sovereignty than American Indian tribes have, because they perceive the overthrow of the Hawaiian monarchy and the subsequent annexation of the Hawaiian Islands to have been illegal – or even more illegal than U.S. violations of tribal treaties. Then, too, some in the Native Hawaiian community have opposed federal recognition all together. These starkly contrasting visions of the future are not readily reconciled.

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824 U.S. Department of Interior and U.S. Department of Justice, *From Macau to Makai*, 50.

825 120 S. Ct. 1044 (23 February 2000).

826 Rick Daysog, "Ruling emboldens OHA, Home Lands opponents," *Honolulu Advertiser*, 4 August 2005.

827 " Kamehameha Schools Admission Policy Upheld," *Honolulu Star-Bulletin*, http://starbulletin.com/breaking/breaking.php?id=5205 (6 December 2006)

In 2000, several groups, including OHA and the Department of Hawaiian Home Lands, met with the congressional delegation of Hawai'i to discuss drafting a federal recognition bill. The bill ultimately drafted, the *Native Hawaiian Government Reorganization Act* (also known as the "Akaka Bill" after its primary sponsor, Senator Daniel Akaka) sought – and still seeks – to advance three central purposes:

> i. [Provide] for a process for federal recognition of [a] Native Hawaiian governing entity,
>
> ii. [Establish] an office within the Department of the Interior to focus on Native Hawaiian issues and to serve as a liaison between Native Hawaiians and the federal government, and
>
> iii. [Create] an interagency coordinating group to be composed of representatives of federal agencies which administer programs and implement policies impacting Native Hawaiians.[828]

The drafted bill also specifically did not authorize Native Hawaiians to develop casinos under the auspices of the Indian Gaming Regulatory Act, nor to benefit from Bureau of Indian Affairs programs.

The Akaka Bill, as drafted, generated significant controversy inside and outside the Native Hawaiian community. Proponents of the approach contained in the bill saw federal recognition as a solution to the restriction that the *Rice v. Cayetano* decision placed on a state-sponsored agency run by and for Native Hawaiians. They also perceived it as a way of safeguarding Native Hawaiian assistance programs currently under attack and as a way of affirming that "the United States has a special political and legal responsibility to promote the welfare of Native Hawaiians."[829] Proponents argued that achieving sovereignty within the framework of federal law constituted the only realistic way to restore any level of sovereignty for Native Hawaiians.

The Akaka Bill has been reintroduced in substantially similar form several times, but has repeatedly failed to pass.[830] It has been opposed by Congressional conservatives who believe that Native Hawaiians do not meet the standard tests for recognition that Indian tribes meet, such as continuous social and political organization. In this view, the Akaka Bill essentially creates race-based privileges for Native Hawaiians.[831] Some constituencies in Hawai'i agree, and not only reject any recognition of Native Hawaiian sovereignty, but also the continuation of state programs specifically targeted to the needs of Native Hawaiians.

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[828] Office of Senator Dan Inouye, "Hawai'i Congressional Delegation Introduces Native Hawaiian Federal Recognition Bill," press release, 11 February 2003, http://inouye.senate.gov/~inouye/03pr/20030211pr03.html (28 October 2005).

[829] "Native Hawaiians" http://www.nativehawaiians.com (28 June 2006).

[830] Derek Ferrar, "Senate Vote Falls Short on Alaska Bill," Office of Hawaiian Affairs, 7 June, 2006. http://www.oha.org/ (28 June 2006).

[831] United States Senate Republican Policy Committee. *Why Congress Must Reject Race-Based Government For Native Hawaiians.* (Washington: Republican Policy Committee, 22 June, 2005).

As noted, many Native Hawaiians have also opposed the idea of federal recognition of Native Hawaiian sovereignty under the Akaka Bill model because they advocate a stronger form of self-determination. The *Native Hawaiian Government Reorganization Act*, as originally drafted, would give Congress "plenary power over Native Hawaiians," with wording in the draft bill specifying "self-determination under the full and exclusive power of the U.S. Congress."[832] The bill as introduced in its 2005 version clearly contemplates a "government-to-government" relationship akin to the tribal-federal standard.[833] The Native Hawaiians critical of the bill believe that measures that go further–such as the decolonization of Hawai'i or outright independence—are more appropriate and morally supportable.

In addition to supporting the push for federal recognition, OHA has supported registration of Native Hawaiians as potential voting members of a Native Hawaiian nation, whatever form that might take. "Kau Inoa: To Build a Nation," was officially launched on January 17th, 2004, the 111th anniversary of the overthrow of the Hawaiian monarchy. According to OHA, the registration movement is a "Hawaiian community initiative" separate from the Akaka Bill and proceeding independently of that bill's political fortunes.

Under the initiative, Native Hawaiians self-register for enrollment under no minimum blood quantum requirement, but with "documented verification of indigenous Hawaiian ancestry." As of 2005, Hawai'i Maoli Inc., a nonprofit arm of the Association of Hawaiian Civic Clubs, was keeping track of registration records and monitoring the progress of participation. Some opponents to the Akaka Bill were skeptical of the Kau Inoa registration process, believing that it was essentially an effort to muster support for federal recognition as the appropriate form of Native Hawaiian self-determination. Even so, many Akaka Bill skeptics encouraged participation in the enrollment process because it appeared to be essential to whatever form self-determination might eventually take.

The persistence of controversy inside and outside the Native Hawaiian community shows that the blueprint for determining and implementing Native Hawaiian self-government and public service delivery has yet to be elaborated and agreed upon. Many Native Hawaiians indicate that they would prefer to engage in a comprehensive process of informed and inclusive self-determination even if it were to take many years, rather than be rushed into a settlement with the United States government.

On the other hand, significant numbers of Native Hawaiian leaders feel strongly that the issues should be resolved swiftly and that the proposed Akaka Bill offers an appropriate framework for self-determination that is politically and functionally practicable. As the experience of American Indians on the mainland U.S. indicates, the way this impassioned debate comes to be resolved promises to influence the not only the expression of Native Hawaiian sovereignty and the future of Native Hawaiian relationships with the United States, but also the future socioeconomic trajectory of the descendants of the Kingdom of Hawai'i.

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[832] Kauanui, J. Kehaulani, "Taking the Apology Seriously" Honolulu Weekly 12, no. 5 (30 January 2002). http://www.honoluluweekly.com (28 June 2006).

[833] United States Senate, *Native Hawaiian Government Reorganization Act of 2005*, S. 147, http://akaka.senate.gov/akakaBill/s147markup.pdf.

URBAN INDIANS

- While the socioeconomic status of off-reservation, urban-based Indians is better than that experienced by their on-reservation counterparts, they suffer from high rates of socioeconomic distress relative to the U.S. average. Indicators of income, education, unemployment, and health show urban Indians at a substantial disadvantage to U.S.-wide and urban all-race averages.

- Despite demonstrated needs, urban Indians are under-served by federal Indian assistance programs, largely because federal Indian policy focuses on tribal governments and their enrolled citizens, rather than on Native American individuals more broadly. Despite acknowledged treaty obligations to serve Indians wherever they live, federal funding for urban Indians remains disproportionately low.

- Nonprofit urban Indian community centers seek to serve urban Indians in a number of major U.S. cities. Focus is on meeting needs in the areas such as health care, employment training, housing assistance, welfare support, and cultural affairs. Generally, these urban Indian centers struggle to provide services at a level comparable to what tribal and federal agencies provide to reservation-based Indians.

- Urban Indians often maintain strong ties to their tribal communities, are dispersed geographically within cities, and are more likely to self-identify as multiracial, making the task of building strong urban Indian communities difficult. Nonetheless, growing recognition by tribal governments of their urban citizens and innovation by urban nonprofits promise to raise the salience of urban Indian concerns and to focus efforts to address them.

Almost two-thirds of American Indians and Alaska Natives live outside Indian areas,[834] and almost half live in urban areas. Yet, research interest, policy attention, and funding for urban Indian

[834] The Census Bureau identifies Indian areas as: Reservations and Off-reservation Trust Lands (of federally recognized tribes), Joint Use Areas, Hawaiian Home Lands, Oklahoma Tribal Statistical Areas, Alaska Native Village Statistical Areas, Tribally Designated Statistical Areas, Reservations (of state-recognized tribes), and State Designated American Indian Statistical Areas.

concerns have lagged far behind what has been available for Indian reservations.[835] The economic opportunities motivating Indian migration to urban areas and the legacy of older assimilationist policies aimed at compelling American Indians and Alaska Natives to move to cities, the urbanization of American Indians and Alaska Natives has not resulted in elimination of the socioeconomic gaps of urban Indians relative to non-Indians.

Today the socioeconomic status of urban Indians is generally better than reservation averages, yet it is still substantially below nationwide and urban averages. The usual adjustments associated with fitting into new economic, institutional, and social systems are compounded for urbanizing Indians by lack of access to tribal programs, inadequate federal funding for urban Indian programs to fill the gap, and geographic and other barriers to urban Indian community formation. Native Americans living in cities find that problems of on-reservation life are not left behind simply because they reside in an urban, off-reservation environment. More needs to be done to understand and address why.

History

Urbanization is not a modern and solely Anglo-European phenomenon. Long before European contact, large and dense concentrations of Native peoples lived in Cahokia, Chaco Canyon, and elsewhere in what is now the U.S. In their primes, these city populations rivaled the largest in Europe at the time in terms of stability, organization, and vibrancy. The onslaught of disease, warfare, suppression of Indian rights, and economic devastation following contact, however, effectively decimated historic the vast majority of Native urban communities.

Contemporary Native American urbanization has generally followed the broader twentieth-century pattern: Indians have moved to cities to take advantage of economic opportunities, paralleling the experience of many African Americans, European immigrants, and previously rural Americans. In the termination era of the 1950s and 1960s, natural processes of urbanization were accelerated by deliberate federal policy. BIA relocation programs that had been conducted at the reservation level through the 1940s evolved into a wholesale national policy orchestrated by Field Relocation Offices in Denver, Salt Lake City, Los Angeles, Chicago, Oakland, San Jose, Dallas, San Francisco, Seattle, Tulsa, Oklahoma City, and Cleveland. These centers sought to support and entice termination by offering placement and training services to migrating Indians.[836]

The *Indian Vocational Training Act of 1956* provided training in urban areas and near reservations, and trainees were either deliberately encouraged or forced by economic realities to move to cities to capitalize on newly acquired skills. By the mid-1970s, 160,000 Indians had passed through the BIA's relocation program, and the overall effect of encouraged and natural migration was that the growth rate of the urban Indian population in the 1950s and 1960s exceeded that of the national Indian population by a factor of three.[837]

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[835] For commentary on and redress of the relative lack of research attention, see the *American Indian Culture and Research Journal Special Edition: American Indians and the Urban Experience* 22, no. 4 (1998).

[836] Stephen Cornell, *Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988), 130; Thomas Kingsley, Maris Mikelsons, and Carla Herbig, *Housing Problems and Needs of American Indians and Alaska Natives* U.S. Department of Housing and Urban Development (Washington, DC: Government Printing Office, 1996), vii., 92.

[837] Cornell, *Return of the Native*, 130-132.

The Socioeconomic Status of Urban Native Americans

Migration to urban areas continued through the end of the 20th century and, today, a substantial fraction of American Indians and Alaska Natives live away from their homelands. Of the 2.4 million people who reported being American Indian or Alaska Native in the 2000 U.S. Census, almost 1.6 million (64%) lived outside Indian areas of all types (Figure 29). More than 1.1 million (45%) lived in what the U.S. Bureau of the Census defines as urbanized areas.[838] By comparison, 70% of all Americans live in these urban areas. Thus, while more Indians live outside Indian areas than in them, the Native population remains less urbanized on average than the United States as a whole.

Figure 29
Socioeconomic Features of Urban and Other Off-Reservation Indians, 2000

	Population		College Attainment	Unem-ployment	Income per Capita	Age 20-64
	(000)	%	%	%	($1999)	%
Indian*						
On Reservations	512	21%	12%	22%	$7,959	49%
In All Indian Areas‡	879	36%	13%	16%	$9,435	51%
Urbanized Areas	1,110	45%	21%	10%	$15,312	62%
Outside Indian Areas	1,568	64%	20%	10%	$14,832	61%
U.S.-wide	2,448	100%	18%	12%	$12,893	58%
All Americans						
Urbanized Areas	195,815	70%	34%	6.0%	$22,736	60%
U.S.-wide	281,422	100%	31%	5.7%	$21,587	59%

* Self-identified American Indian and Alaska Native alone (i.e., not in combination with any other racial category). Note that these geographic categories overlap: some reservations and Indian areas include urban areas.
‡ See footnote 834.
Source: U.S. Census Bureau, Census 2000 Summary File 3.

The economic status of urban Indians lags general population indicators, yet leads reservation and Indian area averages (Figure 29). For example, the proportion of Native adults age twenty-five and over with an Associate's degree or higher is greater in urbanized areas (21%) than on reservations (12%), but lower than the U.S.-wide urban and national averages (34% and 31%). The same pattern holds for unemployment and income: urban Indian status is between the reservation and city averages. The final column in Figure 29 suggests why: The urban proportion of Indians in the prime earning years is indistinguishable from (even slightly higher than) the national averages, whereas in reservation and Indian areas, the population balance is shifted substantially toward the younger and older years. That Indians in their prime earning years are relatively concentrated in urban areas and

838 Urbanized areas consist of "a central place(s) and adjacent territory with a general population density of at least 1,000 people per square mile of land area that together have a minimum residential population of at least 50,000 people." U.S. Bureau of the Census, Census 2000 Glossary, http://factfinder.census.gov (13 July 2005). Note that neither are all reservation areas nor all Indian reservations are rural. About one-fifth of Indians on reservations live in areas classified as urban by the U.S. Census (Taylor and Kalt, *American Indians on Reservations,* 4-5), and the city of Tulsa, OK is contained within an Oklahoma Tribal Statistical Area (OTSA).

not on the reservations is evidence that substantial economic incentives to migrate still exist. "Brain drain" is as much a risk for a Native nation with a struggling economy and unstable political environment as it is for developing nations around the world.

The relative economic deficits borne by urban Indians have counterparts in the social and health status indicators. Urban Indians experience 38% higher accidental death rates, 126% higher cirrhosis and chronic liver disease death rates, 54% higher diabetes death rates, and 178% higher alcohol-related death rates than the general U.S. population. Urban Indian mothers are less likely than average to give birth to low-birth weight babies, but they are 80% more likely to be under 18 years of age, 73% more likely to be single mothers, 13% more likely to deliver prematurely, 115% more likely to have late or missing prenatal care, and 61% more likely to smoke during pregnancy.[839] Taken together with the economic indicators in Figure 29, it is clear that urbanization alone does not constitute disassociation with the tough conditions that so many reservations endure.

Interestingly, the number of self-identified racial categories accompanying self-identification as "Native" rises as the analysis of population moves from the reservation toward the metropolis. Across all reservations, the difference between the number of Indians who self-identify with a single-racial category (AIAN alone) and the number who report one or more (AIAN alone and in combination with one or more) is less than two percent, and there are no reservations where Indians report more than one additional (i.e., non-Native) racial category.[840] Only 8% of the 1.9 million people who self-identified as American Indian or Alaska Native in combination with one or more other racial categories lived in tribal areas (reservations and Indian statistical areas).[841]

In urban areas, on the other hand, the frequency of multi-racial self-identification rises the further one looks from Indian Country. In the five U.S. cities with the highest proportion of Indians (Anchorage, Tulsa, Oklahoma, Albuquerque, Green Bay)—cities which are surrounded by Indian reservations and Indian areas—the number who self-identify with one or more other racial categories is between twenty and forty percent. The Phoenix metropolitan area—home to four major reservations itself—holds the third-largest urban Indian population, and about one-quarter of that population self-identifies with multiple racial categories.[842] In New York and Los Angeles—the cities with the first and second largest Indian populations—the ratio rises still higher: 55% of Native Americans in New York and 43% in Los Angeles are self-described as multi-racial. In Philadelphia and Detroit, the proportion is even higher—on the order of two-thirds. In sum, multiracial identification rises as the distance from Native homelands grows.

Urban Indian communities are also characterized by geographic fluidity and dispersion. It is common for significant numbers of American Indians and Alaska Natives to alternate residences

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839 Urban Indian Health Institute, *The Health Status of Urban American Indians and Alaska Natives* (Seattle, WA: March 2004), v.

840 U.S. Census Bureau, Census 2000 Summary Tape 4.

841 Stella U. Ogunwole and Jesse D. McKinnon, "What Do We Know About American Indians and Alaska Natives Living Outside American Indian and Alaska Native Areas?" paper prepared by the Racial Statistics Branch, Population Division, U.S. Census Bureau and presented at the American Sociological Association conference, August 2004, 5.

842 Calculations derived from Stella U. Ogunwole, *The American Indian and Alaska Native Population: 2000* (Washington, D.C.: Bureau of the Census, 2000), Table 3 and Figure 4.

between cities and tribal areas. This practice helps families maximize scarce social, medical and economic resources and may also be associated with seasonal work patterns. Research indicates that urban Indians commonly undertake living arrangements in which individuals stay with a rotating set of family and friends in different locations.[843] Urban Indian households themselves are also mobile. Thirty-seven percent of Indian households in central cities moved to a different house within the same county from 1985 to 1990, whereas only thirty percent of non-Indian households did so. Similarly, twenty-two percent of such Indian households moved to different counties, while only twelve percent of non-Indian households did.[844]

The relocation policies and organic migration of the post-WWII period did not result in substantial enclaves; there are not substantial Native analogues to the Little Italies and Chinatowns that other groups created. Rather, Native migration to the cities tended to result in relatively in more dispersed populations within cities (see the essay below by Sydney Beane). Coupled with a general pattern of repeated urban Indian visitation to Indian homelands for pow-wows, ceremonies, funerals and family reunions, these demographic patterns mean that the formation of Native community in urban areas takes on a different character and is more difficult to orchestrate than in other ethnic urban communities.

Finally, urban Indians often experience isolation in the urban environment. Rural isolation attendant to reservation living is well documented and widely acknowledged. Yet, contrary to popular conception, moving to an urban setting does not readily solve problems of isolation for Native Americans. The challenges of Native urbanization are well-known, for example, for the case of Indian college students who enroll in urban-area colleges, but then drop out upon finding the environment to be so foreign and unaccommodating.[845] The broader non-Indian community often does not understand or appreciate the challenges confronted by Indians who have migrated into the city. And stereotypes and misconceptions, such as the myth of "all Indians being taken care of by the federal government", persist in the city and among city officials despite its inaccuracy there as elsewhere.[846]

In sum, as with peoples the world over, urban life has its attractions for Native Americans—attractions sufficient to cause many to move their households. Yet, urbanization does not allow all the problems of reservation poverty, ill-health, and isolation to be left behind.

Policy Considerations

Federal Indian policy overwhelmingly focuses on tribal governments and reservations, rather than on Native American individuals. When an individual Indian lives off-reservation, treaty rights

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[843] See Susan Lobo, *Urban Voices: The Bay Area American Indian Community* (Tucson: Arizona Press, 2002); Susan Lobo and Kurt Peters, *American Indians and the Urban Experience* (Walnut Creek, CA: Altamira Press, 2001).

[844] Kingsley, Mikelsons, and Herbig, 94-96.

[845] See, for example, Robin Butterfield, "Blueprints for Indian Education: Improving Mainstream Schooling," Education Resources Information Center, http://www.ael.org/eric/digests/edorc942.htm (28 June 2006); Ruey-Lin Lin, Deborah LaCounte, and Jeanne Eder, "A Study Of Native American Students In A Predominantly White College," *Journal of American Indian Education* 27:3 (May 1988).

[846] Communication with Sydney Beane, Senior Community Development Specialist at the Center for Community Change.

ostensibly still attach to the individual Indian and remain in place in the non-reservation environment. However, many Native Americans who reside in urban areas find that they are effectively cut off from support systems and social programs that are available, however modest, on their home reservations. The lack of services for Native individuals who leave the reservations for cities is a major concern, and individual American Indians have fought for such services, even to the point of litigation.

The relative lack of services for off-reservation tribal citizens raises a fundamental question about the rights and treaties upon which much federal assistance to Indians is predicated: Which treaty obligations and other rights apply collectively and which apply individually? The question generates controversy since federal funding constraints effectively create a zero-sum conflict between urban Indians and Indians residing on or near the reservation and being served by tribes.[847] The federal emphasis on the government-to-government relationship with the tribes appropriately recognizes the sovereign status of Indian nations. At the same time, however, it makes the federal government ill-disposed to serve a large contingent of Indian individuals, many of whom the federal government encouraged to move to cities. Substantial numbers of urban Indians and advocates see a perverse irony in this controversy: The rapid growth of the urban Indian population that is now underserved was the deliberate objective of federal relocation policy.

Indian Health Service care provides a case in point. Urban Indians suffer from inadequate access to quality health care despite high levels of healthcare needs and a federally-acknowledged IHS duty to serve urban Indians.[848] Despite the large proportion of Indians living in cities (Figure 29), IHS funding to service this population accounts for only 1% of the annual IHS budget.[849] To be sure, a substantial number of urban Indians by traveling home to access health care from their reservation-based or regional IHS clinics. And beginning 1976 (two decades after the creation of the IHS), some formal appropriations have finally flowed to IHS urban programs.[850]

Today, the IHS funds 34 urban Indian health organizations operating around the country. These programs undertake a number of activities, including the provision of outreach and referral services, dental services, comprehensive primary care services, limited primary care services, community health outreach, substance abuse (in- and outpatient services), behavioral health services,

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[847] Communication with Sydney Beane, Senior Community Development Specialist at the Center for Community Change.

[848] The IHS has a responsibility to "eliminate barriers, elevate health status, and reduce the health disparities among Native Americans in urban areas." U.S. Commission on Civil Rights (UCCR), *Broken Promises: Evaluating the Native Health Care System* (Washington, DC: September 2004), 69 citing IHS answers to interrogatories.

[849] Ibid., 68. See also Mary Pierpoint, "Urban Indians Want a Share of Funds," *Indian Country Today*, 19 April 2000; Statement of Ron Morton, Executive Director of the San Diego American Indian Health Center, Oversight Hearing before the Senate Committee on Indian Affairs on "A Partnership For A New Millennium: Addressing the Unmet Health Care Needs in Indian Country," 21 May 21, 1998. http://indian.senate.gov/1998hrgs/0521_rm2.htm (28 June 2006).

[850] Ralph Forquera, *Urban Indian Health* (Menlo Park, CA: Henry J. Kaiser Family Foundation, November 2001), 9.

immunizations, HIV activities, health promotion, and disease prevention.[851] Yet despite these efforts, urban service coverage is quite incomplete. The IHS estimates that current urban Indian program funding levels are less than a quarter of what they need to be, and that eighteen cities have a population large enough to justify an Urban Indian Health Program but do not have one.[852] Indians living in some major urban centers, such as New York City, have no practical access to an IHS clinic.[853]

According to a 2001 Issue Brief on the subject of health care access by urban Indians by the Henry J. Kaiser Foundation, only ten of the top twenty largest urban Indian cities have urban Indian health care programs that provide medical services, and six of the ten provide mainly referral services.[854] The authors estimate that 130,000 urban Indians are served,[855] but exactly how incomplete the coverage may be is hard to know. According to the IHS, 100,000 American Indians are not able to access hospitals, health clinics, or contract health services administered by the IHS and tribal health programs, either because they do not meet IHS eligibility criteria or because they reside outside of IHS and tribal service areas.[856]

As with much of urban Indian life, limited data and research attention have meant that policy formulation is impaired.[857] Yet, indicators such as the relatively high Native unemployment shown in Figure 29 imply that, for example, employer-provided health care is not an option for many urban Indians. This makes the failure of policy to adequately address the health care difficulties of urban Indians a substantial problem. Such policy shortcomings contribute to what the U.S. Commission on Civil Rights calls the "Quiet Crisis".[858]

Housing is another domain where the difficulty in matching policy to the needs of individual urban Indians is substantial. The relatively high cost of housing in even low-rent cities is a strain on the budgets of Native American migrants, and purchasing housing is often not a realistic option. In Los Angeles, the second most populous Indian urban center and one of the most expensive housing markets in the U.S., the 2000 Census shows that only 40% of Indian households own their own home

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851 See U.S. Indian Health Service, "Urban Indian Health Programs: Program Overview," http://www.ihs.gov/NonMedicalPrograms/Urban/Overview.asp (June 18, 2006).

852 Ibid.

853 The IHS health center nearest to New York is located in Cherokee, North Carolina, see Mark Fogarty, "Urban Indians: Hope and Hopelessness," *American Indian Report*, September 1999, 13-15.

854 Forquera, *Urban Indian Health*, 12.

855 Ibid., 10.

856 IHS-94 Activity/Mechanism Budget Summary.

857 Forquera, *Urban Indian Health* , 14.

858 U.S. Commission on Civil Rights, *Broken Promises: Evaluating the Native American Health Care System*, Washington: Government Printing Office, September 2004, 70.

compared to 50% for all other races and 60% for Whites. Nationwide, 65% of homes are owner occupied.[859]

As is the case for reservation-based Indians, the federal response to the housing needs of off-reservation Indians is coordinated through the U.S. Department of Housing and Urban Development (HUD). Yet the policies are significantly different in the urban context. Throughout the 1990s, HUD made strides in working with the Native nations on a government-to-government basis, an approach that is allowing tribal governments to take a lead role in designing policy solutions (see the Housing chapter's discussion of NAHASDA). However, since the majority of tribal governments limit services to tribal citizens living on or near the reservations, whatever benefits accrue from these federal-tribal innovations tend not to flow to urban Indians. The federal approaches to urban Indian housing are generally indistinguishable from the approaches aimed at other socioeconomically distressed urban communities. And while some states have recognized the deficiencies of federal approaches to urban Indian housing and have developed programs to support homeownership and rental costs for off-reservation Indians,[860] such policies are relatively rare.

Urban Indian Community Centers

Beginning in the 1950s, nonprofit urban Indian community centers began emerging to address the needs of American Indians living in the more populous cities of the U.S.[861] These organizations play an important role in filling many service provision gaps left behind by limited or absent private, federal and tribal efforts. In many ways, urban Indian community centers serve as a type of proxy for tribal governments, albeit with limited resources and lacking governmental jurisdiction or authority. Typically, urban Indian centers rely upon a mixture of federal, state, foundation, business, and individual donor sources for funding.

Most metropolitan centers with significant Native populations have community centers that attempt to service the needs of American Indians and Alaska Natives. These urban Indian centers' constituencies and service populations range in size. The American Indian Community House in New York City, for example, serves an estimated 27,000 Native Americans representing over 72 different tribes. The service population of the Southern California Indian Center is more than 100,000 and spans 7,000 square miles. The Native American Indian Center of Boston, Inc. serves about 6,000 Indians in eastern Massachusetts. The missions and service offerings of urban Indian centers are also diverse. Some, like the Nebraska Urban Indian Medical Center, have a specific focus (e.g., health), while others, like the Minneapolis American Indian Center or the American Indian Center of Chicago, administer a multitude of programs and services.

A sampling of the range of activities that urban Indian community centers engage in includes:

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[859] UCLA Ralph and Goldy Lewis Center for Regional Policy Studies, "American Indian Adults in Los Angeles, California & the U.S.," *Policy Brief*, April 2004. http://lewis.sppsr.ucla.edu/research/publications/policybriefs.cfm (24 August 2004).

[860] An example is the State of Minnesota, which enacted its Urban Indian Housing Program as early as 1978. See "Minnesota Housing Finance Agency." http://www.mhfa.state.mn.us/homes/Indian.htm (June 2006).

[861] One of the oldest urban Indian centers is the American Indian Center in Chicago, which began formal operations on 1 November 1953. Grant Arndt, "'Contrary to Our Way of Thinking': The Struggle for an American Indian Center in Chicago, 1946-1953," *American Indian Culture and Research Journal, Special Edition: American Indians and the Urban Experience* 22, no. 4 (1998), 117-134.

- *Employment and Training Programs.* The Minneapolis American Indian Center was established in 1975 and offers classroom training to unemployed or underemployed Indian clients within a 71-county area. In addition to providing remedial education and/or General Educational Development (GED) test preparation, the Center arranges short-term work assignments with an employment agency, and provides on-the-job training, counseling, and placement services for its clients.[862]

- *Education Programs*. Formed in 1970, the United Indians of All Tribes Foundation (Seattle, Washington) offers both Head Start and Early Childhood Education and Assistance Program (ECEAP) services to children of low-income families. The ECEAP offerings are culturally tailored to Indians, focus on the whole child, and encourage family involvement. In addition, the Foundation offers kindergarten programs that include Indian cultural activities and operates a childhood development center for developmentally delayed or disabled Native children.[863]

- *Health Services.* The American Indian Community House (New York) was created in 1969 and has a health department staffed by Community Health Representatives. These personnel focus on health education, medical and dental referrals, and the development of Native American-specific health-oriented programs. Other activities include: mental health support, a youth council and theater project, food and clothing banks, and free weekday hot lunches for all community members. The Community House also has a women's wellness project.[864]

- *Cultural and Heritage Programs and Activities*. Many urban Indian centers host community gatherings to celebrate Native American traditions. Because the constituency of nearly every urban Indian center is multi-tribal, centers often sponsor "pan-Indian" or regional intertribal powwows and other gatherings.

The summaries above do not do justice to the full diversity and creativity of urban Indian center programs. The Seattle Indian Health Board is nationally recognized for its excellent work in providing a wide range of services and functions, including family health services, chemical dependency services, and research. Some of the larger centers have foster care recruitment and placement programs. Some have programs that target urban Indians living with HIV or AIDS. Yet others have established museums, art galleries, and theaters.

The Native nations are increasingly reaching out to serve their off-reservation citizens. The award-winning Menominee Community Center of Chicago, for example, is the officially recognized institutional presence of the Menominee Tribe in that city. The Center not only provides services, but maintains formal ties between the Reservation and the Tribe's urban population. (See textbox below.) Examples like Menominee are limited, however. Often, individual Indian nations lack a critical mass of citizens in any one off-reservation locale, or lack the resources to make substantial investments in off-reservation services. Indeed, there can be such diversity among the urban Indian population in a given city that efforts are fractured and working at cross-purposes. In Minneapolis, thirty

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862 The Minneapolis American Indian Center website can be accessed at http://www.maicnet.org.

863 The United Indians of All Tribes Foundation website can be accessed at http://unitedindians.com.

864 The American Indian Community House website can be accessed at http://www.aich.org.

organizations serve urban Indians and at least ten provide health services. As one strategy for dealing with the lack of centralizing forces that might unite and strengthen urban centers, Native leaders from urban organizations focused on family well-being around the country have recently come together to form a National Urban Indian Family Coalition.

Notwithstanding their energy and creativity, the urban centers struggle to keep ahead of an assortment of issues and problems that demand a wide range of expertise. An urban center might have depth in health care provision, but not in career counseling; or it may have expertise in educational assistance referrals, but be relatively inexperienced in substance abuse counseling. The service capacity of these organizations is often hostage to uncertainty in funding. Moreover, unlike the Native nations, who have been able to use the contracting and compacting policies of the federal government to take over and build their expertise in areas dealing with reservation socioeconomic conditions, no such opportunities exist for the urban centers. They have not had the ready access to funding nor the ability to take over from others to craft distinctly Native and self-determined solutions to problems.

Self-Determination for Urban Indians

The growth of tribal powers of self-determination and the successes they have brought affect the relationship between urban Indians and the Native nations. On a demographic level, tribal self-determination has influenced the forces operating on migration. While the relative concentration of prime earning age and college educated adults in urban areas (shown in Figure 29) indicates that migration has effectuated a brain drain historically, movements in the late 1990s and early 2000s of people may be undoing that effect.

Anecdotal evidence indicates that growing reservation economies—whether driven by casinos, natural resources, or other enterprise success and stability—are attracting talented Native individuals back to the reservations. Similarly, stabilizing constitutional and institutional reforms, coupled with self-determination initiatives which have the effect of giving tribes more discretion and control over reservation budgets and programs, seem to be attracting more and more talented Indians back to work for their tribes. Indeed, the governments of tribes such as the Gila River Indian Community (Arizona), Mille Lacs Band of Ojibwe (Minnesota), the Confederated Tribes of Grand Ronde (Oregon), and the Grand Traverse Band of Ottawa and Chippewa Indians (Michigan) are now challenged to cope with rapidly expanding reservation populations seeing growth in the form of return migration.

Countervailing the positive effects of this reverse brain-drain are anecdotes suggesting that welfare recipients are returning to the reservations as term-limited benefits under welfare reform policies have begun to reduce the benefits of living off the reservations. The actual net effect of these trends is difficult to ascertain, but it is probably the case that more Indians in their prime earning years are now inclined toward the reservations than at any time in the last century.

The growth of tribal administrative sophistication under self-determination also positively influences the lives of Indians that have not moved back to the reservation. A number of tribal government initiatives begun in the 1990s directly benefit urban Indians by eschewing residency as a criterion of access to programs. Examples include distributing tribal enterprise profits per capita to citizens regardless of location, awarding college scholarships on the basis of citizenship rather than residency, and offering tribal dental benefits that are no longer limited by IHS rules to a defined service area.

There are indirect effects of improvements “back home” as well. An urban family that is sending money back to the reservation to sustain unemployed relatives may be less likely to need to

do so as on-reservation economies expand. An employed reservation resident whose job resulted from the successful exercise of sovereignty may now be able to support a child or spouse trying to get through an urban college degree program. More broadly, a stronger Indian nation provides a more robust base for personal identity and the associated benefits of greater personal and collective self-esteem, social connection, and economic success.

Future Prospects

Mobility between cities and tribal areas will continue to be a defining fact of Indian life as individuals are attracted to economic and lifestyle opportunities in cities, while seeking to remain connected with their reservation-based family, friends, and communities. At the same time, one factor of growing importance is the emergence of large numbers urban Indian families that, for the first time, are multi-generationally urban. Most urban Indians prior to the 1980s were first-generation city dwellers. Today, however, a growing number of Native Americans have been raised exclusively in metropolitan settings and do not think of themselves as having a reservation to "return" to.

How this new development will affect Indian socioeconomic outcomes or the pursuit of self-determination remains to be seen. As fortunes improve on the reservations, urban Indian pressure on tribal governments to directly share benefits, or on the federal government to meet its unmet commitments to urban Indians may well rise. Or, as urban Indians become increasingly cosmopolitan, their identification with a tribe, a reservation, and an Indian nation government may weaken and, with it, the demands on and connections to the reservation.

Despite the large number of Native Americans living in urban areas and the fact that many urban Indian families have now been in cities for multiple generations, it is important to note that American Indians and Alaska Natives display a loyalty to home-community life that is uncommonly intense for the United States. While much of the rural West is emptying, reservations display high and growing population densities. And, according to a survey of urban Indian community center directors, 64% of the Indians within their communities would prefer to relocate back to reservation areas. The reasons for dissatisfaction with urban life are varied, but include the desire to maintain family ties, to live in ancestral lands, and to practice Native religion.[865]

The pulls toward and away from Native homelands is seen in the testimony of one urban Indian individual:

> At home, people are always talking about half-breeds…blood quantum is a big issue. That isn't something that we deal with as much here [in the city]. It's more about enrollment. When I go home I always feel really welcome, but I know that I could never live there. [It was] my grandmother's and mother's dream to always move back [to the reservation]. They consider it as home. As I get older I think about it in the same way my parents do. It's hard to give up the convenience of this [city]. But I don't want to die here.[866]

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[865] Kingsley, Mikelsons, and Herbig, 96.

[866] American Indian Policy Center, "American Indians and Home Ownership" (1995), Section One: Policies and Practices. http://www.airpi.org/research/hsgsect1.html (28 June 2006).

The challenge for tribal, federal, state, and municipal policymakers in the next decade will be to ensure that urban Indians can close the socioeconomic gap with non-Indian America over a reasonable period. Urban Indian community centers will no doubt be on the front lines of this effort. But urban Indian community organizations will still have to contend with competition for uncertain funding, inchoate federal policy, varied degrees of tribal commitment to urban Indians, and a client population base that is dispersed in space and heterogeneous in identity.

Those challenges are not insurmountable, and the strength of self-determined self-rule on the reservations will be a valuable asset to mobilize in the effort. Nonetheless, past policies have not yet been adequate to effectuate the socioeconomic recovery of urban Indians and more effort and creativity will be needed. The lessons of reservation self-determination are that the requisite energy and ideas will be found within the Indian communities themselves and that outsiders should recognize their supportive, rather than directorial role, in giving life to better policies for Native Americans who reside in America’s urban areas.

TEXT BOX: Menominee Community Center of Chicago, Menominee Indian Tribe of Wisconsin

When the U.S. government terminated the status of the Menominee Tribe of Wisconsin as a federally recognized Indian nation in the late 1950s and early 1960s, many Menominee families moved to Green Bay and Milwaukee, Wisconsin, and Chicago, Illinois. Although federal recognition was restored in 1973, over half of the eight thousand Menominee tribal citizens currently live beyond their reservation boundaries and six percent of these tribal citizens live in the Chicago metropolitan area. To the regret of many Menominee, the ties between the reservation and urban populations were tenuous for decades.

Chicago-area Menominee Indians suffer from myriad economic and social hardships commonly experienced by off-reservation Native communities. The Menominee Indians living in the Chicago area experience high unemployment and those who are employed work mainly in the low-wage service sector. They have critical medical needs but oftentimes do not have access to major medical coverage. Single women head a very high percentage of households. Eighty-four percent of the Menominee Indians living in the Chicago area are at or below the poverty line. Only six percent are homeowners. Most free or low-cost services available to Indians living off-reservation remain contingent upon their return to the reservation yet for many, poverty prevents such travel: a majority of the Menominee Indians of the Chicago area resides over 250 miles from their reservation headquarters in Keshena, Wisconsin.

In 1994, the Menominee Indians of the Chicago area confronted this economic and cultural marginalization by forming a community center. Initially known as the Menominee Social Club of Chicago, its members hosted cultural gatherings and offered support services for Menominee individuals and families living in the greater Chicago area. The Club's members strongly identified themselves as Menominee and insisted on maintaining their status as full-fledged citizens of the Menominee Tribe of Wisconsin. In 1996, the Menominee Nation Tribal Council officially recognized the newly renamed Menominee Community Center of Chicago as the institutional home of the off-reservation community of the Menominee Indian Tribe.

The Center is formally a nonprofit tribal program, making it eligible for tribal funding. It is governed by a five-member Board of Directors that oversees activities and is accountable to the Menominee Legislature. The Center strengthens the relationships of its Chicago-area members by providing a full spectrum of cultural engagements as well as information about and referrals to available social service programs. The MCCC also strengthens social and political connections between the Chicago-area Menominee Indians and the Menominee Tribe. The Center organizes trips for Menominee individuals and families to go "back home" to the reservation for important cultural events and meetings. Most importantly, a line of the Menominee constitution was amended to require that the Legislature meet in Chicago biannually.

Via an innovative partnership between the active off-reservation community and the forward-looking reservation government, the Menominee are redefining what it means to be citizens of an Indian nation. As the Nation formalizes a definition of tribal citizenry that embraces off-reservation Menominees, it creates a cultural, institutional, and physical "homeland" to those who frequently long for but cannot return to their reservation lands. Together, the reservation and urban Menominee are strengthening their respective communities by reuniting their Nation across this bridge**. /END TEXTBOX**

A Different Kind of Immigrant

Sydney Beane (Flandreau Santee Sioux)
Native American Team Leader, Center for Community Change, Plymouth, Minnesota
July 2004

The experience of urban Indians demonstrates the federal government's reluctance to fully support the self-determination of Indian communities. This was evident in the 1950s when the federal policy of relocation resulted in an explosion of the urban Indian population. And, regrettably, it is still true today, several decades after the *Indian Self-Determination Act* made the self-determination of Indian reservation communities explicit federal policy.

During the 1950s, relocation was the federal government's tool for eroding self-determining Indian communities. Throughout those years, the government's policy was to withhold resources for reservation development so that Native residents had to leave their tribal lands to gain education and employment. The government intended that the individual Indians who were driven into the cities as a result of this policy would merge with the general society. The federal relocation program formalized this assimilative process by targeting cities and transporting Native residents. Although relocation ended in the 1970s with the shift in federal policy from assimilation to self-determination, this didn't mean that Congress dedicated sufficient dollars to develop self-determining Indian economies. Reservation residents still enter cities in search of jobs and educational opportunities. And, now, even though many urban Indians would return to their reservations if sufficient economic opportunities existed, others have become rooted in the cities. Over the coming decades, Indians will continue to confront the costs of requisite movement between urban centers and reservations as well as the costs of promoting the development of these separate urban and reservation communities.

The development of healthy urban Indian communities depends on the extension of the rights of self-determination from reservation-based tribes to the growing number of individual Indians in cities. Many of the services that derive from the federal-Indian relationship are already available to urban Indians. However, while laws such as the *Indian Health Care Improvement Act*, the *Workforce Investment Act*, the *Johnson O'Malley Indian Education Act*, and the *Indian Child Welfare Act* extend health care, employment services, job training, education, and child welfare to urban Indians, it is important to recognize that urban Indians do not enjoy self-determination. Several critical services, including community development services, have not been extended to urban Indians. Full self-determination will not be possible until the government extends comparable levels of assistance in the areas of housing and economic development.

Perhaps it isn't surprising that the government has never provided effective or substantial assistance to Indians in the areas of housing or economic development. This failure—on reservations and in urban centers—reflects the views of our society that Indians don't exist, that Indians aren't visible, and that Indians don't wield viable political or economic power. Even now, congressional lawmakers' own uncertainty over the future of Indian communities inhibits the economic development of reservations. And while the policies that mean to encourage economic development on reservations are certainly complex and often inconsistent, there is simply no targeted federal economic or social policy for Indians in urban areas. Urban Indians struggle towards self-determination in the absence of the organizing force of clear federal policy and without a well-defined geographic and political base in the cities.

The result is the fragmentation of urban Indian communities. While reservation-based tribes organize around tribal governments whose decision-making processes and policies respond to the needs of the entire reservation population, the urban Indian community is organized only by the delivery of various services. Contracts for service delivery are awarded as the result of a competitive process. Although competition encourages the building of capacity—Indian service organizations must demonstrate their professionalism and expertise to earn service contracts—it compromises urban Indians' efforts to pursue true community development. Indian service dollars actually divide the urban Indian community. In Minneapolis there are over thirty Indian service organizations that split the city's Indian community into various sub-communities. There is an education Indian community, a health Indian community, an employment Indian community, etc. These communities are themselves divided. At least ten of the Indian service organizations in Minneapolis provide health services. To do so, they compete for funds on the city, county, state, and federal levels. This competitive approach to community development scatters resources, making efficiency and unity increasingly difficult and effectively undermining the self-determination of urban Indian communities.

Regrettably, this failure occurs by design. As I argued initially, the relocation program had the particular goal of assimilating Indians into the general society. In a sense, Indians are among the last immigrants, but we are a different kind of immigrant. When the federal government brought us into urban areas, we weren't put into distinct neighborhoods. We were spread out. We had no opportunity to form the Chinatowns or Little Italies that earlier immigrants formed. Those immigrants moved together and, as a result, they had the opportunity to form visible and distinct geographical bases from which they could leverage economic and political power. Urban Indians, however, have found it very difficult to coalesce into communities or elect representatives to positions of power. Without the infrastructure to support our own development, our social problems have become overwhelming. Within cities, we have higher dropout rates and higher unemployment rates than other minority groups. People wonder why this is so. It is because we have been denied the economic and political power of other immigrant groups.

The focus of my work is to enhance urban Indians' economic and political power through community development strategies surrounding Indian housing and Indian economic development. To do this, I work to establish non-profit development organizations with a focus on Indian housing and community economic development. In major cities these organizations have, in turn, organized to establish the National American Indian Development Corporation. Through training and technical assistance, the National American Indian Development Corporation helps urban Indians access resources and develop housing and economic development projects. In this way, we build capacity and community simultaneously.

Capable urban Indian communities are a source of political and economic power. Initially, housing projects provide urban Indians with a substantial concentration of individuals who want employment and educational opportunities as near their homes as possible. For example, the first and only off-reservation Indian housing project in the country with Indian preference, Little Earth Housing of Minneapolis, has allowed over one thousand Indians to live within a single neighborhood—the Phillips neighborhood. Over time, such a concentration of individuals can become a powerful physical and political presence. While Little Earth Housing has succeeded in bringing these individuals together, they must now access the community economic development resources that will enable those individuals to find employment and own their own homes. As this occurs, they will become self-sufficient individuals who make up a self-sufficient community. Urban Indians who organize and demonstrate capacity in the area of community development sustain the movement toward self-sufficiency and self-determination.

As community development projects become self-sustaining and capable of leveraging their resources for additional community development projects, the urban Indian community becomes more politically and economically visible. This political and economic power enables U.S. to seek the support of our tribes to work towards the establishment of effective federal policy. For years, our need of various services has seemed to pit urban and reservation Indians against each other. However, our interests are coming into alignment. As urban Indians have organized to obtain services, we've demonstrated our need for city, county, and state resources based on our population numbers and poverty rates. We've tapped into these resources rather than reservation dollars, thus expanding the total resources available to Indians. As we've built our capacity, we've also built a bridge between urban and reservation populations. Our economic diversity creates natural linkages to reservations as tribes, too, diversify their economies into the private and non-profit sectors. Most importantly, as we've built our capacity within the areas of housing and economic development, our common concern for maintaining self-determination over our own distinct communities has brought us into alignment with our reservation counterparts. Although sovereignty is often assumed to be the right of tribes on reservations, it is, as well, a right of urban Indian communities. It is now time for the development of federal policies that provide urban Indians with housing and economic development resources based upon Indian sovereignty and self-determination.

The development of healthy urban Indian communities includes the extension of self-determination to tribal citizens in urban centers. Indians in cities and reservations have long benefited from common cultural values and are now realizing their common political and economic interests. These are the interests we must have to sustain Indian communities in cities *and* on reservations. These are the interests that urban and reservation Indians must share to preserve Native communities in this country. There is an increasing interest on the part of all Indians to be participants in the economic and political systems of this country while retaining their sovereignty. As tribes and their urban members reconnect and act together culturally and politically, we become one as Indian people.

CONCLUSION

In September 2004, the Smithsonian Institution's National Museum of the American Indian (NMAI) opened on the Mall in Washington, D.C. It stands as testimony to the renaissance underway in Native America. The museum was driven to completion by American Indian leaders exercising new-found political clout, directed by nationally prominent Indian managers and fund-raisers, and substantially underwritten by select Native nations flush with their own income from gaming and other enterprises.

Perhaps nothing is more descriptive of the form and substance of this renaissance than the manner in which the story of Native America is being presented by Native Americans through the National Museum. The opening of the Museum was celebrated by a gala evening attended by Washington dignitaries, the media, movie stars, the wealthy, and hundreds of Native leaders. The centerpiece of the evening was a showing of "En Pointe: The Lives and Legacies of Ballet's Native Americans."[867] This work by acclaimed documentary film maker Shawnee Brittan showcases the lives of five Osage, Shawnee-Peoria, Choctaw, and Cherokee prima ballerinas who rose from their roots in rural Oklahoma to the pinnacle of international stardom in the dance world of the 1950s.

Why this story at the time of honoring the nation's Indian heritage? Why ballerinas taking New York and Paris by storm in the 20th century? Where were the iconic symbols of earlier centuries that mainstream America associates with "Indian" – warriors, headdresses, the bison? To be sure, for some tribes, such symbols are iconic and reverential, albeit in their indigenous forms, not their Hollywood caricatures. But the dominant theme that Indian America is setting before the world at the start of the 21st century is one which says "we're still here, we're strong in our identities, and we will determine who and what we are." The foregoing pages of this study have chronicled the many and variegated dimensions of this message and struggle.

In fact, in the context of world history and the comings and goings of cultures and nations, the resilience of Native communities and identities is truly striking. In the five hundred years since the collision with Europeans, the indigenous people of the Americas have confronted waves of

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867 Shawnee Brittan, *En Pointe: The Lives and Legacies of Ballet's Native Americans*. Brittan Entertainment, 2000.

decimation by disease, conquest and economic deprivation; oppression of their rights of self-rule; forced and insidious subjugation of their languages, beliefs, and institutions; and alternately malevolent and benevolent stereotyping that saps self-esteem and self-definition. Yet, in the United States at least, Native nations and communities endure. If anything, they are growing in social, cultural, economic and political self-confidence, assertiveness, and capacity.

The appropriate metaphor for today's conditions in Native America is the proverbial half-full, half-empty glass – but a glass that is, at last, filling. In fact, in many dimensions the Native nations of the U.S. are like many developing nations around the world. They remain plagued by unemployment and poverty, but employment and incomes are improving. They bear legacies of colonization and racism, but they strive above all to assert and maintain their sovereignty and rights of self-determination. Their cultures and their children are changing rapidly with the globalization of communications and economies, but they strive to control, not stop, the process and the impacts of changing times by taking control of their schools, their social programs, their museums, their histories, their religions, and their governments. They suffer under burdens of crime, ill-health, family dissolution, and substance abuse, but when freed to do so they invest their own resources in building their judicial systems, their education systems, their communities' physical and human infrastructures, and their social support systems.

There is inspiration to be found in the boot-strapping character of Native peoples' current drives to rebuild their nations and communities according to their own means and their own definitions of "success", and it is appealing to root for the underdog. But this upbeat perspective should not mask the difficulties tribes face and the frequency with which non-Indian jurisdictions seek to limit tribes' abilities to chart their own courses toward healthier communities. Then, too, even if they can assert and hold onto extensive powers of self-rule, American Indian nations are like other nations in the world. Some will fail, and some will succeed, in the process of self-determined nation building.

The challenges and the strategies of self-determination that define the state of the Native nations in the United States at the start of the 21st century have been borne of unpleasant and unjust necessity. Notwithstanding protections embedded in the U.S. Constitution and hundreds of treaties, and despite decades of federal and state policies putatively designed to improve the lives of Indians on reservations, the lesson is clear that relying – whether by choice, coercion, or default – on the resources and decisions of others who are more powerful proved to be more disease than cure. By the second half of the 20th century, American Indians on reservations on average lived in the most dire social and economic conditions of any identifiable group of U.S. citizens. With unbearably poor living and community conditions came social stresses that tore at individuals, families and the fabrics of entire cultures.

No amount of romanticizing or optimism can erase the deficits and deprivations that confront Indian Country today. On many reservations, life is tough and grinds on individuals', families', and communities' resources, self-conceptions, and self-respect. As detailed in this study:

- Rates of violent crime victimization among American Indians are twice the U.S.-wide average, and American Indians are incarcerated at a rate 38% higher than the national average rate.
- In terms of health conditions, significant progress has been made in the last few decades in such areas as communicable diseases, infant mortality, and death due to unintentional injuries. Notwithstanding such progress, the deficits to be made up have been huge: Infant mortality among Native populations remains at more than twice the national level;

tuberculosis case rates are more than four times the U.S. average rate; and Type 2 diabetes is twice as prevalent among American Indians as among all Americans.

- In fact, many of the health problems of Native America speak to behavioral factors embedded in social and cultural stress, with tobacco use among Indian adults the highest of any group in the country, suicide rates that are 60% higher than the national average, and death due to alcoholism, chronic liver disease, and cirrhosis of the liver standing at approximately six times the national rate.
- Indicative of broader deficiencies in community infrastructure, reservation housing is strikingly poor, with the share of housing characterized by federal standards as "inadequate" standing at 40% in 2000, more than six times the level for the U.S. as a whole.
- Educationally, Native children are disproportionately placed in special education and learning disabilities programs. Standardized testing (recognizing its limitations) finds the lowest levels of educational attainment in the Indian population. Reservation school facilities are inadequate in the extreme.
- At the time of the 2000 U.S. Census, officially measured unemployment among Indians residing on reservations stood at approximately three times the U.S.-wide rate of 6%. The Indian Country family poverty rate was more than four times the U.S. rate of 9%.

In some sense, it comes as no surprise that Indian Country is characterized in the aggregate by poor social and economic conditions. For most of its history, the Indian reservation system was designed to contain and control, and not in any way enrich, Native cultures, communities and economies. The advent in the 1960s of the Great Society programs may have shifted emphasis more toward federal attempts to improve living conditions on reservations, but the effort was meager, left decision making in the hands of outsiders accountable to masters in Washington, D.C., and fostered adaptation to and dependence on one-size-fits-all federal programs and systems. Even with the much publicized infusion of revenues from tribal government-owned gaming operations on many reservations that began at the end of the 1980s, legacies of undeveloped, non-federal indigenous organizational capacities and deplorable deficits in health, education, social conditions, and economic opportunity could hardly be expected to be reversed in little more than a decade.

Yet, the foregoing description of still-poor living conditions and social problems does not tell the full story of Indian America today. It misses "the story" in at least two important respects. First, numerical statistics do not capture the essence of Native communities, much less what it means to be Native. Despite often tough living conditions, the distinctly Indian version of the civil rights movement that began in the 1960s has given impetus to stronger, self-determined Native identities and to commitments to the revitalization of Native nations. In their tone and substance, the essays in this volume by Native leaders from a broad swath of current affairs speak to this revitalization. On the ground, the bonds of identity and community are strong. A strengthened Native consciousness and expanded scope for Native decision making in community affairs is being manifested by in-migration on many reservations, as Native citizens return to play positive roles in their communities.

Second, the glass may be only half-full, but it is filling. Indian Country came roaring into the new millennium. Consider that:

- Even after real economic decline in the 1980s and even with the population of Indian Country rising by more than 20% over the 1990s, between 1990 and 2000, real (inflation-adjusted) Indian income per person rose by about one-

third. For both gaming and non-gaming tribes, income grew close to three times faster than for the average American.

- From 1990 to 2000, Indian family poverty rates dropped by about seven percentage points in non-gaming areas, and by about twelve percentage points in gaming areas. For the U.S. as a whole, family poverty dropped only eight-tenths of a percentage point.
- Over the 1990s, Indian unemployment rates dropped by about two percentage points in non-gaming areas and by about five percentage points in gaming areas. U.S. unemployment dropped by half a percentage point.
- The percentage of American Indians living in homes with plumbing increased in both gaming and non-gaming areas – from 65% to 76% and from 96% to 97%, respectively for gaming and non-gaming tribes.
- The proportion of adult Indians on reservations with less than a 9th grade education has been declining substantially. By 2000, in Indian areas with gaming, this put adult Indians at about par with U.S. levels of 8%, with non-gaming Indian areas standing at approximately 19%. The proportion of Indian adults with college degrees rose substantially.
- Many Native nations are investing in language education and showing rising rates of Native language use. Overall, Native language use held steady over the last decade of the 20th century.

What emerges, then, is a picture of Native nations that are, in the aggregate and with exceptions to be sure, vibrant and in the midst of a renaissance. Probably more than at any time in the last century, there are signs of sustained economic and social strength that is progressing on the path of nation building under Native peoples' own criteria of success and well-being. Improvements in such indicators as Indian income and poverty rates cannot be traced to some expansion of federal or state largesse; public spending on American Indians and their issues was generally less than spending on the average U.S. citizen over the 1990s.[868] Instead, the pattern of encouraging prospects and, in many instances, improving Native community well-being can be traced directly to the emergence in the 1970s of national public policies of self-determination and self-rule.

The underlying reasons why policies of self-determination and expanded scope for local self-government have fueled revitalization in Native America are to be found in two key consequences. First, self-government has improved the accountability of decision makers vis-à-vis the citizens they affect. Indian self-determination brings accountability home. Like local government from Chicago to Portland, Indian tribal governments are imperfect; they may perform well or poorly, and they are subject to their own politics, constraints, and flaws. Relative to control by external governments and decision makers, however, local control over local matters by local decision makers generally means greater pressure on those decision makers to understand and meet the community's needs.

The product of this improved accountability in Indian Country is the burst in innovation and self-started governmental and non-governmental efforts at improving the lives of tribal citizens. As set out in this study, such innovation and self-determination are being manifested in virtually all

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[868] Joseph P. Kalt and Joseph W. Singer, "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule" (Cambridge, MA: The Harvard Project on American Indian Economic Development, 2004).

dimensions of community life – from environmental protection and efforts at cultural strengthening to taking control of schools and police forces, from the running of increasing numbers of business enterprises to direct tribal investment in health, housing and education.

Second, by drawing governmental, business and civil society decision makers from the local communities, policies of self-determination and self-rule allow those decision makers a better chance of making choices and implementing nation building efforts that are in tune with the cultural values of the community. The tremendous variety of cultural values regarding how and what things should be done in a community arises from the striking diversity of Native cultures themselves. Accordingly, the avoidance of one-size-fits-all approaches and the promotion of local self-rule are turning out to be critical to Indian Country. As documented in this volume, the innovative efforts of tribes in areas ranging from judicial systems to suicide prevention, and from religious practices to foster care, are marked by the large and small ways in which they are being matched to specific tribes' cultures. In the process, the evidence indicates they are improving the lives of affected citizens.

In short, for officially recognized American Indian tribes, Alaska Native entities, and other Native communities in the United States, the contemporary era is all about self-determination *as self-governing polities*. Native American affairs cannot be understood if Native peoples are seen as "just another" ethnic minority. American Indian nations possess inherent rights as sovereigns that are recognized in hundreds of still-extant treaties with the United States, in the Constitution, in court decisions, in congressional acts, and in executive orders that call for government-to-government relationships between the U.S. federal government and the hundreds of federally-recognized tribes, communities, Indian areas. Under the U.S. federalist system, the American Indian nations co-exist with the states and territories of the United States, exercising similar sovereign powers and providing the full array of local governmental services.

The paramount importance of Native nations' status as sovereigns, able to make and enforce laws affecting a broad range of their respective communities' affairs, is difficult to overstate. We can imagine the outcry if a serious effort was made to tell each of the fifty U.S. states that their sovereign powers and identities would be replaced by those of a uniform single (i.e., federal) sovereign. In fact, non-Indian Nebraskans and Californians and Pennsylvanians and Montanans and their counterparts across the country cannot conceive of why such a hypothetical and self-evidently ridiculous thought would ever be brought up. Yet, for Native nations, the functional equivalent was actually adopted during the termination period in the middle of the 20th century.

Today, many non-Indians who find nothing unworkable or unusual about the fact that New Yorkers want to remain New Yorkers, or that Nevada wants the sovereign power to determine its laws rather than deferring to the neighboring jurisdiction of California, routinely conceive, whether out of naïveté or worse, of Indian nations' as anomalies and enclaves of special rights for a previously wronged group. Even among the well-informed and well-meaning, Indian tribes often are not seen as "real governments."

The risks to their sovereignty that the Native nations perceive from such conceptions are real. The Native voice is all but lost in the maelstrom of American political, cultural, economic and social affairs. Accounting for less than 2% of the U.S. population, Native nations' futures are tenuous when dependent on the views of a non-Indian public that knows little of Native affairs, and when what it does "know" is founded on stereotypes and an occasional blitz of media coverage.

Perhaps most insidiously undermining of Native nations as distinct sovereigns within the federal system is the sense that general U.S. public acceptance of tribes as warranting such standing depends upon the public's perception that contemporary Native Americans are "still real Indians" –

"real" in the sense of exhibiting iconic, mainstream media- and folklore-derived cultural practices. It is as if Texas' status as a sovereign within the federalist U.S. system were at risk because Texans no longer drive longhorns and carry six-shooters as they ride into Fort Worth.

The tiny size of the Native voice in national affairs makes it understandable that the general public's views would hinge on stereotyping, and that it would see Native people as somehow no longer Indian if they were in the roles of ballerinas, business executives, museum directors, police officers, teachers, health professionals, or myriad other contemporary positions Yet, as Native America stands at the start of 21st century, the Native nations are teaching the broader public the lesson that Native culture and society are dynamic, and that they will determine for themselves what "Indian" and "Native" mean.

Defending Tribal Sovereignty

Jacqueline Johnson (Tlingit)
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The National Congress of American Indians (NCAI) was organized in 1944 in the wake of federal termination policies that sought to declare obsolete the very existence of Native American tribes. For sixty years, NCAI has led the fight to preserve and protect tribal sovereignty, acting as a central hub to bring tribes together and to develop unified consensus positions on issues of mutual concern. The challenge of bringing together tribes—hundreds of diverse and totally autonomous tribes—to design policy that promotes common interests is enormously challenging in the same way that the work of the United Nations or the U.S. Congress can be—but like these institutions, NCAI is critically needed.

The issues that faced tribal governments at NCAI's inception are still seen in variations today. The erosion of our tribal sovereignty takes more subtle forms, but is no less real for our generation. Recent Supreme Court cases have eroded tribal jurisdiction. The federal government has grossly mismanaged tribal and individual trust accounts, and has gone to great lengths to avoid any accountability. Treaty commitments to provide for basic needs—health care, housing, education—go unfulfilled. Together, tribal nations must work together to take on these challenges and preserve who we are.

NCAI initiated a Tribal Sovereignty Protection Initiative in 2001 in response to a series of Supreme Court decisions that threatened to eliminate vast swaths of tribal jurisdiction. In the fall of 2001 NCAI, along with the Navajo Nation, which had just lost a critical case before the Supreme Court, invited tribal leaders from across the nation to Washington D.C. to develop a plan in defense of tribal sovereignty. We met on September 11th to ask ourselves the hard questions: How do we define tribal sovereignty? How do we educate the public about it? How do we respond to a Supreme Court that erodes our jurisdiction? How do we support and promote legislation that enhances our powers of self-governance? On that day, as events unfolded that would change our nation forever, tribal nations were gathered to face down a different kind of threat. Stranded in Washington for several days following September 11, tribal leadership had little choice but to saddle down, stand together, and look for serious solutions.

Sovereignty is a challenging word for a critical need. Most individuals—Indian and non-Indian—struggle to define it. Many fear it. Sovereignty is the power of tribes to be self-determining, the power of tribes to govern our own affairs. Non-Indians have at times been troubled by the concept of sovereign nations existing within a sovereign nation. They simply don't understand how tribal governance works. As tribes exert increasing political power, these fears grow. During those difficult days in September 2001, we realized that, as a first step, we had to define sovereignty for ourselves. We determined that the word "sovereignty" generated more fear and confusion than was necessary. When the basic concepts behind the term were brought to bear, a comprehensive survey of the general public showed that there is fundamental support for tribes' right to exercise governance over the individuals living within their communities.

Reeducating the American public on Native issues is no easy task. There is so much that people don't learn about tribal governments in public school. They don't learn that tribes *are* governments. One of our goals is to replace a fear or misunderstanding of tribal governance with the absolute fact that tribal governments act exactly the same as state or city governments. Tribal governments enact and uphold laws and provide vital services for their community members. For

instance, tribal police officers must meet the same training requirements as county and state police officers. Tribal officers uphold the law just like their non-Indian counterparts. When tribal opponents attempt to eradicate tribal law enforcement systems or tribal courts, those efforts reveal a clear misunderstanding of tribes functioning as governments and working in collaboration with federal, state and county governments.

NCAI is also addressing these misunderstandings through the State-Tribal Relations Initiative, a program that allows NCAI to educate state government officials on tribal sovereignty. For many years, tribes' relationships with the federal government meant that tribal governments and state governments had very little contact. Now, devolution and policies surrounding issues such as gaming require increased interaction and understanding. NCAI works to ensure that these interactions are as productive as possible. We educate both the executive and legislative branches of state governments through "Indian Country 101," a basic training on tribal sovereignty, devolution and the resulting state-tribal relationships, and critical issues such as building relationships with tribes, understanding Indian law, and addressing taxation and gaming compacts. At states' request, NCAI provides technical assistance and offers model documents of state-tribal agreements that demonstrate effective solutions to issues surrounding law enforcement or welfare. As states begin to understand tribal sovereignty, tribal governments and state governments are better prepared to work towards our common goal of building thriving communities.

State government aside, NCAI's primary purpose is to defend tribal sovereignty at the federal level. NCAI monitors and manages Indian policy discussions in Washington D.C. When policy is being shaped or federal agencies are in need of policy recommendations, NCAI facilitates consultation between agencies and tribes. While NCAI works hard to facilitate productive interactions, it is not the organization's responsibility to filter the message.

NCAI also assists tribes in the defense of their sovereignty in other federal forums, including the Supreme Court Project, a collaboration of forty attorneys who study the cases that are going before the court. Members of this project search out the right cases that will set the right precedents for tribal sovereignty defense. NCAI joins those cases with amicus briefs and strengthens them through our collective efforts. Members of the NCAI staff also draft legislation in targeted areas that clarify our sovereign rights and enhance our ability to exercise jurisdiction over our communities.

While the organization aids tribes, NCAI doesn't presume to fill the role that must be held by tribal leaders. Tribes—by virtue of their sovereignty—sustain their own government-to-government relationship with the federal government. Through self-governance, tribes have become more politically and financially powerful than ever. At the founding of the NCAI in 1944, it was the Bureau of Indian Affairs that urged tribes toward collective organization. Now, tribes wield the power of their self-determination. Individually and collectively, tribes engage the federal government on a daily basis. Whether their representatives are personally present in D.C. or operating in other forums, the tribal presence is felt here. Still some tribes hesitate to engage in self-governance because they fear that it releases the federal government from its promises. NCAI does not share this fear and exists to help tribal governments control their own destiny. I think it is our responsibility, as native leaders, to do our utmost for our people.

The best defense of tribal sovereignty is to do an even better job of being tribal governments. The Sovereignty Protection Initiative requires us to ask ourselves the difficult questions that will promote enhanced governance. Are our court systems ready for a federal review process? Or, if we don't want to subject ourselves to federal review, are we developing a review process that will prove to the nation at large that we aren't afraid to show how well we're doing? And are we holding ourselves accountable for the use of our funds? Do the proceeds of tribal gaming operations—like the

proceeds of state lotteries—support governmental functions? Do we work hard enough to make this clear to our own constituents and to others?

Look to the past to see the future. If the challenge of the last fifty years was to catch the vision of self-determination, then the challenge of the next fifty years will be to enact it. As tribes become fully autonomous, self-sustaining governments, not only will tribes grow stronger individually, but our relationship with the federal government will change. The trust relationship will be marked by mutual accountability. The federal government will no longer serve as our accountant. Already, we have proved that we can manage our own accounts more effectively. We will expand this role. In turn, the federal government will assume its responsibility as trustee to advocate for tribal interests. Federal agencies will actually wield their expertise to benefit tribes directly. Rather than negotiating through the Bureau of Indian Affairs, tribes will work with the Department of Commerce to enhance economic development or with the Department of Education to enhance education. The Bureau of Indian Affairs will become an advocate ombudsman—an ambassador of sorts—between tribes and the federal government.

Can you imagine it? Can you imagine hundreds of powerful tribes governing their own affairs and governing them well? Can you imagine hundreds of powerful tribes consulting with the federal government regarding the interests of their common citizens? It is a bold vision. There are many steps in between, steps to be addressed. We will. We all have to fight the day-to-day battles. But it is the vision I love. And this is my personal challenge: How can I empower tribal nations to envision such a future?